NATIONAL REPORTER SYSTEM—UNITED STATES SERIES

THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 276

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

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
GRANTED OR DENIED

JANUARY — MARCH, 1922

ST. PAUL
WEST PUBLISHING CO.
1922

(276 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[1].....Portland, Me.
Hon. JOHN A. PETERS, District Judge[2].....Portland, Me.
Hon. JAMES M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. GEORGE F. MORRIS, District Judge, New Hampshire[3].....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 Judge.....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. GARVIN, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. FRANK COOPER, District Judge, N. D. New York.....Albany, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. 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] Retired, effective January 2, 1922.
[2] Appointed, effective January 2, 1922.
[3] Appointed October 25, 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.

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 Judge[4].....Denver, Colo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. FRANK A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado[4].....Denver, Colo.
Hon. HENRY T. REED, District Judge, N. D. Iowa[5].....Cresco, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa.....Davenport, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota.....Minneapolis, Minn.
Hon. CHARLES B. FARIS, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri..Kansas City, Mo.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska.....Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, New Mexico.....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. ROBERT L. WILLIAMS, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. TILLMAN D. JOHNSON, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming[6].....Cheyenne, Wyo.
Hon. T. BLAKE KENNEDY, District Judge, Wyoming[7].....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

CASES REPORTED

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

DISTRICT OF COLUMBIA.

CASES ON REHEARING

CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

EIGHTH CIRCUIT

Bosworth-Chanute & Co. v. Brighton, 272 F. 964. Denied Dec. 5, 1921.
McRae v. Henkes, 273 F. 108. Denied Dec. 16, 1921.
Yellow Cab Co. v. Earle, 275 F. 928. Denied Feb. 1, 1922.

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

WOODWARD IRON CO. v. LIMBAUGH.

(Circuit Court of Appeals, Fifth Circuit. November 1, 1921.)

No. 3783.

1. **Master and servant ⟸284(2)—Relation of parties held question for jury.**
   In an action under Alabama Employers' Liability Act (Code 1907, § 3910) for injuries to plaintiff's hand run over by a tramcar in defendant's mine, while plaintiff, an employee of an independent contractor, was engaged in pushing the car under defendant's direction and control under agreement was independent contractor, *held*, that the question whether plaintiff was defendant's employee as to the tramming at the time of the injury was for the jury.
2. **Master and servant ⟸88(1)—Employee may become third party's employee for special service.**
   A general employee may with his consent be hired by employer to a third party for some special service so as to become as to that service the employee of such third party, if, as to that service, he becomes subject to the direction and control of such third party.
3. **Master and servant ⟸285(10)—Proximate cause of injuries to mine employee's hand run over by tramcar held for jury.**
   In action under Alabama Employers' Liability Act (Code 1907, § 3910) for injuries to mine employee's hand run over by loaded tramcar while car was being pushed up incline, whether defective condition of brake shoe was a proximate cause of the injury *held* for the jury.
4. **Master and servant ⟸107(8)—Reasonable care required to maintain brake on tramcar.**
   Coal mine operator, having equipped tramcar with brake shoe, was liable, under Alabama Employers' Liability Act (Code 1907, § 3910), for injuries to employee caused by defective condition thereof, regardless of whether it was required in first instance to equip the car with such brake shoe, since, having equipped car therewith, it was required to use reasonable care to maintain it in a workable condition.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by J. C. Limbaugh against the Woodward Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. H. Scrivner and W. H. Sadler, Jr., both of Birmingham, Ala. (Nesbit & Sadler, of Birmingham, Ala., on the brief), for plaintiff in error.

Erle Pettus, of Birmingham, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the defendant in error (herein referred to as the plaintiff) against the plaintiff in error, Woodward Iron Company (herein referred to as the defendant), to recover damages for personal injuries alleged to have been sustained by the former while engaged in the discharge of his duty as an employee of the latter. Each count of the complaint which was put in issue and submitted to the jury alleged negligence for the consequences of which to its employee the defendant was responsible under the Alabama Employers' Liability Act. Code of Ala. of 1907, § 3910.

The plaintiff while pushing a loaded tramcar in a coal mine of the defendant stumbled and, after, in trying to regain his balance, holding on to the car while it moved a distance which there was evidence tending to prove was 8 or 10 feet, fell, and in doing so placed his hand on the rail of the track and it was run over by a wheel of the car and injured.

[1, 2] It is contended that requested instructions to the jury to find in favor of the defendant should have been given because of the absence of any evidence tending to prove that when the plaintiff was hurt he was an employee of the defendant or acting as such. The evidence showed that the plaintiff was employed by one Waters, who, as an independent contractor, was engaged in doing work in the defendant's mine. There was evidence tending to prove that Waters, as an independent contractor, did not have charge or control of the work in which the plaintiff was engaged when he was hurt. That evidence was to the effect that the moving of the coal by tramcars was not included in the work which Waters was employed to do as an independent contractor; that the tramming was in charge of the defendant, and under its direction and control, on its track and in its cars, the operation of which was not directed by Waters; that the tramming was done by men employed by the defendant until friction arose between them and employees of Waters, whereupon it was arranged for the tramming being done by employees of Waters, the defendant paying an agreed price for that work. One who is the general employee of his employer may, with the former's consent, be hired by the latter to a third party for some special service, so as to become, as to that service, the employee of such third party, if, as to that service, he becomes subject to the direction and control of such third party. 18 Ruling Case Law, 493. The court left it to the jury to find from the evidence whether the plaintiff was or was not acting as an employee of the defendant at the time the injury complained of was sustained. There was evidence to support a finding that when the plaintiff was hurt he was acting as an employee of the defendant.

[3] The car which the plaintiff was pushing was equipped with a brake shoe, designed to be operated, for the purpose of stopping the

car or checking its speed, by inserting a brake stick between the shoe and the wheel, and then pressing down the brake stick, thereby causing friction with the wheel. When the plaintiff stumbled, Taylor Rayburn, a coemployee who was working with him in moving the car, grabbed the brake stick and tried to insert it under the brake shoe on the wheel on the right hand side, but was unable to do so because that brake shoe was in bad condition, having been mashed down so close to the wheel that the opening between it and the wheel was insufficient to permit the insertion of the stick. There was evidence tending to prove that Rayburn could and would have stopped the car in the manner attempted before the plaintiff fell if the brake shoe had not been in bad condition, and that it had been in bad condition for a long time. The evidence was such as to support a finding that the fact of the brake shoe remaining in bad condition, making it unworkable, was due to negligence chargeable against the defendant. But it is contended that the stumbling of the plaintiff was the proximate cause of his injury, and that the bad condition of the brake shoe could not properly be considered as either the sole or a contributing proximate cause of the injury complained of. In the circumstances disclosed this contention is quite analogous to one which was adversely disposed of in the case of Choctaw, Oklahoma, etc., R. R. Co. v. Holloway, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. Ed. 207. Evidence in that case was to the effect that when the plaintiff, a fireman on a railroad engine which was being run backward, just before the engine collided with a horse on a trestle, was trying to escape by going out between the engine and tank, he was caught between the same and thereby injured; and that the bringing of the ends of the engine and tank close together was due to the breaking of a cast-iron connection between them, which resulted from the fact that the tender stopped when the air brakes were applied, while the engine did not stop, because the brakes on it were out of repair and could not be worked. The following is an extract from the opinion in that case:

"It is insisted, however, on the part of the defendant, that the court erred in not holding that the absence of brakes on the engine was not the proximate cause of the injury; that the presence of the horse on the trestle was the proximate cause of derailing the tender and engine; and that the company was not guilty of any negligence by reason of which the horse came upon the trestle.

"We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the engine. At any rate, there was evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine in good order and fit for use.

"It may be assumed that there was no negligence on the part of the defendant by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident was, therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only

because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true.

"The obstacle is one of the things which caused the necessity to use the brake, and it is the neglect of the company in not furnishing the brake which constitutes an immediate and proximate cause of the injury."

When the plaintiff was hurt, the tramcar was being pushed up a slight incline. It is suggested that the stopping devices on the car were intended for use when it was going downgrade, and that it was not contemplated that they would be resorted to when the car was being pushed upgrade. There is no merit in this suggestion. The purpose of the device in question was to stop the car whenever there was occasion or necessity to do so. The evidence as to the defective condition of the brake shoe was properly submitted to the jury.

The refusal of the court to give the following requested charge is complained of:

"There is no duty on the company to place such brake shoes on the cars as would bring them to a stop quickly enough to stop the car and prevent the injury of a person who might suddenly be on the track in front of the moving car."

[4] Whether the refusal to give that charge is or is not justifiable on another ground, it is justifiable on the ground that the case was not one which involved the inquiry whether the defendant was or was not under a duty to equip the car with the stopping appliance in question. The uncontroverted evidence showed that the car was equipped with that appliance. The defendant having supplied the stopping device in question was under a duty to use reasonable care to maintain it in a workable condition. Hunt v. Kane, 100 Fed. 256, 40 C. C. A. 372. The fact that the car was equipped with the brake shoe and with a brake stick for use in operating it amounted to an invitation to employees to use the appliances when there was occasion or necessity to stop the car or check its speed.

We conclude that there was no reversible error in any ruling complained of.

The judgment is affirmed.

RUSSELL et al. v. BOSTON CARD INDEX CO.

(Circuit Court of Appeals, Third Circuit. September 10, 1921.)

No. 2697.

1. Patents ⟸206—Contract held a license, and not an assignment.

In a contract by which defendants, owners of a patent for an index system, granted to complainant "the sole right to use their said patent rights" in certain states and territories "on the conditions hereinafter named so far as the same may be necessary for the successful making and marketing of said index system," the phrase "so far as may be necessary for the successful making and marketing of said index system" *held* not to qualify the "conditions" named, but to qualify and limit the grant, and the contract *held* to constitute a license, and not an assignment.

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

2. **Patents ⇐206—Grant of anything short of the entire monopoly is a license.**
The grant of anything short of the entire unqualified monopoly given by a patent, in the territory specified, is a mere license.

3. **Patents ⇐214—Contract for license may be forfeitable.**
A provision of a contract, granting rights under a patent that in case of assignment of such rights without consent of the licensors the contract should be terminable at their election, *held* valid and enforceable.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Boston Card Index Company against Robert C. Russell and others. Decree for complainant, and defendants appeal. Reversed.

Beatty, Magee & Martin and John H. Roney, all of Pittsburgh, Pa., and Joseph C. Fraley, of Philadelphia, Pa., for appellant.

John G. Frazer and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. On March 17, 1916, Andrew Siegel and Robert C. Russell, doing business under the firm name of Siegel-Russell Index Company, granted by a written instrument, to the Boston Card Index Company, hereafter called the plaintiff, a corporation of Massachusetts, certain sole rights under letters patent No. 869,521 and other pending patents upon specified conditions in all the states and territories of the United States except Pennsylvania, New Jersey, Maryland, Ohio, and West Virginia. Robert C. Russell, J. Parker Russell, and J. Clifford Russell formed a partnership on February 1, 1919, and took over the business of the Siegel-Russell Index Company, which they are conducting under the name of the Russell Index Company. One of the conditions of the grant was that—

"The said party of the first part [Boston Card Index Company] further agrees not to assign its interest in this agreement to any person, firm or corporation without the written consent of the second party so to do."

The agreement further provided that—

"If said first party shall become insolvent, bankrupt, or commit a breach of any of the agreements on its part to be done, kept, or performed, then upon such default or breach of covenant, and upon written notice being given by second parties to first party of intention of second parties to nullify this contract, all of the rights, agreements, and privileges granted to first party under this agreement shall cease and determine, and revert to and become reinvested in the said parties of second part as fully and completely as if this agreement had not been made."

On June 19, 1919, the Boston Card Index Company made an agreement with William N. Howard and Hiram H. Howard, of Pittsburgh, Pa., wherein, inter alia, the following is recited:

"Whereas, the Boston Card Index Company has exclusive sales rights under the United States letters patents granted and to be granted to R. C. Russell, of Pittsburgh, Pennsylvania, and to the Siegel-Russell Index Company,

of said Pittsburgh, for an index known as the 'Russell Index,' 'Russell Definite Index,' or any other trade-name that may be used; and

"Whereas, the Boston Card Index Company desires to sublease to said William N. Howard and Hiram H. Howard the exclusive rights in the states of California, Oregon, Washington, Arizona, Nevada, Utah, New Mexico, and Idaho; and

"Whereas, said William N. Howard and Hiram H. Howard desire to obtain said rights and to conduct business herewith:

"Now, therefore, for and in consideration of the mutual covenants and agreements herein contained and of one dollar by each party to the other party in hand paid and the receipt of which is hereby acknowledged, the parties hereto agree as follows:

"First. The said Boston Card Index Company agrees to grant to said William N. Howard and Hiram H. Howard, exclusive rights in and to the use of the United States letters patents, granted and to be granted, etc.

"All contracts, however, for the installation of said system, shall be made in the name of the said William N. Howard and Hiram H. Howard, or their heirs, and in no way involve the said Boston Index Card Company, except that full credit shall be given said Boston Card Index Company as lessee under the United States letters patents aforesaid in all correspondence and contracts."

After the Howards had operated some time under the sublease, the defendants learned of its real character, and thereupon, on September 7, 1920, notified the plaintiff in writing that they elected to determine, cancel, and declare at an end the agreement of March 17, 1916, on the ground that the contract between it and the Howards was a breach of the agreement. Whereupon plaintiff filed a bill in the District Court, praying that the agreement be adjudged to be in full force and effect, and that the defendants be enjoined from granting licenses to others in the territory given to plaintiff, or from persuading others from entering into contracts with it in that territory. Upon final hearing the court decreed that the agreement of March 17, 1916, and the supplemental agreement constitute a valid and subsisting contract between the plaintiff and defendants, that they were in full force and effect and binding upon defendants, and that defendants were perpetually enjoined as prayed.

The defendants appealed to this court, and the real question is whether or not the agreement of June 19, 1919, between the plaintiff and the Howards, entered into without the written consent of the defendants, constitutes a breach of the agreement of March 17, 1916. The determination of the question depends upon what is meant by the covenant, "The said party of the first part further agrees not to assign its interest in this agreement without the written consent of the second parties," and upon whether or not the agreement of June 19, 1919, between the plaintiff and the Howards comes within the prohibited assignment.

[1] The plaintiff contends that the contract of March 17, 1916, is an assignment of an interest in a patent, and the defendants contend that it is a mere license. The learned trial judge held that it was an assignment. The language of the grant is as follows:

"The said second parties [defendants] further agree to give said first party [plaintiff] the sole right to use their said patent rights and improvements in all the states and territories of the United States, excepting the states hereinafter expressed and upon the conditions hereinafter named, so far as the same

may be necessary for the successful making and marketing of said index system."

The court held that the words, "so far as the same may be necessary for the successful making and marketing of said index system," qualify "the conditions hereinafter named," and not the "sole right to use their said patent rights and improvements," and so the qualifying words do not limit the quantum of the grant as defendants contend. The plaintiff, however, before this controversy arose, construed the quantum of the grant contained in the contract of March 17, 1916, in the agreement of June 19, 1919, between itself and the Howards. That agreement states that:

"Whereas, the Boston Index Company has exclusive sales rights under United States letters patent granted and to be granted to R. C. Russell," etc.

The plaintiff's conception of what it had under the agreement of March 17, 1916, seemed to be "exclusive sales rights." The language of the grant was further construed by plaintiff's counsel in the "first" paragraph of the bill of complaint. It states:

"Siegel-Russell Index Company agreed to give the plaintiff the sole right to use said patent rights and improvements in all the states and territories of the United States, with the exception of Pennsylvania, New Jersey, Maryland, Ohio, and West Virginia, upon the conditions named in said contract, so far as said rights should be necessary for the successful making and marketing of said index system."

[2] We are of opinion that the words, "so far as the same may be necessary for the successful making," etc., were correctly construed by the plaintiff and its counsel. They qualify "the sole right to use the said patent rights" and limit the quantum of the grant, thus giving the plaintiff "sales rights," a license under the patents. The grant of anything short of an entire, unqualified monopoly in the territory specified is a mere license. Gayler & Brown v. Wilder (10 How.) 51 U. S. 477, 494, 13 L. Ed. 504. Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923; Pope Manufacturing Co. v. Gormully & Jefferey Manufacturing Co., 144 U. S. 248, 250, 12 Sup. Ct. 637, 36 L. Ed. 419.

[3] Whatever the grant was, an assignment of an interest in the patent or a mere license under it, the grantors had the unqualified right to impose any conditions upon the grant they chose. One of the conditions it contained was that the plaintiff was not to assign its interest in the agreement without the written consent of the defendants. The plaintiff did convey its interest in the agreement in eight states to the Howards without their written consent. This seems to us a clear breach of the covenant. After the defendants had served notice on plaintiff that they had elected to forfeit its rights in that agreement, an instrument was executed by the plaintiff and the Howards on October 25, 1920, in which they sought to construe the agreement between them of June 19, 1919, as one of agency only. That agreement, however, must stand upon its own terms as interpreted by the court under the ordinary rules and canons of construction, and cannot be changed by their own interpretation to suit the situation after trouble began.

Yet it is interesting to note that W. N. Howard interpreted the contract of June 19, 1919, in a telegram to the defendants on July 31, 1920, before the defendants forfeited the rights of the plaintiff in the contract of March 17, 1916. He then, in response to questions, said that the contractual rights of himself and brother with the plaintiff under the agreement of June 19, 1919, were perpetual and exclusive, and empowered them to license users of the system for continued use in a given index, and that they were not in business for the plaintiff, but for themselves.

Whatever the interest conveyed to the plaintiff by the instrument of March 17, 1916, was, that entire interest was substantially conveyed to the Howards by the agreement of June 19, 1919, so far as it related to the states of California, Oregon, Washington, Arizona, Nevada, Utah, New Mexico, and Idaho. The plaintiff, in the agreement of June 19, 1919, practically copied the terms of the agreement of March 17, 1916. The defendants have not waived the breach or acquiesced in it. On the contrary, within a month and seven days after they definitely knew the plaintiff had conveyed its interest in certain specified territory in the agreement of March 17, 1916, and the supplemental agreement of June 5, 1917, to the Howards, they forfeited its rights thereunder in accordance with the provision relating thereto in the contract. In so doing they were exercising their contractual authority, and with that exercise the rights conveyed to the plaintiff in the agreement of March 17, 1916, came to an end. Platt v. Fire Extinguisher Manufacturing Co., 59 Fed. 897, 8 C. C. A. 357; Foster Hose Supporter Co. v. Taylor, 184 Fed. 71, 106 C. C. A. 467.

It follows that the decree of the District Court must be reversed, with instructions to dismiss the bill of complaint.

In re KROEGER BROS. CO.

ARTHUR YOUNG & CO. v. GOETZ.

(Circuit Court of Appeals, Seventh Circuit. September 13, 1921.)

No. 2921.

Bankruptcy ⊂=274—Accountant held not to have agreed to forfeit compensation, if report not completed on time.

In a bankruptcy proceeding, *held*, that an accountant, on agreeing to make report of conditions before certain date, did not thereby agree to forfeit all rights to compensation if he did not perform within such time.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of the Kroeger Bros. Company, bankrupt. Claim by Arthur Young & Co. against Julius J. Goetz, as trustee. From a decree allowing it only part of its claim, claimant appeals. Reversed, with directions.

See, also, 262 Fed. 463.

Charles B. Quarles, of Milwaukee, Wis., for appellant.
I. A. Fish, of Milwaukee, Wis., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Appellant is here asking a reversal of an order of the District Court for the Eastern District of Wisconsin, allowing it, for services rendered as an accountant, on its claim against appellee as trustee in bankruptcy of Kroeger Bros. Company, $271, instead of $5,285, claimed.

On September 28, 1918, appellant was employed by a Milwaukee bank to make an examination and report upon the affairs of Kroeger Bros. Company, a large mercantile concern of that city. On October 18th, following, William B. Weller was appointed receiver of Kroeger Bros. Company in the state court, and he continued, under order of that court, in the employment of appellant. On November 18, 1918, Kroeger Bros. Company was adjudged a bankrupt, and Goetz (appellee) was appointed receiver. On December 27, 1918, Goetz was elected trustee, and, so far as appears, he is still acting.

Appellant's claim was for unpaid balance of $780, on a charge figured at $20 per day, for services rendered Weller as receiver, and $4,505 for services rendered appellee as receiver and trustee, figured at $20 per day. The District Court fixed $12 per day as fair, and disallowed all the claim against Weller and all the claim against appellee except $271. Goetz, in his petition filed September 24, 1919, to review the order of the referee filed September 15, 1919, says:

"Under and pursuant to an order of this court, your petitioner did continue the said Arthur Young & Co. in certain examinations of the books of said bankrupt company."

Appellee claims, however, that later he and appellant made an agreement that superseded all other agreements, and that, because appellant failed to perform within the time agreed, it forfeited all rights to compensation. The substance of that agreement, as claimed, is that the work to be done by appellant was limited to four accounts, and that the report was to be delivered by the first adjourned meeting of creditors, which was held January 10, 1919. The time when it is claimed that arrangement was made is uncertain, and seems to be based upon conversations between Marshutz, appellee's attorney, and Fragstein, appellant's representative in charge of the work.

Marshutz fixes one conversation as between November 20th and 30th, in Lecher's office; the next as December 26th, at the Mitchell street store, in the presence of Goetz and Lecher; and again, on December 31st, at which time he says he told Fragstein that the adjourned meeting of creditors would be on January 10, 1919. The date fixed by Goetz of a conversation between Marshutz and Fragstein was December 26, 1918. Fragstein says there was one conversation at Lecher's office, and another about December 26, 1918. Lecher's recollection is that the conversation took place much later than the time fixed by Marshutz.

There is quite as much uncertainty as to what the conversations were, but we will take them, in substance, as stated by Marshutz. He said to Fragstein:

"I want you to direct your attention particularly to the question relative to the absorption of the Kelly-Roth Company by Kroeger Bros. Company, giving us, as far as you can, the amount of tangible assets taken over by Kroeger Bros. Company; * * * also directing your attention to the W. B. Rubin account, as it relates to the loans which he made to either Kelly-Roth Company or Kroeger Bros.; also the status of the American Exchange Bank account, and their dealings with the bankrupt, either Kelly-Roth Company or Kroeger Bros., or both, and the Union Bank account."

Fragstein replied:

"I would say that the matter would be completed within two or three weeks."

And Marshutz said:

"Well, that will be entirely satisfactory."

He fixed the next date as December 26, 1918, and, after some statements, that show confusion as to dates and what was said, testified:

"I previously advised him that the meeting of the creditors was to be the next day, and I was going to get my report, and he said, 'No,' that he * * * could get it out in a very short time."

Marshutz said he told Fragstein he was being pressed for the report, and then fixes the next date as December 31, 1918:

"Told him that the first meeting had been adjourned until January 10th; * * * that the sale had been set for the 8th, and I had been able to bridge over the examination that should have taken place at the first meeting of creditors; * * * that I was not able at that time to give an examination of the officers, because I hadn't had this report."

There was much acrimonious conversation. Marshutz told Fragstein that it was imperative that he should have the report. He says Fragstein told him he could positively have the report in a week or 10 days. Marshutz told Fragstein that appellant had been at work down there 4 months. If that was true, then that conversation must have been as late as January 28, 1919, because the first work done for any one was September 28, 1918.

Appellant had worked for appellee 10 days up to November 30th and had charged therefor $520. Up to December 31st, appellant had worked another 30 days and had made an additional charge therefor of $1,285. Even if either Fragstein or Marshutz had authority to make a contract, there can be no presumption from the record that Fragstein had any authority, or that he intended to hazard a considerable amount already earned on his ability to guess the time of the completion of work under the complicated conditions shown to exist in Kroeger Bros.' affairs. The most that Marshutz claims he said is that if the work was not done they would have difficulty in getting their pay. The books of Kroeger Bros. had not been written up for many months. After long and repeated attempts to write them up, it was found necessary, a week or 10 days before Goetz was appointed, to write a new set.

If Fragstein's testimony is true, and it is not disputed on that point,

the business was much tangled up, seemingly purposely so, and the work was delayed at all times by efforts to untangle erroneous entries that were believed to be correct, but were afterwards found otherwise. Fragstein understood that it was important to have the report as soon as possible. Petitioner is a reputable concern, and beyond the fact that Fragstein was not able to make good his promise as to time, there is no evidence that the work was not diligently or intelligently prosecuted. The whole of the month of November, 1918, was consumed in the hearing of a contempt proceeding, for which petitioner furnished much information and numerous papers. Over 5,000 pages of testimony were taken before the court and Fragstein was used as a witness.

We are of opinion that the promises as to time of performance must be taken to have been made subject to those delays and uncertainties that appear to have been produced by the conditions inherent in the affairs of Kroeger Bros. The work was being done under order of court, and if it was desired to terminate the employment, it would have been a simple and logical thing to have cited appellant before the court, and the court doubtless would have placed such limitations upon appellant as the circumstances seemed to justify.

On February 27, 1919, appellee wrote appellant:

"For some time past you have promised the writer that a report of your doings in the matter of Kroeger Bros. Company, bankrupt, would be submitted, but up to now same has not been received, but in place thereof bills are sent to the writer by the company whom you represent covering services which the writer knows nothing about, has not ordered and is not authorized to pay. I must insist that this matter be closed at once, and I trust you will take the necessary steps to that end."

This letter clearly indicates that Goetz was still relying on appellant's promises to get him a report, that he wanted in at once, and that appellant should proceed by the necessary steps to close the matter up and get him the report. He permitted appellant to keep the books until the 17th of March, 1920. The claim that appellee could not induce appellant to return the books does not appeal strongly to the court, because from appellant's own statement appellee was working under order of the court. The books in any event were at all times subject to the order of the court.

We are of opinion that the rate of $12 per day found by the master should not be disturbed, but that appellant should be allowed compensation for 220¼ days at $12 per day, amounting to $2,643, plus cost of typing report, 20 days at $5, $100. The reduction of the rate to $12 per day disposes of the claim against Weller, leaving nothing due thereon.

The decree is reversed, with directions to enter a decree in accordance herewith.

VENLINIO v. UNITED STATES.

MANICINI v. SAME.

(Circuit Court of Appeals, Seventh Circuit. September 8, 1921.)

Nos. 2912, 2913.

1. **Indictment and information ⊂=60—Test of sufficiency stated.**
An indictment must embrace every element of the offense charged, and plainly apprise the accused of the proof he must be prepared to meet, and must so state the charge that judgment thereunder can be pleaded in bar of further prosecutions for the same offense.

2. **Perjury ⊂=19(2)—Indictment held sufficient.**
Indictments alleging that at time and place stated it was material as to whether defendant M. was at a certain place, or whether in a certain other city, and that defendants willfully, corruptly, and falsely, and contrary to oath, did swear and depose before the court that said M. went from such place to said city, and that they, defendants, and the said M. slept together in the same room in said city on stated date, whereas in fact it was not and is not true, etc., *held* sufficient.

3. **Criminal law ⊂=400(2)—Transcript of testimony held best evidence.**
In prosecution for perjury, the transcript of the testimony in a former criminal proceeding, which the reporter had already testified he had heard, reduced to writing, and correctly transcribed, was the best evidence by which such facts could be proven.

4. **Criminal law ⊂=1169(1)—Perjury ⊂=32(8)—Evidence held competent, but its admission harmless, if immaterial.**
In a prosecution for perjury, in that witnesses had testified that on certain day they had taken a train in company with accused, going with him to a certain city, testimony by trainmen that shoes which defendant said he left in the train were not found had some bearing, and was competent to contradict and test the testimony, but of so little importance that wrongful admission was not ground for reversal.

5. **Criminal law ⊂=1169(9)—Rejecting nonexperts on handwriting held harmless.**
Refusal to permit testimony of nonexperts on handwriting on a hotel register was harmless, where expert witness was permitted to testify, and the register and other papers involved were admitted in evidence.

6. **Perjury ⊂=37(3)—Instructions held to indicate degree of proof required.**
Instructions did not fail to indicate degree of proof required to convict, where they recited that defendants were charged with perjury, which, "under the law, means that they willfully and maliciously swore falsely in the cause described in the indictments," and that the government is required by law to produce such evidence as will satisfy your mind beyond a reasonable doubt that the defendant is guilty as charged, and that they are under the law presumed innocent, which presumption continues until such time as the jury believes from the evidence beyond a reasonable doubt that they are guilty, and that the only question that you determine is the guilt or innocence of these defendants of the crime with which they are charged.

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

Baldy Venlinio and Charles Manicini were convicted on trial of separate indictments of perjury, and bring error. Affirmed.

Charles A. Karch, of East St. Louis, Ill., and Chester H. Krum, of St. Louis, Mo., for plaintiffs in error.

McCawley Baird, for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Writs of error to reverse judgments against Baldy Venlinio (No. 2912) and Charles Manicini (No. 2913), tried together by agreement under separate, but identical, indictments charging perjury.

[1] 1. The first error relied upon is failure to sustain demurrers to the indictments. There does not appear to be any record of any rulings upon the demurrers, but inquiry into the sufficiency of the indictments shows that they meet the test of sufficiency laid down by this court in Baskin v. United States, 209 Fed. 740, 744, 126 C. C. A. 464, viz.: (a) They must embrace every element of the offense charged and plainly apprise the accused of the proof he must be prepared to meet; and (b) must so state the charge that judgment thereunder can be pleaded in bar of further prosecution for the same offense.

[2] The indictments, after stating all of the preliminaries with reference to the court, term, time, the persons who were tried and the offense, all of which was admitted by stipulation before the commencement of the trial, charge that at the time and place and upon the occasion alleged it was a material inquiry as to whether the defendant Skeeters Muskino was in Orient, in the county of Franklin, in the state of Illinois, on the night of May 22 and the morning of May 23, 1919, and whether the said Skeeters Muskino was in the city of St. Louis at that time. It is further charged that each of the defendants willfully, corruptly, and falsely and contrary to his oath did swear and depose before the said court and jury, amongst other things, in substance, that said Skeeters Muskino went from West Frankfort, Ill., on the morning of May 22, 1919, to the city of St. Louis, and that they, defendants, and the said Skeeters Muskino, slept together in the same room in the city of St. Louis on the night of May 22, 1919, and that said Skeeters Muskino was in St. Louis on the morning of May 23, 1919, whereas, in fact, it was not and is not true, and at the time of so swearing and deposing the defendants knew it was not true.

The indictments charge with sufficient certainty and clearness the offense of perjury and of what it consisted, and apprised the accused of the proof he must be prepared to make. There is no possibility that the judgments here complained of cannot be successfully pleaded in bar of any further prosecution for the same offense. The record indicates that the defendants were not, nor was either of them, surprised in any way.

[3] 2. The second error relied on is that the motion for an instructed verdict was not allowed. A stipulation is in the record, showing all the formal matters necessary to be proven in regard to the trial in which the perjury was alleged to have been committed. It shows the administration of the oath to the plaintiffs in error, and that they testified in the cause. The record also shows that the government sought to introduce the testimony of the defendants before the jury, as taken and transcribed by the reporter. The sole objection thereto was:

"Mr. Karch: I object to that, your honor; that is not the proper way to prove the perjured testimony, because that may contain a lot of matters which are not relevant to the issue."

To which the court replied:

"If counsel will point out the relevant matters, they will be considered, and those that are irrelevant will be overruled."

Subsequently, when the testimony was again offered, no objection whatever was made, defendants' counsel merely observing, "I haven't had time to examine them" (Exhibit 1, Manicini's testimony in the Muskino case, and Exhibit 2, Venlinio's testimony in the same case). Thereupon there was read to the jury the transcript of the testimony of Manicini, which the reporter had already testified he had heard, reduced to writing, and correctly transcribed, and no further objection was made, excepting that counsel for defendants suggested with reference to a certain question and answer, "That part of it is irrelevant." The evidence offered and admitted was the best evidence by which such facts could be proven. Brown v. Luehrs, 79 Ill. 575; Luetgert v. Volker, 153 Ill. 385, 388, 39 N. E. 113. When Venlinio's testimony was read, no further objection was made.

[4] Further objection is made to the admission of testimony by the trainmen that shoes which one of the defendants said he had left in the train were not found there by any of the trainmen. It had some bearing, and was competent to contradict and test the truthfulness of defendant's testimony; but it is of so little importance that, if erroneously admitted, it could not furnish a basis of reversal.

[5] 3. Complaint is also made that nonexperts on handwriting were not permitted to testify as to specimens of handwriting; one being the name "Carlo Molini" on a hotel register and the other being the name "Carlo Molini" written several times on a sheet of paper in the presence of the witness John Beltram. Whether or not there was any error in that connection is wholly immaterial, because the witness Trendley, an expert on handwriting, was permitted to testify, and in addition to that the hotel register and the names on the paper were admitted in evidence. The jury were as capable of determining their genuineness as other nonexperts.

[6] 4. The last error relied upon is that the charge of the court to the jury failed to indicate the degree of proof required to convict. There were no objections or exceptions to the instructions, but the error is not well assigned, because the court told the jury that the defendants were charged with perjury, which, "under the law, means that they willfully and maliciously swore falsely in the cause described in the indictments in this case." It is alleged in the indictments that they testified to a material matter in the trial of the case wherein Skeeters Muskino was a defendant, with others. The jury was told:

"The government is required by the law to produce such evidence as will satisfy your mind beyond a reasonable doubt that the defendant is guilty as charged in the indictment."

The court told the jury:

"The defendants under the law are presumed to be innocent, and that presumption continues until such times as the jury believes from the evidence beyond a reasonable doubt that they are guilty."

And the court again told the jury:

"The only question that you do determine by your verdict is the guilt or innocence of these defendants of the crime with which they are charged, and that is of knowingly and willfully swearing to a thing which they do not believe, or which wasn't so."

There was no substantial error in the instructions.

The judgments are and each of them is affirmed.

PAYNE, Director General of Railroads, v. COLVIN.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1921.)

No. 2886.

1. **Appeal and error ⇐927(7)—Favorable view of plaintiff's evidence taken on review of motion for directed verdict.**
   In reviewing the court's refusal of defendant's motion for directed verdict, the court on appeal will take the version of the evidence favorable to the plaintiff.
2. **Master and servant ⇐112(1½)—Coupler required by federal Safety Appliance Act.**
   Federal Safety Appliance Act, § 2 (Comp. St. § 8606), requiring automatic couplers, is not to be construed as permitting the use of a coupler which might require brakeman to go on the tracks at the end of the car, though the approaching train was some distance away, in order to open the knuckles of the coupler, but requires a coupler that will open or may be opened without going between the cars.
3. **Constitutional law ⇐70(3)—Master and servant ⇐270(10)—Evidence of impracticability of complying with federal Safety Appliance Act irrelevant.**
   In an action for negligence in not maintaining automatic couplers required by Federal Safety Appliance Act, § 2 (Comp. St. § 8606), evidence to the effect that it is impracticable to build couplers which can always be opened by the lever at the side of the car, that no such couplers have been made, and that defendant used a generally approved type, is irrelevant, for if the statute is harsh, relief must come from the lawmaking, not the judicial, branch of the government.
4. **Appeal and error ⇐1064(1)—Error in instruction on defendant's capacity to earn livelihood for himself and family held harmless.**
   Where, in suit for personal injuries, plaintiff testified without objection as to his age, and that he was married and had three children, statement in the charge, permitting the jury to take into account the effect which the injury had on his capacity to earn a livelihood "for himself and his family," was immaterial and harmless.
5. **New trial ⇐102(1)—Newly discovered rule in railroad's books held not ground.**
   A railroad company was not entitled to a new trial as for newly discovered evidence, consisting of a printed rule in the company's books, promulgated long before the accident.

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

Action by Edward O. Colvin against John Barton Payne, as Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 256 U. S. ——, 42 Sup. Ct. 92, 66 L. Ed. ——.

H. J. Killilea and C. H. Van Alstine, both of Milwaukee, Wis., for plaintiff in error.

Arthur W. Richter and Frank E. Waldron, both of Milwaukee, Wis., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Colvin, plaintiff in the trial court, recovered judgment for personal injuries sustained while performing interstate service for an interstate railroad company.

His action was based on the federal Employers' Liability Act (Comp. St. §§ 8657–8665), and he pleaded that his injury was caused by the company's failure to maintain automatic couplers as required by the federal Safety Appliance Act (Comp. St. §§ 8605–8612) and also by the engineer's failure to obey his stop signal.

Colvin was a brakeman; the engine, with several cars attached, was backing toward a standing baggage car; Colvin was on the car that was to be coupled to the standing baggage car; the engine was moving quite slowly; when the cars were 40 or 50 feet apart Colvin noticed that the knuckles on both cars were closed; he ran to the standing baggage car and pulled the lever at the side of the car three or four times, but without any effect in opening the closed knuckle; the other car was then 15 or 20 feet away; at that instant Colvin gave the engineer a signal to stop ("I could see the engineer's cab and there was no reason why he could not see my signal"); upon giving the signal Colvin stepped between the rails to open the knuckle on the standing baggage car; the stop signal was not obeyed; when the cars were about 3 feet apart Colvin in backing out slipped on the icy ground; in trying to save himself he seized hold of a grabiron, but his right foot flew up and was caught between the couplers as they came together.

[1] At the close of the evidence defendant moved for a directed verdict and excepted to the overruling thereof. We have read the bill of exceptions and from it we have hereinabove taken the version that is favorable to Colvin, which we must assume was adopted by the jurors. That version conflicts with testimony of other witnesses and with Colvin's own statement given shortly after the occurrence. Weight and credibility are not reviewable. On the assignment of error now under consideration the only question is whether Colvin's proofs as above stated sustained his pleaded cause of action.

[2] Couplers must be such that the act of coupling, as well as of uncoupling, can be accomplished "without the necessity of men going between the ends of the cars." Johnson v. So. Pac. Ry. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. Emphasizing the words "between the ends of the cars," defendant contends that the true construction of the statute [1] is that, if cars to be coupled are standing a considerable dis-

[1] "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531 (Comp. St. § 8606).

tance apart with knuckles closed, the command of Congress is satisfied, although there is no appliance extending outside of the rails by means of which the knuckle can be opened, and although the brakeman is thereby compelled to go between the rails on the intervening track and open the respective knuckles by hand, provided that the couplers, with knuckles so opened and remaining open, will couple automatically by impact. But opening the knuckles is a necessary part of the act of coupling as a whole; and remaining open against their being closed by the jar of movement is a necessary condition. Looking to the safety of employees as the object of the statute, defendant insists that there is no danger to a brakeman in going on the track to open the knuckles of cars standing apart. Similarly there is no danger in going on the track to perform by hand the act of uncoupling, if there could be an assurance that there would never be any movement of cars until the brakeman was safely out of the zone of danger. If a brakeman has opened the knuckles by hand and has retired to safety before movement begins, there would be the hazard, if car movement should jar into nonoperative position the uncontrolled and uncontrollable knuckles which defendant contends for, that the brakeman would yield to the temptation to exercise his oldtime and now forbidden skill in jumping into and out of danger by attempting to readjust the knuckles while the cars were in motion. We therefore reject defendant's interpretation of the statute, and we conclude that plaintiff's proofs warranted the jury in finding that the statute was violated, that the engineer was negligent in failing to abate the peril which originated in such violation, and that such violation and such negligence were respectively the proximate and contributing causes of the injury.

[3] Defendant complains of the court's rejection of proffered evidence to the effect that it is impracticable to build couplers whose knuckles can always be opened by the lever extending beyond the rails to the side of the car, that no such couplers have yet been made, and that defendant uses a generally approved type. Under the construction we place upon the statute, the evidence was irrelevant. If the statute is harsh and is difficult to comply with, relief must come from the lawmaking, not the judicial, branch of the government. It is to be observed that the offer did not profess to show that compliance is a mechanical impossibility. If lawmakers should command what is absolutely impossible of execution, as conditioning one's freedom from punishment on jumping over the courthouse, a different question would be presented.

[4] Exception was taken to only one part of the charge to the jury:

"Take into account the effect which this injury has had upon his capacity to earn a livelihood for himself and his family."

Without objection or exception plaintiff testified in response to questions introducing him to the jury that he was 30 years old, married, and had three children. It was proper for the jury to consider whatever the evidence disclosed as to plaintiff's diminished earning power. What he might do with his earnings (in support of himself alone or in support of his family) was immaterial. But the reference in the

charge to this immaterial matter which defendant acquiesced in bringing into the case was harmless.

[5] Defendant applied for a new trial on account of new matter discovered after the trial. This alleged new matter was a printed rule in the company's book of rules promulgated long before the accident. Defendant's claim that the matter was new and was discovered only after the trial was properly ignored.

The judgment is affirmed.

WHITEHURST et al. v. D. M. FERRY & CO.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1921.)

No. 5650.

1. **Agriculture ⟸16—Label on seed must state month and year of testing.**
Under Laws Okl. 1919, c. 138, § 4, a label on a container of seeds offered for sale must positively state the month and year that the seed was tested.

2. **Agriculture ⟸16—Label on seed must use word "germination" and not word "viable."**
Although the word "viable" as used in a label on a container of seed has the same meaning as the word "germination" as used in Laws Okl. 1919, c. 138, § 4, the statute requires the use of the word "germination."

3. **Agriculture ⟸16—Label on container of seeds must give approximate germination and not less.**
Under Laws Okl. 1919, c. 138, § 4, label on containers of garden seed must state the approximate germination, and a seller of seed violates such statute by labeling it either 1 per cent. or 10 per cent. germination when in fact the germination is 80 per cent. or 90 per cent.

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

Suit for injunction by D. M. Ferry & Co. against John A. Whitehurst and others, officers charged with enforcement of laws relating to sale of garden seeds. Decree for plaintiff, and defendants appeal. Reversed and remanded.

S. P. Freeling, of Oklahoma City, Okl. (C. W. King, of Oklahoma City, Okl., on the brief), for appellants.

Rockwell T. Gust, of Detroit, Mich. (Thomas G. Long, of Detroit, Mich., Stuart, Sharp & Cruce, of Oklahoma City, Okl., and Stevenson, Carpenter, Butzel & Backus, of Detroit, Mich., on the brief), for appellee.

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

CARLAND, Circuit Judge. Section 4, c. 138, Session Laws of Oklahoma 1919, provides as follows:

"Section 4. Every lot of beans, lettuce, radish, cabbage, watermelon, cantaloupe, and other garden and truck seeds, which are sold, offered or exposed for sale, when in bulk, package or other container, shall have affixed thereto,

in a conspicuous place on the exterior of the container of such seed a plainly written or printed, in not less than 18-point type, tag or label in the English language, stating:

* * * * * * * * * * * *

"(d) Approximate percentage of germination of such garden and truck seed together with the month and year said seed was tested."

[1-3] Appellee is a corporation of the state of Michigan, engaged in the business of selling truck and garden seeds to merchants in the state of Oklahoma, and throughout the United States. Appellants are officers and employees of the state of Oklahoma charged with the duty of enforcing the law above mentioned. Appellee, claiming to have complied with said law, caused a stamp to be affixed to packages of truck and garden seeds sold by it and in the possession of merchants in Oklahoma, which read as follows: "One per cent. viable, tested since July 1, 1919, 99½% pure." Appellants, deeming this tag or label a violation of the law, took measures to prevent the sale of the truck and garden seeds so labeled. Whereupon appellee brought this suit to restrain appellants from interfering with the sale thereof. The trial court granted a perpetual injunction against appellants upon the condition that appellee should tag or label its truck and garden seeds as follows: "Germination, 10%. Tested July, 1919, or any other specific month as the fact may be, 99½% Pure." Appellee accepted the condition, and a decree was entered in its favor, from which appellants have appealed. The only point presented by the appeal is as to whether the word "approximate" in subdivision (d) above mentioned allows the appellee to specify 1 per cent. or 10 per cent. as the approximate percentage of germination. The trial court was correct in so far as it ruled that the month and year must be positively stated in the tag or label, and that the tag or label used by appellee was in this respect not in conformity to the requirements of the statute, but we think it erred when it decided that the statement of "germination 10 per cent." was a compliance with the statute in so far as it requires the approximate percentage of germination to be stated. In this connection we may say that the word "viable," used in the label of appellee, has the same meaning as the word "germination," used in the statute, but manifestly would not so plainly convey the information intended to the ordinary purchaser as the word "germination," and as the statute uses the latter word, the tag or label must also use it. There is evidence in the record showing that appellee claimed its seed would run 80 or 90 per cent. as to germination, but that it would not label its seed with any statement that implied a guaranty as to germination. This is the real reason back of appellee's refusal to label its seed as the law requires. It does not want to guarantee its seed as to germination. The law does not require any such guaranty, and therefore uses the word "approximate" or in effect a reasonable margin above or below the actual test percentage of germination. In addition to the admission of appellee as to the actual percentage of germination of its seed, we are of the opinion that we may judicially know that a percentage as low as 1 per cent. or 10 per cent. is not the approximate percentage of germination of appellee's seed. No dealer would offer seed for sale with such a low percentage of germination if he expected the purchaser to rely upon the

statement. Counsel for appellee contend that it may place any percentage of germination it chooses upon its label, for the reason that the law does not fix a minimum, and therefore it is just as lawful to label seed 1 per cent. or 10 per cent. germination as 80 or 90 per cent., but we are of the opinion that this position of counsel entirely overlooks the requirement of the law that the percentage stated must be approximately or very nearly the true percentage, and that 1 per cent. or 10 per cent. is manifestly not an approximation of such true percentage. Counsel further insists that the only lawful purpose sought to be accomplished by the law, or which it could seek to accomplish, is the protection, under the police power of the state, of its citizens from fraud and imposition by making the seller of seeds conform to the requirement that he should state some percentage of germination, and, further, that he should not knowingly overstate such percentage. We can agree with counsel upon this view, except that the law only requires a statement of some percentage of germination. The law does not say "some percentage"; it says "approximate percentage," and the word "approximate" as used in the statute means "very nearly." We therefore are of the opinion that the label which states a percentage of 1 per cent. or 10 per cent. of germination is not according to the requirement of the statute, for the reason that the percentage is so low as to show upon its face that it is not a true approximation. In this situation counsel for appellee argue that the buyer of truck and garden seed can in no way be injured, but must be benefited if he receives seeds of a higher percentage of germination than indicated by the stamp or label. This argument, however, assumes that appellee or any dealer in truck and garden seeds may place upon the tag or label any percentage of germination as long as the percentage does not in fact exceed the actual percentage of germination of the truck and garden seeds offered for sale. This is not our understanding of the law. In support of counsel's contention the case of City of Chicago v. Schweinfurth, 174 Ill. App. 64, is cited. In this case the ordinance of the city of Chicago defined a standard loaf of bread, and provided that bread sold or offered for sale should be labeled as to its weight in pounds or fractions, and imposed a fine if such bread did not weigh as much as the amount marked thereon. It was decided in this case that the ordinance was not violated where loaves were labeled as weighing three-fourths of a pound when they in fact exceeded that weight. We do not see how this case has any bearing on the decision of the question now before us. We are not dealing with such a law. The Legislature of the state of Oklahoma in the exercise of the police power of the state was of the opinion that a regulation, requiring the approximate percentage of germination to be stated, whether that approximation was above or below the actual percentage, would prevent fraud and imposition upon the buyer. The Legislature was not making the law for the appellee alone, but for all persons who might engage in the seed business; and, while the seeds of appellee have gained a reputation through a period of upwards of 60 years that causes them to be purchased regardless of label, this might not be so of other dealers, and purchasers, not knowing the character of the seeds offered for sale by such other dealers, might have to depend

altogether upon the label. The stamp formulated by appellee or the one formulated by the trial court did not comply with the law. The bill of complaint complained only of the construction placed upon section 4 (d) by appellants. As that construction is not shown to have been wrong, the decree below is reversed, and the cause remanded, with directions to dismiss the bill.

The judges who heard this case all concurred in the decision thereof, but Judge HOOK deceased before the opinion was prepared.

CLARKE v. AIKEN et al.

(Circuit Court of Appeals, Fifth Circuit. October 25, 1921.)

No. 3601.

1. **Specific performance ⇐8, 16—Granting discretionary.**
A court of equity exercises a discretion in determining whether the relief of specific performance should be granted or withheld, and the relief may be withheld when the granting of it may produce hardship or injustice to either of the parties.

2. **Specific performance ⇐16—Landowner held not entitled to specific performance of contract to provide canals across railroad.**
Where landowner conveyed land to railroad for right of way, in consideration of an agreement to provide and maintain openings through embankment, so as to permit passage of water to be used in cultivation of rice, and it was found unprofitable to raise rice on the land, and the damage to the land in value for failure to provide passageways for water is only $400, the landowner is not entitled to specific performance, where it would cost the railroad in excess of $3,000 to construct such passageways.

3. **Railroads ⇐72(9)—Measure of damages for breach of contract for water openings in embankment stated.**
Where landowner conveyed land to railroad for right of way, in consideration of an agreement on the part of the railroad to maintain openings through any embankment constructed to insure flow of water required in cultivation of rice, and cultivation of rice was abandoned for 20 years, and passageways through embankment were filled up, the landowner, in an action for damages, was not entitled to the cost of reconstructing the passageways, but only to the difference in the value of the land with the passageways and without them, where such difference was only $400 and the cost of reconstructing the passageways would be in excess of $3,000.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Suit in equity by David Loewenthal against the Georgia Coast & Piedmont Railroad Company, in which F. D. Aiken and others were named as receivers, John D. Clarke intervened, and the Columbia Trust Company filed a cross-bill against the Georgia Coast & Piedmont Railroad Company. From an adverse decree (265 Fed. 961), the intervener appeals. Affirmed.

William L. Clay, of Savannah, Ga., for appellant.

H. H. Dean, of Gainesville, Ga., T. M. Cunningham, of Savannah, Ga., and Max Isaac, of Brunswick, Ga. (Dean & Wright, of Gainesville, Ga., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. By an indenture made in the year 1912 between the appellant, John D. Clarke, and the Georgia Coast & Piedmont Railroad Company, the former conveyed to the latter a right of way, 200 feet in width, across General's Island, in McIntosh county, Ga. That instrument bound the railroad company to maintain openings through any embankment constructed by it on the right of way acquired, so as to permit the passage of water from one side of such embankment to the other. A purpose of that provision was to insure the flow of water, required in the cultivation of rice, to that portion of the island east of the right of way. By intervention in a suit brought for the foreclosure of a mortgage or deed of trust covering the properties of the railroad company, in which suit receivers were appointed, Clarke, after alleging that the receivers, or their authorized agent, with knowledge of the above-mentioned contract, in doing work upon the railroad under the court's orders, so filled in openings in the embankment constructed by the railroad company as to prevent the flow of water from one side of such embankment to the other, prayed that he be awarded damages in the sum of $12,978, that for such amount he be allowed a first lien upon the proceeds of the sale of the properties administered by the receivers, and that he—

"be adjudged to have the right hereafter to place in, through, across, over, and under said embankment such ditches, canals, drains, conduits, passages, and roadways as the contract provides should be made and established where any embankment should be built."

At the time the intervention was filed the property of the railroad company had been sold under a decree of the court, which gave the purchaser the option to discontinue the operation of the railroad and to take up and sell its rails. When the decree on Clarke's intervention was rendered, the railroad had been dismantled, as permitted by the terms of the decree of sale.

The evidence disclosed that formerly rice was grown on a considerable part of the island, but that the use of the land for growing rice, or any other kind of crop, was abandoned more than 20 years ago, and has not been resumed. The evidence indicated that the abandonment of the use of the land for growing rice was due to the increased cost of the labor required, and to the difficulty or impossibility of getting laborers willing to undertake the task, which involves constant work in the wet; the laborers having to work in mud and ditches up to their knees. It well may be inferred that the land will continue to be unavailable for rice farming, except in the possible event of changes in conditions making it possible to get the required labor at a cost that would make the growing of rice on the land profitable.

The master made findings of fact which included the following:

"Whatever damage there has been to the market value of the land was occasioned by filling of the canals, ditches, drains, and roadways, and to this extent destroying the usefulness of that portion of the island to the east of the railroad for the culture of rice. The highest number of acres given in this tract is 75 acres. From the evidence, the highest market value which this

land has, apparently either present or prospective, is for the cultivation of rice. * * * The special master finds that the market value of the land has been reduced and decreased in the sum of $400."

The just-quoted findings were not excepted to on the grounds that there was an absence of evidence to support them, or that they were contrary to the evidence adduced. The court confirmed the findings of the master, and awarded to Clarke $400 damages. In behalf of Clarke it is contended that the court should have awarded to him as damages the amount of the cost of restoring the structure on the right of way to the condition it was in before the openings in the fill or embankment were filled in or closed, which the master found to be the sum of $3,000, but which the appellant's counsel contends was shown by the evidence to be the sum of $4,682.

[1, 2] The appellant is not seeking a decree requiring specific performance of the above-mentioned contract. A result of granting the relief he seeks would be the payment to him, out of the funds of the estate in the court's charge, of the amount of the cost of restoring the openings in the fill or embankment, which amount the appellant could use as he pleases, unless, without his procurement, he is required to use it in the work of restoring the openings. It is not to be supposed that he would choose to expend $3,000 or $4,682 to have work done which would benefit him to the extent of only $400. He is suing for damages only, but claims that he is entitled to recover greatly more than the amount he lost by the breach of contract complained of. Certainly the court should not grant the relief sought by the appellant, if the situation disclosed is such that specific performance of the contract would not properly have been granted, if that relief had been sought. A court of equity exercises a discretion in determining whether the relief of specific performance should be granted or withheld. The relief may be withheld when the granting of it will produce hardship or injustice to either of the parties. Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120.

[3] The record shows that the cost of restoring the openings in the fill or embankment would be at least more than seven times the value of the benefit to accrue to the appellant as a result of that work being done. The cost of the work being so much in excess of the benefit to the appellant therefrom, it would be unjust and inequitable to require specific performance. Sanitary District v. Martin, 227 Ill. 260, 268, 81 N. E. 417, 10 Ann. Cas. 227. In the situation disclosed, justice was done by awarding to the appellant the amount of damages he sustained by the closing of the openings. The proper measure of damages is the difference between the value of the land before the complained-of breach of the contract and its value after such breach. Atkinson v. Kreis, 140 Ga. 52, 78 S. E. 465. In the situation disclosed the appellant has no tenable ground of complaint against a decree which awarded him the full amount of the damages he sustained.

The decree is affirmed.

LEAVENWORTH v. BANK OF GILLETT et al.

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

No. 5783.

1. **Evidence ⟸245—Sheriff's advertisement held competent as admission against attaching creditor.**
   In an action against a sheriff and creditor for attaching logs, in which plaintiff claimed that he attached but 500,000 feet of logs, the sheriff's notice of sale of some 900,000 feet was competent evidence against defendants in the nature of an admission against interest as to amount.

2. **Sheriffs and constables ⟸171—Evidence as to attachment of plaintiff's property held for the jury.**
   In an action against an attaching creditor and a sheriff on the ground that they had attached plaintiff's logs as those of another, evidence as to the amount of logs attached, and as to whether they belonged to the plaintiff or to the creditor, *held* for the jury.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by George Leavenworth against the Bank of Gillett and others. From judgment for defendant, plaintiff brings error. Reversed and remanded.

J. B. Daggett and C. E. Daggett, both of Marianna, Ark., and Thomas S. Buzbee, George B. Pugh, and H. T. Harrison, all of Little Rock, Ark., for plaintiff in error.

Charles T. Coleman, Joe T. Robinson, Joe W. House, Jr., and Walter G. Riddick, all of Little Rock, Ark., for defendants in error.

Before SANBORN and STONE, Circuit Judges.

SANBORN, Circuit Judge. George Leavenworth, the plaintiff in error, sued the Bank of Gillett, R. H. Elliott, the sheriff of Arkansas City, and the sureties on his bond for $15,000 damages because, as he alleged, the sheriff, under an attachment caused to be issued by the bank in a suit to which the plaintiff was not a party, seized and took from his possession 1,180,679 feet of his logs which he had caused to be cut from his land, described as private survey No. 2400 in Arkansas county, and banked on the river to be floated to the mills. By their answer the defendants admitted that the plaintiff was the owner of private survey No. 2400, but denied that the logs which they seized came from that survey, or that the plaintiff was the owner of the logs that they seized, or that the logs were worth $15,000, or any other sum, and alleged that the only logs they seized were logs from timber cut from lands belonging to the Bank of Gillett. The issues thus made were tried by a jury, which returned a verdict for the defendants.

The plaintiff assigns several alleged errors which it is unnecessary to consider. One which demands consideration is that the court below held during the trial of the case and charged the jury that the sheriff seized only 502,000 feet of logs under the attachment. There was substantial conflicting testimony as to the amount seized by the sheriff and

as to the disposition he made of the logs he seized. Witnesses for the defendants testified, it is true, that he seized only 502,000 feet. But Angel, a witness for the plaintiff, testified that he cut the logs on plaintiff's private survey No. 2400 and scaled them; that there were more than a million feet of them. J. D. Asher, one of the witnesses for the plaintiff, testified that he was the man referred to by Angel who had charge of the cutting and hauling of the logs. During his cross-examination by counsel for the defendants he testified as follows:

"The Court:
"Q. How many were attached? A. The whole thing.
"Q. The whole million? A. Yes, sir; so I understand.
"Mr. Coleman:
"Q. Do you know? A. They had them advertised for sale.
"The Court:
"Q. By the sheriff? A. Yes, sir.
"Q. How does it come they recovered 600 and some odd thousand feet? A. That was the next year.
"Q. I mean, were they sold by the sheriff? A. No, sir; wouldn't nobody bid on the gum and stuff there not down.
"Q. You say it wasn't sold? A. All of it wasn't sold.
"Q. It was abandoned and Mr. Kimble took charge of it again? A. Yes, sir; we went there next year and put out six hundred and eleven thousand or ten thousand feet and hauled it out and delivered it.
"Mr. Coleman:
"Q. Another question. These logs were hauled there for the purpose of floating them down to market? A. How is that?
"Q. These logs were hauled there for the purpose of floating them down to market? A. Yes, sir; sure.
"Q. Now, did you have any water between June, 1917, and April 1919, when you could have floated these logs? A. Did we have any water? We had water in April.
"Q. April what year? A. Of 1918.
"Q. Sufficient water to float these logs? A. Yes, sir.
"Q. Were you there at that time? A. No, sir; I wasn't there at that time.
"Q. Oh, well, you don't know anything about it? A. Yes, sir; I know.
"The Court:
"Q. You knew there was high water? A. Yes, sir; I knew there was high water at the time it was up there, but I weren't there."

[1, 2] The deputy sheriff who made the attachment and conducted the sale testified that he attached only 502,000 feet of logs. But he also testified that he made a sale of a part of these logs prior to his sale of June, 1918, and the advertisement of the sale in June which was in evidence described 903,450 feet. While this notice bears the signature "R. H. Elliott, Receiver," there was substantial evidence that Elliott was the sheriff, and that the sale was made under the attachment pursuant to an order of the court to scale and sell the attached logs after the attachment was made. In this state of the evidence the advertisement was competent and persuasive evidence against the defendants in the nature of an admission against interest as to the amount of logs the sheriff attached and attempted to sell. There was also substantial evidence that the 611,000 feet of logs which the plaintiff subsequently recovered were held under the attachment and advertised for sale but were not sold for want of bidders, and that the sheriff's detention of these logs under the attachment resulted in a loss to the

plaintiff of many thousands of dollars. In the state of evidence disclosed by the record at the time this case went to the jury the plaintiff was entitled therefore to the submission to the jury of the questions of fact: What was the amount of logs of the plaintiff attached by the sheriff so that the plaintiff was excluded from the possession or from the free use and disposition thereof? How long was he so excluded and what damages did he suffer thereby? What amount of his logs did the sheriff or receiver sell under the attachment, and what amount of damages did he suffer from this sale and conversion if any? There was such a substantial conflict in the evidence on material issues of facts that were not submitted to the jury in this case that the plaintiff is entitled to another trial. The judgment is accordingly reversed, and the case remanded to the court below for that purpose.

SPANGELO v. NORTHERN DAKOTA RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1921.)

No. 5807.

1. **Appeal and error ⟸148—Purchaser under decree not a party who may appeal.**
   A purchaser of property at a foreclosure sale does not thereby become a party to the suit who may maintain an appeal from an order made therein.

2. **Appeal and error ⟸69(1)—Order refusing to confirm sale not appealable.**
   An order of a District Court refusing to confirm a sale in a foreclosure suit and directing a new sale is not a final order and is not appealable.

Appeal from the District Court of the United States for the District of North Dakota; Charles S. Amidon, Judge.

Suit in equity by the Minneapolis Trust Company against the Northern Dakota Railway Company and others. Jens H. Spangelo appeals from an order of the District Court. Appeal dismissed.

G. Grimson, of Langdon, N. D., and S. Johnson, of Grand Forks, N. D. (J. M. Snowfield, of Langdon, N. D., on the brief), for appellant.

C. J. Murphy, of Grand Forks, N. D. (T. A. Toner, of Grand Forks, N. D., on the brief), for appellees.

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

PER CURIAM. Under a decree of foreclosure of a mortgage, in which the Minneapolis Trust Company was plaintiff and the Northern Dakota Railway Company, defendant, the property of the railway was sold by a special master appointed by the court for the sum of $35,000. Upon objections urged by the mortgagor, the railway company, that the amount bid was inadequate, the court disapproved the sale and thereupon entered an amended decree of foreclosure, adding to the original that the special master is to offer the property for sale as an

entity first, and if a satisfactory price could not be obtained, that the property be dismantled and the material assembled at a convenient point and sold by the special master.

The special master proceeded with the new notice of sale at which the appellant, Spangelo, again bid $35,000, which bid the special master declined to accept and postponed the sale. He reported the situation to the court, asking further instructions. Spangelo appeared at the hearing and insisted that his bid be accepted. The court denied his request and the proceedings of the special master were approved. The order further provided that if the appellant, or any other party, would pay the special master $65,000 within a certain specified time, the sale should be made to such party, but if no such payment should be made, the special master was directed to carry out the decree, dismantle the line, and sell the material. At the request of Spangelo the time for payment of the $65,000 was extended, he representing that he and other interested parties were engaged in an effort to raise this money and would be able to do so within a stated time. On the last day of the extension, no payment having been made, appellant, without any further application to the court, took this appeal.

[1] The appellee filed a motion to dismiss the appeal upon the ground that the appellant is not a party to the action, nor did he ever apply to be made a party thereto. The motion must be granted. Bayard v. Lombard, 50 U. S. (9 How.) 530, 13 L. Ed. 245; Ex parte Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Cook v. Lasher, 73 Fed. 701, 19 C. C. A. 654.

[2] Another ground upon which the appeal must be dismissed is that there is no final decree. Butterfield v. Usher, 91 U. S. 246, 23 L. Ed. 318; The St. Paul, 262 Fed. 1021 (C. C. A. 2d Ct.).

The appeal is dismissed.

Judge HOOK participated in the hearing of the case and concurred in the conclusion reached, but died before the opinion was prepared.

BAILEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1921.)

No. 5817.

Internal revenue ⇐2—Special tax on liquor dealers repealed by Prohibition Act.

The provision of Rev. St. § 3242 (Comp. St. § 5965), making it an offense to carry on the business of retail liquor dealer without having first paid the special tax therefor *held* repealed by Volstead Act.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

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

Ben Cravens and Ira D. Oglesby, both of Ft. Smith, Ark., for plaintiff in error.

J. S. Holt, U. S. Atty., of Ft. Smith, Ark.

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

PER CURIAM. The plaintiff in error was indicted, tried, and convicted of having engaged in the business of a retail liquor dealer, without having paid the special tax required by law. Rev. St. § 3242 (Comp. St. § 5965). The offense was committed after the enactment of the Volstead Act.

The Supreme Court of the United States, in United States v. Yuginovich, 256 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, in which the opinion was filed June 1, 1921, and this court in Ketchum v. United States (C. C. A.) 270 Fed. 416, and Sanford v. United States (C. C. A.) opinion filed June 7, 1921, 274 Fed. 369, held that the statute upon which the conviction and sentence were based was repealed by the Volstead Act (41 St. 305), before the time when the offenses were alleged to have been committed.

Upon the authority of those decisions the judgment is reversed, with directions to let the mandate go down forthwith.

HOOK, Circuit Judge, sat in the case, concurred in the conclusions reached, but died before this opinion was written.

UNITED STATES v. ONE ESSEX TOURING AUTOMOBILE.

(District Court, N. D. Georgia, N. D. August 8, 1921.)

No. 785.

1. **Judgment ⇐346—Validity may be considered after close of term.**
   A motion to set aside a judgment as void may be considered after the term at which it was rendered.

2. **Internal revenue ⇐2—Provision for forfeiture of vehicle used to defraud government of tax not repealed.**
   Rev. St. § 3450 (Comp. St. § 6352), was not repealed by the National Prohibition Act, and a vehicle used to remove or conceal distilled spirits subject to tax which has not been paid, with intent to defraud the United States of such tax, is subject to forfeiture thereunder.

Libel of condemnation by the United States against one Essex touring automobile. On motion by claimant to set aside judgment of forfeiture. Denied.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga.

Philip Weltner, of Atlanta, Ga., and Austin Bell and Andrew J. Cobb, both of Athens, Ga., for claimant.

SIBLEY, District Judge. The automobile was libeled for condemnation under R. S. § 3450 (Comp. St. § 6352), on April 24, 1920, on the ground that it was used by a person unknown for the re-

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

moval, deposit, and concealment of 80 gallons of distilled spirits in respect of which a tax was imposed which had not been paid, with intent to defraud the United States of the tax. Judgment of condemnation was had, and after the term a motion is made to set it aside on the ground that the judgment is void, because on April 24, 1920, there was no law to authorize it; R. S. § 3450, having been repealed by the National Prohibition Act (41 Stat. 305).

[1] 1. Notwithstanding the term at which the judgment was rendered is past, the validity of the judgment will be examined, because, if void, it cannot be enforced, and enforcement ought in the interest of justice to be stopped at any time that the invalidity is brought to the attention of the court.

[2] 2. The question of repeal here raised was examined in this court in One Essex Touring Automobile (D. C.) 266 Fed. 138, and the conclusion reached that forfeiture under R. S. § 3450, might be had, notwithstanding the provisions of the National Prohibition Act. A review of this conclusion has now been had, in the light of the case of United States v. Yuginovich, 256 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, decided by the Supreme Court June 1, 1921. That case settles that the laws taxing distilled or other intoxicating liquors are not repealed by the National Prohibition Act, but these remain "goods or commodities in respect of which a tax is or shall be imposed," mentioned in R. S. § 3450.

The question of the repeal of former penalties by prescribing lesser ones for substantially the same act does not arise here at all, for, if the acts punished by section 3450 are supposed to be substantially the same as the forbidden transportations of the Prohibition Act, it happens that the penalties are the same. But, as stated in the former opinion of this court, the two laws really cover very different ground. R. S. § 3450, deals not only with distilled liquors, but every other taxed article. Its subject-matter is far broader than that of the Prohibition Act. Its purpose is not to discourage the transportation or use of taxed articles, but to facilitate the collection of the tax on them. The propriety of forbidding their removal, deposit, or concealment without the payment of the tax and with intent to defraud is evident. The fact that Congress, under constitutional authority, has since seen fit to select a class of articles on which a tax is due, and with a different purpose in view to prohibit their transportation or possession, except under prescribed conditions, even *after* the tax has been paid, in no wise impairs the propriety of prohibiting their removal or concealment in the interest of the revenue *before* the tax is paid.

The transportation or possession punished under the Prohibition Act is of intoxicating liquors, irrespecitve of whether the tax has been paid, or whether any tax was ever imposed on them. R. S. § 3450, has to do only with articles on which a tax is due and unpaid, irrespective of whether the use of them is restricted by other laws. One may violate R. S. § 3450, by removing or concealing liquors on which a tax is due and unpaid with intent to defraud of the tax, even though he have all requisite permits for transportation and possession under the Prohibition Act. In like manner he may violate the Prohibi-

tion Act by transporting and possessing intoxicating liquors contrary to its provisions, even though he may have paid all taxes upon them. Or he may violate the provisions of both laws at the same time, if the tax is not paid and permit not secured.

The case in question could not be reached by the proceeding for forfeiture provided by section 26 of the Prohibition Act. The person in charge of the automobile fled and is unknown, and cannot be prosecuted and convicted, however evident his guilt. Moreover, he may have had a permit to transport the liquors, and so not be capable of conviction "under the provisions of this title," as required by section 26. Yet if he and the automobile were engaged in an effort to defraud the government of the tax due, there is no more reason why the penalty for so doing should be relaxed in the case of distilled liquors than in the case of any other taxed article. One may wonder why greater severity should be prescribed by Congress in the matter of forfeitures as well as penalties in protection of the revenue laws than in enforcing constitutional prohibition, but that is not a judicial problem. The field covered by the two acts here in question is too distinct to raise any question of collision or implied repeal.

The motion to vacate is denied.

UNITED STATES v. SHARROCK.

(District Court, D. Montana. November 5, 1921.)

No. 49.

1. **Aliens ⟸71½, New, vol. 7 Key-No. Series—Notice held insufficient to give jurisdiction of suit to revoke citizenship.**

   Proceedings under 34 Stat. 601, Comp. St. § 4374, to annul citizenship, not having been fully defined, the court proceeds in conformity to its practice and rules in like proceedings. and, the suit being in equity, did not acquire jurisdiction where the subpœna was not published as required.

2. **Aliens ⟸71½, New, vol. 7 Key-No. Series—Clear proof required to revoke naturalization.**

   To deprive a naturalized alien of a citizenship, there must be full proof, and the evidence must be clear, unequivocal, and convincing.

In Equity. Proceedings by the United States against Robert Sharrock to annul citizenship. Decree for defendant.

John L. Slattery, U. S. Atty., of Helena, Mont.

BOURQUIN, District Judge. In this suit to annul defendant's citizenship, having heretofore taken an order for decree pro confesso, plaintiff proceeds ex parte and submits the cause for decision and final decree on only the files and record.

The petition or bill filed February 10, 1917, is founded upon a naturalization examiner's affidavit attached, which states that July 10, 1915, in Deer Lodge county, this state, defendant was admitted to citizenship illegally, in that therein he, then married, as "from information before him * * * affiant verily believes," willfully took

oath that he was then unmarried. The bill is only that plaintiff "represents and shows to the court" all these facts "upon information and belief," and includes a like jurisdictional averment, not in the affidavit, that defendant resides in Anaconda, said county. The usual subpœna in equity, though labeled "Notice" only, and stipulating 60 days for defendant's appearance, forthwith issued, and was promptly returned not found.

More than two years later, and July 28, 1919, petition for service by publication was filed, and order therefor made. The return thereon is that a "notice" directed to defendant, otherwise in substance and teste a subpœna, not under the court seal nor signed by the clerk, but by the marshal, was promptly published in Lewis and Clark county, this state. November 4, 1919, order was taken for decree pro confesso, and August 5, 1921, the cause was submitted as aforesaid.

[1] It is very clear decision and decree must be for defendant. The statute (34 Stat. 601; Comp. St. § 4374) confers upon courts jurisdiction of a new subject-matter without defining procedure farther than that the suit shall be brought in the district wherein the defendant then resides, that defendant "shall have sixty days personal notice in which to make answer to the petition of the United States," and, if he is absent, "such notice shall be given by publication in the manner provided for the service of summons * * * by the laws of the state."

In these circumstances the court proceeds in conformity to its practice and rules in like proceedings. Hence the suit is in equity (Luria v. U. S., 231 U. S. 27, 34 Sup. Ct. 10, 58 L. Ed. 101), and the notice referred to is the usual process and subpœna in equity of statute and rules, modified in respect to time, necessarily under the seal of the court, and signed by its clerk. R. S. §§ 911, 913 (Comp. Stats. §§ 1534, 1536); equity rule 7 (198 Fed. xx, 115 C. C. A. xx). Such subpœna was not published herein, and so jurisdiction of defendant was not acquired.

It is a question of supreme importance, but not now for decision, whether the status of a citizen constitutes a res that may have a situs apart from him, is a thing that upon his change of domicile or travel abroad remains behind, and of which courts of its locality may have jurisdiction to annul, upon constructive notice by publication to the citizen, and whether such notice constitutes due process of law. If to be answered in the affirmative, the hazards to naturalized citizens are great indeed, more so than in respect to property. For men changing domicile or traveling, leaving property behind, so far keep in touch with it that they are very likely to learn in apt time of any proceedings affecting it or their interest in it. But who, in like circumstances of change or travel, appreciates that his citizenship, instead of accompanying him in its entirety, so far remains behind that it is there subject to annulment without actual notice to him, and who undertakes to insure notice thereof to himself And yet all will concede that there ought to be legal way by which the United States can secure relief from fraudulent admissions to citizenship, though the beneficiaries have disappeared or gone abroad. If, however, the notice herein suffices, this

dilatory suit fails upon the merits. Not only the jurisdictional allegation of defendant's residence, but also that of his fraud, is upon information and belief, and without evidence in its support.

[2] In no case of like circumstances, much less in one of the character of the instant suit, will a court of equity be satisfied that justice will be done by a decree in accordance with the prayer of the bill. To deprive a man of his priceless possession of and inestimable right to American citizenship, there must be full proof. Nothing will warrant cancellation of his grant of citizenship, but clear, unequivocal, and convincing evidence, that in quantity and quality inspires confidence and produces conviction of the truth of the charge, virtually beyond reasonable doubt.

Decree for defendant.

O'CONNOR v. POTTER et al.

WOODCOME v. SAME.

(District Court, D. Massachusetts. September 30, 1921.)

Nos. 2046, 2047.

Criminal law ⇐394, 395—Intoxicating liquors ⇐255—Liquor unlawfully seized and information obtained thereby inadmissible; person from whom liquor is unlawfully seized, but who does not claim ownership, not entitled to its return.

Where five barrels of whisky were illegally seized without a search warrant from the residence of claimant, neither the whisky nor the knowledge obtained by the seizure is admissible in a criminal prosecution against him; but where he does not allege ownership, and it appears that the whisky was a part of a quantity withdrawn from storage under a permit by a drug company, and that claimant's possession was unlawful under the National Prohibition Act, he is not entitled to its return.

Petitions by Cornelius O'Connor and by William Woodcome against Elmer C. Potter and others for return of liquor seized. Denied.

James A. Hatton, of Boston, Mass., for plaintiffs.

The U. S. Attorney, for defendants.

MORTON, District Judge. These are two petitions seeking orders for the return of intoxicating liquors taken from the residence of the petitioners. They were heard in open court on oral and documentary evidence. The facts are as follows:

The petitioners Woodcome and O'Connor live on Hayward street in Fitchburg, in buildings used solely for residential purposes. On August 6, 1921, two officers of the internal revenue, one of them being also a prohibition officer, and another prohibition officer, went to the houses of the petitioners and took from each house 5 barrels of whisky. The officers had no search warrant or process of any kind; neither petitioner was at home when the officers came; the officers explained to the wife of each petitioner that they were revenue officers, who desired to enter to examine goods subject to tax in accordance with Rev. St. § 3177 (Comp. St. § 5900), and that it was her duty to allow them

to enter. Having obtained entrance in this way, they discovered the whisky here in question. The stamps upon the barrels had been defaced or removed; parts of the stamps were found on the premises of each petitioner, indicating that they had been removed there. The officers then seized the liquor as being unlawfully possessed under the National Prohibition Act (41 Stat. 305) and carried it off. It is now in the custody of Mr. Potter as Prohibition Director.

Neither petition alleges that the liquor seized was the property of the petitioner; the allegations on this point being in each:

"That your petitioner neither affirms nor denies that the above-described property is his property, but reasserts that the property was taken from his premises without due process of law."

Each petitioner testified in these proceedings. Neither gave any evidence concerning the ownership of the liquor, nor how it came into his possession. It appears to have been part of a lot of 20 barrels which was withdrawn from storage under permits in the name of the Emeline Drug Company, and the possession of it by the petitioners appears to have been unlawful under the Volstead Act.

Some time after the seizure, one Cunningham, who directed the officers to the premises in question, was duly summoned to appear before the federal grand jury and was in attendance, but was never called upon to testify.

The contention of the petitioners is that the liquor was illegally obtained by the officers, and that the government has no right to use it as evidence in criminal proceedings against them; that, being evidence illegally obtained, they are entitled to have it returned to them as the persons from whose custody it was taken, regardless of whether they are the owners of it or not.

It is clear that the seizure was illegal and unjustifiable. It follows that neither the goods seized nor the knowledge obtained by the seizure can be used in evidence. It does not, however, follow that, simply because it happened to be taken from their premises, the petitioners are entitled to have this large amount of outlawed liquor returned to them. They do not claim to own it, and are not injured by the seizure of it, except that the illegal action of the officers has placed in the government's hands evidence against the petitioners which it has no right to use. In Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. —, relied on by the petitioners, the petition stated, according to the opinion, that the liquor was the property of the petitioner. The constitutional rights of these petitioners will be adequately protected by an order declaring the seizure an illegal one, and all evidence obtained thereby or based thereon inadmissible, and directing that the liquor be delivered to the United States marshal and impounded in his keeping until further order of the court in relation thereto.

As to the clerk the petition is dismissed. He has nothing to do with the matter.

As to the other defendants the petition will be retained as a basis for future action, if necessary.

The motions to dismiss are overruled.

UNITED STATES v. 426 BAGS OF ECONOMY SPECIAL HOG FEED.

(District Court, W. D. Michigan. May 6, 1921.)

1. **Adulteration ⇐4—Hog feed held misbranded.**
Hog feed was misbranded, in violation of Food and Drugs Act, § 10 (Comp. St. § 8726), where the labels upon the bags contained false and misleading statements as to percentages of its ingredients.

2. **Adulteration ⇐4—Shipment of misbranded goods not for sale violation of Food and Drugs Act.**
Transportation from one state to another of misbranded hog feed was a violation of Food and Drugs Act, § 10 (Comp. St. § 8726), though the purpose of the transportation was not for sale.

Proceeding by the United States to condemn 426 bags of Economy Special Hog Feed. On motion to strike claimant's answer and for a decree of condemnation. Motion granted.

M. H. Walker, Dist. Atty., of Grand Rapids, Mich., for the United States.

Wm. J. Landman, of Grand Rapids, Mich., for Chas. F. Bartlett Co.

SESSIONS, District Judge. [1] This is a proceeding under section 10 of the Food and Drugs Act of 1906 (Comp. St. § 8726) to condemn 426 bags of feed owned by claimant and, under its direction, shipped and transported in interstate commerce from Milford, Ind., to Augusta, Mich. At the time of the shipment and transportation and of the seizure the feed was misbranded, in that the labels upon the bags contained false and misleading statements as to percentages of its ingredients. Claimant faintly urges that such false statements in the labels did not constitute misbranding within the meaning of the act of Congress; but this insistence is so plainly without foundation as not to require discussion. Claimant was the original manufacturer of the feed in question and had sold and shipped it to one of its customers at Milford, Ind. Upon being notified that the feed did not contain the percentages of ingredients stated and set forth in the labels, claimant instructed and directed its customer to reship the feed to Augusta, Mich., in order that it might be remanufactured, or remixed, and thus made to conform to the statements in the labels. The shipment and transportation of the feed from Indiana to Michigan was not for sale. At the time the libel in this case was filed and the seizure made, the transportation of the feed in interstate commerce had been completed, but the feed still remained in the possession of claimant and in the original unbroken packages.

[2] The principal contention of claimant is that the feed in question is not subject to seizure and forfeiture because the purpose of the transportation thereof from Indiana to Michigan was not for sale. The question thus presented was settled adversely to claimant by the Supreme Court in the case of Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, and is not now an open one. In that case the decisions of the lower courts, upon which claimant re-

lies, were mentioned and briefly discussed, but not approved; indeed, the result reached was a distinct disapproval. The prohibition of the statute is directed against the transportation in interstate commerce of misbranded and adulterated articles of food alike. Some of the later cases directly in point are the following: United States v. 12 Crates of Frozen Eggs (D. C.) 208 Fed. 950; Id., 215 Fed. 584, 585, 131 C. C. A. 652; Philadelphia Pickling Co. v. United States, 202 Fed. 150, 120 C. C. A. 429; United States v. 9 Barrels of Butter (D. C.) 241 Fed. 499; United States v. 2 Barrels of Desiccated Eggs (D. C.) 185 Fed. 302; United States v. 300 Cans of Frozen Eggs, 189 Fed. 351, 111 C. C. A. 83; Weigle v. Curtice Bros. Co., 248 U. S. 285–287, 39 Sup. Ct. 124, 63 L. Ed. 242; Weeks v. United States, 245 U. S. 618–622, 38 Sup. Ct. 219, 62 L. Ed. 513. Since the Hipolite Case, above cited, there have been no decisions to the contrary.

The motion to strike claimant's answer from the files and for a decree of condemnation will be granted.

THE MOSHULU.

(District Court, N. D. California, First Division. October 5, 1921.)

Nos. 17277, 17290.

Seamen ⇐33—Not entitled to recover penalty for nonpayment of wages from fund belonging to mortgagee.

The provision of Seamen's Act, § 3 (Comp. St. § 8320), that a master or owner who refuses or neglects to pay wages as therein required shall pay a sum equal to two days' wages for every day payment is delayed, does not entitle a seaman to recover such penalty from a fund belonging to a lienholder or mortgagee and in which neither the master nor owner has any interest.

In Admiralty. Suit by E. Sjogren and others against the sailing ship Moshulu. Previous order modified.

Ira S. Lillick and J. A. Olson, both of San Francisco, Cal., for libelants.

John T. Williams, U. S. Atty., and Frederick Milverton, Sp. Asst. U. S. Atty., both of San Francisco, Cal., for the United States.

DOOLING, District Judge An order was heretofore entered on September 26, 1921, directing a decree allowing those libelants who are seamen, and suing for wages as such, the penalty fixed by statute of two days' pay for each day that payment of their wages has been withheld. At the time such order was entered the court had no knowledge that there were other claimants having a lien upon the funds. The court did know, however, that a claim for the remnants was made by the United States, as mortgagee of the vessel sold. No decree has as yet been entered, and the court still has the power to correct the error which it believes it committed in its former order.

The statute awarding penalties provides that:

"Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seamen a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court." R. S. § 4529 (Comp. St. § 8320).

In the present case neither the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and owner to the lienholders and the mortgagee. This I do not believe was ever contemplated, or intended, by Congress in enacting the statute in question. The order heretofore entered will therefore be modified to read as follows:

It is ordered that libelants recover the amount of wages actually earned as found by the commissioner, with interest thereon at 7 per cent. from July 9, 1921. Their claim for penalties will be disallowed. Let a decree be entered accordingly.

BRAMWELL, State Superintendent of Banks, v. OWEN.

(District Court, D. Oregon. October 22, 1921.)

No. L-8798.

1. **Removal of causes ⇐79(2)—Not permitted on defendant's petition filed after expiration of time to plead.**
   Removal from state to federal court, on defendant's petition filed after expiration of period given defendant in which to answer or plead, cannot be sustained.

2. **Judgment ⇐17(9)—Void where service is void and defendant has not voluntarily appeared.**
   A void service of summons is the same as if none had been had, and a judgment against the defendant is void, unless he has appeared and voluntarily submitted himself to the court's jurisdiction.

3. **Appearance ⇐9(3)—To move to quash service gave court no jurisdiction, except to pass on motion.**
   Where service of process on defendant was void, defendant's special appearance to move to quash service gave court no jurisdiction, except to pass on the motion to quash.

4. **Appearance ⇐9(6)—Filing of petition for removal not general appearance.**
   The filing of a petition for removal to federal court is not the equivalent of a general appearance.

5. **Removal of causes ⇐79(2)—Defendant not required to plead or answer as a condition to removal.**
   A defendant is not required to plead or answer as a condition to removal from state to federal court.

6. **Removal of causes ⇐79(1)—Time for filing petition for removal runs from valid service of summons.**
   The time within which a defendant is required to file petition for removal to federal court does not begin to run until there has been a valid service of summons.

7. **Removal of causes ⟸79(1)—May be granted during pendency of motion to quash service of summons.**
The cause may be removed from a state to a federal court while a motion is pending to quash the service of summons, or after the motion has been denied, and a reargument on the motion to quash has been granted, in which event the case stands as though the motion was still pending and undecided.

8. **Removal of causes ⟸114—State court's order overruling motion to quash not res judicata as to validity of service in federal court.**
State court's order overruling motion to quash is not res judicata as to validity of service in the federal court after removal thereto.

9. **Extradition ⟸21—Right of asylum pertaining to extradition from a foreign country does not obtain as between the states.**
The right of asylum pertaining to extradition from a foreign country under the federal Constitution and the laws of Congress does not obtain as between the states.

10. **Process ⟸118—Persons in attendance on court exempt from service of process.**
Persons while in attendance on the court in civil actions, whether as witnesses or suitors, are exempt from the service of process on them, whether civil or criminal.

11. **Extradition ⟸41—One extradited exempt from service of process.**
One who has been brought into a state by extradition proceedings to answer in a criminal action pending against him is exempt from service of process in such state.

At Law. Action by Frank C. Bramwell, Superintendent of Banks of the State of Oregon, against C. H. Owen, brought in a state court. On plaintiff's motion to remand cause to state court, and defendant's motion to quash service of summons. Motion to remand denied, motion to quash service of summons sustained, and cause dismissed.

G. M. Roberts, of Medford, Or., for plaintiff.
Reames & Reames, of Medford, Or., for defendant.

WOLVERTON, District Judge. This cause is here by removal from the circuit court of the state of Oregon for Jackson county. The plaintiff has moved the court to remand the cause to the state court. The complaint was filed April 12, 1921, and on the same day the summons was delivered to the sheriff of Jackson county for service, and by him served within the county, upon the defendant personally, and in person.

On April 22, 1921, the defendant, appearing specially, moved in the state court to quash the service of summons, on the ground that he had been brought into the state from the state of Utah, by extradition proceedings, to answer in a criminal action instituted and then pending against him, by indictment charging him with aiding and abetting a cashier of a bank to injure and defraud the bank. This motion was brought on for hearing in due time, and, after consideration by the court, was on May 14th denied. On May 19th plaintiff moved the court for an order of default and judgment against defendant.

On the same day the defendant interposed a motion for reargument of the motion to quash. This latter motion was allowed, and while it was pending, namely, on May 19th, the defendant filed his petition for

removal of the cause to this court, and in pursuance thereof the removal was had. On June 17, 1921, the defendant, again appearing specially, moved in this court to quash the service of summons. The questions presented on the motion to remand arise on this record.

It is first insisted that the defendant failed to file his petition for removal within the time allowed to plead or answer to the complaint in the state court, and therefore that the cause should be remanded. To this the defendant makes answer that no valid service of summons has ever been had upon him, and, the service being void, his time for pleading or answering to the complaint has not even begun to run.

The action is transitory in character, being for recovery upon two promissory notes, and for money had and received to defendant's use and benefit, and, under the Oregon statute (sections 44 and 45, L. O. L.), may be instituted and service had upon the defendant in the county where he resides or may be found. An action is deemed to have been commenced against a defendant when the complaint is filed and the summons served upon him; and, if served within the county where commenced, he is required to answer or plead to the complaint within 10 days, or, if in any other county in the state, within 20 days. Sections 14 and 52, L. O. L. An attempt to commence an action is the equivalent of commencement, when the complaint is filed and the summons delivered to the proper officer with intent that it shall be actually served. Section 15, L. O. L.

Waiving for the present the question whether or not the service of summons is void, we will inquire whether, within the federal removal statutes, the defendant was required, assuming it to be void, to answer or plead to the complaint filed herein. More than 10 days had expired between the time of the attempted service and the filing of the petition for removal.

[1-4] If the service was good, there can be no doubt that the removal cannot be sustained. A void service is as if none had been had, and any judgment rendered by the court in the action against the defendant, unless he has appeared and voluntarily submitted himself to its jurisdiction, would be alike void and nugatory. The cause, however, had been commenced, and he had the right to appear generally or specially. He appeared specially, for testing the validity of the service. This gave the court no authority for rendering judgment against him, except to pass upon the motion to quash. The filing of the petition for removal was not the equivalent of a general appearance.

[5, 6] A defendant can never be required to answer or plead to a complaint under a void service of summons; otherwise it might result in the taking of his property without due process of law. He could stand mute, and let the plaintiff take his course, and yet the law would protect him against the further process of the court. Nor does the federal statute require him so to plead or answer as a condition to removal. Indeed, a general appearance would, in itself, defeat the removal. So we must conclude that the time in which a defendant is required to remove his case to the federal court, if he desires to do so, does not begin to run until he has been served with a summons, by a valid service thereof; that is to say, such a service as would re-

quire him to appear in the state court, in default of which a valid judgment could be rendered against him in the cause. As we have seen, however, the cause being pending, he had the right to appear generally or specially, and he had also the further right to remove the cause to this court. Donahue v. Calumet Fire Clay Co. (C. C.) 94 Fed. 23, 27; Tortat v. Hardin Min. & Mfg. Co. (C. C.) 111 Fed. 426; Sullivan v. Lloyd (D. C.) 213 Fed. 275.

[7] It was suggested in argument that, the state court having passed upon the motion to quash the service, the effect of the removal would be to require this court to review the action of the state court, and that the federal court possesses no jurisdiction for that purpose. The state court having granted a reargument on the motion to quash, the case stands on the record as though that motion were still pending and undecided. There can be no valid reason why a cause could not be removed while a motion is pending to quash the service of summons. If pending, and the removal is had, the federal court takes up the proceeding where the state court left off, and the jurisdiction is not appellate, but primary.

[8] But, had the case stood with the motion for reargument of the motion to quash denied by the state court, its order overruling the motion to quash would not have been res judicata on the question of the validity of the service. It has been so held by the Supreme Court. Remington v. Central P. R. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959. The suggestion, therefore, that this court is without proper jurisdiction to entertain the motion to quash cannot be sustained.

This leaves but the one question for decision; that is, whether there was a valid service of the summons. That depends upon whether the defendant was privileged from service by reason of his having been brought into Jackson county from the state of Utah, by virtue of an extradition warrant, to answer in a criminal cause then pending against him in said county.

[9] The privilege sought to be invoked must not be confused with the right of asylum pertaining to extradition from a foreign country. Such right of asylum, under the federal Constitution and the laws of Congress enacted in pursuance thereof, does not obtain as between the states. It therefore has been held that, because of the duty imposed by the Constitution and the Congress upon the states to render up to another state a fugitive from justice, a person brought from one state by extradition warrant into another, to answer in a criminal cause, is not exempt from indictment and trial in the latter state, upon a new and independent charge. Lascelles v. State of Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549.

The principle thus ascertained and announced is not applicable here, because defendant cannot insist upon the right of asylum in Utah, as against his service in a civil cause. It is the privilege or immunity from such service, while in attendance upon court for answering in the criminal case, that he insists upon. There is no legislative declaration in Oregon, of which I am aware, that deprives the person of such immunity, if it exists, or in any way impinges upon such right. Nor has the state Supreme Court, by any judicial utterance to

this time, determined respecting the right, assuming, but not deciding, that we would be bound by such utterance, if first made. The question must therefore be decided by ascertainment of the general law respecting it.

[10] It should be further stated that defendant's attendance in the criminal action was not in any way induced by fraud or deception. The rule of law that persons, while in attendance of the court in civil actions, whether as witnesses or suitors, are exempt from the service of process upon them, whether civil or criminal, is now settled beyond cavil in the federal courts, and by a great majority of the states of the Union. Hale v. Wharton (C. C.) 73 Fed. 739; Parker v. Hotchkiss, 18 Fed. Cas. 1137, No. 10,739, concurred in by Mr. Justice Grier and Chief Justice Taney, of the Supreme Court.

The rule rests upon the postulate that the service of such process would serve to intimidate and deter persons thus exempt from attendance upon the court, especially when compelled to come from another jurisdiction, or from places far distant from the place of trial, or beyond the reach of subpœna, and would result many times in a failure of justice. The rule is even buttressed upon a broader principle, namely, that it is a privilege of the court as affecting its dignity and authority, and is founded upon sound public policy. Hale v. Wharton, supra; Feister v. Hulick (D. C.) 228 Fed. 821.

Now, while conceding this principle of law, it is urged that it is inapplicable where the party is in attendance upon the court by compulsion, as under an extradition warrant, and the service is in a civil action. The contention is sustained by a number of the state courts, but is denied as unsound in others of equal distinction. See Ex parte Frank Hendersen (1914) 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N. S.) 328, where many of the diverging authorities are noted.

The principle contended for has never been sustained, so far as I am now advised, in the federal courts. On the other hand, the general rule has been applied in some of the District Courts. United States v. Bridgman, 24 Fed. Cas. 1230, No. 14,645; Kaufman v. Garner (C. C.) 173 Fed. 550; Feister v. Hulick, supra.

[11] The argument that attendance by compulsory process affords a distinction, or bars the immunity, is not, to my mind, persuasive. It would seem that it affords a stronger reason for sustaining the immunity under the general rule.

The motion to remand will be denied, and the motion to quash the service of summons will be sustained, and the complaint dismissed.

UNITED STATES v. HAGA et ux.

(District Court, D. Idaho, S. D. August 10, 1921.)

No. 846.

1. **Waters and water courses ⇐152(2)—Appropriator from stream can object to diversion from tributary only when actually injured.**
An appropriator from a main channel can complain of a diversion from a tributary only if and when such tributary would, if not interfered with, make a valuable contribution to the main stream.

2. **Waters and water courses ⇐143, 151—Appropriator who has applied water to irrigation is entitled to wastage, so long as not abandoned.**
An appropriator who has diverted water and devoted it to irrigation purposes is entitled to its exclusive control, so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation necessarily incident to practical irrigation; nor is it essential to his control that he maintain continuous actual possession of such water, but so long as he does not abandon it or forfeit it by failure to use, and can identify it he may assert his rights.

3. **Waters and water courses ⇐130—Water escaping from irrigation system not subject to appropriation by another.**
Comp. St. Idaho, §§ 5556, 5558, providing that all of the waters of the state when flowing in their natural channel are the property of the state and that the right to the use of waters of rivers, streams, etc., may be acquired by appropriation, do not apply to wastage water from an irrigation system though flowing in the natural channel of a stream.

4. **Waters and water courses ⇐130—Statute regulating use applies only to public waters.**
Comp. St. Idaho, § 5562, providing that "all ditches * * * constructed for the purpose of utilizing seepage, waste, or spring water of the state, shall be governed by the same laws applicable to ditches * * * constructed to utilize waters of running streams," has relation only to public waters of the state subject to appropriation, and does not authorize the construction of ditches to utilize seepage or waste water rightfully under the control of another.

5. **Waters and water courses ⇐130—Government project held entitled to so much of its wastage water as could be identified in a creek.**
Defendant for irrigation of his land diverted water from a creek which had a natural flow only during early spring, the water which it carried later being overflow and seepage from lands irrigated in part by water owned by an irrigation company which had abandoned such wastage, and in part from lands under an irrigation project of the United States which had not abandoned its wastage. *Held*, that defendant was entitled to the use of the natural flow and of the wastage from the irrigation company lands, but that the government was entitled to such share of the later flow as could be determined as coming from the lands within its project.

In Equity. Suit by the United States against Oliver O. Haga and wife. Decree for plaintiff.

James L. McClear and B. E. Stoutemyer, both of Boise, Idaho, for the United States.

Richards & Haga, of Boise, Idaho, for defendants.

DIETRICH, District Judge. The defendant owns 320 acres of land on Eight Mile creek in Ada county, Idaho. For its irrigation he maintains two ditches diverting water from the channel of the creek. Con-

structively, at least, the creek is a tributary of Boise river. The land is within the boundaries of a large tract for the irrigation of which the government has constructed an expensive irrigation system commonly referred to as the Boise-Payette or Boise project. This system heads in the south bank of the Boise river and supplies water to more than 150,000 acres, including a considerable area within the Eight Mile creek drainage, a short distance above the defendant's lands. In constructing the system the Secretary of the Interior took over the New York Canal under an agreement with the owning corporation, the stockholders of which were farmers holding lands to which it supplied water. By the agreement the government became the owner of the existing canals and ditches, with the right to enlarge and alter them as it might see fit; but the canal company and its stockholders reserved the water right appurtenant thereto, with the understanding that the water owned by them would continue to be delivered through the enlarged system, their only obligation being to pay a ratable part of the expense of maintenance and operation. This arrangement was made in 1906, whereupon the government took possession of the system, greatly increased its capacity, built an extensive distributing system, and also constructed two reservoirs, the Deer Flat, for the lower reaches of the project, and Arrowrock, upon the river itself, a few miles above the head of the main canal.

Admittedly, during the early springtime at least, Eight Mile creek received a little water from the natural drainage, but it is further to be conceded that after the commencement of the irrigation season most of the water flowing in the channel at the head of the defendant's ditches has its source in surface waste and seepage incident to the use of water from the government canals in the irrigation of lands lying along or near the creek above the defendant's points of diversion. The government has made provision for the utilization of all the water flowing in the creek for the irrigation of project lands, and the question in controversy is whether it or the defendant has the better right. Perhaps it should be added at this point that the government is an appropriator of a large amount of the natural flow of Boise river for direct use upon the project lands, and also impounds in the Arrowrock reservoir a large volume which it releases in the latter part of the season when the river is low, and diverts into its canal system in the same manner as the natural flow. Its rights as an appropriator are subsequent to those of the New York Canal Company and of other large ditch companies diverting water at various points farther down the river, some above and some below the mouth of Eight Mile creek.

The contention of the government is, first, that, assuming the creek to be a tributary of the river and the water therein to be natural flow, the river and its tributaries are to be deemed to be a single unit; and inasmuch as the defendant's appropriations are subsequent to many of the large appropriations directly from the river, the government has the right to demand that the water of the creek be permitted to go to the river to supply such early rights in order that there may be left in the river at the point of its diversion, higher up, an equivalent amount to supply its right, which is prior to the larger of the defend-

ant's appropriations. While as a general principle of law the correctness of the proposition may be conceded, the position is thought to be untenable for these reasons:

[1] (1) While, as already stated, the creek is constructively a tributary of the river, there is no showing that naturally, during the irrigation season, it actually makes any contribution to the river flow. There is a continuous channel, it is true, and there are doubtless short periods of unusual run-off in extraordinary seasons when there is a discharge into the river; but the showing is insufficient to warrant a holding that the older diversions from the river have any substantial beneficial interest in the creek. An appropriator from a main channel can complain of a diversion from a "tributary" only if and when such tributary would, if not interfered with, make a valuable contribution to the main stream.

(2) In the second place, there is no warrant for finding that in normal seasons there is any natural flow in the creek later than June 1st, whereas up to about July 1st, and sometimes to a later date, there is an abundance of water in Boise river proper for the supplying of all rights therein, and hence the use of the creek by the defendant infringes no appropriator's right. It follows that plaintiff is not in any way injured by the defendant's diversion of the natural flow of the stream.

The second contention is that substantially all of the water in the creek during the irrigation season comes from plaintiff's canals by the way of surface waste from irrigated fields and the seepage of percolating waters from the same source, and that plaintiff has a superior right to pick up this water and apply it to other beneficial uses upon the project. In point of fact, I think it must be found that except for a very short period in the spring the amount of natural flow in the creek is negligible. It is insufficient either in volume or continuity of flow to be susceptible to beneficial use in irrigating farm lands. In an exceptional year an unusually heavy rain may result in a temporary run-off, but from the evidence as a whole the conclusion is irresistible that the stream in its natural state is not dependable as a source of irrigation even in May; and generally speaking, after May, the creek is only a dry channel.

[2] In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suf-

fer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used. U. S. v. Ramshorn Ditch Co. (D. C.) 254 Fed. 842; Ramshorn Ditch Co. v. U. S. (C. C. A.) 269 Fed. 80; McKelvey v. North Sterling Irr. Dist., 66 Colo. 11, 179 Pac. 872; Lambeye v. Garcia, 18 Ariz. 178, 157 Pac. 977; Hagerman Irr. Co. v. East Grand Plains D. District, 25 N. M. 649, 187 Pac. 555; Griffiths v. Cole et al. (D. C.) 264 Fed. 369; Twin Falls Canal Co. v. Damman (this court No. 689, oral decision rendered September 19, 1919, filed August 20, 1920) 277 Fed. 331.

[3] In no wise is this view out of harmony with the provisions of the Idaho statute cited by the defendant. Section 5556 of the Compiled Statutes declares only that "all the waters of the state, when flowing in their natural channels," etc., are the property of the state and subject to its supervision, and section 5558 further provides that "the right to the use of the waters of rivers, streams," etc., may be acquired by appropriation. But the waters under discussion diverted from the Boise river and carried many miles through the plaintiff's costly system of artificial canals and from them indirectly discharged into Eight Mile creek are not "flowing in their natural channels." If all water flowing in a natural channel is subject to appropriation, then water released from the Arrowrock reservoir is subject to appropriation and diversion by a stranger the moment it is discharged from the reservoir into the river below, to be carried down to the head of the plaintiff's canal; but no one would make such a contention. It is a familiar rule that an appropriator may utilize a natural channel for conveying his water, and may even dump his water into a running stream and take it out again lower down, so long as he does not interfere with existing rights.

[4] Section 5562 provides that—

"All ditches * * * constructed for the purposes of utilizing seepage, waste, or spring water of the state" are governed by the laws applicable to ditches constructed to utilize "waters of running streams."

True, but the section neither expressly nor impliedly authorizes citizens to construct ditches to utilize seepage or waste water rightfully under the control of another, any more than it does the construction of ditches to utilize springs already appropriated by another or the water of a running stream. In any case, whatever may be the classification of the water source, the water must belong to the state. It must be public water subject to appropriation. I find no suggestion to the contrary in the Idaho decisions to which my attention has been drawn. Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A. (N. S.) 176; Gerber v. Nampa & Meridian Irr. Dist., 16 Idaho, 1, 100 Pac. 80; Bower v. Moorman, 27 Idaho, 162, 147 Pac. 496, Ann. Cas. 1917C, 99. Of course, as was said by the Colorado Supreme Court, in La Jara Creamery Co. v. Hansen, 35 Colo. 105, 83 Pac. 644, "after waste waters reach the [natural] stream, unless there is then an intention by the owner to reclaim them, they become part of its volume" and are subject to appropriation; but that is only to suggest the possibility of losing the right by abandonment.

In the light of these principles we pass to a consideration of the facts.

Responding first to certain suggestions in the briefs, I have no hesitation in holding without discussion that Eight Mile creek is a natural water course or channel. It is further thought, and for the purpose of this decision it will be assumed, that in so far as material here the status of the government is like that of any other appropriator; its rights and obligations are no greater and no less. And I may add that presumably the suit was brought and is prosecuted with due official authority.

Aside from such slight natural flow as there may be in the creek from time to time in the early part of the season, its waters at any given date come from one or more of three possible sources. In the first place, some of the lands in the creek basin above defendant's diversion from which there is a run-off, either surface or subterranean, belong to stockholders of the New York Canal Company and receive water out of the appropriation of that company, which, as has already been stated, it reserved when it turned over its canal system to the government in 1906. In the second place, there are project lands, in the strict sense, which in the early part of the season are irrigated with water diverted from the natural flow of Boise river under the government's appropriation. In the third place, all of these lands, of both classes, receive water from the Arrowrock storage, the first of such storage water being delivered about July 1st, and the amount gradually increasing thereafter as the river supply falls off until about the first of August, and from that time forward all of the water delivered to any of the lands is storage water.

An application of the general rule as discussed, to the undisputed facts, leaves no room for doubt of the right of the plaintiff to follow the wastage from this storage water so far as it can be identified. Clearly, it has never intended to relinquish such rights, nor is there any ground upon which to rest a finding of forfeiture. The reservoir was not completed and put into service until 1915, and at that time the plaintiff's distributing system was so constructed and it had done such work on the channel of the creek as to enable it to pick the water up and send it on for use on project lands in the Nampa & Meridian irrigation district. In any possible view of the law defendant's interference was not so continuous or of such character as to confer upon him any right to such water or to divest the plaintiff of any right, nor as to this water is there any substance in fact to the defense of estoppel.

Upon the other hand, it is thought that the plaintiff has failed to establish a superior right to the wastage from the use of water under the original appropriation of the New York Canal Company and its stockholders. In the case of the New York Canal Co. v. United States (this court, No. ———) 277 Fed. 444, the government successfully contended that it acquired no interest in this water, but the title thereto was reserved and that its only obligation in relation thereto was to divert it and deliver it through the enlarged system to the canal company's stockholders (decision December 31, 1913). If it does not own the primary rights, of course, it is a stranger to the wastage. The con-

tract of July 1, 1918, between the New York Canal Company and the government, in no wise alters the case. This instrument expressly refers to the original and unconveyed right of the canal company as a "vested" right, and taken as a whole clearly evidences the intention of the parties that such right was to remain intact and unaffected by the new agreement, the subject-matter of which was an additional or supplemental right to be supplied by the government from storage water. Paragraph 21 in explicit terms reserves to the government wastage from water supplied by it as distinguished from wastage incident to the use of the vested right. At the end of the paragraph is found an equivocal general clause to the effect that there is "reserved" to the United States "any other waste water not heretofore applied to beneficial use"; but the word "reserved" is not an appropriate term to express the idea of transfer or conveyance, and it is quite incredible that the parties understood and used it in an exceptional sense when it is noted that the contract as a whole so carefully guards the "vested" right of the canal company (which necessarily included the right to the wastage incident to the use of the primary right), and at the same time so carefully and explicitly "reserves" in the government as grantor the right to wastage from the water it and not the canal company owns and supplies, while making no specific reference to wastage from the vested right. But if a different view were to be taken, it is still further to be observed that even this general clause purports to "reserve" only "any other waste water not heretofore applied to a beneficial use," and such waste as the defendant is now claiming, he had been using for beneficial purposes for ten years prior to the execution of this contract. And here the further consideration is suggested that whatever may have originally been the right of the New York Canal Company, it was in 1918 without the power to convey this waste water to the government for use upon lands for which it was not appropriated or diverted. For approximately 18 years it and its stockholders had caused or permitted the water to pass from their lands into a natural channel physically tributary to the stream from which it had been originally diverted, and to "waste" in a very real sense. Defendant's lower ditch was constructed in the early nineties, so that during all of this 18 years he was making beneficial use of a part of the water. His upper ditch was constructed in 1908, after several years of open abandonment of the water by the canal company, and thereafter he continued to divert the water through the upper ditch without interference or objection for five years, up to the time the second contract between the canal company and the government was entered into, during all of which period the canal company continuously permitted the water to waste and manifested no intention to recapture or again to use it. Clearly, it must be held to have abandoned such right as it may have had; at least, it could not under such circumstances reclaim the water and dispose of it to a third person to be used in any other territory, to the detriment of one who in good faith had appropriated it and was using it for beneficial purposes. While we are not expressly advised of the views or motives of the reclamation officials in 1910, when certain construction work was done for the purpose of enabling the

government to deliver water from the channel of Eight Mile creek into the Ridenbaugh system for use on project lands, it may fairly be inferred that the plan adopted was worked out in recognition of the fact that defendant had superior rights to at least some of the flow of the creek.

Considering now the third source from which the creek is supplied, the wastage from project lands to which the government supplies water out of its appropriation of the natural flow of the river, it is manifest that primarily the right of the government to such water is the same as its right touching wastage from the use of storage water. The distinction, if any there may be, must be found in the facts relating to the claim that this right has been abandoned or forfeited or that the plaintiff is estopped to assert it. But upon consideration of the evidence I am not convinced that any one of these defenses is sustained. That there never was any conscious intent or purpose to abandon is scarcely open to controversy; nor, under all of the circumstances, can it be held that there was unreasonable delay in asserting the right. While the government took over the New York system in 1906, it, of course, was not in a position to furnish water out of its own appropriation until it had enlarged the capacity of the canals. For this work time was required, and while some additional water was furnished perhaps as early as 1908, the system was not completed until a recent date, and in the meantime water was not delivered upon a permanent basis. The form of application for water rights prepared by the reclamation service contained a provision reserving to the government the right to reclaim waste water. Public declaration of its intention to reserve all waste and percolating waters was made as early as 1913, in the annual report of the service, and in 1910 provision was made by which water in Eight Mile could all be used for the irrigation of project lands. It is true that defendant continued to make use of the stream; but, as we have seen, he could use a portion thereof without infringing any right of the government, and as between the parties there seems never to have been a clear definition of their respective claims or a disclosure of how far they were in conflict. From year to year defendant purchased water from the plaintiff, the amount thereof in at least 1918 and 1919 being apparently sufficient for the full irrigation of his lands. It may also be added that there were negotiations between the parties looking to the purchase by defendant of an adequate and permanent right.

Even if we assume that in carrying on such an enterprise the government is fully subject to the principle of estoppel, the evidence does not establish such a defense. The most that can be said of the construction work performed in 1910 upon which the defendant chiefly relies is that its implications are equivocal. From the conduct of the reclamation service in relation thereto a recognition of some right in defendant is inferable, but not necessarily the right to use all of the water flowing in the creek. An intention to recognize only partial right is quite as reasonable. At that time the government could have been supplying but little water out of its own appropriation to the lands

in the creek basin, and, as we have seen, it had no right to waters wasting or coming from other sources.

[5] My general conclusion therefore is that the plaintiff is entitled to be protected in the reclamation and use of water coming from water which it supplies, but as against the defendant it is without right in the natural flow of the creek or in the waste from the "vested" water rights of the New York Canal Company and its stockholders. Identification of the water to which it is thus found to be entitled is necessarily attended with a measure of uncertainty, but an approximation is thought to be practicable. It is stated in the defendant's brief, and I am assuming the statement to be substantially correct, that the evidence shows a total irrigated area draining into the creek of 1,500 acres, 1,050 acres of which is supplied by the New York Canal "vested" right, and the remainder of 450 acres from the government right. There is from time to time in the early part of the irrigation season, and not later than June 1st, a small amount of "natural" water in the channel. During the month of July there is a gradual falling off of the natural flow in Boise river for both the New York and the project lands, and the growing deficiency is provided for from the Arrowrock storage. After August 1st the entire supply is from such storage. Bearing in mind all these considerations, it is thought that up to August 1st the defendant is entitled to divert $^{7}/_{10}$ of the flow in Eight Mile creek and the plaintiff $^{3}/_{10}$; after August 1st, the plaintiff is entitled to all of the flow. Defendant's maximum right of diversion for the season up to August 1st will be fixed at the rate of 2 acre feet per acre for water measured at the intake of the lower canal and 2¼ acre feet of water measured at the intake of the upper canal.

COTHRAN & CONNALLY v. UNITED STATES.

(District Court, W. D. Virginia, at Lynchburg. October 6, 1921.)

1. **Statutes ⟸179—Statutory definition given word to be adhered to.**
   Where a statute defines the meaning of a word, it is improper to seek to give it a different meaning.

2. **Internal revenue ⟸9—"Broker" held to include tobacco warehouseman.**
   The word "broker," as used in Revenue Act 1918, § 1001, subsec. 1 (Comp. St. Ann. Supp. 1919, § 5980o), requiring brokers to pay special tax, includes tobacco warehouseman, who brings about sales of tobacco by mutual arrangement.

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

3. **Evidence ⟸21—Judicial notice that stockbroker gets stock certificate indorsed in blank from seller.**
   It is a matter of common knowledge that a stockbroker commissioned or directed to sell shares of stock frequently, if not usually, gets the stock certificate (indorsed in blank) from the seller and then finds a purchaser, and frequently the seller does not know who the purchaser is.

At Law. Action by Cothran & Connally against the United States. Judgment for defendant.

Harrison & Long and S. H. Williams, all of Lynchburg, Va., for petitioners.

Thos. J. Muncy, U. S. Atty., of Roanoke, Va., and C. E. Gentry, Asst. U. S. Atty., of Charlottesville, Va., for the government.

McDOWELL, District Judge. This is a proceeding, brought under subsection 20 of section 24, Judicial Code (Comp. St. § 991 [20]), and sections 4, 5, 6, 7, and 10 of the Tucker Act (24 Stat. 505–507 [Comp. St. §§ 1574–1578]). See also 30 Stat. 495. The right of the petitioners to sue the United States was not questioned. U. S. v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; U. S. v. Emery, 237 U. S. 28, 32, 35 Sup. Ct. 499, 59 L. Ed. 825. The ground of action was that the petitioners had been required to pay, under duress and after protest, a special tax on brokers under section 1001 (1) of the Revenue Act of 1918 (40 Stat. 1126 [Comp. St. Ann. Supp. 1919, § 5980*o*]). This statute reads:

"Brokers shall pay $50. Every person whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, other securities, produce or merchandise, for others, shall be regarded as a broker. * * *"

Findings of Fact.

During the period covered by the assessment here the petitioners were engaged in the business of tobacco warehousemen. They had previously leased a warehouse at Brookneal, Va., and had, as is usual in such business, solicited in various ways the neighboring tobacco growers to send leaf tobacco to petitioners to be sold, and had arranged with the principal manufacturers of tobacco to have buyers assemble at the warehouse on fixed occasions to buy the tobacco. The leaf tobacco was brought by the grower to the warehouse, where it was displayed on the floor in weighed piles of different grades, each ticketed with the name of the grower and the weight. Subject, usually, to right of rejection on the part of the grower, at prescribed times, the warehousemen held auction sales of the piles of tobacco. The warehousemen acted as, or employed, auctioneers. The highest bidder on each pile became the purchaser thereof, unless such bid was rejected. If the bid was not rejected, the warehouseman, promptly after the conclusion of the sale, paid the grower the bid price of the tobacco, less a commission of 2 per cent. and a charge for weighing. Later on the warehouseman collected the purchase price from the successful bidder. The buyers and sellers were not usually brought into personal contact; the seller looked to the warehouseman for his share of the selling price, and the warehouseman looked to the buyer to pay for the tobacco.

The right of rejection is a somewhat peculiar feature of this business. In a great majority of instances the growers personally attend the sales, and if the highest bid is unsatisfactory to the grower he rejects the bid, and the sale is then nullified. In such case the grower may leave the particular pile or piles on the floor, to be offered at the next sale, or may remove it from the warehouse. In some exceptional cases, after a rejection, the warehouseman may induce the grower to recall his re-

jection and accept the bid as made, or may induce the bidder to increase his offer, and thus effect a sale.

Where the grower does not attend the sale in person he may, and usually does, by prearrangement with the warehouseman, fix a minimum price for his tobacco. In such event the warehouseman rejects the bid, where it is less than the minimum.

I further find that the tax (and penalties) were paid under duress, after threat of seizure and sale of the personal property of petitioners had been made, and with protest against the validity of the assessment.

Opinion.

[1, 2] Where a statute defines the meaning of a word it is clearly improper to seek to give such word a different meaning. The word "broker," as used in subsection 1 of section 1001 of the Revenue Act of 1918 (40 Stat. 1057, 1126), is defined in this section. One of the common meanings of the word "negotiate," found in the Century Dictionary and in Webster's Dictionary is "to bring about by mutual arrangement." The evidence in this case shows that the very essence of the business of the petitioners was to arrange that tobacco planters should bring their produce to petitioners' warehouse to be sold at auction, and that tobacco buyers should attend such auction sales and bid for the tobacco. The petitioners clearly brought about sales of tobacco by mutual arrangement. The planter was given to understand that petitioners would have buyers present to bid, and the buyers were given to understand that planters would have tobacco in the warehouse to be sold. The petitioners conducted their business successfully only in so far as they brought about this mutual arrangement between the planters and the buyers.

[3] In this same subsection stock brokers are included. It is matter of common knowledge that the stock broker, commissioned or directed to sell shares of stock, frequently, if not usually, gets the stock certificate (indorsed in blank) from the seller, and then finds a purchaser, and frequently the seller does not know who the purchaser is. So, also, in case a stock or bond broker is directed to buy. In all cases the stock or bond broker negotiates sales and purchases because he brings them about by mutual arrangement. It is true that in some brokerage businesses it is usual for the broker, as in real estate brokerage, to bring the buyer and seller together. But the definition of broker in this statute is much too comprehensive to make it permissible to restrict the word to cases in which the broker effects the sale by bringing the seller and the buyer together.

It is sought to exclude tobacco warehousemen from this section of the statute on the ground that such persons have the custody and possession of the article to be sold. This is also frequently true of stock and bond brokers, bullion and exchange brokers, and note brokers. Moreover, the possession of the article to be sold does not in the least prevent the business of a tobacco warehouseman from being that of "negotiating sales of produce or merchandise."

A reason of no slight force for concluding that subsection 1 of section 1001 of the Revenue Act of 1918 was intended to include tobacco

warehousemen is this: Section 704 of this statute (40 Stat. 1118 [Comp. St. 1919, § 6168]) repeals section 35 of the Act of August 5, 1909 (36 Stat. 11, 110, 111 [Comp. St. § 6175]), which defines a dealer in leaf tobacco as any person, other than the farmer or producer, who sells leaf tobacco to manufacturers of tobacco, snuff or cigars, and makes such dealers subject to a special tax as such. See section 3244, R. S. (Comp. St. § 6176); 20 Stat. 343; 22 Stat. 488. Having thus (in section 704) repealed the tax on dealers in leaf tobacco, there was inserted in subsection 1 of section 1001 the words "produce or merchandise." The corresponding provision of the Revenue Act of 1916 (39 Stat. 757, 790 [Comp. St. § 5980b]) read:

"Brokers. * * * Every person, firm, or company, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for others, shall be regarded as a broker."

The fact that the Revenue Act of 1918 repealed the tax on dealers in leaf tobacco and copied the foregoing provision with the addition of the words "produce or merchandise," seems to make quite clear the intent to subject tobacco warehousemen to the brokers' tax, in lieu of the former tax on dealers in leaf tobacco. It may be that the chief purpose of the change made in the act of 1918 was to exempt from the special tax on dealers in leaf tobacco the independent buyers of leaf tobacco. But the intent to leave tobacco warehousemen subject to a special tax seems clear enough, as does the intent that they should be taxed as brokers of produce or merchandise, instead of as dealers in leaf tobacco. As tobacco warehousemen had been (section 3244, R. S.) for many years, in times of peace, subjected to an occupation tax, and remained so taxed under the Revenue Acts of 1916 and 1917, it is difficult to conceive of any reason for an intent on the part of Congress, in drafting the Revenue Act of 1918, to exempt them from such tax. Tobacco warehousemen might be classified as dealers in leaf tobacco, as commission merchants, or as brokers. But no classification more clearly includes them than does the language of the section under consideration. They undoubtedly do "negotiate sales of produce." I find nothing in Slack v. Tucker, 23 Wall. 321, 23 L. Ed. 143, which seems to require a different conclusion.

In accordance with the foregoing finding of facts and opinion, I shall enter judgment in favor of the defendant.

FIDELITY TRUST CO. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. July 14, 1921.)

No. 8118.

1. **Internal revenue ⇐19(1)—All forms of security issued by corporations expressive of indebtedness taxable.**
   All forms of so-called securities or investments issued by corporations, whether expressive of indebtedness or shares in anything the corporation possesses, are taxed, as are also all forms of instruments expressive of the indebtedness of any person to the holder.

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

2. Internal revenue ⊂⊃19(1)—Car trust certificates issued under Philadelphia plan held subject to stamp tax.

Car trust certificates, issued under the Philadelphia plan by a trustee holding the legal title to rolling stock who sells the same to the railroad company under a contract of conditional sale, were intended and are sufficiently shown to be subjected to the stamp tax imposed by Act Feb. 24, 1919, § 1107 (1), being Comp. St. Ann. Supp. 1919, § 6318p, though such a certificate is in strictness neither a "certificate of indebtedness issued by any person" nor an "instrument issued by any corporation," within the meaning of the act, and though such a certificate is not evidence of corporate debt nor of shares in corporate assets; it evidently being the intent of Congress to bring within the act everything known generally as corporate securities and such certificates come within that designation.

3. Internal revenue ⊂⊃19(1)—Executive and judicial departments cannot levy tax, but must give effect to act of Congress not clearly expressed.

Neither the executive nor the judicial departments of the government can levy a tax, as this can only be done by Congress; but when Congress has acted, and the tax questioned is found to have been levied, the mere fact that in the light of the particular case in which the question is raised the meaning of Congress might have been more clearly expressed does not justify a refusal to give that meaning effect.

At Law. Action by the Fidelity Trust Company against Ephraim Lederer, Collector of Internal Revenue. Sur rule for judgment. Rule discharged.

Dickson, Beitler & McCouch and H. Gordon McCouch, all of Philadelphia, Pa., for plaintiff.

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa., Carl A. Mapes, Solicitor of Internal Revenue, of Washington, D. C., and Harold Allen, Sp. Atty. for Internal Revenue Bureau, of New York City, for defendant.

DICKINSON, District Judge. This case is in effect a case stated, in the determination of which we are asked to decide a question of law. The question, broadly stated, is whether the "certificates" held by the plaintiff as trustee are taxable. We, in consequence, limit our attention to this.

[1] The taxing authorities give the impression of their attitude as, first, one of uncertainty and then one of doubt. We have given the subject of the tax the name of "certificates," in order to get a word as colorless as possible, because any word or words definitely descriptive of what the thing sought to be taxed really is anticipates the ruling to be made, inasmuch as what the thing is determines whether or not it is taxable. It is conceded that Congress might have taxed these "certificates," had they been known or thought of, and had Congress so willed. The whole question is: Has it taxed them? It has, if they fall within the verbiage of the acts of Congress; otherwise, they remain untaxed. It is doubtless the fact that the draftsman of the tax laws had the purpose in mind to tax everything from which income was expected to be derived by granting to one person the use of the money of another. In the effort to make sure of the accomplishment of this purpose, resort was had to enumeration and description. The descent from the

general to the particular and specific, however careful the attempt to make the list of the latter full and all-embracing, always has the result of at least rendering doubtful the inclusion of what is not by name listed. All forms of so-called securities or investments issued by corporations, whether expressive of indebtedness or shares in anything the corporation possesses, are without doubt taxed, as are also all forms of instruments expressive of the indebtedness of any person to the holder.

[2] We are strongly impressed by the argument at bar that these two general lines of thought marked the limits of what had been taxed. The question before us, then, resolved itself into an inquiry into what these "certificates" are. They are in strictness neither evidences of debt nor of shares in corporate assets. This is because of their peculiar form and of the plan under which created. A dealer in so-called investments or securities would without doubt or hesitation list them under the name or designation of "car trust certificates," for such they are. There are many such "on the market." They all have the same general purpose and character. They are called for because some railroad or other transportation company is in need of rolling stock or other equipment, and is without funds or credit with which to supply itself, and there is a legal or other difficulty in the way of a direct pledge of the property. They are issued under a number of different plans. The one with which we are concerned is known as the Philadelphia plan. Those willing to share in the venture are invited to place their contributions in the hands of an acceptable trustee. The rolling stock, or other property, is then purchased in the name of this trustee as owner. The trustee then enters into a form of bailment or conditional sale agreement with the carrier, the periodical and final payments upon which are sufficient to pay the interest on the investment and the principal at maturity. The contributors in the meantime hold the certificates or acknowledgment of the trustee of their respective shares in the venture.

It will thus be seen that in strictness the only obligation in the nature of a debt or promise to pay money is the obligation and agreement of the carrier to pay the agreed price for the hire and use of the property, or the rentals, as they are commonly termed. The trustee is a mere purse, and only in a secondary sense can be said to owe anything to any one, other than faithfulness to its trust obligations, and is not a debtor, even in this secondary sense, unless and until and as the moneys which belong to the contributors come into its hands. The certificate is not within the literal verbiage of Act Cong. Feb. 24, 1919, § 1107 (Comp. St. Ann. Supp. 1919, § 6318p), not being "a certificate of indebtedness issued by any person," nor "an instrument issued by any corporation." If the taxing hand has been laid only upon these specific forms of what are generally known as securities, it must be withdrawn from the "trust certificates" now under view. This would mean that they are the exceptions among this general class of securities, and are exempt because the very effort made in the framing of the law to include all forms of securities of this general character has, in verbal nicety, excluded them. The act of Congress, however, includes more than the two kinds of

securities mentioned above, because we think it includes everything "known generally as corporate securities." That these trust certificates are so known would not be denied. The denial would be of the correctness of this construction of the act of Congress. There are two obstacles to be surmounted before reaching this construction. One is that the rule of the nearest antecedent makes the quoted phrase relate to and serve as a definition of the described kinds of "instruments issued by corporations," and the other is that the finding of a meaning to tax all instruments "commonly known as corporate securities" involves the presence of a grammatical error in the act of Congress. Neither of these obstacles are, however, insurmountable, if this was the meaning of Congress, and we so find. Nor do we see any conflict between a ruling that these certificates are taxable and the doctrine of the cases to which we have been referred that there is no such thing as a doubtful tax. U. S. v. Isham, 84 U. S. (17 Wall.) 496, 21 L. Ed. 728.

[3] The question now presented is admittedly a close one, but this does not necessarily make for the taxpayer. The true doctrine is that neither the executive nor the judicial departments, nor both, can levy a tax. This can only be done by Congress. When, however, Congress has acted, and the tax questioned is found to have been levied, the mere fact that, in the light of the particular case in which the question is raised, the meaning of Congress might have been more clearly expressed, does not justify a refusal to give that meaning effect. The real truth back of the whole discussion is that, if these certificates are not taxable, it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the obligation of debt entered into by the carrier corporation. The real security is the promise, not of one corporation, but of two, to pay to the certificate holders the sums due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for equipment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. This, it is true, was not the form of the promise; but such it was in substance, because it was a promise to pay a sum which was the exact (and not accidental, but prefixed) equivalent of the advances, with interest. It is, however and none the less, true that, if for any reason Congress has not included these certificates, no tax can be imposed. The impression of this effect made by the argument at bar has been removed by what seems to us to be the sufficiently expressed will of Congress to tax them.

We have disposed of the case as if on trial hearing, with all the facts which enter into the discussion established, understanding such to be the wish of all parties; it being conceded that all these facts are in the record.

Rule for judgment discharged.

THE TUSCAN.

(District Court, S. D. Alabama. October 10, 1921.)

Internal revenue ⇐2—Rev. St. § 3450, not repealed by Prohibition Act.

National Prohibition Act, tit. 2, § 35, which expressly provides that the act shall not relieve any one from payment of taxes or other charges imposed on the manufacture or traffic in liquor, *held* not to repeal Rev. St. § 3450 (Comp. St. § 6352), which provides for the forfeiture of any vessel, boat, or vehicle used to remove or conceal liquor with intent to defraud the United States of the tax thereon.

In Admiralty. Suit by the United States against the steamship Tuscan. On exceptions to libel. Overruled.

Alec. D. Pitts, Dist. Atty., of Selma, Ala., and James O. Middleton, Asst. Dist. Atty., of Mobile, Ala., for libelant.

Rich & Hamilton, of Mobile, Ala., for claimant.

ERVIN, District Judge. This is a libel filed by the government seeking to condemn the steamship Tuscan and have her forfeited under the provisions of section 3450 of the Revised Statutes (Comp. St. § 6352); the charge being made that certain liquors were being conveyed, transported, and concealed on said steamer with intent to defraud the United States of a tax imposed upon such liquor.

Objection is made that section 3450 is repealed by the National Prohibition Act (41 Stat. 305).

I am cited to the case of United States v. One Haynes Automobile (D. C.) 268 Fed. 1003, in which it is so held.

I am forced to dissent from the conclusion reached by the judge in that case for the following reasons:

The section in question applies only to the cases where the removal and concealment of the goods and commodities were "with intent to defraud the United States of such taxes." I find no provision in the National Prohibition Act which seeks to penalize any act done by any one in the effort to defraud the United States of the tax it claims upon liquor whether it has been illegally manufactured or not.

The question seems to me to be determined by whether the tax which formerly was imposed by the government upon the legal manufacture of liquor is still maintained under the provisions of the National Prohibition Act, though the said act prohibits the manufacture of liquor for beverage purposes.

The act unquestionably prohibits and penalizes the distillation of liquor for beverage purposes.

Section 35 of said act reads as follows:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. *This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor.* No liquor revenue stamps or tax receipts for any illegal manufacture

or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers."

It will be noticed that in copying, on page 1004 of 268 Fed., this section, Judge Call omitted the sentence which I have italicized.

Notice the language of this sentence, "This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture," etc. It does not say shall relieve any one from the paying of taxes imposed by this act, but any taxes or other charges imposed upon the manufacture or traffic of such liquor.

Now as the National Prohibition Act fails to levy any tax for the manufacture or sale of liquor, this necessarily refers to the taxes already levied by existing laws, and that this is so is clearly shown by the following portions of this section where it is provided that, though revenue stamps shall not be issued, upon evidence of illegal manufacture or sale a tax shall be levied against the person responsible for such illegal manufacture or sale in double the amount now provided by law with an additional penalty.

There can therefore be no question that the expressed intent of the National Prohibition Act does maintain in force such taxes as might have already been assessed upon the manufacture or sale of liquor, even though such manufacture or sale since the passage of the act was made illegal.

Now if the act preserves these taxes and there is no provision contained in the National Prohibition Act penalizing the effort to defraud the government out of such taxes, then how is section 3450 inconsistent with any provision contained in the National Prohibition Act?

Instead of being inconsistent, it is a necessary complement of the National Prohibition Act to secure the collection by the government of the tax levied and to provide a penalty against the effort to defraud the government of this tax.

Not only is it not inconsistent with any provisions of the act, but it is not inconsistent with the policy and purpose of the act.

It is true that the act contains provisions penalizing the transportation of liquor as a beverage in violation of the law, but this provision has nothing to do with the question where transportation or concealment of the liquor is with the intent to deprive the government of the tax on such liquors.

It has been held that the same act may be a violation of more than one statute. Gilbert v. Minnesota, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. ——; Houston v. Moore, 5 Wheat. 33, 5 L. Ed. 19; U. S. v. Holt (D. C.) 270 Fed. 639.

It is true that these two cases were discussing the proposition that the same act might violate the statutes of the state and also the statutes of the federal government, but, if this is true, it is also true that the same act might violate different statutes either of the state or of the federal government. In the instant case the one statute, section 3450, makes punishable an act which is done with the certain intent, while

the National Prohibition Act punishes the same act when done with a different intent.

If therefore there is a statute declaring that the doing of an act with the certain intent shall be punishable thereunder and thereafter there is another statute passed which declares that the doing of the same act for another purpose shall be punishable thereunder, it is clear, I think, these two statutes are not inconsistent one with another, and it does not follow that the passage of the last act repeals the first. The violation of the one is not the same offense as the violation of the other. The same evidence would not convict under each statute.

I therefore reach the conclusion that as the tax on the liquor is not abolished, but still is imposed, even though the liquor be illegally manufactured, and there is nothing in section 3450 which is inconsistent with the provisions of the National Prohibition Act, such section is not abolished by the act, but still remains in force.

Ex parte SWIFT.

(District Court, E. D. of Missouri.)

District and prosecuting attorneys ⇐8—Habeas corpus ⇐45(4)—Federal court without jurisdiction to discharge prisoner held by state officers without color of authority.

A United States District Attorney is without even color of authority to order the arrest of a person without a warrant for alleged violation of a federal statute, and a federal court is without jurisdiction to issue a writ of habeas corpus for the discharge of a prisoner arrested for violation of the Volstead Act by state officers by oral direction of a District Attorney; such jurisdiction being in the state courts.

Habeas Corpus. Petition of William Swift for writ to secure discharge from custody. Denied for want of jurisdiction.

H. C. Morsey, of St. Louis, Mo., for petitioner.

FARIS, District Judge. Petitioner held by respondents O'Brien and Stinger, who are, respectively, chief of police and captain of police of the city of St. Louis, under the oral direction and request, as it is alleged, of the United States District Attorney and of the Special Assistant Attorney General, upon the charge of violating the provisions of the Volstead Act, seeks his discharge by writ of habeas corpus.

Primarily the question is one of jurisdiction. If this court has jurisdiction, then there is no doubt of petitioner's right to his liberty on the facts stated in his petition. His detention upon the paper showing made by him is in disregard of the law and of his rights as a citizen. But the question of jurisdiction is, of course, the first point to be settled, and I am unable to find that jurisdiction is vested in this court.

It is averred that petitioner is being held by O'Brien and Stinger, by the verbal direction of the District Attorney and the Special Assistant

Attorney General. I do not think that such direction has any more effect than a direction of any private citizen would have, for I know of no federal rule or statute so far making such officers conservators of the peace as to clothe either of them with the power to arrest without a warrant, or to order others to make arrests without warrants. Thus judicially noticing the utter lack of power and authority to make the direction pleaded, such direction is an utter nullity in law. It is just as good, but no better, than no direction at all, and so it confers no authority at all. I cannot even see that it constitutes color of law or color of authority, even if the allegation be true. See section 1674, Comp. Stats. Moreover, if on a hearing it should develop that not even any verbal direction was made, by the District Attorney or the Special Assistant to the Attorney General, this court would instantly lose jurisdiction of the case. Because O'Brien and Stinger are not federal officers, but officers of the state of Missouri, this court has neither jurisdiction over nor control of them. If a federal officer were thus holding petitioner under color of his office, or under color or authority of a federal statute, the case would, I think, be wholly different. If O'Brien or Stinger were holding petitioner by a federal warrant or other federal process, which was averred to be illegal, or possibly if they were holding petitioner under "color of a federal statute" or under "color of the authority of such a federal statute," there would be on the first assumption, jurisdiction in this court, and as forecast, there might exist such jurisdiction on the last proposition. But I judicially notice that a mere verbal request of the attorneys in this case is not color, or even a semblance of color, of either law or authority.

Because O'Brien and Stinger are state officers, as distinguished from federal officers, and because no question of the invasion of any right of petitioner given under any law of the United States, or vouchsafed to him by the Constitution of the United States, is raised, and because the mere verbal directions of the said attorneys are absolute nullities, I think this court has no jurisdiction.

But some court has jurisdiction. This jurisdiction is, I think, vested in the state courts. If to a writ of habeas corpus, issued by a state court, O'Brien and Stinger could make a return that petitioner is in truth being held by virtue of a warrant or commitment of a federal court, or of a commissioner of the United States for a federal offense, the state court would thereupon have no further jurisdiction; or if upon a hearing on such status developing, the state court would have to remand petitioner to custody. But obviously O'Brien and Stinger cannot excuse the detention of petitioner as against a writ of habeas corpus issuing from the state courts, upon the plea that petitioner is held by them for a federal offense under the verbal direction of persons having no authority to so direct. If to a writ from a state court such a return (absent any other authority) were made, it would instantly require the petitioner's discharge. The matter is one of substance. The state courts are not bound by specious excuses, nor by excuses having no foundation in law or authority. Tarble's Case, 13 Wall. 397, 20 L. Ed. 597, and the case of Ableman v. Booth, 21 How. 506, 16 L. Ed. 169, are cases which illustrate some of these views, and which make clear up-

on many phases the delimitations of state and federal jurisdiction in cases wherein such jurisdictions clash.

The case of Harvell, Ex parte (D. C.) 267 Fed. 997, does not even refer to the question of jurisdiction. Moreover, there was present in that case some "color of law" and "color of authority" under federal statutes, if "color of law" is at all analogous to color of title. But be all this as may be, I am not able to see the source of any jurisdiction to issue the writ. I am constrained to believe that ample jurisdiction inheres in the state courts in this case, absent a warrant or commitment from a federal judge or commissioner, or such warrant or commitment for violation of some federal statute issued by a judicial officer of the state (see section 1674, Comp. Stat.). I cannot be led to believe that the mere arbitrary entry upon the blotter that petitioner is being held for the violation of a federal statute, without more, either shears the state courts of jurisdiction over its own officers, or that such entry confers jurisdiction over such officers upon this court.

Deeming the issuance of the writ prayed for to be beyond my jurisdiction, it will be denied.

HUDSON TIRE CO., Inc., v. HUDSON TIRE & RUBBER CORPORATION et al.

(District Court, S. D. New York. July 6, 1921.)

Trade-marks and trade-names and unfair competition ⊂=71—"Hudson," as applied to tires, held to have obtained secondary meaning referable to merchandise.

In an action to restrain sale of rubber tires in conjunction with the word "Hudson," facts *held* to show that the word "Hudson," as applied to tires and cords, had obtained a secondary meaning referable to complainant's merchandise, and the fact that defendants had secured a corporate name containing the word "Hudson" from the state of New York did not authorize them to use it in connection with their merchandise.

In Equity. Suit by the Hudson Tire Company, Inc., against the Hudson Tire & Rubber Corporation and others. Preliminary injunction granted.

Seligsberg, Lewis & Rothschild, of New York City (Clarence M. Lewis and Jay Leo Rothschild, both of New York City, of counsel), for plaintiff.

Brennan & Bleakley, of Yonkers, N. Y., for defendants.

AUGUSTUS N. HAND, District Judge. This is a motion to restrain defendants from manufacturing, selling, or dealing in rubber tires in conjunction with the word "Hudson." Plaintiff is a New Jersey corporation, having its principal place of business in Newark, New Jersey. Since January 1, 1911, plaintiff's secretary has been engaged in buying and selling automobile rubber tires described either as "Hud-

son double tires," "Hudson cords," or "Hudson super-cords." The business was incorporated December 2, 1915, under the name of "Hudson Double Tire Company, Inc." On December 2, 1916, the name was changed to "Hudson Tire Company, Inc.," which was the same name under which the secretary, Samuel Ehrlich, had done business as a trade-name prior to incorporation. During the past eight months the plaintiff has manufactured tires and super-cords. The secretary, and the succeeding corporation which he formed, are alleged to have spent about $4,000 a year in advertising. The plaintiff has sold super-cords in New Jersey, the New England states, Illinois, and Ohio. It is also stated that the corporation is proposing to make a contract for sale of Hudson cords in the state of New York. Prior to the organization of the plaintiff, Samuel Ehrlich swears that he sold tires in New York, as well as in New Jersey and Pennsylvania, under the name of Hudson Double Tire Company.

The defendant was not organized until April 19, 1920. It has purchased nine acres of land and started to construct a building for the manufacture of tires at Yonkers. It has advertised extensively, and a tire company, in Akron, Ohio, has manufactured certain tires for it with which to supply its stockholders "until production is had." The defendant at the time of its incorporation, in order to meet objections of the Secretary of State to the use of its name, obtained the consent of the Hudson Rubber Company and Hudson Tire Company, two New York corporations, to the use of the name under which defendant was incorporated. It is not shown what, if any, business these corporations did, or that they ever manufactured or sold tires. Defendant's advertising matter shows that it proposes to sell certain tires under the name of "Hudson cords," which is one of the names used in connection with plaintiff's merchandise.

Samuel Ehrlich states that he has received a number of telephone calls not intended for the plaintiff, and intended for the defendant; that a number of people wanted to know if plaintiff was putting up a building at Yonkers and whether they could furnish an estimate on the building. Plaintiff also received mail intended for defendant, and had machinery equipment people, who were really desiring to equip defendant's proposed building, call upon plaintiff. It is evident that the similarity of names may cause confusion, that the plaintiff was first in the field, that the defendant has done no manufacturing and dealt in no tires that were really its own, but has thus far been engaged largely in selling its stock in order to raise money to get into the manufacturing business.

The facts seem to bring the case within the principles laid down in Hanover Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713; Scandinavia Belting Co. v. Asbestos & Rubber Works, 257 Fed. 937, 169 C. C. A. 87; and National Circle, Daughters of Isabella, v. National Order of Daughters of Isabella (C. C. A.) 270 Fed. 723. I think the word "Hudson," as applied to tires and cords, had obtained a secondary meaning referable to complainant's merchandise, and the fact that defendants had secured a corporate name from the state of

New York did not authorize them to use it in connection with such merchandise.

A preliminary injunction will be granted, upon filing a bond with sufficient surety in the sum of $10,000.

THE LAFORREST L. SIMMONS.

(District Court, D. Massachusetts. October 17, 1921.)

No. 1897.

1. **Shipping ⟸209(1)—Jurisdiction to limit liability confined to maritime causes.**
   A District Court cannot take jurisdiction of a petition to limit liability, under Rev. St. § 4283 (Comp. St. § 8021), where it would not have had jurisdiction in admiralty originally of the cause of action involved.

2. **Shipping ⟸207—Part owner of vessel held not entitled to limitation of liability for injury to stevedore on wharf.**
   A part owner of a schooner from which coal was being discharged *held* not entitled to limitation of liability under Rev. St. § 4283 (Comp. St. § 8021), for injury to a stevedore by the breaking of the hoisting rope of a derrick on the wharf owned by petitioner, where neither vessel nor crew had anything to do with the discharging and no claim was made against the vessel nor against petitioner on account of his interest therein.

In Admiralty. Petition by Laforrest L. Simmons against Joe Duart for limitation of liability and injunction. Petition dismissed.

Edward C. Stone and Sawyer, Hardy, Stone & Morrison, all of Boston, Mass., for libelant.

David R. Radovsky, of Fall River, Mass., for respondent.

MORTON, District Judge. This is a petition to limit liability under Rev. St. § 4283 (U. S. Comp. St. 1916, § 8021) and for an injunction against proceedings in the state court. The principal question is one of jurisdiction. There is no serious controversy as to the facts on which it depends.

Simmons, the petitioner, was a coal dealer in Somerset, Mass. The schooner Laforrest L. Simmons came to the wharf which he leased from one Eddy with a cargo of coal consigned to the petitioner. He contracted with one Davis, as stevedore, to furnish shovellers for the discharge. Duart was hired by Davis to shovel coal into the discharging bucket in the hold of the vessel. The bucket when filled was hoisted by a rope running over a derrick, or "shears" on the wharf. The derrick, rope, and bucket were owned by the petitioner, and the power was furnished by a pair of horses hired by him. The only active part which any of the crew of the vessel took in the discharge was that her mate tied the rope to the axle to which the horses were hitched; but this act was not part of his duty, and it in no way entered into the accident —he appears to have done it as a volunteer. During the discharge the

rope broke near the axle and the bucket fell on Duart inflicting severe injuries. The vessel had nothing to do with the discharge, and the rope did not belong to her. No claim has ever been made against her, and neither she nor her owners were liable for the accident. Simmons owned one-sixteenth of her, but no claim was made against him on account of such ownership.

[1, 2] Cases under the statute invoked by the petitioner come within the jurisdiction of this court (Norwich Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585; Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. Ed. 82); but it cannot take jurisdiction of a petition for limitation of liability where it would not have had jurisdiction in admiralty originally of the cause of action involved (Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274). The foundation of the petition for limitation is that a claim cognizable in admiralty has been made against the vessel or her owner. As above stated, no claim of that sort was or is asserted, and there is no ground for it. There were no "damages done by the vessel" (In re Goodrich Transp. Co. [D. C.] 26 Fed. 713) for which she or her owner might be held liable. Even if, as the petitioner contends, the accident arose out of a "maritime tort" (see Atlantic Transp. Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. [N. S.] 1157), that does not give him the right to limit his liability for it to the value of the share or interest which he happened to own in the discharging vessel. No case has been cited which supports the petitioner's position.

The petition must be dismissed; and I do not think that there is sufficient substance to the petitioner's contention to warrant a continuance of the injunction pending an appeal, and further interference by this court with the judgment of the state court.

Petition dismissed; restraining order discharged.

GOLDWYN DISTRIBUTING CORPORATION v. CARROLL.

(Court of Appeals of District of Columbia. Submitted October 12, 1921. Decided November 7, 1921.)

No. 3491.

Landlord and tenant ⊂=157(6)—Tenant not "owner entitled to beneficial use" required to erect fire escape, and cannot recover therefor.

Under Act Cong. March 19, 1906, as amended by Act Cong. March 2, 1907, requiring the owner, entitled to the beneficial use, rental, or control of specified buildings, to erect fire escapes, which before amendment made the lessee, occupant, or person having possession also liable to its provisions, a tenant is not required to erect a fire escape, and he cannot, in the absence of any action prejudicial to his rights, voluntarily erect fire escapes and recover therefor from the landlord.

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

Appeal from the Supreme Court of the District of Columbia.

Action by the Goldwyn Distributing Corporation against Harry R. Carroll. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

J. H. Ralston, S. D. Willis, and W. T. Rankin, all of Washington, D. C., for appellant.

James S. Easby-Smith and Ralph B. Fleharty, both of Washington, D. C., for appellee.

ROBB, Associate Justice. This is an appeal from a judgment in the Supreme Court of the District sustaining the demurrer of the defendant, appellee here, to the declaration of plaintiff, appellant here, seeking a recovery for money paid by the plaintiff in its construction of a fire escape upon premises owned by the defendant and leased in part by the plaintiff.

The Act of March 19, 1906 (34 Stat. 70), as amended by the Act of March 2, 1907 (34 Stat. 1247), makes it "the duty of the owner, entitled to the beneficial use, rental, or control of any building three or more stories in height, or over thirty feet in height, constructed or used or intended to be used as a tenement house, apartment house, flat, hotel, hospital, seminary, academy, school, college, institute, dormitory, asylum, sanitarium, hall, or place of amusement, or office building or store not exempted as in this act hereinafter provided, to provide and cause to be erected and fixed to every such building," etc., such suitable fire escapes as the Commissioners of the District may determine. Under section 2 it is made the duty of the owner entitled to the beneficial use, rental, or control of any building "in which ten or more persons are employed at the same time in any of the stories above the second story, except three-story buildings used exclusively as stores or for office purposes, and having at least two stairways from the ground floor each three or more feet wide and separated from each other by a distance of at least thirty feet, from one of which stairways shall be easy

access to the roof," to erect fire escapes. Any person failing or neglecting to comply with the provisions of the act, "after notice from the Commissioners of the District of Columbia so to do," is subject to a prescribed penalty. It is further provided that in case of the failure or refusal "of the owner, entitled to the beneficial use, rental, or control of any building specified in this act, to comply with the requirements of the notice provided for," the Commissioners may erect the fire escapes and other appliances mentioned in the notice and assess the cost as a tax against the buildings. Finally, it is provided that, upon petition of the District, an injuncton may issue "to restrain the use or occupation of any building" in violation of the provisions of the act. Under the original act the "lessee, occupant, or person having possession" also was liable to its provisions, but the words "owner, entitled to the beneficial use, rental, or control" were substituted in the amendatory act, Congress thus plainly evincing an intent to exclude from the provisions of the act the lessee or occupant.

It is too plain to admit of argument that under the provisions of the statute as amended it was not the duty of the plaintiff as tenant to erect this fire escape, and upon the record before us we may not say that this building is within the class mentioned in the statute. This circumstance precludes further inquiry on our part because, unless it appears that a legal duty rested upon the defendant, under no possible theory may the defendant be held responsible for an unnecessary and voluntary payment by his tenant. The owner had a right to his day in court on the question whether his building came within the class specified in the act. It was he and not the tenant who was subject to the penalty of the act, and the tenant could suffer no legal prejudice by the owner's failure immediately to comply with its provisions. Had the Commissioners sought an injunction to restrain the use and occupation of the building, it would have been the duty of the owner to defend the suit and protect his tenant, but we need not determine here what the rights of the tenant would have been had the owner failed in this regard. Moreover, in view of the provision authorizing the Commissioners in a proper case to erect fire escapes and make the cost a tax against the building, resort to an injunction would be unlikely. At all events, when appellant, in advance of a determination of the question of the legal necessity of a fire escape, erected the escape and foreclosed that question, his act was that of a mere volunteer and the trial court was correct in sustaining the demurrer. The judgment therefore is affirmed, with costs.

Affirmed.

WINEINGER v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 4, 1921. Rehearing Denied December 19, 1921.)

No. 5540.

1. **Railroads ⇐400(1)—Negligence and contributory negligence held questions for jury on evidence as to injury to soldier guarding bridge.**
Plaintiff's intestate was one of a company of soldiers detailed to guard a bridge on defendant's railroad. The camp was at the east end of the bridge, and guards were maintained at each end and beneath. There was a double track over the bridge; east-bound trains using the south, and west-bound trains the north, track. Plaintiff's intestate was one of the guards at the west end, and in early morning, while it was somewhat hazy, started under orders to cross to the camp over the north track walking on the ties, there being no flooring, and was struck and killed by an east-bound train using that track contrary to custom. There was a curve west of the bridge, and it could not be seen until a train reached the bridge upon which track it was running. Defendant knew of the presence of the soldiers, the location of the camp, and where the guards were stationed. There was evidence that the train gave no signal of its approach. *Held*, that the questions of negligence and contributory negligence were for the jury.

2. **Appeal and error ⇐856(1)—Ruling sustained if correct on any ground.**
The ruling of a trial court may be sustained on a ground different from that on which the court based it.

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

Action at law by Josephine Wineinger, administratrix, against the Union Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

William S. Hogsett and Murat Boyle, both of Kansas City, Mo., for plaintiff in error.

N. H. Loomis, Edson Rich, Charles A. Magaw, and Thomas W. Bockes, all of Omaha, Neb., for defendant in error.

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

CARLAND, Circuit Judge. [1] Action for the death of Leo A. Duke caused by the alleged negligence of the railroad company. A verdict was directed in favor of the company, and the administratrix of the estate of Duke assigns this ruling as error. The plaintiff at the trial introduced evidence showing and tending to show the following facts: Duke at the time of his death on April 9, 1917, was a private soldier in Company D, Fourth Nebraska Infantry. Prior to the above date the United States had declared war against the Imperial Government of Germany and had called the Fourth Nebraska Infantry into the military service of the United States. Through correspondence between the War Department and the railroad company, the latter was requested by the former to designate the points and bridges on the line of its railroad which ought to be guarded. The railroad company, pursuant

to said request, designated the railroad bridge located about one-half mile east of Waterloo, Neb. Whereupon Company D aforesaid was assigned to guard said bridge, and Duke as a member of said company on the date mentioned was on duty aiding in the performance of the duty with which said company had been charged. The railroad company knew on the date above mentioned that there were soldiers stationed at and guarding the bridge in question and the places on the bridge where they were stationed. The bridge was about 600 feet long. The railroad company operated over the bridge a double-track railroad extending in a general east and west direction, east-bound trains traveling on the south track, and west-bound trains on the north track. The camp of the soldiers was at the east end of the bridge. At night there were two men at each end of the bridge and two underneath the center doing guard duty. It was necessary for the men stationed at the west end of the bridge to cross the bridge in going on or off duty.

On the morning of the day above mentioned, Duke and one Murphy were on duty guarding the west end of the bridge, having gone on duty at 12 midnight, and would go off duty at 6 o'clock a. m. About 5 o'clock a. m. Duke was given permission by his superior officer to cross the bridge to the east end to get a drink of water. It was necessary for him to cross the bridge to obtain the water. Duke started to cross the bridge on the north or left-hand track. In crossing the bridge he was obliged to walk on the ties between the rails. There was no place to walk between the two tracks as the ties under each track did not meet. The ties extended from one to one and one-half feet outside the rail. The only way to get from one track to the other was to step across the space between the ties, which was about three feet. Soon after Duke started to cross the bridge, a fast freight train consisting of 50 or 60 cars approached the bridge from the west, east bound on the north or left-hand track. Trains usually approached and crossed the bridge at from 35 to 40 miles per hour, the exact speed of the train in question not being shown. All of the witnesses testified that they did not hear any whistle sounded or bell rung as the train approached the bridge. One witness testified that the train whistled in the town of Waterloo. It is conceded that this train struck Duke and killed him. Shortly after the train passed, deceased was found underneath the north track about 75 yards west of the east end of the bridge. Duke was struck by the train from the rear, thrown against the girder at the north side of the bridge, and from there his body fell to the ground beneath. At the time of the accident day was just breaking, and while the atmosphere was "kind of hazy" or foggy from the river, one could see "clear across the bridge." The double tracks as they left the west end of the bridge curved to the north, the curve being from 100 to 200 yards west of the west end of the bridge. By reason of the fact that east-bound trains had been accustomed to run on the south track and west-bound trains on the north track, the soldiers had been directed to walk on the north track when going east and the south track when going west.

The witness Perry testified that the tracks seem to run together at the curve just west of the bridge and that he could not tell at first which track the train was running on. This witness started to cross the bridge

some distance behind deceased. He was first able to tell that the train was on the north track when it got to the end of the bridge and within 30 or 40 feet of him, at which time he crossed to the other track. The only means of getting to a place of safety when a train came along on a track on which a person was walking was to either drop down to the sand bar beneath, or if he were near one of the cross braces he could stand on it, or he could step across the open space between the ends of the ties to the other track. On account of the curve west of the bridge and the height of the steel girders on the side of the bridge, it was not possible for a person on the bridge to see a train approaching from the west until the train was almost on the bridge. The railroad company introduced no evidence. One of the grounds of negligence alleged in the petition was that the defendant carelessly and negligently ran down Duke without giving any signal of the approach of its train to or on the bridge. Witnesses who testified that they did not hear a whistle sounded or a bell rung were in positions to hear the whistle and bell if they had been sounded or rung. Conceding that the whistle was sounded in Waterloo as testified by the witness Perry, we think the case was clearly one for the jury as to whether any signal of the approach of the train to or onto the bridge was given. Certainly the sounding of the whistle in the village of Waterloo could not be said, owing to the distance between the village and the bridge, to be a signal for the bridge. Whatever the exact status of Duke was in relation to the railroad company, it is clear beyond question that he was lawfully upon the track upon which he was killed and that the railroad company owed him the duty to use ordinary care not to injure him; such care being measured by the circumstances and conditions surrounding the railroad company and Duke at the time in question. The railroad company knew that the soldiers were there. It knew where the camp was located and where the guards were posted. It knew that the bridge could not be crossed except by walking on the ties between the rails of the different tracks. In view of the double track, the roar of the train cannot be relied upon, standing alone, as notice that the train was approaching on the track upon which deceased was walking.

[2] The trial court directed a verdict on the ground that the evidence did not show any negligence on the part of the railroad company. Counsel for the company now urge that if for any reason the ground upon which the ruling of the trial court was based was erroneous, still the ruling of the court was right because Duke was guilty of contributory negligence. Under the decisions of this court the company has the right to make this contention. U. S. v. Porter Fuel Co., 247 Fed. 769, 159 C. C. A. 627; Ramsey v. Crevlin, 254 Fed. 813, 166 C. C. A. 259; Latting v. Owasso Mfg. Co., 148 Fed. 369, 78 C. C. A. 183; Modern Woodmen of America v. Union Nat. Bank of Omaha, 108 Fed. 753, 47 C. C. A. 667.

It is claimed that if Duke had looked and listened he would have known that the train was approaching him on the north track. There being no evidence as to what he actually did, we must presume that he used ordinary care or looked and listened, and if the physical facts were such as to show conclusively that by so doing he could have ascertained

that the train was approaching him on the north track, then he was guilty of contributory negligence in remaining on the track. The roar of a train, however, would not tell him which track the train was on, and in view of the fact that it was customary for east-bound trains to run on the south track, together with the haze and fog, we cannot say that he could or must have seen that the train was on the north track. It is not enough that he might have seen the train but that he might have seen that it was approaching him on said north track. It is true that the running of the train against traffic was not an act of negligence on the part of the company, but in determining whether Duke was guilty of contributory negligence the fact that the train was running against traffic becomes material. We are of the opinion that the evidence appearing in the record would not authorize a court to say as matter of law that the railroad company was not negligent or that Duke was guilty of contributory negligence. The law governing the situation of the parties is so well settled as to require no citation of authorities and so far as the facts are concerned each case must be judged by its own facts.

Judgment reversed, and a new trial ordered.

KORN et al. v. SPOKANE & EASTERN TRUST CO. et al.

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

No. 3693.

1. **Corporations ⇐40—In absence of objection to its validity, amendment to articles held sufficient to authorize conveyance.**
   A conveyance by corporation will not be held ultra vires by the Circuit Court of Appeals on ground that amendment to articles of incorporation was not made in compliance with Rem. & Bal. Code Wash. § 3679, requiring majority vote of trustees and vote or written consent of two-thirds of the capital stock, where no objection was made by any stockholder that amendment had not been lawfully made during a long interval between adoption of amendment and conveyance, and where the amended articles were received in evidence on the trial and no objection made that amendment had not been duly authorized and no showing made that requirements of statute had not been complied with.
2. **Corporations ⇐439—Conveyance held not ultra vires.**
   Where prohibition left a brewing company without funds to pay existing indebtedness and without a continued profitable use for its brewery, its only property, its conveyance thereof to the mortgagee, made in compromising a foreclosure suit on the latter's agreement to reconvey on payment of the mortgage debt within 18 months, was not ultra vires.
3. **Corporations ⇐388(2)—Corporation and stockholders held estopped by receiving benefits from asserting conveyance ultra vires.**
   Where corporation and stockholders received substantial benefits from conveyance by corporation of mortgaged property to mortgagee, they are estopped from asserting the conveyance was ultra vires after grantee had paid substantial amounts for delinquent taxes and insurance.
4. **Corporations ⇐426(11)—Directors held to have ratified unauthorized conveyance.**
   Where directors were advised of an unauthorized conveyance, and at subsequent meetings, at which all were present, and at which they dis-

cussed efforts made to dispose of the property, they did not disapprove thereof, the conveyance was ratified.

5. **Corporations ⇐182—Agreement held not fraudulent as to minority stockholders.**

Where a brewing company, forced to discontinue its business by prohibition and was without funds with which to pay its indebtedness and prevent a mortgage foreclosure, conveyed its property to the mortgagee with option to repurchase on payment of indebtedness within 18 months, the mere fact that mortgagee agreed that the principal stockholder could use the property during such period without rental, of which the stockholder did not avail himself, and released the principal stockholder from his personal guaranty of the indebtedness, did not make the agreement fraudulent as to the other stockholders.

6. **Corporations ⇐182—Stockholders not entitled to cancellation of conveyance to mortgagee without an offer to return amount of taxes, etc., paid by mortgagee.**

Stockholders *held* not entitled to cancellation of corporation's conveyance to a mortgagee in the absence of a showing of readiness and willingness to return the amount paid by the mortgagee for taxes, insurance, and repairs; the stockholders' rights in such case being no greater than those of corporation itself.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit by Erna Korn and another against the Spokane & Eastern Trust Company, a corporation, and others. Decree of dismissal, and plaintiffs appeal. Affirmed.

Caleb Jones and Post, Russell & Higgins, all of Spokane, Wash., for appellants.

F. H. Graves, W. G. Graves, and B. H. Kizer, all of Spokane, Wash., for appellees.

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

GILBERT, Circuit Judge. The appellant Korn, a stockholder of the B. Schade Brewing Company, brought a suit against the Spokane & Eastern Trust Company and the officers of the brewing company, to set aside a conveyance of the property of the latter company to the trust company. Another stockholder intervened, praying the same relief as did the plaintiff. Upon a trial on the merits, the bill was dismissed for want of equity.

The brewing company, a corporation of the state of Washington, was incorporated in 1903 for the purpose of brewing, manufacturing, and selling beer, with authority to acquire, purchase, and sell real estate and personal property for the purpose of carrying on and conducting a general malting and brewing business. In 1907 an amendment to the articles of incorporation gave the corporation power to purchase, mortgage, sell, and convey real and personal property "for any purpose which the corporation may deem expedient or necessary to aid in, increase, or protect any business it may now or hereafter become engaged in." The corporation constructed a brewery in Spo-

kane, and was engaged in the business of making and selling beer until January 1, 1916, when the Washington Prohibition Act (Laws 1915, p. 2) became effective. Thereafter, discouraged by an unsuccessful attempt to operate a soft drink establishment, it ceased all business. It had a capital stock of 5,000 shares, of which B. Schade owned 2,606. He, his wife, and R. Stritesky were the directors. In 1914 the brewing company owed the trust company $50,000 for borrowed money and it executed notes to the trust company to that amount, and secured the same by a mortgage upon all its property. At the demand of the trust company, B. Schade personally guaranteed the payment of the notes. The business of the brewing company having been destroyed by prohibition, it had no money or resources to pay interest on its debt or taxes or insurance on its property. The trust company caused suit to be brought for foreclosure. It joined B. Schade as defendant, and made Mrs. Schade defendant for the purpose of having her husband's guaranty adjudged to be a community obligation. After the cause had been set for trial, it was compromised. The brewing company conveyed the mortgaged property to the trust company, and the latter surrendered the notes and released the mortgage and caused the foreclosure suit to be dismissed. At that time the debt, together with interest, taxes, and insurance paid by the trust company, amounted to $63,650. The trust company gave the brewing company an option to repurchase the property within 18 months thereafter on paying the amount of the indebtedness. The corporations agreed to co-operate in efforts to sell the property during the period of the option. Notwithstanding their efforts, they failed to accomplish a sale, and at the expiration of the option period, on July 1, 1919, the trust company took possession of the property. On August 25, 1919, the trust company made an offer to the stockholders of the brewing company to give each of them an interest in the property proportionate to his holdings in the brewing company if he would pay a proportionate share of the indebtedness, which at that time was $76,000. Seven or eight of the stockholders accepted the offer.

[1] The main contentions of the appellants are that the conveyance was ultra vires, that it was not authorized by the board of directors of the brewing company, and that it was fraudulent in that the officers of the brewing company personally profited thereby. As to the first of these contentions it is urged that the amendment of the articles of incorporation which was made in 1907, and which increased the powers of the corporation in the matter of purchasing, mortgaging, and conveying real and personal property, was void for the reason that it was made without the unanimous consent of the stockholders. The statute of Washington, however (Rem. & Ball. Code, § 3679), provides that amendment may be made to articles of incorporation "by a majority vote of its trustees and by the vote or written consent of two-thirds of the capital stock of such corporation." During all the years which succeeded the adoption of the amendment of 1907, no objection was made by any stockholder that the amendment had not been lawfully made, and on the trial when the amended articles were received in evidence, no objection was interposed on the ground that

the amendment had not been duly authorized. Nor did the appellants on their part offer evidence to show that the requirements of the statute had not been complied with. Such being the facts, it cannot now be held that the amendment was not in force and effect at the time of the conveyance which is complained of.

[2] In the year 1918, at the time when the conveyance was made, the brewing company had no property other than its brewery. It had no business save the manufacture and sale of beer. Its whole capital was invested in that business. Prohibition had put an end to the brewing business, not only in Washington but in the adjoining states of Idaho and Oregon, and Congress had adopted a joint resolution proposing the Eighteenth Amendment. After the failure of the brewing company to run a soft drink establishment, it did no business. It could not pay its taxes. Schade testified that the conveyance was made because the company "could not pay the mortgage and there wasn't anything else to do." The evidence indicated that Mr. Schade industriously endeavored to stave off foreclosure and to sell the property during the period of the option. In Thompson on Corporations (2d Ed.) § 2429, it is said:

"The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable and where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business, and no money with which to pay existing indebtedness, or when the corporation is in failing circumstances, or is in fact insolvent."

That doctrine finds support in the decisions of the Supreme Court of Washington (Lange v. Reservation Min. Co., 48 Wash. 167, 93 Pac. 208; Logie v. Mother Lode Copper Mines Co., 106 Wash. 208, 179 Pac. 835; Klosterman v. Mason County Ry., 8 Wash. 281, 36 Pac. 136), and it fully answers the contention that the conveyance here involved was ultra vires.

[3] Again, the circumstances are such as to estop the brewing company and its stockholders to assert that the conveyance was ultra vires. The brewing company received substantial benefits from the conveyance. The trust company paid $5,550 delinquent taxes, and thereafter paid $8,000 for taxes and insurance on the property. It surrendered its notes and released its mortgage and dismissed its foreclosure suit. It received no income from the property. United States F. & G. Co. v. Cascade Construction Co., 106 Wash. 478, 180 Pac. 463; Moore v. American Sav. Bank, 111 Wash. 148, 189 Pac. 1010.

[4] It is true that the execution of the conveyance was never formally authorized by the brewing company's board of directors. But it is clear from the evidence that the conveyance was subsequently ratified. At the February, 1918, meeting, at which all of the directors were present, they were advised that the mortgaged property had been conveyed to the trust company. At each of the meetings of the board thereafter the directors discussed the efforts that had been made to dispose of the property, and at the July, 1919, meeting, it was stated that the property of the company was to pass into the hands of the trust company on July 1, but that the latter had made no move to take

possession. At none of these meetings was there an expression of disapproval of the conveyance of the property.

[5] It is alleged in the complaint that as an inducement for the execution of the conveyance, the brewing company released Schade from his guaranty and secured to him and to his wife the right to the individual use of the conveyed property for a year and six months without rental. The agreement as to the use of the property was that during the lifetime of the option the brewing company might if it desired conduct on the premises a business of its own without rental, or that the Schades might personally operate a business in the bottling works. It was desirable, of course, that the conveyed property be occupied by some one during the existence of the option. The trust company apparently was content to have either the brewing company or the Schades occupy and use it. As a matter of fact, no use was made of it by either. We cannot discover, in the mere fact that such an agreement was made, evidence of fraud or of fraudulent inducement to the execution of the conveyance; nor do we think that fraud is to be inferred from the fact that Schade was released from the obligation of his guaranty. It was not his own debt that he had guaranteed. It was the debt of his corporation. In receiving all of the property of that corporation in payment of its debt, there was nothing improper in acquitting Schade of his personal obligation. The stockholders had no right to demand that Schade should pay the debt or any part thereof. As evidence of fraud, reference is made to what is claimed to be the gross inadequacy of the price at which the property was transferred, and it is contended that the property was worth $350,000. That estimate is obviously based upon the cost of the property and its value for use as a brewery prior to the time when prohibition destroyed its value for that purpose, and grossly impaired its value for any purpose. More convincing evidence of its true value is found in the failure of all efforts during a period of three or four years to raise money on the property or to sell the same for a sum sufficient to pay the obligations of the company.

[6] The prayer of the bill of complaint was that the agreement between the two corporations be set aside and declared null and void, and that the property be returned to the brewing company, subject to the rights of its creditors and stockholders. Neither in the pleadings nor on the trial was there any offer on the part of the appellants to return to the trust company any part of the money which it had paid out for taxes, insurance, and repairs. The appellants stand in no better position than would the brewing company in a similar suit. As was said by the court below:

"It should at least appear that either the corporation or the stockholders are ready and wiling to pay the amount due on redemption. No such readiness or willingness is averred in the pleadings, and no such readiness or willingness was disclosed at the trial. Counsel frankly conceded that the stockholders did not have the means to effect a redemption, and further conceded that if they had the means, it would not be deemed advisable to employ them in that way."

The decree is affirmed.

ST. LOUIS & S. F. RY. CO. v. JEFFRIES.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1921.)

No. 5649.

1. **Master and servant ⇐286(30)—Custom to give signal before increasing speed of train held for jury.**
   In an action under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for injuries to a brakeman thrown from the train when the engineer increased the speed without giving signal according to a custom shown by plaintiff's witnesses, *held* that the existence of the custom was a question for the jury, though defendant's witnesses testified that they did not observe any such custom.

2. **Customs and usages ⇐6—Custom need not be shown to have become a rule of the common law.**
   In action under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for injuries to brakeman sustained when engineer started train forward at increased rate of speed without giving signal according to alleged custom, plaintiff, in proving custom, was not required to show the custom so completely as would be required in showing the custom to have become a rule of the common law.

3. **Master and servant ⇐135, 150(1)—Omission of customary signals and warnings negligence.**
   A servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and master's failure to give such signals and warnings constitutes negligence.

4. **Master ad servant ⇐258(18)—Complaint held to plead locomotive engineer's duty to give signal.**
   In an action under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for injuries to a brakeman thrown from a train when engineer increased the speed without giving the customary signal, complaint *held* sufficient to plead engineer's duty to give signal.

5. **Trial ⇐260(8)—Refusal of instructions on railroad's negligence held not error in view of other instructions.**
   In an action under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for injuries to a brakeman thrown from the train when the engineer increased the speed without giving the customary signal, refusal of requested instructions that, if engineer was not negligent, the verdict should be for the railroad regardless of the contributory negligence of the brakeman, *held* not error, in view of other instructions to such effect.

6. **Trial ⇐296(4, 5)—Instruction not erroneous as practically eliminating defenses in view of other instructions.**
   In an action under federal Employers' Liability Act (Comp. St. §§ 8657–8665) for injuries to brakeman thrown from a train when the engineer increased the speed without giving the customary signal, instruction *held* not erroneous as practically eliminating defenses of plaintiff's negligence and assumption of risk, in view of other instructions as to such defenses.

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

Action by Andrew N. Jeffries against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans and E. T. Miller, both of St. Louis, Mo., for plaintiff in error.

Sidney Thorne Able and Charles P. Noell, both of St. Louis, Mo., for defendant in error.

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

CARLAND, Circuit Judge. Jeffries, hereafter called plaintiff, sued the railway company, hereafter called defendant, under the federal Employers' Liability Act (35 Stat. 65 [Comp. St. §§ 8657-8665]), to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. There was a verdict and judgment for the plaintiff. Defendant sued out a writ of error. The alleged negligence of defendant is stated in plaintiff's complaint as follows:

"Plaintiff further states that on or about the 24th day of October, 1917, he was in the employ of the defendant as a brakeman, and that while he was so employed on the said day it was necessary for the plaintiff to throw a certain switch to permit the train on and about which the plaintiff was working to move off of a siding at Menfro, Mo., onto the main line; that in pursuance to said duty he threw the switch and permitted the train to move out on the main line; that it then became and was the duty of the conductor on the said train to reline the switch after the train had passed upon the main line and that he in pursuance to said duty relined the switch; that it then became and was the duty of the engineer on the said train either to stop the train or to let the train drift along without giving it any more steam at all until the engineer received a signal from the plaintiff that the plaintiff was ready to have the engine given steam, ready to have the train to proceed, and it was then the duty of the engineer after receiving such signal from the plaintiff not to give the engine steam or in any manner start the train forward at a faster rate of speed until after the engineer had given the usual and customary signal of two short blasts signifying that he was about to give the engine steam and proceed on the journey, and plaintiff further states that while he was stationed on top of one of the cars in the train the conductor threw the switch and got upon the train and that the plaintiff gave a signal to the engineer to proceed, and further states that he received no response from the engineer to indicate that the engineer was about to proceed, and plaintiff further states that thereafter and while he was waiting for such signal from the engineer to indicate that the engineer was about to proceed, he, the plaintiff, was moving over the top of the train toward the engine, and that as the plaintiff was at the end of one of the cars moving over to the car nearer to the engine, that train was suddenly caused to move forward at a greatly increased rate of speed, causing a sudden, violent, and unusual jerk and taking out of the slack of the train, causing the plaintiff to be thrown from the said car to the ground and to be run over and injured as hereinafter stated.

"Plaintiff further states that his said injuries were caused by the carelessness and negligence of those in charge of the movements of the said train in suddenly permitting, allowing, and causing the train to start forward at an increased rate of speed without first having given the usual and customary signal that the train was about to proceed, and by reason of their negligence in causing such violent, unusual, and sudden jerk of the train."

Defendant by its answer denied generally the allegations of the complaint and pleaded contributory negligence and assumption of risk. The first alleged error assigned is that the trial court erred in refusing to direct a verdict for the defendant because the alleged cus-

tom was not proven. The position of counsel is illustrated by the following language taken from their brief:

"The situation therefore presented is that two or three witnesses for the plaintiff testified that there was such a custom, while six or seven witnesses for the defendant testified that there was not; and there is absolutely no evidence in the record to disprove the positive testimony of some of defendant's witnesses who stated that they did not observe any such custom in increasing the speed of their trains. The result therefore is as stated in the Lindeman case that there 'was uncontradicted evidence that the custom to which the witnesses for the plaintiff testified was not uniform, and hence that it was not binding.' If it should be contended that where there is contradictory testimony as to the existence of a custom, it is the province of the jury to determine if the custom in fact exists, yet where there is uncontradicted testimony as existed here that the alleged custom was not uniform, it is the duty of the court to so declare."

[1-3] The first position would render it impossible to ever establish a custom if some witness whose orthodoxy in telling the truth would permit him to deny that there was such a custom as claimed, for if the proposition is sound it must be just as sound with one witness as seven. We do not think it can be claimed that because certain witnesses testified that they did not observe any such custom that the evidence as to custom was uncontradicted in view of counsel's statement "that two or three witnesses testified that there was such a custom." The second proposition is to the effect that if it is claimed that where the existence of a custom is in issue the question may be one for a jury, still such a rule would not apply in the present case, because there was uncontradicted evidence that the custom was not uniform. An examination of the evidence of the plaintiff and his witnesses convinces us that counsel are mistaken when they say that there was no evidence that the custom was uniform. We are of the further opinion that it was not incumbent on plaintiff to show such a custom as would make it a rule of the common law. A servant has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the master fails to give these, he is negligent. Anderson v. Northern Mill Co., 42 Minn. 424, 44 N. W. 315; Burlington, etc., R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921; Hough v. Grants Pass Power Co., 41 Or. 531, 69 Pac. 655; Andreson v. Ogden Union R., etc., Co., 8 Utah, 128, 30 Pac. 305; Lyons v. Ryerson, 148 Ill. App. 284; Jones v. R. Co., 149 Ky. 566, 149 S. W. 951; Hines v. Mfg. Co., 199 Mass. 522, 85 N. E. 851; Fitzgerald v. Twine Co., 104 Minn. 138, 116 N. W. 475; Schoen v. R. Co., 112 Minn. 38, 127 N. W. 433, 45 L. R. A. (N. S.) 841; Lancaster v. R. Co., 143 Mo. App. 163, 127 S. W. 607; Germanus v. R. Co., 74 N. J. Law, 662, 67 Atl. 79; Ondis v. Tea Co., 82 N. J. Law, 511, 81 Atl. 856, 46 L. R. A. (N. S.) 777; Baccelli v. Delaware, etc. Co., 138 App. Div. 623, 122 N. Y. Supp. 849; R. Co. v. Bartley, 172 Fed. 82, 96 C. C. A. 570; R. Co. v. Dutcher, 182 Fed. 494, 104 C. C. A. 438; Allard v. Contract Co., 64 Wash. 14, 116 Pac. 457; McKee v. R. Co., 151 Ky. 698, 152 S. W. 759; McCalley v. R. Co., 169 Ky. 47, 183 S. W. 234, L. R. A. 1916F, 551; Taber v. R. Co. (Mo.) 186 S. W. 688; Bowman v. Coal, etc., Co., 168 Mo. App. 703, 154

S. W. 891; Huxoll v. R. Co., 99 Neb. 170, 155 N. W. 900; Curran v. R. Co., 211 N. Y. 60, 105 N. E. 105; Cement Co. v. Brown, 45 Okl. 476, 146 Pac. 6; Maness v. Coal Corp., 128 Tenn. 143, 162 S. W. 1105.

In Fletcher v. Baltimore & Potomac R. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, the uncontradicted evidence showed the following facts:

"The defendant had been in the daily habit for several years of running out of Washington and Alexandria a repair train of open flat cars loaded with its employees, and the train returned every evening about 6 o'clock and brought the workmen back to their homes. These men were allowed the privilege of bringing back with them, for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, cross-ties, etc. It was the constant habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other person waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt any one in throwing the wood off. The foreman of the gang was the man who usually gave such instruction."

The trial court directed a verdict on this evidence for the railroad. The Supreme Court reversed this action of the court and in doing so said:

"We feel quite clear that, from the evidence in this case, it was for the jury to say whether the custom was sufficiently proved."

[4, 5] Both counsel for plaintiff and defendant and also the court used the case of C., M. & St. P. Ry. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18, decided by this court, as stating the rule which should govern the present case. When rightly interpreted we do not think that case would compel a direction of a verdict in favor of the defendant in this case because the alleged custom had not been proven. We have carefully read the evidence and are of the opinion that the question as to whether the alleged custom was proven was a question for the jury. It is next claimed that there was no evidence consistent with well-known physical laws and facts that the train sustained a sudden, violent, and unusual jerk; but an examination of the evidence shows this contention to be wrong. There was positive evidence that the train did suddenly start forward and that there was such a jerk as claimed. Also evidence that such a jerk was possible under the circumstances. It is next insisted that as it was admitted that the engineer did not receive the proceed signal he could not have violated the alleged custom. We think this is giving a wrong construction to the claim of the plaintiff. According to plaintiff's contention, the engineer had no right to suddenly increase the speed of the train without he first received a signal from the plaintiff. The complaint fairly pleads the duty of the engineer in such a situation. Plaintiff complains of the refusal of the trial court to give instructions requested by it numbered 14 and 15. Request No. 14 concluded with the words "then your verdict must be for the defendant." No. 15 contained the words:

"Before plaintiff can recover in any event you must believe from the evidence that the engineer of the defendant on said train was guilty of negligence as herein defined which caused or contributed to cause his injury."

The trial court charged the jury if they believed from the evidence that the injury to plaintiff arose through his own fault, and through no fault or negligence of the engineer as the court had already explained to them, then their verdict should be in accordance with the rule touching contributory negligence which the court should thereafter give them. It is claimed that the court should have stated to the jury that if the engineer was not negligent their verdict should be for the defendant regardless of the contributory negligence of the plaintiff. The court, however, in many other places stated just what counsel for defendant contends for. To illustrate, in many places in the charge is found language like the following:

"If, upon consideration of all of the evidence, you believe that the defendant's engineer was not guilty of any negligence, as hereinafter defined, or if upon this issue the evidence is evenly balanced, and if you are unable to determine in whose favor the same preponderates, then your verdict ought to be for the defendant."

[6] The use of the language to which counsel for defendant objects was caused no doubt by the doctrine of comparative negligence established by the Employers' Liability Act. It is next claimed that the court's charge limited the defendant to a general denial of the allegations of the petition. practically eliminating the defenses of plaintiff's negligence and assumption of risk. In one place in the charge is found the following language:

"From what I have said to you, gentlemen, you will readily appreciate that there are but two issues in this case. One of those issues is whether the custom contended for by the plaintiff existed. The other is whether the failure to observe that custom, after you have found it existed, concurred with or acted with a sudden, violent, and unusual jerk of the train, so that thereby plaintiff was thrown off, run over and hurt. That is all there is left in this case. The other questions in it, according to my view, and I say to you the subjects on those points have been disposed of by admissions or proof which is not contradicted in this case—I say this to you because I want you to devote your considerations to these points. I shall have more to say about that custom and about that jerk hereafter in my charge."

Standing alone this portion of the charge might be subject to criticism; but, when the whole charge is examined, all of the defenses that the defendant had were repeatedly stated to the jury and the rules of law governing the same. It was admitted that the train carried interstate commerce, and that plaintiff was an employee of the defendant. The engineer admitted that he did not give the two short blasts of the whistle and also testified that he was under no duty to do so. The conductor also testified that he did not hear or remember of hearing the two short blasts of the whistle after he saw the plaintiff give the proceed signal. The trial court did, in another part of its charge, state to the jury that by virtue of plaintiff's employment in a business universally believed, and known to be hazardous, he assumed all the risks, dangers, and hazards properly and necessarily incident thereto, and then stated that if plaintiff's injury was caused by any

jerk necessary and incident to the operation of the train as it was then situated and then being operated the plaintiff could not recover, but before he could recover, he must show both the custom which was followed and the unusual and unnecessary jerking which caught him off his guard because of the violation of the custom to acknowledge the signal. The court also stated to the jury that there was a plea in the case and therefore an issue of contributory negligence, and also charged the jury if they found that the acts and conduct of the plaintiff contributed to the cause of plaintiff's being thrown from the train and being injured thereby, then they were charged that plaintiff was guilty of negligence which contributed to cause his injury. The court further said:

"I think it is clear to the jury that plaintiff cannot recover in this case if there was no negligence on the part of defendant. If the hurt accrued to him solely by his own negligence of course he cannot recover. I think I made that clear. I labored to make it clear."

We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and if it appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism is not important. The jury in this case were told that they must take the charge as a whole, and we have no doubt that the charge as a whole fully, correctly, and fairly presented the case to the jury. As there does not appear to be any prejudicial error in the record, the judgment below is affirmed.

The Judges who heard this case all concurred in the decision thereof and the reasons therefor, but Judge HOOK deceased before the opinion was prepared.

CRAMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1921.)

No. 3657.

1. **Public lands ⇐75—Land occupied by Indians not embraced in railroad grant, "otherwise disposed of."**

In view of the uniform policy of the United States to respect Indian occupancy of public lands, Act July 25, 1866, § 2, making a grant of lands to the California & Oregon Railroad Company, *held* not to include within the grant any legal subdivision of 40 acres any part of which was then occupied and had been improved by an Indian settler; such land having been "otherwise disposed of" within the meaning of the act, in lieu of which, if within the boundaries of the grant, the company was authorized to select other lands.

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

2. **Indians ⇐27(5)—United States may maintain suit to protect rights of Indians in land.**

The United States in its own right and in its capacity of guardian for the Indians may maintain a suit to protect the rights of Indians in public lands.

---

3. **Abatement and revival ⊜8(2)—Pendency of private suit for possession of land not a bar to suit by United States to cancel patent.**
The pendency of a suit between private parties in a state court involving possession of land is not a bar to a suit by the United States to cancel a patent for the land.

4. **Estoppel ⊜62(5)—United States not estopped by unauthorized acts of officers.**
The fact that a department accepted leases of lands from a railroad company *held* not to estop the United States from maintaining a suit ior cancellation of the patent to the land on the ground that it was excepted from the grant under which the patent was issued.

Appeal and Cross-Appeal from the District Court of the United States for Second Division of the Northern District of California; Frank S. Dietrich, Judge.

Suit in equity by the United States against Fred W. Cramer, Ira B. Cramer, and the Central Pacific Railway Company. From the decree, both parties appeal. Reversed on complainant's appeal.

The United States sued to cancel a patent alleged to have been issued without authority to the Central Pacific Railway Company in 1904. The patent was issued under the act of Congress approved July 25, 1866 (chapter 242, 14 Stat. 239), making a grant of land to California & Oregon Railroad Company to aid in the construction of a railroad from a connection with the Central Pacific Railroad at Roseville, Cal., to the line between Oregon and California.

The government's position is that for years prior to 1904 and from time immemorial the Indians occupied and claimed the lands, and that none of the Indian rights were extinguished by the act of 1866 hereinbefore cited. The defendants denied occupation and use, pleaded the statute of limitations, and sale by the railroad company to defendants Cramer under executory contracts made in 1916 and 1917; the sales being subject to leases made by the United States for the benefit of the Indians.

The District Court held that from 1859 the Indian occupants have been in possession of certain of the lands; have fenced between 150 and 175 acres thereof, and improved the same; that they acquired substantial rights respected by the government and that such title as the railroad company acquired is subject to the Indian right of occupancy subject only to interference by the United States, and made a decree in favor of the right of the Indian occupants to remain in possession of the lands and only the lands actually inclosed by fence.

The defendants below appealed, and the United States filed a cross-appeal.

Frank Thunen and E. J. Foulds, both of San Francisco, Cal., for appellants.

S. W. Williams, Sp. Asst. Atty. Gen., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] This case affects two individual Indians, remnants of a band that since 1859 have lived in a small valley in Siskiyou county, Cal. The Indians have occupied and cultivated and inclosed certain of the lands involved. May their occupancy and improvement be regarded as constituting a reservation or disposition of the lands?

Section 2 of the grant of public lands to the Railroad Company, predecessor of Central Pacific Railway Company, contained the following language:

"* * * And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid, shall be selected * * * in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." 14 Stat. 239, Act Congress July 25, 1866.

While it is true that prior to the Act of March 3, 1875, 18 Stat. 420 (Comp. St. § 4611), extending the homestead privileges to Indians, Congress did not recognize the individual right of an Indian to take a homestead under the homestead law, nevertheless, it has long been the policy of the Interior Department not to disturb the possession and occupancy of Indians who have long resided upon the public lands, and have cultivated and improved the same. Evidence of such a policy is found in Ma-gee-see v. Johnson, 30 Land Dec. 125 (1900), where it was held that lands there involved in the possession of Indians were not unappropriated public lands within the meaning of the homestead law; and in Shumacher v. State of Washington, 33 Land Dec. 454, where an Indian had settled upon land which was surveyed in 1880, while the grant to the state of Washington for school purposes was made by the act of Congress of February 22, 1889, c. 180, 25 Stat. 676, the ruling was that, inasmuch as at the date of the survey the land was in the possession of an Indian living apart from his tribe and cultivated by the Indian, it was "otherwise disposed of" under authority of Congress within the meaning of that term as employed in the act making the grant of school lands to the state. Secretary Hitchcock said:

"This Department has uniformly respected the occupancy of Indians upon the public lands living apart from their tribes, and has, by circular, directed the register and receiver of the several land offices to peremptorily refuse all entries or filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon (see circular of May 31, 1884, 3 L. D. 371; reissued October 26, 1887, 6 L. D. 341), and has held that such lands are not unappropriated lands within the meaning of section 2289 of the Revised Statutes and are therefore not subject to homestead entry. See Ma-gee-see v. Johnson (30 L. D. 125)."

To the rulings of the Department the courts will give much weight. U. S. v. Moore, 95 U. S. 760, 24 L. Ed. 588; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Midway Co. v. Eaton, 183 U. S. 602, 22 Sup. Ct. 261, 46 L. Ed. 347. It was held in Buttz v. No. Pac. R. Co., 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330, there can be no doubt that lands subject to Indian occupancy may be granted to others by Congress, but the language of the act under consideration in that case showed very clearly that Congress intended the grant to become effective as soon as the Indians were removed from the land or as the right of occupancy was terminated. Furthermore, in that case it appeared that the Indians had actually been removed to their respective reservations before the grant to the

Northern Pacific Railroad Company was held to be effective. In the present case for years prior to 1866 Indians occupied and improved the lands described in the decree, and the United States made no attempt to interfere or to disturb their possession. If the contention of the railroad company is correct, it necessarily leads to the conclusion that Congress meant to take away from the individual Indians homes which they had long possessed and improved and were in possession of when the grant was made; and, moreover, that such intention was expressed without making provision for compensation to the Indians. It may be that such a construction is the true one; but, in the absence of clear expression or binding authority in support of it, we shall adopt a view more in harmony with the idea repeatedly announced: that the Government meant to protect the Indians in their occupancy and possession. We, therefore, hold that the learned judge of the District Court was correct in deciding that, although the right of the Indians was only that of occupancy, nevertheless it was a substantial right respected by the United States, and not to be invaded by private individuals without authority of law, and that the lands actually occupied and improved at the time of the grant were reserved and otherwise disposed of, subject always to be interfered with or terminated by the United States. Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440; Nadeau v. U. P. R. R. Co., 253 U. S. 442, 40 Sup. Ct. 570, 64 L. Ed. 1002.

[2, 3] It is also argued that the United States lacked the capacity to maintain the action by reason of want of interest; that there was no jurisdiction; and that there was a prior action pending in the state court, involving the same issues presented in the present controversy. Capacity to maintain suit by the United States in its own right and as guardian of the Indians was recognized in United States v. Board of County Commissioners of Osage County, 251 U. S. 128, 40 Sup. Ct. 100, 64 L. Ed. 184; Heckman v. U. S., 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. We see no merit in the point that the case should have been abated because of the suggestion in the record that there was another case involving possession of the same land pending in a court of the state of California. The litigation in the state court involved the right of possession to the land, whereas the present suit is one to cancel the patent issued to the railroad company, a direct attack upon the patent by a suit which could be instituted and maintained only by the government itself.

[4] The doctrine of estoppel is inapplicable, for, granting that the Department of the Interior at one time accepted leases from the railroad company for the lands in question, if we are right in the view that the land was excepted from the grant of the railroad company, or even if the grant was taken subject to the right of Indian occupancy, then the acts of the agents of the government in taking leases was unauthorized, and the government is not bound by such unauthorized acts.

Nor can the appellant railroad company rely on the statute of limitations. N. P. Ry. Co. v. United States, 227 U. S. 355, 33 Sup. Ct. 368, 57 L. Ed. 544; United States v. Whited & Wheless, 246 U. S. 552, 38 Sup. Ct. 367, 62 L. Ed. 879.

By cross-appeal, the government has asked for a cancellation of the patent to the railroad company, and that the decree of the District Court be modified so as to sustain the right of the Indians to the possession of the entire area of each legal subdivision on which they have made any improvements, and that where any part of a 40-acre tract is shown to have been improved and used, such improvement and use extends to the entire subdivision. In Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800, the Supreme Court said that a settlement upon a portion of a quarter section of the public lands and the making of the improvements thereon as required by law will sustain a pre-emption claim to the whole quarter section as against subsequent settlers. It is generally true too that unless the law provides otherwise, public lands are disposed of only according to the legal subdivisions of the public survey, and that where there has been a use and occupation of one 40-acre tract, the whole technical quarter section will be excepted from a grant to a railroad company. The Interior Department so ruled in Union Pac. R. R. Co. v. Simmons, 6 Land Dec. 172, and in Melder v. White, 28 Land Dec. 412, 420. Applying the usual rule, Ellen Ruff should be allowed to retain the possession of the east half of the northeast and the southwest of the northeast quarter of section 23; and Maggie and George Wall should be allowed to retain the possession of the southwest quarter of the southwest quarter and the east half of the southwest quarter, the west half of the southeast quarter and the southeast quarter of the northwest quarter of section 13, because the evidence is that they have improved, used, and actually inclosed a considerable part of each of these several subdivisions.

Furthermore, we think it must follow that as the lands were actually occupied and lived upon and improved by the Indians, they were not public lands as included within the general land laws of the United States, and hence they did not pass under the grant to the railroad company, which was authorized to take lieu lands.

The decree is reversed, and the cause remanded, with directions to enter a decree canceling the patent.

Reversed.

ALASKA HOMESTAKE MINING CO. v. KRAMPITZ.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1921.)

No. 3641.

Mines and minerals ⇐112(4)—Notice by lessor held sufficient to protect property from liens under Alaska statute.

Laws Alaska 1915, c. 13, defines a "mine" as including all claims of the same owner being worked together and all buildings, structures, and machinery which are fixtures thereon and used in connection with its working, and provides that all work done thereon at the instance of any person in privity with the owner shall be deemed to have been done at the instance of the owner, whose interest shall be subject to a lien therefor unless he shall give notice that he will not be responsible for the same by posting notices in writing on the mine, which, in case the mine is being operated by a lessee, shall refer to the recorded lease. It also

provides for a lien on a mill or machine for work done about the same unless a similar notice is posted "on such mill or machine." *Held* that, where a mine and the machinery and tools thereon and used in working the same are under one ownership, but are being operated and used by a lessee, notices posted on the mine by the owner, referring to the recorded lease, and stating that the owner would not be responsible for any work done on the claims or in aid of mining operations thereon, were sufficient to protect both the mine and all machinery and equipment thereon from liens for work done thereafter by employés of the lessee.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Suit in equity by the Alaska Homestake Mining Company against R. A. W. Krampitz. Decree for defendant, and complainant appeals. Reversed and remanded, with directions.

Upon a default judgment in favor of Krampitz for himself and certain other lien claimants to foreclose liens against certain property in the possession of the Free Gold Mining Company, the marshal sold certain property to Krampitz. Thereafter the Alaska Homestake Mining Company brought this suit against Krampitz to set aside the decree in the foreclosure suit referred to in so far as the same affected the property rights of the Alaska Homestake Company. The court set aside the judgment and after trial dismissed the complaint in the present suit. The mining company appeals.

Appellant, as owner of the Camp Bird No. 1 and Camp Bird No. 2, leased the claims together with "all improvements, machinery, tools, buildings and equipment upon or near said mining claim and used or to be used in connection with the working or development of the same, * * * including a certain quantity of tools and equipment in Valdez, Alaska, the same to be taken to said mining claims by the parties of the second part." The lessees were Whalen and Quitsch. Under the terms of the lease, all improvements, machinery, tools, and equipment placed on the property by the parties of the second part during the time of the running of the lease at the expiration of the term were to be the property of the party of the first part, not to be removed from the property by the parties of the second part, and in case of expiration of the lease prior to October 25, 1922, by reason of a violation of the terms, then all the improvements and tools and other equipment should be the property of the mining company. The lessees also agreed to have a compressor on the claims and to put a mill thereon. The conditions of the lease were made binding upon the assigns of all the parties.

The original lessees, after operating for a time, on June 3, 1918, assigned the lease and all their rights thereunder to the Free Gold Mining Company, which went into possession and operated the mines until 1920. In June, 1919, the Homestake Mining Company posted on the ground notices reciting that it was the owner of the Camp Bird No. 1 and Camp Bird No. 2 mining claims leased to Whalen and Quitsch by lease then of record; that the lease was assigned to the Free Gold Mining Company by assignment of record: "that all work being done on said mining claim or to aid in their development or operations is done under and by virtue of said lease by the lessee or their assigns, and said Alaska Homestake Mining Company will not be responsible for any wages of employés engaged in any kind of work upon said claims or in aid of mining operations thereon."

The District Court found that about January, 1920, the lessees and their assigns failed for more than 30 days thereafter to keep at least six men at work upon the mine and failed to keep the premises free of labor liens as required by the provisions of the lease; and that upon January 10, 1920, Krampitz and five others filed claims of lien upon certain machinery, tools, and other equipment on the premises and upon certain gold amalgam taken from the mines, all the claims of lien being for wages for labor performed subsequent to the posting of the notice referred to.

The court also found that the property sold by the marshal consisted of cer-

tain mills, engines, beltings, and cars and tools, but that no part of the property sold was affixed to the ground so as to be included within the terms "mine" or "mining claim" as defined in chapter 13 of the Session Laws of Alaska of 1915; that all the property, except some gold retort, was within the definition of "mill" or "machine" as defined in the laws of Alaska; that the gold retort was within the class of property defined as "dump or mass of mineral bearing sand, earth or rock," etc.; that the notice was not posted upon any of the personal property particularly described in the findings; and that the liens and equities of the defendant were superior to any right or claim of the mining company.

L. L. James, Jr., of San Francisco, Cal., John Lyons, of Seattle, Wash., and E. E. Ritchie, of Valdez, Alaska, for appellant.

J. L. Reed, of Valdez, Alaska, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The principal question involves the legal effect of the notice posted by the mining company notifying all persons interested that it would not be liable for wages of employés of the lessee. The statute under which the lien is claimed provides (section 2) that when two or more claims are contiguous and owned or claimed by the same person and are worked through a common shaft or at one mill, then all mining claims, lodes, or deposits so owned and worked, and all roads, flumes, pipe lines, "buildings, structures, superstructures and machinery which is a fixture thereto thereon and used in connection with the working thereof," shall be considered one mine.

Section 5 provides that all work done on or upon a mining claim at the instance of any person in privity with or having the right of possession or privilege of working or mining thereon from the owner or his authorized agent, in developing, mining, or doing other class of work in mining such mining claim, or the separation or reduction to a commercial value of the minerals therein or extracted therefrom, shall be deemed to have been done at the instance of the owner, and the owner's interest shall be subject to any lien filed in accordance with the provisions of the act, unless such owner shall, within ten days after he shall have obtained knowledge of such work or labor being performed, give notice that he will not be responsible for the same, by posting notice in writing to that effect in three conspicuous places on such mine or mining claim; and should said mine or mining claim be worked or mined by a lessee under a written lease or lay or under a bond or contract of sale from the owner or executed by his authority, such lease, bond, or contract must be recorded in the precinct records of the precinct wherein the mine or mining claim is situate, and the notice of nonliability aforesaid shall refer to the record of such recorded instrument.

It is also provided that all work done about a mill or machine used in mining, and on account of which the same is subject to a lien under the act at the instance of any person having the right of possession or right of use from the owner, shall be deemed to have been done at the instance of the owner of the mill or machine, and the owner's interest is made subject to the lien unless the owner within ten days

after he shall have obtained knowledge of such use, give notice of his interest therein, and that he will not be responsible for the labor involved in such use, by posting a notice in writing to that effect in a conspicuous place on such mill or machine, etc.

The provisions cited make it plain that for the purposes of the lien law, when mining property is held under one ownership, the claim and all improvements and fixtures used in connection with the working of the mine shall constitute one mine. They make it equally clear that while there shall be a lien for work done upon a mining claim at the instance of any person in privity with or having the right of possession or privilege of working from the owner, and that the owner's interest shall be subject to a lien, nevertheless the owner may exclude his interest from the operation of the statute by giving and posting the notices in writing to the effect prescribed. We cannot sustain the view of the District Court that the notice only protected the mining claims as distinguished from the improvements and fixtures upon the claim.

Section 3 of the statute provides that while the liens shall not be deemed one exclusive of the other, but shall attach, "and may be claimed for the same labor" upon the mine or mining claim, and the dredge and mill or machinery, and the dump, should the facts relative to the labor warrant the same; "and it shall be optional with the lienor to claim a lien on one or all the different classes of property subject to his lien for the same labor." It is also provided should "one class or kind of property" be insufficient security therefor, then any other class or kind which may be lienable under the act, may be concurrently concomitantly claimed and subjected thereto."

There appear to be three classes of property upon which liens may be claimed: (1) The mining claim; (2) the machinery, mill, dredge, and like property; (3) the gravel, ore, rock, minerals, gold dust, and gold. Claim of lien may be made for the same labor on any one or all classes, but there must be a claim upon the class to be subjected before the lien can attach.

Section 6 of the act tends to confirm this view. By its provision with respect to the procedure to be followed, if the employment has been continuous under one contract, "the lien claimant may in one lien notice claim his lien against more than one of the different classes of property mentioned in section 1 of this act, provided the amount claimed against each separate class of property be specified, the property sought to be charged be identified sufficiently, and the name of the owner or reputed owner thereof be stated."

Again, in section 10, it is provided that any number of persons claiming may join, and should a lien claim be filed for the same labor against two separate kinds of property claimed or owned by different persons, the court may adjudge the liability of each kind of property and designate which should be sold first to discharge the amount of the lien claimed. Also, section 11 makes a substantial compliance in matters of procedure and contents of lien notice sufficient, provided that such notice shall satisfactorily show the "property sought to be charged with the lien sufficient for identification." In section 13 there is a provision

to the effect that whenever the phrase "different classes or kinds of property" subject to lien is used in the act, "the same shall refer to mines and mining claims as hereinbefore designated as one class; dredges, steam shovels, mills and machines as another class; and dump or mass of mineral bearing sands, earth, ore, rock, etc., as a third class."

In the present case the liens were filed upon certain machinery, tools, and other equipment on the premises belonging to plaintiff and upon certain gold amalgam taken from the mine. But the notice posted by the Homestake Company owner advised all that the work being done was under the lease already referred to, and that that company would not be responsible "for any wages of employés engaged in any kind of work upon said claims or in aid of mining operations thereon." This was enough, we think, to advise all that the mining company would not be responsible for work done upon the claim whether in mining, or upon machinery upon the mine, or in extracting ore and reducing the same to commercial value. Stinson v. Hardy, 27 Or. 584, 41 Pac. 116; Washburn v. Inter-Mountain Mining Co., 56 Or. 578, 109 Pac. 382, Ann. Cas. 1912C, 357. No liberality of construction which should prevail when a lien has once attached can extend a lien to the owner's interest where the statute says it shall not apply, if the owner gives notice to the effect prescribed. Any one reading the notice hereinbefore set forth could not have been misled, for the one and only meaning thereof was to announce that the company would not be responsible for the wages of men engaged in "any kind of work upon the claims" or "in aid of mining operations thereon."

Assuming that the machinery was personalty, it could not be reasonably held that it was necessary to post the notices upon each separate piece of personal property upon the claims. One of the notices was conspicuously placed upon a building in which part of the machinery was placed. All referred to the record which enabled one to learn the full contents of the lease; substantial compliance was had.

The lower court held that a certain quantity of gold retort which was sold as personal property was within the statute defining dump or mass of mineral bearing sands, ore, rock, etc. The retort was claimed by the mining company as royalty under the lease which provided that the lessees were to operate the mines and to pay a royalty of 12½ per cent. gross on all mineral production, and that all output was to be delivered to the Bank of Valdez, which was to have the ore reduced, and when the proceeds were received was immediately to credit 87½ per cent. to the credit of the lessees and 12½ per cent. to the credit of the lessors. But as the rights of the parties are to be ascertained by the effect of the notices posted, it would seem that the bank became merely a trustee for the parties separately when the gold was deposited, and there was not the relationship of debtor and creditor between lessor and lessee.

At the time of the institution of the lien foreclosure suit and when the judgment therein was rendered and the sale of property was made, the Alaska Homestake Mining Company, admitted to be a foreign corporation, had not complied with the laws of Alaska governing for-

eign corporations doing business within that territory. On the other hand, it is of record that the mining company did comply with such laws prior to bringing the suit now under consideration. Nevertheless, the appellee herein contends that the mining company was barred from bringing it, and that contracts with citizens of Alaska were void under the provisions of the Alaska Code of 1913, § 660.

Under the authority of Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, the company was not engaged in doing business. It was involved in merely a single transaction.

The judgment is reversed, and the cause is remanded, with directions to enter a decree in favor of the Alaska Homestake Mining Company.

Reversed.

DIAMOND et al. v. CONNOLLY et al.

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

No. 3662.

1. **Wills ⇐111(2)—Instrument held inadmissible as testamentary disposition.**
A written instrument, purporting to be a contract by which one party, for a consideration named, agreed that on his death his estate should go in equal parts to the other parties, the instrument consisting of two pieces of paper glued together, on one of which was the body of the contract, and on the other the signatures and date line, in different colored type from the body, *held* inadmissible in evidence as a testamentary disposition of the property of the promisor, after his death, in the absence of convincing proof that it was in the same condition when signed.

2. **Descent and distribution ⇐84—Administrator, procuring distribution to himself and others, held chargeable with fraud.**
Defendant, as administrator, procured an order for distribution of the estate to himself and his brothers and sister, who were cousins of decedent, as the heirs at law. Before making actual distribution, he went to Ireland and for a fraction of its value obtained a conveyance of her interest in the estate from a half-sister of decedent, who was old and illiterate, and who, under Rev. Codes Idaho, §§ 5702, 5715, was entitled to the entire estate, provided she claimed it within five years after decedent's death. After expiration of the five years defendant distributed the estate in accordance with the decree. *Held*, that he was chargeable with fraud against complainants, children of the half-sister, who as next of kin became the heirs at law and entitled to the estate on failure of their mother to claim it within the five years, and for whom defendant was trustee.

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

Suit in equity by Celia Diamond, William Diamond, Bridget McGrail, and John McGrail against Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, and others. Decree for defendants, and complainants appeal. Reversed.

For prior opinion, see 251 Fed. 234, 163 C. C. A. 390. Certiorari denied 256 U. S. —, 42 Sup. Ct. 169, 66 L. Ed. —.

The appellants Celia Diamond and Bridget McGrail, with their respective husbands, by their original bill in this case sued the appellee Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, and

Lawrence F. Connolly individually, and John J. Connolly and John E. McBurney—the latter two as sureties on the bond of the administrator—and in the bill alleged in substance that the complainants Celia and Bridget were the heirs of John Corbett, deceased, of whose estate Lawrence F. Connolly was appointed administrator by the probate court of Kootenai county, Idaho, where Corbett died; that when Lawrence F. Connolly petitioned for such letters of administration he represented to the court that William Connolly, John Connolly, and himself were brothers, and that one Ellen Udell was their sister, all of whom were cousins of the deceased, John Corbett, and were his heirs at law, notwithstanding which representations Lawrence F. Connolly not only knew that the parties so named by him were not the heirs at law of the deceased, or the next of kin, but withheld and concealed from the complainants knowledge of the death of Corbett; that he made the said representations with intent to deceive the court and to defraud the complainants; that subsequent to the appointment of Lawrence F. Connolly as such administrator John J. Connolly and John E. McBurney became sureties on his bond as administrator, and that in March, 1907, the said administrator filed an inventory and appraisement of the estate of the deceased, showing its value to be $21,356, which the complainants alleged was grossly disproportionate to its real value; that subsequently, and on August 2, 1909, the said administrator prayed for a decree of distribution of the estate, falsely representing to the court that he and his said brothers and his sister were heirs at law of the deceased, which representations were made with the knowledge and assent of the said brothers and sister, and with intent to deceive the court and defraud the complainants; that subsequently, and on August 23, 1909, the said probate court, acting upon that petition and by reason of the said false representations, entered a decree distributing to said Lawrence, William, and John Connolly, and Ellen Udell, all of the said estate in equal parts, and thereafter, on the 28th of June, 1912, the said Lawrence F. Connolly, as such administrator, distributed the estate to himself and to his brothers and sister, each knowing that none of them was rightfully entitled to any share in the estate; that about a year after the entry of the decree of distribution the death of Corbett was first brought to the knowledge of the complainants by neighbors who read of the same in a newspaper; that the complainants Celia and Bridget, who were unable to read or write, at once had a friend write to their mother of the death of their uncle, John Corbett, believing, under the advice of their counsel, that their mother was the sole heir of the deceased, and acted in that belief until about August, 1916, when they went to Idaho, where they were told by Caleb Jones, an attorney at law of Spokane, Wash., that they were the heirs of the deceased in their own right; that Lawrence F. Connolly, while administrator of the estate of the deceased, went to Ireland, where the complainants lived, and by fraud and misrepresentation as to the value of the estate procured an assignment to himself, of date April 1, 1911, of all the interest of Bridget Madden, their mother, who was then 85 years of age, and an illiterate woman of failing understanding, in the estate of the deceased, John Corbett; that thereafter, and in the year 1912, a suit was instituted in a state court of Idaho in behalf of Bridget Madden to establish her right to succeed to the estate of the deceased, which suit resulted in a decision of the Supreme Court of the state to the effect that she never had any interest or right therein (Connolly v. Reed, 22 Idaho, 29, 125 Pac. 213); that thereafter the Attorney General of the state, in connection with counsel for Bridget Madden, instituted a suit to have the said estate escheated to the state of Idaho, which suit resulted adversely to the contentions of the Attorney General and of such counsel (Connolly v. Probate Court, 25 Idaho, 35, 136 Pac. 205).

The original bill further alleged that, during the times that have been above alluded to, the complainants Celia and Bridget were informed by a number of attorneys in whom they confided that their mother was the sole heir of the deceased, Corbett, and that they would have no direct interest in his estate until the death of their mother; that their said mother died in Ireland August 26, 1914, and that shortly before her death the complainants learned of the decision of the Idaho courts denying her claim to the estate of the deceased,

and that the plaintiffs were then told that, inasmuch as their mother had been denied any right in the estate, they could have no right, and that not until August, 1916, did they know of the disposition of the Corbett estate, or that they were the heirs of the deceased, whereupon they brought the present suit.

Subsequently the complainants by leave of the court so amended paragraph XIX of the bill, wherein it was alleged that Lawrence F. Connolly, as the administrator of the estate of the deceased, falsely represented that he and his brothers, William Connolly and John J. Connolly, and his sister, Ellen Udell, were his heirs at law, as to insert in place of the words "that said representations were made by said Lawrence F. Connolly," the following: "At the same time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly while acting as administrator of said estate."

The answer of the defendants, among other things, put in issue all of the averments of fraud, pleaded in bar various sections of the Idaho statute of limitations, set up laches on the part of the complainants, the said assignment to Lawrence F. Connolly by Bridget Madden of all of her interest in the estate of the deceased, and also an alleged written contract by which for a valuable consideration Corbett provided that at his death all of his property should go to the said Lawrence F. Connolly, John J. Connolly, William Connolly, and Ellen Udell. After trial the bill was dismissed at the complainants' cost, from which decree the present appeal comes.

Caleb Jones, B. B. Adams, and O. C. Moore, all of Spokane, Wash., for appellants.

C. W. Beale, of Wallace, Idaho, and Ezra R. Whitla, of Cœur d'Alene, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). When the case was before this court on writ of error to the judgment of the court below sustaining the demurrer to the bill and dismissing it, that judgment was reversed, and the cause remanded, with instructions to require the defendants to answer. 251 Fed. 234, 163 C. C. A. 390. The question of the sufficiency of the bill is therefore settled.

One other thing we must take to be settled, and that is the fact, found by the court below, that the deceased, Corbett, was the half-brother of Bridget Madden. The record would not, in our opinion, justify us in interfering with that finding. Therefore it is clear, in view of the former decision of this court (251 Fed. pp. 237, 238, 163 C. C. A. 390), and of the statutes of Idaho and the decisions of its Supreme Court there referred to, and of the further fact shown by the record that Bridget Madden, a nonresident foreigner, failed to initiate her claim to the estate of the deceased within the required statutory time after his death, there can be no doubt of the right of the appellants Celia Diamond and Bridget McGrail to judgment, unless they failed to establish by proof the alleged fraud, or their rights are barred by limitation or laches, or by the conveyance from Bridget Madden, or by the alleged written contract by which for a valuable consideration Corbett provided that at his death all of his property should go to the said Lawrence F. Connolly, John J. Connolly, William Connolly, and Ellen Udell.

[1] Respecting the latter alleged contract the court below said in its opinion:

"In support thereof defendant offered in evidence a writing bearing date April 28, 1899, at Erina, Nebraska, where all the parties then resided. For certain valuable considerations, therein named, Corbett agreed that at his death all his property should in equal shares go to the four Connollys, and upon the other hand, in case of the prior death of a Connolly, Corbett was to share in his estate equally with the other parties. To the instrument are attached the genuine signatures of all the parties, including Corbett. The infirmity of the instrument as evidence lies in the fact that it consists of two pieces of paper glued together, upon one of which is the body of the agreement, and upon the other the signatures and date line together with the name of a witness. In corroboration of his own testimony as to the circumstances of its execution, defendant produced in court a citizen of Nebraska, living near Erina, who testified that he drafted the instrument, and explained how pieces of paper happened to be used. Another witness testified that Corbett left it in his keeping for a short time, and still another as to finding it with other effects of the intestate some time after his death. There was no attempt to cover up the fact that the instrument is 'pieced,' for the body is in green type while the latter part is in purple It bears the appearance of having been in its present condition for a considerable time, and the relations existing between the parties at the date it bears were such that it cannot be said to be improbable that Corbett would have entered into such an arrangement.

The veracity of the witnesses is not impeached, there is no contradictory testimony, and there are corroborating circumstances. But, upon the other hand, there are certain inherent improbabilities and opposing circumstances. Upon the one side it is pointed out that defendant did not plead or produce the instrument in the probate court, and upon the other it is to be said that at the very outset, when the controversy first arose, he referred to it, and soon thereafter exhibited it to Bridget Madden's attorneys. Upon the whole, it is thought that if, in such a case, it were requisite only that there be a preponderance of the evidence, the finding would have to be for the defendant; the weight is decidedly upon that side. But, while I have discovered no adjudication upon the subject, I am inclined to think that, where the law requires evidence of a transaction to be in writing, an instrument of this character ought not to be received, unless the proofs are so convincing as to leave little, if any, room for doubt that it was in the same condition when it was signed. It is so unusual for parties to commit their agreements to a form so objectionable that a strong presumption should be indulged against it, especially in a case where, as here, one of the parties is dead.

Injustice may sometimes result from the enforcement of such a rule, and in this case the rejection of the instrument may so result. But such a possibility also attends the enforcement of the rule requiring written evidence. The imprudence of putting a contract containing executory provisions to become operative only upon the death of one of the parties into such an unusual and precarious form should have been obvious, and, if the defendant suffers by reason of the rejection of the instrument, his loss must be attributed to his own want of care. My conclusion is that, while preponderating in the defendant's favor, the proofs are not sufficiently conclusive, and hence the offer should have been rejected, and accordingly the instrument will be stricken out and disregarded."

An inspection of the original of that alleged contract which was afforded us at the oral argument of the case confirms us in the opinion that the court below was right in its ruling regarding it.

The defenses based upon laches and the limitations prescribed by the statutes of Idaho were covered and disposed of by the former decision of this court (251 Fed. page 241, 163 C. C. A. 390), where it was also decided that the sureties of the administrator were proper parties to the suit in order to do complete justice "in case the administrator should fail to pay."

[2] That leaves only the question of fraud, which is, in our opinion, the only real question for our consideration and determination on the present appeal. Upon the evidence the court below reached the conclusion that there was no fraud upon the part of the administrator, and gave judgment for the defendants.

There are certain pregnant facts in it which preclude us from taking that view of the case. That he who undertakes the administration of the estate of a deceased person is a trustee for the heirs of the deceased was expressly held by this court when the case was last here, and is the well-established law. Many years ago, in the leading case of Michoud et al. v. Girod et al., 4 How. 503, 11 L. Ed. 1076, involving a purchase by executors at public sale of property of the estate, where they were empowered by the will to sell the estate of their testator for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were, the Supreme Court of the United States said:

"The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—per interpositam personam—carries fraud on the face of it. * * * The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest; but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

The evidence in the present case shows that Corbett died in January, 1907, and that the decree of distribution of his estate upon the petition of the administrator was entered August 23, 1909, and that on the 28th of June, 1912, the entire estate was actually distributed by the administrator to himself, his brothers, and his sister. Between the time of the entry of the decree of distribution and such actual distribution, however, according to the evidence, to wit, in the spring of 1911, the administrator went to Ireland, taking with him a Catholic priest, to see the old and ignorant woman, Bridget Madden, for the purpose of acquiring all of her interest in the estate. It is undisputed that, being the half-sister of the deceased, she was, under and by virtue of section 5702 of the Revised Codes of Idaho, entitled to the entire estate, and by virtue of section 5715 of the same Codes, although a nonresident foreigner, was entitled to take the estate by succession at any time within five years after the death of the decedent.

The record, therefore, shows that Bridget Madden was, in the spring of 1911, at the time she was approached at her home in Ireland by the administrator of the estate of the deceased, accompanied as he was by the Catholic priest, entitled as next of kin to succeed to the entire estate of the deceased (Corbett), and that she then had nearly a year within which, under the law of Idaho, to make claim to it. This case is therefore, wholly unlike that of Wilson v. Day, 260 Fed. 788, 171 C. C. A. 514, referred to in the opinion of the court below, for there the property in question had ceased to be property of the estate of the deceased when the negotiations in question in that case occurred. See page 798 of 260 Fed. (171 C. C. A. 514).

The learned judge seems from his opinion to have attached great importance to the testimony given on behalf of the defendants, to the effect that the administrator did not know and had never heard of the existence of Celia Diamond or Bridget McGrail prior to the entry of the decree of distribution. But, beyond any sort of question, he did know while still administrator, and therefore trustee of the estate of the deceased, that if and when the right of succession existing in Bridget Madden should cease by reason of her failure to claim the estate within five years after the death of the deceased, there might be other "next of kin" entitled to take by succession under and by virtue of the above-cited section 5702 of the Idaho statute which provides that

"If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree," etc.

For such "next of kin," whoever they might be, the administrator of the decedent's estate continued trustee. Yet, while occupying that relation to the estate, and to whoever might be entitled to succeed to it under the law of Idaho, the uncontradicted evidence shows that the administrator went to Ireland in the spring of 1911, taking with him a Catholic priest, and on the 10th day of April of that year obtained from Bridget Madden, the half-sister of the deceased, in consideration of $2,500 paid to her, and $1,500 paid to her lawyers, a deed purporting to convey to him the entire estate of the deceased, which was appraised under his administration, as has been seen, at $21,356 in value, and which the evidence shows in truth greatly exceeded that amount.

It is true that the appellants Celia Diamond and Bridget McGrail did not and could not, as we think and as did the court below, claim to derive any right under or through Bridget Madden, but only as next of kin of the deceased in the event she did not make claim to the estate as heir within the five-year period allowed by the Idaho statute for that purpose. But, most obviously, the administrator represented, as trustee, that contingent right in them precisely the same and to the same extent as he represented as trustee the right of Bridget Madden as heir; and the same principle of equity, in our opinion, forbade him from acquiring, or in any way defeating, the interest or right of either the heir or next of kin.

The judgment is reversed, and the case remanded to the court below, for further proceedings in accordance with the views above expressed.

KLAUER v. WESTERN METAL SPECIALTY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 20, 1921.)

No. 2866.

Patents ⊂=328—Reissue 14,648, for charcoal burner, held not infringed.

The Klauer reissue patent No. 14,648 (original No. 1,188,880), for a charcoal burner, adapted to generate carbon monoxid gas, which is the essence of the invention, in view of the prior art and proceedings in the Patent Office, is limited to the form of burner described and claimed. As so construed, claims 5, 7, 8, and 9 *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit in equity by William H. Klauer against the Western Metal Specialty Company and Julius J. Goetz. Decree for defendants, and complainant appeals. Affirmed.

Samuel W. Banning, of Chicago, Ill., for appellant.

F. C. Dennett, for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The patent in suit, reissue No. 14,648, original 1,188,880, pertains to a "charcoal burner." Appellant's bill was dismissed in the lower court without opinion, and various defenses, including invalidity and noninfringement, are pressed. Both counsel agree that the ground for the lower court's decision is unknown to them.

While the subject matter of the patent is a charcoal burner it is suggested that "a charcoal burner and carbon monoxid generator" would be more descriptive. Claims 5, 7, 8, and 9 of the reissue patent are involved, and 5 and 7 read as follows:

"5. In a heater, in combination, a base portion, a fire pot spaced from said base portion, adapted to burn charcoal and provided with a grate and having a top closure portion provided with an inlet opening, a magazine communicating for discharge through the opening into the fire pot, and disposed with relation to said opening and with the grate of said fire pot in a manner to retard normal combustion for the purpose of producing carbon monoxid gas, a casing provided with outlet openings adjacent the top of the fire pot, and connecting the magazine and the base portion and provided with inlet openings at points adjacent the space below the fire pot and communicating therewith and with the space between the fire pot and the casing for communication both with the space above and below said fire pot, whereby air is supplied to the fire pot and also to the space between the fire pot and the casing to cool the outer wall of the former and also communicates with the space above the fire pot to be commingled with the carbon monoxid gas."

"7. A combined heater and carbon monoxid generator for the purposes herein set forth, comprising, a substantially inclosed vertical fire pot provided with an outlet for the products of combustion located in the upper portion thereof, a grate supported in said fire pot, a fuel magazine for feeding fuel into the fire pot, an outer casing provided with an inlet in its lower portion for supplying air to the fire pot and an exhaust opening for the products of combustion and air above said inlet and leading directly to the atmosphere, said casing surrounding the fire pot and spaced from the vertical side wall

of the latter to form an air passage exterior of the fire pot through which a portion of the air supplied by the inlet in said casing is diverted from the fire pot, the inlet and exhaust openings of the fire pot being within the casing and the inlet to the casing being of restricted capacity with respect to the passage through and around the fire pot, whereby a relatively restricted draft is produced in the fire pot, combustion in the fire pot is retarded and carbon monoxid is generated, which exhausts through the fire pot outlet into the surrounding air chamber and thence through the casing outlet directly into the atmosphere surrounding the casing."

Claim 5 of the original patent was identical with the above-quoted claim of the same number, save only that it contained the limiting clause referable to the fire pot and the casing as follows: "Said casing being spaced from the fire pot."

A serious attack is made upon the validity of the reissue patent, which, in view of our determination of the appeal, need not be considered. Whether the amendment to the specifications without a new verification is fatal, or whether the monoxid generator idea was conceived more than two years after the application was filed, are matters the effect of which we need not determine. Likewise questions presented involving the validity of the reissue patent because of the alleged defective affidavit which supported it we will pass over.

The original specifications, and the presentation of the matter to the Patent Examiner prior to August, 1915, suggested merely a type of carbon burner for use primarily in refrigerator cars. As such, it was not a pioneer. Burners that would long hold fire were by no means novel, and this structure was met by a well-developed art. Charcoal for various reasons was an ideal fuel in such burners.

Moreover, monoxid as a germ destroyer and as a fruit preserver was well known and commonly used. That a burner consuming charcoal could be made to give off carbon monoxid was, of course, also well known. In fact, monoxid is generally recognized as a product of fuel combustion which the manufacturers of charcoal burners must avoid. It is generated when undesired, is present to some degree in almost all instances where charcoal is consumed in slow burners. As carbon dioxid evidences complete combustion, so carbon monoxid evidences incomplete combustion. To create the latter, one should maintain a slow fire.

The patent was allowed in this case solely upon the asserted combination which operated successfully as a slow burner and as a producer of CO_1, a burner so constructed as to generate a somewhat even or regulated quantity of this gas and also to hold the fire for several days. As such, it was valuable to the shippers of fruit partly or nearly ripe, and which fruit was to be transported hundreds of miles. The proceedings in the Patent Office are instructive, and, we think, conclusive on the question of infringement.

After describing a burner of a particular type, appellant set forth many claims, all for a charcoal burner, and all of which were rejected. In the rejection, he acquiesced. Upon amendment, the Patent Office wrote:

"This invention appears to be distinguished from the prior art in the limitations that the fire box is provided with a top formed centrally with an

escape opening for the products of combustion, the converging portion of the magazine extending through said opening, and means for adjusting the fire box with respect to said escape opening may be varied, and should a claim be presented to this subject-matter it would probably be allowable. Other claims drawn to equivalent subject-matter and including the features by which air is fed to the fire box and the products of combustion are permitted to escape from the casing would also be allowable as now advised."

All the claims were thereupon withdrawn, and 12 new claims presented, all likewise dealing with a heater, none of them containing any reference to a monoxid generator. In presenting patentee's claims, his counsel argued:

"In reference to the application for patent for the Baxter car heater, it appears to me that one of the main merits of the heater has been entirely overlooked, and that is the fact that the heater is so constructed and the draft is let in below in such an indirect way that should the car be wrecked and turned over a dozen times, the heater will remain intact (will not come apart) and no fire will escape. * * *

"The second important feature is that it is possible to vary the depth or thickness of fuel on the grate surface, or, in other words, to vary the quantity of burning fuel, and at the same time decrease the draft in direct proportion to the quantity of fuel that is allowed to burn."

Most of the claims were thereupon disallowed; those purely descriptive of a particular type of burner shown in the specifications alone being allowed. On August 24, 1915, some two years five months, after the original filing of the application, reference was first made to the monoxid gas generating qualities of the burner, and the specifications were amended to include:

"Another object of the invention is to provide a heater or burner that will supply the desired amount of heat and at the same time generate and introduce into the car or the compartment in which the heater is placed, carbon monoxid gas to create a preservative effect upon the fruit or other perishable articles contained in the car or compartment.

"Still another object of the invention is the disseminating of a product of charcoal combustion (carbon monoxid gas) within a closed container, as a car body, for the purpose of retarding the ripening process by delaying the action of fermentation in the fruit or vegetable contents of the car or container."

Supporting the amended specifications and claims, applicant argued:

"Applicant's specific heater or apparatus for heating and disseminating carbon monoxid gas is new in the art to which it relates, and it is thought that this case, as now presented, avoids any conflict with the art cited by the Examiner."

To which the Patent Office replied:

"Claims 8, 11, 12 and 13 should set forth the means adapted to generate carbon monoxid gas and for the escape of said gas from the heater."

It is evident from the foregoing that a point was here reached in the presentation of this application for a patent wherein the applicant was emphasizing in his burner its qualities as a monoxid gas producer. The Patent Office in turn demanded that the burner be described with such particularity that it could definitely ascertain how the CO_1 was to be generated and how it would escape from the heater. Appreciating the fact that the application would only be allowed upon his dis-

closing the two important means in his burner for generating CO_1 and for its escape from the heater, he modified his specifications and rewrote his claims. That is to say, the means provided in applicant's burner for generating CO_1 and the means for its escape from the heater were detailed and specifically set forth.

Constructing a burner that differed but slightly, and perhaps not inventionally, from other burners, as burners, the means whereby CO_1 was generated and distributed were the life of the invention, especially in view of the fact that all such carbon burners, when well checked, could be made to generate and distribute CO_1.

In other words, in view of the demand of the Patent Office, and the acquiescence therein by applicant, as well as the disclosures of the prior art, the means for generating and distributing the CO_1 became the essence of the invention. Obviously, such means, under these circumstances, are not entitled to a broad range of equivalency. In view of the history of this application above related, the applicant knew, when he recited his means for generating and distributing CO_1, he was to be limited thereto.

Noninfringement is asserted because appellee's structure differs from appellant's, who described his burner as follows:

"Referring to the particular features of my device, which are instrumental in producing carbon monoxid gas, it will be noted that I have a combustion chamber which is entirely inclosed except that provision is made for free entrance of air below the reticulated bottom thereof and a restricted draft opening is provided at the top, which may be regulated to control the exhaust of gases therefrom.

"Oxygen is required to support combustion and enters below the reticulated bottom of the combustion chamber, and as it enters the combustion chamber and comes in contact with the burning charcoal, carbon dioxid is formed, and as it passes up through the burning charcoal, it unites with carbon and emerges from the surface of the burning charcoal in the form of carbon monoxid. If the combustion chamber were not closed and oxygen were supplied to the combustion chamber above the fuel surface, it would unite with the carbon monoxid or burn. To preserve the carbon monoxid, therefore, the combustion chamber is closed above the burning fuel, and the draft outlet is limited or arranged so as to permit escape of carbon monoxid from the combustion chamber and prevent entrance of oxygen thereto, and the carbon monoxid thus formed passes out through the openings into the compartment in which the heater is located."

True, this is but a preferred form. But in view of what has been said, in view of the prior art, in view of the language of the claims, and in view of the fact that patentee was obtaining a patent upon a type of carbon burner that was, so far as these claims are concerned, a producer and distributor of CO_1 in desired or predetermined quantities, the form described may well be the only type protected. And if doubt otherwise existed, it is removed by the claims. They are drawn to cover just what patentee described. The element "a substantially inclosed, vertical fire pot," etc., appearing in claims 7, 8, and 9, may, under the circumstances, we think, well distinguish appellee's structure.

Appellee insists that its burner is not a CO_1 generator at all, and never was so intended; that, so far as it is a burner generating CO_1

it is subject to objection. But as all such heaters do generate CO_1 under certain operations and conditions, and as appellee's will likewise do so, we may pass to the question of construction. Appellee's heater has, I think, no "inclosed vertical fire pot" as that term is used in the claims. The top of the fire box is composed of two plates, one being used as a baffle-plate. Means for avoiding fires are obviously desirable in a burner that must be subject to jars and unattended for days as these burners are. The baffle-plate is for that purpose. Perhaps there is a restricted escape of the products of combustion, but nevertheless, with such a construction, the fire box could not be said to be a closed one. It is not, as appellant's, operatable so as to control draft and gases. Appellant says:

"Surrounding and extending below the tube is a circular fire box, which has a top, the said top being provided with an opening therein, of substantially the size of the largest part of the tapering tube through which opening projects said tube, and by which the draft and gases are controlled."

"Referring to the particular features of my device, which are instrumental in producing carbon monoxid gas, it will be noted that I have a combustion chamber which is entirely inclosed, except that provision is made for free entrance of air below the reticulated bottom thereof and a restricted draft opening is provided at the top, which may be regulated to control the exhaust of gases therefrom."

But more significant as a distinguishing factor is the effect of the opening in appellee's structure. Bearing in mind patentee was answering the Patent Office's demand for particularity as to means whereby CO_1 was generated and distributed, he pointed out the advantages of a closed fire in his amended specifications as heretofore quoted. In other words, by stressing what patentee was so vigorously stressing before the Patent Office, we find ample support for a finding of noninfringement.

The mere fact that the top of appellee's fire pot is composed of two pieces, one overlapping the other, would not necessarily avoid infringement of the type disclosed in the patent and described in the claims, if mere type or form of structure were the only factor to be considered. But we are here considering a charcoal burner and monoxid generator as one structure, and we must examine the two structures for the purpose of determining whether their differences are merely a matter of type or form or whether they affect the monoxid producing qualities of the burner. Certainly the most that could be said of appellee's burner is that its construction in so far as it deviates from appellant's tends to discourage and avoid the production of monoxid gas.

A further difference between the two structures may be found in the means for conveying air to the fire. Both, of course provide for some outside air entering the ash pit and providing draft. But appellee also permits some air to pass directly to a point above the fire yet within the box. To this extent it is a retardant rather than an inciter of monoxid gas production. True, both structures may and doubtless will under certain conditions produce some monoxid gas, but the patent must be judged by its pretensions as a steady producer of this gas, not as an occasional or accidental producer of it. It is because one

element in the claim is a factor that assists in the production of this gas, and was inserted in the claims because of its influence, and a differently constructed means is a deterrent so far as it acts at all, that we find support for the finding of noninfringement.

There was conducted an experiment before trial, the results of which were given in evidence, and appellant submits them as proof of infringement. In other words, he claims the two structures are similar because of similarity of results; that is, both generate CO_1 in constant and sufficient quantities. We are not impressed by the proof. Upon appellant was the burden of proving infringement. It could have conducted its experiment in a box car or in a similarly constructed and similarly ventilated structure. Instead, it took an air-tight box, 4x4x5 containing but 80 cubic feet of air. Oxygen content was reduced from 19.2 to 6.7 cubic feet before the experiment began. The period of time covered by the experiments was not the same. Appellant's structure was in the box one hour, while appellee's was used but 46 minutes. The CO_1 in the box when appellant's test began was .96, and increased to 1.61 per cent., and showed a steady increase. Meanwhile the oxygen was reduced. When the experiment with appellee's burner began, the CO_1 was 1.44 cubic feet and rose in 23 minutes to 2.24, and during the second 23 minutes fell to 1.60, or nearly 50 per cent. During the same period, the CO_2 steadily increased, while in appellant's case it remained about even.

While no very satisfactory deductions may be drawn from this experiment, it is at least suggestive that had the experiment with appellee's burner continued even for an hour, the decrease in CO_1 would have been such as to entirely eliminate it as a sustained producer of that gas such as patentee described in his invention and claimed his structure to be. Certainly, to determine whether a burner is a CO_1 generator, it was hardly fair to reduce the oxygen content of the air as here shown. Moreover, an air-tight structure would be far more likely to result in CO^1 production than would a car which admitted air as freely even as the ordinary refrigerator car. The record is not silent as to the construction of a refrigerator car, and it appears that in all such refrigerator cars fresh air is constantly admitted.

We cannot escape the conclusion that the experiment, instead of furnishing proof of infringement, is rather suggestive, if not persuasive, of the fact that appellee's burner, under conditions existing in the ordinary box car into which some air could pass, would not be a constant producer of CO_1, but the combustion would be sufficiently complete to distinguish it from the patent. This impression is confirmed by other facts disclosed by the record. Carbon monoxid is odorless, yet extremely poisonous. When inhaled in considerable quantity, it is fatal. This dangerous poison could not be safely allowed to circulate in a refrigerator car without warning notices. Individuals who entered the car at the destination or elsewhere would be overcome by it if produced in the quantities charged against appellee's burner. Notwithstanding this danger, it appears that appellee used its burners without warning and without any record of fatal consequences.

This conclusion of noninfringement is further strengthened by the

presumption which the dismissal of the bill by the District Court creates. We may assume, nothing appearing to the contrary, that the dismissal was on the ground of noninfringement. The weight to be given the experiments in this case depended in part upon the impression created by the witnesses who testified in open court. To a certain extent, therefore, credibility entered into the finding.

We conclude infringement is not established. The decree is affirmed.

MARTORELL et al. v. OCHOA et al.

(Circuit Court of Appeals, First Circuit. November 1, 1921.)

No. 1419.

1. **Parent and child ⇐8—Interests of minors carefully guarded by courts and without it neither parent of infant may sell or incumber property.**
   Minors in every civilized country and under every known form of jurisprudence are a special care of the state, and their interests are carefully guarded by the courts, and neither father nor mother, without some authorization from the sovereign power itself, has any authority to sell or incumber the property of a minor child.
2. **Infants ⇐34—Alienation of property of minors authorized only by court of district of their domicile.**
   Authorization for the alienation of property in Porto Rico of minors should be granted only by the court of the district of their domicile, under Spanish Civ. Code, art. 164, which took effect in 1890; Law of Civil Procedure, arts. 56 and 58, not relating to such matter, in view of article 63, § 23, and article 71.
3. **Adverse possession ⇐84—No title acquired under void deed of minor's property.**
   A deed executed by a mother to lands of minor in Porto Rico under authorization of a court other than that of the district of the domicile of the minor was a nullity, and one who entered into possession under it could not acquire ownership by possession, under Civ. Code Porto Rico, § 1858, which requires good faith on the part of the possessor, since one who acquires the property of a minor in a manner unauthorized by local law is not a possessor in good faith.

Appeal from the Supreme Court of Porto Rico.

Action by Miguel Martorell y Torrens and others against J. Ochoa y Hermano and others. From a judgment of the Supreme Court of Porto Rico, affirming a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Arturo Aponte, Jr., of Humacao, Porto Rico (Frank Antonsanti, of San Juan, Porto Rico, Jose Tous Soto, Manuel Tous Soto, of San Juan, Porto Rico, and Eduardo Flores Colon, of Ponce, Porto Rico, on the brief), for appellants.

Jorge V. Dominguez, of San Juan, Porto Rico, for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. This is an appeal from a final judgment of the Supreme Court of Porto Rico, affirming a judgment of

the District Court of San Juan. The plaintiffs-appellants were minors at the death of their father, a resident of Porto Rico. They with their mother resided and had their domicile in the District of Arecibo. On July 28, 1902, the mother, in the exercise of patria potestas, obtained a judicial authorization from the District Court of San Juan, being a court of a district other than that in which she and the minors resided and had their domicile, for the sale of the interests of the minors in certain real estate, and on March 18, 1904, by virtue of such authorization, she conveyed their interests in said real estate to the firm of J. Ochoa & Bro.

The only error assigned is the ruling of the Supreme Court that the District Court of San Juan had jurisdiction to give this authorization. Article 164 of the Spanish Civil Code, in force in Porto Rico at the time when the District Court of San Juan granted the authorization, is as follows:

"Art. 164. The father, or the mother in a proper case, cannot alienate the real property of the child, the usufruct or administration of which belongs to them, nor incumber the same, except for sufficient reasons of utility or necessity, and after authorization from the judge of the domicle, hearing the department of public prosecution, excepting the provisions which, with regard to the effects of transfers, the Mortgage Law establishes."

The Spanish Civil Code took effect in Porto Rico, January 1, 1890, by virtue of a Royal Decree of July 31, 1889. The law of civil procedure in force at the same time had gone into effect on January 1, 1886, by virtue of a Royal Order dated September 25, 1885, and contained the following articles:

"Art. 56. Any judge impliedly or expressly agreed upon by the litigants shall be competent to take cognizance of the suits arising from actions of all kinds.

"The submission, however, can only be made to a judge exercising ordinary jurisdiction, and who is competent to take cognizance of questions similar to and of the same kind as the one submitted."

"Art. 58. An implied submission is made:

"First. By the plaintiff, by the act of filing his complaint before the judge.

"Second. By the defendant when after his appearance is entered in the action, he takes any further steps therein, except to formally object to the jurisdiction of the judge by declinature."

"Art. 63. In order to determine competency, in cases other than those mentioned in the foregoing articles, the following rules shall apply: * * *

"23. In authorizations for the sale of property of minors or incapacitated persons, the competent judge shall be that of the place where the property may be situated, or that of the domicile of the persons to whom it belongs."

Under these articles of the Law of Civil Procedure it was held by the Supreme Court of Porto Rico, one justice dissenting, that the mother of the plaintiffs in the exercise of patria potestas could apply to any District Court upon the Island of Porto Rico for judicial authorization to sell the real estate of her minor children, notwithstanding the explicit provision contained in article 164 of the Civil Code. The reasoning upon which this decision was placed is that, although the Civil Code went into effect January 1, 1890, four years after the law of Civil Procedure, it did not repeal articles 56 and 58 of the latter, because the Civil Code being substantive law repealed only laws of the

same kind, and did not repeal adjective or procedural laws such as those contained in the Law of Civil Procedure, and that there is no real conflict between them and section 164 of the Civil Code. In support of this interpretation Manresa and Scaevola, distinguished commentators upon Spanish law, are cited, and also judgments of the Supreme Court of Spain of July 22 and September 30, 1857, October 6, 1866, and June 2, 1877, holding, it is said, that—

"The question of territorial jurisdiction has no place in ex parte proceedings because in them jurisdiction is conferred by rule 1 of article 1208 of the Law of Civil Procedure of 1855 upon the judge before whom the proceeding is brought, and that question can be raised only when the proceeding loses its character of an ex parte proceeding and is converted into a contentious cause."

Decisions of the General Directorate of Registries of Spain, of January 22, 1886, May 9, 1889, and February 8, 1907, based upon these decisions of the Supreme Court of Spain, are cited to the effect that the question of jurisdiction does not arise in ex parte proceedings because conferred by the mere act of applying to the court. It is stated by counsel however, and not denied, that section 1208 of the Spanish Law of Civil Procedure was omitted in the revision which went into effect in Spain in 1881, and does not appear in the Law of Civil Procedure which was made applicable to Porto Rico in 1886.

The construction of these articles of the old Spanish Codes, or analogous articles of the present Codes, have been before the Supreme Court of Porto Rico in several cases. In Sola v. The Registrar of Property, 8 P. R. R. 205, the court had before it the question of the proper court in which a declaration of the heirs of deceased persons should be made. Section 75 of the present Code of Civil Procedure is as follows:

"Actions for the following causes must be tried in the district in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this Code:

"(1) For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right, and for injuries to real property."

And it was there held as section 56 of the former Law of Civil Procedure had been reproduced in sections 76 and 77 of the new Code of Civil Procedure that—

"* * * parties seeking a declaration of the heirs of the deceased can be heard by the judge of any District Court."

In Esteras et al. v. Arroyo, 16 P. R. R. 689, which was also a proceeding for the designation of heirs, Sola v. The Registrar of Property was reversed, and it was held that the jurisdiction conferred upon the District Court of the district where the deceased last resided, or where his property is situated, is exclusive; that an application to be declared an universal heir is not an adversary proceeding; and that the party who brings it cannot choose his forum, citing Garzot v. Rubio, 209 U. S. 283, 28 Sup. Ct. 548, 52 L. Ed. 794.

In Nazario v. The Registrar of Property, 16 P. R. R. 635, which was a proceeding to have the ownership of certain real property declared,

it was held that section 395 of the Mortgage Law, which provides that an application praying that the ownership of property be declared to have been established in cases where the petitioner is without a written and a recordable title of ownership shall be presented to the judge of the first instance of the district within which the property is situated, or within which the principal part is situated, if it lies within two different districts, conferred exclusive jurisdiction upon the judge of the district where the property or the principal part is situated.

In the present case, when the first appeal came before the Supreme Court from a judgment of the District Court overruling a demurrer to the complaint on the ground that it did not state a cause of action, the Supreme Court, in an elaborate opinion concurred in by all its members, reversed the judgment of the District Court, and sustained the demurrer, holding that article 164 of the Civil Code repealed articles 56 and 58 of the Code of Civil Procedure. Martorell et al. v. J. Ochoa and Brother et al., 23 P. R. R. 28.

In that opinion the court quotes Manresa on article 1976, the repealing article of the Spanish Civil Code, in which he says:

"Combining in their analysis the terms of the article under consideration, we must consider it an indisputable conclusion that it repeals the provisions of the common civil law of a purely substantive nature, except those which may have been regarded or declared to be still in force; therefore the repealing provision of the said article does not apply to the other civil laws relative to procedure, unless by reason of their peculiar nature they were the object of special provision to the contrary in the Code or cannot coexist with those established therein."

The court found this doctrine of Manresa to be sound, and that article 164 of the Code containing a substantive provision determining the manner and means and the authority which should complete the civil capacity of the father or the mother of the minor in cases of the alienation or incumbrance of real property belonging to their minor children repealed the openly conflicting provisions of the Spanish Law of Civil Procedure. A judgment of the 12th of June, 1894, of the Supreme Court of Spain, was also cited, holding:

"The provisions of the Law of Civil Procedure being a part of the general law and not of the so-called lex fori, they were repealed by article 1976 of the Civil Code in so far as they may be in conflict with said Code, which is a subsequent law; and it cannot be contended that they are in force in consequence of the provisions of article 12 of the Code. * * *"

The court discussed the judgments of the Supreme Court of Spain in which it held that questions of competency are not included in acts of voluntary submission, because the law grants this to the judge before whom the case is tried, and also the decision of the General Directorate of Registries of Spain, and stated that in none of the said judgments or decisions has it been held that the provisions of the Law of Civil Procedure, of 1886, applicable to the question of the competency of the judge, should continue to be applied after the enactment of article 164 of the Civil Code, and stated that in its examination it had been unable to find a single case in which this question had been raised

and decided. The case then went back to the District Court, where there was a trial, and the judge of the District Court found and ruled that the defendants had acquired ownership by prescription under the laws of Porto Rico. From this judgment there was a second appeal, and the Supreme Court—two justices dissenting—sustained the judgment of the District Court. One of the concurring justices, however, concurred only in the judgment and later filed a concurring opinion in which he attacked the reasoning and judgment of the court in its opinion upon the first appeal, and also the second judgment of the District Court, on the ground that if the authorization was given by the court without authority there could be no question of prescription. A motion for a rehearing was then granted, and upon this the final judgment appealed from was rendered. In its opinion the court bases its approval of the judgment of the District Court upon two grounds:

First. That the authorization of the District Court of San Juan was valid and effective in law, and that its former judgment and opinion of July 23, 1915, 23 P. R. R. 28, was erroneous.

Second. That, without receding from its former decision, the judgment appealed from should be sustained on the ground that the defendants had acquired ownership by prescription by reason of section 1858 of the Civil Code.

Two of the justices concurred in the judgment and in the whole opinion; two others concurred, agreeing "with the judgment and opinion, but without considering the matter of prescription"; and one justice dissented in toto.

[1, 2] We think, in the discussion of this case, the Supreme Court of Porto Rico failed to give due consideration to the important fact that minors, in every civilized country and under every known form of jurisprudence, are a special care of the state; that their interests are carefully guarded by the courts, and that neither father nor mother, without some authorization from the sovereign power itself, has any authority to sell or incumber the property of a minor child. The Civil Code in force in Porto Rico in 1902 pointed out the manner in which this authorization could be obtained, and it is elementary that this method must be strictly complied with, for the state itself, as a protector of the rights of the minor, is interested, and under the provisions of the Spanish Code the Fiscal—the attorney of the state—was required to be present at the hearing upon the application and to protect the interests of the minor. While the mother was nominally a party to the proceeding, the real parties in interest were the minor children, and the application by her for judicial authorization to alienate their property did not involve her rights alone. It may be, which we do not decide, that in a strictly ex parte proceeding a suitor may, by vountary submission, choose his forum; but subdivision 23 of article 63 of the Spanish Code of Civil Procedure clearly indicates that the court to which application is to be made for authorization to alienate the property of a minor cannot be chosen, for, if the parent, in the exercise of patria potestas, could choose a court to which application could be made for such authorization, it was entirely unnecessary to provide, as subsection 23 does, that, in the authorization for the

sale of property of minors or incapacitated persons, "the competent judge shall be that of the place where the property may be situated, or that of the domicile of the person to whom it belongs." The only reasonable interpretation that can be placed upon this section is that authorization for the sale of property of minors was not intended to be included in the cases to which submission would apply, under articles 56 and 58. This interpretation is confirmed by article 71 of the Spanish Code of Civil Procedure, which is as follows:

"Art. 71. The rules established in the foregoing articles shall be understood without prejudice to the provision of law in special cases."

The foregoing articles referred to in this section include articles 56 and 58.

Article 164 of the Civil Code contains a provision of law in a special case which is consonant with reason and the protection of the rights of the minor. Articles 56 and 58 may govern submission in general, in both ex parte and adversary proceedings, but in the special case of the alienation of the property of a minor the special provision contained in article 164 of the Civil Code must govern. It is not necessary to hold that articles 56 and 58 of the Code of Civil Procedure were repealed by article 164 of the Civil Code, as they do not apply to the special case covered by that article. The distinguished Spanish commentators, Manresa and Scaevola, both recognize that the repealing clause of the Spanish Civil Code repeals conflicting provisions in the law of procedure; the former stating that this repealing clause "does not apply to the other civil laws relative to procedure, unless by reason of their peculiar nature they were the object of special conflicting provisions in the Code or cannot coexist with those established therein." And the latter, in discussing further article 164 of the Civil Code repealing article 63, section 23, of the Law of Civil Procedure, states:

"Although for the reason stated we are of the opinion that the Code did not and could not repeal the Law of Civil Procedure, the provision of the former (article 164) is conclusive since it orders that the authorization ought to be obtained from the Judge of the domicile."

[3] We think it was the intent clearly expressed that authorization for the alienation of property of minors should be granted only by the court of the district of their domicile; and holding this view it is unnecessary to discuss the question of prescription, as the deed executed by the mother, Rosa Torrens, was a nullity; and one who entered into possession under it could not acquire ownership by possession under section 1858 of the Civil Code of Porto Rico, for that requires good faith upon the part of the possessor, and it has been held in Longpré v. Diaz, 237 U. S. 512, 522, 35 Sup. Ct. 731, 59 L. Ed. 1080, that one who requires the property of a minor in a manner unauthorized by local law is not a possessor in good faith.

It is also to be noted that the Supreme Court of Porto Rico did not, by a majority of its members, affirm the judgment of the District Court, based upon prescription.

The judgment of the Supreme Court of Porto Rico is reversed, with costs to the appellants in this court, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

AGENJO et al. v. AGENJO et al.

(Circuit Court of Appeals, First Circuit. November 1, 1921.)

No. 1414.

1. **Infants ⇐34—Power to authorize sale of property of minors exclusive in District Court of district where property situated.**
   Under Civ. Code Porto Rico, § 229, as it existed in 1910, power to authorize the sale of the property of minors was exclusive in the District Court of the judicial district where the property to be sold was situated, it being clear that the Legislative Assembly, when it adopted the Civil Code and the Code of Civil Procedure, intended to remove, from the operation of sections 76 and 77 of the latter, applications for authorization to sell the real estate of minors in view of Judicial Proceedings, tit. 5, §§ 80–82.

2. **Territories ⇐20—Porto Rico has power to reject provisions of Spanish Civil Code.**
   It was within the undoubted power of the Legislative Assembly of Porto Rico to adopt or reject any of the provisions of the Spanish Civil Code in force at the time the American Civil Code was adopted in 1902, under the Organic Act passed by the Congress of the United States for the island of Porto Rico and approved April 12, 1900, § 15 (Comp. St. § 3763).

Appeal from the Supreme Court of Porto Rico.

Action by Felix Fabian Agenjo and others against Juana Agenjo and others. From a judgment of the Supreme Court of Porto Rico reversing a judgment for plaintiffs, they appeal. Reversed and remanded.

Arturo Aponte, Jr., of Humacao, Porto Rico, for appellants.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., and Luis Munoz Morales, of San Juan, Porto Rico, on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. [1] This case is here by appeal from a final judgment of the Supreme Court of Porto Rico. The question presented is whether, under section 229 of the Civil Code of Porto Rico, power to authorize the sale of the property of minors is exclusive in the District Court of the judicial district where the property to be sold is situated. This section, in 1910, when judicial authorization was given, was as follows:

"Sec. 229. The exercise of the patria potestas does not authorize the father or mother to alienate or burden real property which in any manner belongs to the child, and over which either of them may have the administration, ex-

cept after securing judicial authorization, which shall be accorded by the District Court of the judicial district where said property is situated, upon proof being furnished as to the necessity or utility of such transfer or burden."

The Civil Code, of which this forms a part, took effect in Porto Rico on July 1, 1902, superseding on that date the Spanish Civil Code.

The facts briefly stated are these: The plaintiffs, who were minors, at the death of their father, a resident of Porto Rico, inherited from him certain real estate situated within the judicial district of Humacao, on the island of Porto Rico. In September, 1910, their mother, in the exercise of patria potestas, filed a petition in the District Court of San Juan, asking for authority to convey the minors' interests in this real estate. Authorization was granted and by virtue of the same the real estate of the minors was conveyed.

Through a guardian ad litem an action was brought to adjudge the conveyance null and void and to decree that the party in possession by virtue of the said sale deliver same up to the plaintiffs free of incumbrance and account for rents and profits. There was a judgment for the plaintiffs in the District Court, but the Supreme Court of Porto Rico reversed this and dismissed the complaint. It based its decision upon its interpretation of sections 76 and 77 of the Code of Civil Procedure of Porto Rico, which are as follows:

"Sec. 76. In accordance with its jurisdiction, a court shall have cognizance of the suits to which the maintenance of all kinds of actions may give rise, when the parties may have agreed to submit the suit to decision of court.

"Sec. 77. The submission shall be understood to be made:

"(1). By the written agreement of the parties.

"(2). By the plaintiff through the mere act of applying to the court and filing the complaint.

"(3). By the defendant when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court."

The Code of Civil Procedure went into effect in Porto Rico on July 1, 1904, and the Supreme Court of Porto Rico, construing the above sections in connection with articles 56, 57, and 58 of the Spanish Code of Civil Procedure, and article 164 of the Spanish Civil Code, formerly in force in Porto Rico, and also decisions of the Supreme Court of Spain and of its General Directorate of Registries, in regard to analogous provisions of Spanish law, has held that, notwithstanding the express provision of section 229 of the Civil Code, authorization for the sale of real estate of minors can be granted by the court of any district on the island of Porto Rico, provided the judge thereof exercises civil jurisdiction and is competent to have cognizance of questions similar to and of the same kind as the one submitted.

We cannot assent to this view. Whatever may have been the law and practice under the Spanish Civil Code, it is evident that, when the Legislative Assembly of Porto Rico enacted section 229 of the Civil Code, it intended to confine the authorization for the sale of real estate of minors to the District Court for the district in which the property is situated. We are confirmed in this view by the fact that the Legislative Assembly, in 1907, made an amendment which in clear and unambiguous language makes certain that this was its intent. The

act, as it was first adopted, contained a provision that the authorization should be given by the District Court of the domicile of the minors; but in 1907 it was amended so that the exercise of the patria potestas would not authorize the father or mother to alienate property belonging to the child, except after securing judicial authorization "which shall be accorded by the District Court of the judicial district where said property is situated." Although this section was again amended in 1911, this particular provision was not changed.

We have held in Martorell y Torrens et al. v. J. Ochoa y Hermano et al., 275 Fed. 99, that under the old Spanish Codes the law of voluntary submission, whereby a suitor may choose his forum, did not apply to applications of parents in exercise of patria potestas to sell the real estate of minor children, and that authorization for the sale of their real estate must be granted by the District Court of the domicile of the minors in accordance with article 164 of the Spanish Civil Code.

It therefore follows that articles 76 and 77, which are analogous to articles 56 and 58 of the old Spanish Code, must receive the same interpretation, although we do not find in the Code of Civil Procedure in force in 1907 any provision similar to that contained in section 71 of the old Spanish Code, which expressly exempts from the operation of the articles relating to submission, cases which are specifically covered by other Code provisions.

We think it clear that the Legislative Assembly of Porto Rico, when it adopted the present Civil Code and the Code of Civil Procedure, intended to remove from the operation of sections 76 and 77 of the latter, applications for authorization to sell the real estate of minors.

The amendment of section 229, made in 1907, designating the District Court of the district in which the land is situated as the court to make the authorization instead of the place of the domicile of the minors, evinces a purpose to have the important matter of the alienation of a minor's property passed upon by a court which would possess, or could easily obtain, knowledge of its value. It might authorize a sale at public auction, and, if this be done, the sale is to be had in the presence of and under the direction of the marshal of the district after "publication of the corresponding edicts in the customary places and in a newspaper having a circulation in the district." Judicial Proceedings, title 5, § 82. The only reasonable interpretation to be placed upon sections 80, 81, and 82 of this title is that all the proceedings are to be had in the district where the land is situated.

Section 229 was again amended in 1911 (Laws 1911, p. 118), and made to extend to the alienation or incumbrance of personal property above the value of $500, and making the authorization of the District Court wherein the property is situate necessary.

The Legislative Assembly conferred upon the parent power to alienate the property of a minor under patria potestas, after obtaining authorization in a certain manner, which cannot be departed from.

By the Organic Act, passed by the Congress of the United States for the island of Porto Rico and approved April 12, 1900 (31 Stat. 77 [Comp. St. § 3747 et seq.]), the laws then in force in Porto Rico were continued in force; but section 15 (Comp. St. § 3763) provides:

"That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit."

[2] It was within the undoubted power of the Legislative Assembly of Porto Rico to adopt or reject any of the provisions of the Spanish Civil Code in force at the time the American Civil Code was adopted in 1902; and if, in the exercise of a wise public policy, it provided in clear and unambiguous language that judicial authorization for the sale of land of minors could only be given by the court of the district in which the land is situated and where knowledge of its value could be most easily obtained and the interests of the minors most safely guarded, this cannot be overridden by judicial interpretation. We think not only that the language is clear, but, also, looking at the history of the act and the amendments made to it, that it clearly expresses the legislative intent.

The judgment of the Supreme Court of Porto Rico is reversed, with costs in this court to the appellants, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

LUGO et al. v. BENITEZ et al.

(Circuit Court of Appeals, First Circuit. November 1, 1921.)

No. 1478.

Appeal from the Supreme Court of Porto Rico.

Action by Carlota Gonzalez Lugo and others against Jose J. Benitez and others. From a final judgment of the Supreme Court of Porto Rico, reversing a judgment of a District Court for plaintiffs, the latter appeal. Reversed and remanded, with directions.

Asa P. French, of Boston, Mass., and Arturo Aponte, Jr., of Humacao, Porto Rico (Jose A. Poventud, of Ponce, Porto Rico, on the brief), for appellants.

Henry G. Molina, of San Juan, Porto Rico (Francisco Gonzalez Fagundo, of Humacao, Porto Rico, on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. This is an appeal from a final judgment of the Supreme Court of Porto Rico, reversing a judgment of the District Court of Ponce.

The only question raised by the appeal is whether authorization to sell the property of minors can be given by the District Court of a district in which the property is not situated.

In Agenjo et al. v. Agenjo et al., 275 Fed. 105, handed down by us at this term, we have determined that question in the negative. Other questions were raised in the District Court and covered by its judgment. These were not dealt with by the Supreme Court. We do not pass upon them, but leave them to be dealt with after the case has been remanded.

The judgment of the Supreme Court is reversed, with costs to the appellants in this court, and the case is remanded to that court for further proceedings not inconsistent with this opinion, as amplified and explained by the opinion in Agenjo et al. v. Agenjo et al., supra.

FANNON et al. v. UNITED STATES.

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

No. 3643.

Conspiracy ⇐25—Provision of Lever Act against conspiracy to limit transportation facilities held constitutional and valid.

The provision of Act Aug. 10, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as amended by Act Oct. 22, 1919, making it unlawful to conspire to limit facilities for transportation of necessaries, *held* constitutional and valid.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Criminal prosecutions by the United States against William G. Fannon and others. Judgments of conviction, and defendants bring error. Affirmed.

Davis, Rush & MacDonald, of Los Angeles, Cal., and Allison & Dickson, of San Bernardino, Cal., for plaintiffs 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 HUNT, Circuit Judges.

ROSS, Circuit Judge. The trial of these cases was consolidated in the District Court, and they were brought and submitted here in the same way by stipulation of counsel.

The statute upon which the indictment in each case was based was passed during the late war, and was entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," the fourth section of which (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff) was amended October 22, 1919 (41 St. L. 298), and, so far as here applicable, is as follows:

"That it is hereby made unlawful for any person * * * to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting * * * supplying, storing, * * * any necessaries; * * * (c) to restrict distribution of any necessaries; * * * provided, that this section shall not apply to any farmer, gardner, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him. * * *"

The indictment charged that the defendants thereto did on or about April 6, 1920, knowingly, willfully, unlawfully, and feloniously conspire, combine, agree, and arrange together and with other persons to the grand jurors unknown, to limit the facilities for transporting, supplying, and storing many necessaries, to wit, foods, feeds, and fuel, including many carloads of oranges and lemons, and large quantities of potatoes, wheat, lettuce, cabbage, asparagus, live stock ready for slaughter for use as meat, and fuel oil, by then and there and by means

of agitating and calling and declaring a strike of railway yardmen and switchmen, and such other railway trainmen, shopmen, and employees as could be induced to leave their employment, and the said defendants and each of them were at said time employees of railways having yards and terminals in the city of Los Angeles; that the said railroads, to wit, the Los Angeles & Salt Lake Railroad, the Atchison, Topeka & Santa Fé Railroad, and the Southern Pacific Railroad, are concerned in and are engaged in transportation of passengers and freight in interstate commerce between the state of California and the various other states of the United States; and the defendants well knew that such railroads were engaged in carrying as freight all manner and description of foods, feeds, and fuel oil, which commodities were necessaries as described and set forth in section 1 of title 1 of an act to amend an act entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, and well knowing such facts, began, instituted, agitated, and spread a strike among the switchmen and other men who were engaged in handling the freight trains of the said railroad companies in the city of Los Angeles and in the state and Southern division of the Southern District of California; and because of such conduct on the part of said defendants a strike of switchmen and yardmen of said railroads in said district was declared, and the men employed by said railroad companies to handle their said freight trains as such yardmen and switchmen refused to do and perform their duties as such employees of said railroad companies, and because of said strike and refusal of the said yardmen and switchmen to perform their duties the said railroad companies were totally unable to transport or supply said food stuffs, feeds, and fuel oil, and by such action of the said defendants the transportation of such foodstuffs, feeds, and fuel oil was then and there prevented, and the facilities for transporting the same were thereby limited; and because of such preventing and limiting of such transportation facilities many hundred carloads of said foodstuffs deteriorated and became spoiled and unfit for use as human food, and the transportation of said animals for meat was prevented and the supply of meats was thereby curtailed.

The only points made on behalf of the plaintiffs in error is that the act itself is invalid as being in contravention of the Constitution, and that the indictment does not state facts sufficient to constitute an offense under it.

The first of such points is based largely upon the recent decision of the Supreme Court in the case of United States v. L. Cohen Grocery Co., 41 Sup. Ct. 298, decided February 28, 1921 (Advance Sheets).

The same statute made it unlawful for any person willfully "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and the question presented to the Supreme Court in the Cohen Grocery Company Case was whether that language constituted a fixing by Congress of an ascertainable standard of guilt and was adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them.

In the crime denounced by the same statute and charged against the plaintiffs in error in the present case there is no such uncertainty. It is perfectly manifest that what are "unjust or unreasonable rates or charges" may strike and impress the mind of both jurors and judges very differently; one may think a certain rate or charge reasonable, and another may just as conscientiously consider the same rate or charge wholly unreasonable. That provision of the statute was therefore wholly uncertain and void of any standard of criminality, and was by the court adjudged repugnant to the Constitution, and invalid. But the court by no means declared the whole act void. Indeed, section 22 of the same act of Congress in terms declares:

"If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered." Comp. St. 1918, Comp. St. Ann. Supp. 1919. § 3115⅛oo.

The provision involved in the Grocery Company Case, being distinct from that involved in the present one, is therefore unaffected by the decision to which reference has been made. Berea College v. Kentucky, 211 U. S. 45, 55, 29 Sup. Ct. 33, 53 L. Ed. 81.

The offense with which the plaintiffs in error here were charged was specifically and in detail described in the indictment and clearly brought the case within certain specific provisions of the statute expressly declared criminal and punishable in a prescribed way.

In each case the judgment is affirmed.

HAUGE v. UNITED STATES.

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

No. 3685.

1. **Perjury ⇐32(8)—Signed admission competent evidence.**
On trial of a defendant for perjury in falsely testifying in support of his petition for naturalization that he did not claim exemption from military service on the ground of alienage, a certified copy of the questionnaire, signed by him, in which he claimed such exemption, *held* competent evidence.

2. **Aliens ⇐68—Claim of exemption from military duty as alien held material on application for naturalization.**
On a petition for naturalization, the fact that the applicant after his declaration of intention claimed exemption from military service on the ground of his alienage, and stated his willingness to return to his native country and enter its military service, *held* material.

3. **Criminal law ⇐676—Limitation of witnesses discretionary.**
The limitation of the number of witnesses whose testimony is merely cumulative is within the discretion of the court.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Criminal prosecution by the United States against Olaf Hauge. Judgment of conviction, and defendant brings error. Affirmed.

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

Erwin J. Rowe, of Portland, Ore., for plaintiff in error.
Lester W. Humphreys, U. S. Atty., of Portland, Or.

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

HUNT, Circuit Judge. Hauge was convicted of having sworn falsely in a proceeding under the laws relating to the naturalization of aliens, and brings writ of error. Section 80, Penal Code (Comp. St. § 10248). The indictment charged that in June, 1920, in the District Court of the United States, in Oregon, Hauge took an oath to answer truthfully all questions which might be put to him touching his qualifications for admission to become a citizen of the United States, and that while under oath he willfully and feloniously falsely swore that about January 9, 1918, at the time he filed his questionnaire with the local board in Chicago, in the course of registration for military services, he did not make claim for exemption from military service of the United States by virtue of his alienage and foreign citizenship, or the fact that he was not a citizen of the United States; whereas, in truth about January 8, 1919, he filed with the local board a questionnaire in which he claimed exemption as a resident alien, not an enemy, and claimed classification in division F of Class V, and claimed exemption from military service because he was not a citizen of the United States and stated that he was willing to return to his native country and enter its military service, and that in June, 1920, he well knew he had made the said claims for exemption.

Upon the trial it appeared that in August, 1920, there was a rehearing by the District Court of Hauge's petition for naturalization and that at such rehearing Hauge admitted under oath that his testimony on the first hearing in June, 1920, was to the effect that he had not claimed exemption at the time of making out his questionnaire. Hauge's counsel objected to the admission of the testimony. The government offered in evidence a statement with answers in writing by Hauge to the naturalization examiner in connection with his petition for naturalization in which Hauge stated that he had not claimed exemption on the ground of alienage. It is contended that the court erred in admitting such written statement.

[1] Over the objection of defendant, the court admitted a certified copy of the defendant's questionnaire, which showed that he had claimed exemption from military duty on the ground of being a resident alien, not an enemy, who claimed exemption on the ground of permanent physical unfitness, and also that he was a man whose wife and children depended on his labor for support. In the questionnaire defendant also said that he was willing to return to his native country and enter military service therein.

Both matters were evidence in the nature of admissions over Hauge's signature, and clearly competent as original evidence against him. 16 C. J. 626; Adamson v. U. S., 184 Fed. 714, 107 C. C. A. 633.

[2] Upon the question of the materiality of the claim for exemption, our opinion is that it was entirely material and proper to ascertain whether the applicant for citizenship was willing to serve in military

defense of the country. What finer test of the disposition of one who wishes to be naturalized can be conceived of than to ascertain whether he is willing to support and defend the nation in time of war? How can one be really attached to the principles of the Constitution and be well disposed to the good order and happiness of the nation, and attempt to escape from the obligation to defend the country, on the ground that he is an alien and willing to return to his native country and enter its military service? It is wholly inconsistent with the fundamentals of loyalty and good faith to say that where a plea of alienage is deliberately set up in an endeavor to avoid military service, the alien can shortly afterwards apply for naturalization and be adjudged entitled to the privileges of citizenship. In re Tomarchio (D. C.) 269 Fed. 400; In re Silberschutz (D. C.) 269 Fed. 398.

[3] After six witnesses had testified to defendant's good reputation for truth and veracity, the court declined to permit defendant to call further witnesses upon the same point. Defendant excepted and assigns error in the action of the court. As the proposed additional witnesses would give evidence which was merely cumulative, the matter was one within the discretion of the court, and we cannot see that there was any prejudice by the ruling. O'Hara v. U. S., 129 Fed. 551, 64 C. C. A. 81; Chapa v. U. S. (C. C. A.) 261 Fed. 775.

We have carefully examined the whole record and find no error.

The judgment is affirmed.

FT. DODGE PORTLAND CEMENT CORPORATION v. MONK et al.

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

No. 5749.

Courts ⇐405(12)—Circuit Court of Appeals without jurisdiction to review order granting new trial.

Under Judicial Code, § 128 (Comp. St. § 1120), limiting the jurisdiction of the Circuit Court of Appeals to a review of final decisions of the District Court, it is without jurisdiction to review an order granting a new trial in an action at law, the effect of which is to entitle the parties to a retrial of all the issues.

In Error to the District Court of the United States for the District of South Dakota; Martin J. Wade, Judge.

Action at law by the Ft. Dodge Portland Cement Corporation against H. E. Monk and Knut Elendal, administrators of the estate of A. J. Thomsen, deceased. From an order granting a new trial, plaintiff brings error. Dismissed.

U. S. G. Cherry, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for plaintiff in error.

E. E. Wagner, of Sioux City, Iowa (Alan Bogue, Jr., of Parker, S. D., on the brief), for defendants in error.

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

CARLAND, Circuit Judge. Action to recover the amount of a promissory note for $10,000 given by one A. J. Thomsen to plaintiff in error. Plaintiff in error recovered judgment for the amount of the note and interest. Defendants in error moved for a new trial upon the grounds: (a) The court erred in refusing to direct a verdict in their behalf, (b) errors in charge to the jury, (c) error in refusing to instruct jury as requested. The trial court granted the motion for a new trial for the reason that the note was given for the purchase price of preferred stock of the plaintiff in error and that at the time the subscription for the stock was made it was agreed between the parties that the subscriber should receive 100 shares of the common stock of the corporation as a bonus, thereby rendering the stock subscription contract void as against law and public policy. The other grounds for a new trial were overruled.

The order granting a new trial did not in terms vacate the judgment for plaintiff in error, but that was its legal effect. Plaintiff in error sued out a writ of error from the order granting a new trial. It is assigned as error that the granting of the order was a clear abuse of discretion and that the court erred in holding the stock subscription void. Counsel for defendants in error insist that we have no authority to review the order granting a new trial for the reason that whether it should be granted or not rested in the sound discretion of the trial court and such discretion is not reviewable. It appears from the record, however, that we have no jurisdiction over the case and can do nothing but dismiss the writ of error. Our jurisdiction to review the decisions of the District Court is limited by law to final decisions. Judicial Code, § 128; section 6, Act of March 3, 1891, c. 517, 26 Stat. 828 (Comp. St. § 1120). Defendants in error did not plead the defense that the court sustained on granting the motion for a new trial, but raised the question by motion for a directed verdict. They did plead in their answer that the note was obtained from the maker by false pretenses and that there was no consideration ever received therefor. The trial court did not grant a new trial of a single issue, but granted a new trial generally because of its opinion on a single issue. It is true that the court declared that it overruled the other grounds urged for a new trial, but nevertheless it granted a new trial without limitation, and if the ruling is to stand defendants in error are entitled to have the issues pleaded, retried as well as the issue ruled upon. They are entitled to a trial by jury of all the issues. They can get no such trial here. R. S. U. S. § 1011, amended February 18, 1875, chapter 80, § 1 (Comp. St. § 1672). So far as the finality of the order granting a new trial is concerned, it left the case as if it had never been tried. It would therefore seem that no argument is necessary to show that an order which had the effect stated is not a final decision of the District Court. If, however, authority is required for the position here taken, it may be found in Hume v. Bowie, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; Baker et al., Assignees, v. White, 92 U. S. 176, 23 L. Ed. 480; Parcels v. Johnson, 87 U. S. (20 Wall.) 653, 22 L. Ed. 410; McComb, Executor, v. Com'rs Knox Co., 91 U. S. 1, 23 L. Ed. 185; Moore v. Robbins, 85 U. S. (18 Wall.) 588, 21 L. Ed. 758; St. Clair Co. v. Lov-

ingston, 87 U. S. (18 Wall.) 628, 21 L. Ed. 813; Tracy v. Holcombe, 65 U. S. (24 How.) 426, 16 L. Ed. 742; Pepper v. Dunlap, 46 U. S. (5 How.) 51, 12 L. Ed. 46; Heike v. U. S., 217 U. S. 423, 30 Sup. Ct. 539, 54 L. Ed. 821; U. S. v. Beatty, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686; Werner v. Charleston, 151 U. S. 361, 14 Sup. Ct. 356, 38 L. Ed. 192; Lodge v. Twell, 135 U. S. 233, 10 Sup. Ct. 745, 34 L. Ed. 153; Macfarland v. Brown, 187 U. S. 239, 23 Sup. Ct. 105, 47 L. Ed. 159; Clark v. Kansas City, 172 U. S. 334, 19 Sup. Ct. 207, 43 L. Ed. 467; Meagher v. Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 Sup. Ct. 876, 36 L. Ed. 834. All of the above cases are not cases where new trials have been granted, but they are cases which clearly decide that the judgment appealed from must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance by the appellate court, the court below would have nothing to do but to execute the judgment or decree which it had already rendered.

Writ of error dismissed.

SCHAUFFELE v. DIRECTOR GENERAL OF RAILROADS.

(Circuit Court of Appeals, Third Circuit. November 4, 1921.)

No. 2726.

Commerce ⇐27(7)—Conductor killed in movement of cars in shop yard held not killed while engaged in "interstate commerce."

Where cars owned by carriers in distant states and destined eventually to be returned thereto had come into state in transportation of coal in interstate commerce, conductor of drill crew, killed while crew, many days after cars had come into state, was engaged in railroad shop yard in shifting unloaded cars to a place for repair and a loaded car to a chute for unloading, was not killed while engaged in "interstate commerce," within the federal Employers' Liability Act (Comp. St. §§ 8657–8665); the movement of the cars being purely local and for purposes not connected with interstate commerce.

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

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

Action by Sarah Schauffele, administratrix of the estate of George Schauffele, deceased, against the Director General of Railroads, as Agent. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert V. Kinkead, of Jersey City, N. J., and Benjamin W. Moore, of New York City (Thomas J. O'Neill, of New York City, of counsel), for plaintiff in error.

William A. Barkalow, of New York City (Charles E. Miller and George Holmes, both of New York City, of counsel), for defendant in error.

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

WOOLLEY, Circuit Judge. The plaintiff brought this action under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665) to recover damages for the death of her husband, caused by negligence of the defendant. From a judgment entered on a directed verdict in favor of the defendant the sole question brought here for review is whether the evidence would sustain a finding that the plaintiff's decedent was at the time of his death employed in interstate commerce.

The decedent was a conductor of a drill crew engaged in shifting cars in the shop yard of the defendant at Elizabethport, New Jersey. He was caught between two cars and killed.

All cars in the movement—two unloaded and one loaded—were owned by carriers in distant states, had come into New Jersey transporting coal in interstate commerce and were destined eventually to be returned to the states of their origin. All had arrived at their destinations many days before the movement. At the time of the accident they were being shifted for different purposes; the two unloaded cars to a place for repair and the loaded car to a chute for unloading. In the absence of evidence as to the character of commerce, if any, in which the cars were engaged at the time of the accident, the plaintiff in error advances the proposition that being foreign cars, certain in the course of events to be returned to distant states, the jury should have been permitted to draw the inference that they were at the time being moved in interstate commerce, or, were engaged in a movement so closely related to interstate commerce as to be practically a part of it. While, admittedly, the cars were foreign cars, there is no evidence that they, or any one of them, were homeward bound. On the contrary, the evidence is that their movement was purely local and for purposes not connected with interstate commerce. The interstate movement of the two empty cars ended when they reached their destination. Kozimko v. Hines (C. C. A. 268 Fed. 507, 508. After being unloaded, their next movement would be interstate or intrastate according to its character and place. The character of the movement of these cars at the time of the accident was established by the purpose for which they were being moved and the place in which they were being moved. The purpose was for repairs. Movement for this purpose does not partake of interstate commerce. M. & St. L. R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; Central Railroad of New Jersey v. Paslick, 239 Fed. 713, 152 C. C. A. 547. The place was within the yard and therefore wholly within the state.

The place of the movement of the loaded car, ten days after it had arrived at its destination, was within the same yard and was for the purpose of unloading. The movement therefore was local and its purpose was not related to commerce at all. Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070.

As the plaintiff failed to bring her decedent within the Federal Employers' Liability Act, the judgment below must be affirmed.

McCAULEY v. FIRST TRUST & SAVINGS BANK.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1921.)

No. 2823.

1. **Injunction ⟸221—Binding on strangers to suit only after actual notice.**
Under Act Oct. 15, 1914, § 19 (Comp. St. § 1243c), a stranger to the suit in which an injunction is issued must have actual notice of the injunction before he can be adjudged guilty of contempt for its violation.

2. **Contempt ⟸54(4)—Motion of party not ground for punishment of stranger for criminal contempt.**
Motion of a party to a civil suit is not a basis for punishment of a stranger to the suit for a criminal contempt.

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

John McCauley brings error from an order, made on motion of the First Trust & Savings Bank, sentencing him to imprisonment for criminal contempt for violation of an injunction. Reversed.

M. D. Owen, of Chicago, Ill., for plaintiff in error.

Frank T. Miller, of Peoria, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. McCauley was sentenced to six months' imprisonment for contempt of court.

First Trust & Savings Bank, as trustee for bondholders of Keystone Steel & Wire Company, obtained a preliminary injunction against the company to restrain it from failing to provide watchmen and guards and against certain labor organizations and numerous individuals to restrain them from interfering with the operations of the company's plant.

[1] McCauley was not a party to the cause. The bank filed a written motion in which it alleged that it "presents to the court the affidavits of Martin Keul, E. R. Church, John Van Norman, and Edward Randers relating to an alleged violation of the injunction by McCauley and moves the court that a rule be entered requiring McCauley to show cause why he should not be held for contempt of court." Rule was entered and citation served. McCauley demurred on the ground, among others, that nowhere in the motion, the affidavits, or the citation, was it charged that he had actual notice of the injunction. Congress has said (38 St. L. 738, 6 Fed. St. Ann. [2d. Ed.] 140 [Comp. St. § 1243c]) that injunctions "shall be binding only upon the parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participating with them and who shall, by personal service or otherwise, have received actual notice of the same." If McCauley's speeches as detailed in the affidavits should be considered as showing active concert with the strikers (concerning which we express no opinion), that would satisfy only half of the clause that pertains to strangers to the suit. A stranger who comes into active concert with

the enjoined must have actual notice of the injunction before he can be guilty of contempt. As the pleading on which the prosecution rested (counting the affidavits as parts thereof) failed to charge that McCauley had actual notice of the injunction when he made the alleged speeches, the demurrer should have been sustained.

[2] We note that the bank's pleading sought no civil remedy for itself through coercive punishment of the alleged contemnor, but, on the contrary, asked the court to vindicate its power and dignity as a branch of the government by assessing a definite punishment for criminal contempt. As soon as the trial court perceived the nature of the proceeding, the bank's pleading should have been dismissed as that of an incompetent party.

After McCauley's demurrer was overruled, he filed a verified answer in which he denied the charge of contempt and gave his version of the nature and purpose of his speeches. McCauley waived a jury, but he did not expressly waive a trial of the issues joined. Neither did he demand a trial,—meaning by that an opportunity to confront the prosecuting witnesses in open court and to cross-examine them and subsequently to introduce evidence in his defense. On the affidavits filed with the bank's barren motion, and on McCauley's answer as a counter affidavit, the court pronounced judgment. It may be said that McCauley waived his right to the trial he was entitled to demand. But the entry of the judgment on an examination of affidavits is such a serious departure from the due process guaranteed in criminal cases by the Constitution and the laws that we are reluctant to charge McCauley with an intent to waive a trial. But, as the judgment must be reversed on the grounds hereinabove stated, we pass the question of what effect should be given to McCauley's failure to object.

The judgment is reversed, with the direction to dismiss the proceeding.

THE PENN.

(Circuit Court of Appeals, Third Circuit. November 2, 1921.)

No. 2709.

Maritime liens ⇐29—Furnisher of supplies on order of agent of charterer held entitled to lien.

A furnisher of supplies to a vessel on orders of the authorized local agent of the charterer, nothing appearing to give notice that because of the terms of the charter party he was without authority to bind the vessel, *held* entitled to a lien therefor under Act June 23, 1910, §§ 1–3 (Comp. St. §§ 7783–7785).

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

Suit in admiralty by the D. Pender Grocery Company against the steamer Penn. Decree for respondent, and libelant appeals. Reversed.

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

Lewis, Adler & Laws and Otto Wolff, Jr., all of Philadelphia, Pa., for appellant.

John Cadwalader, Jr., of Philadelphia, for appellee.

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

WOOLLEY, Circuit Judge. The essential facts of this case are, with one exception, similar to the facts in The Lord Baltimore (C. C. A.) 273 Fed. 990. On these facts we found in both cases that the supplies furnished each vessel were "necessaries" in the maritime sense and would sustain a maritime lien, and that the Washington-Southern Navigation Company, Inc., assignee of the charterer, was the "person to whom the management of the vessel at the port of supply (had been) intrusted." Act of Congress of June 23, 1910, 36 Stat. c. 373 (Compiled Statutes, §§ 7783-7787).

The difference between the cases in point of fact is that in The Lord Baltimore the supplies were ordered at Norfolk, the port of supply, by the steward of the ship and were delivered upon the request of Charles H. St. Johns, Vice-President and General Manager of the Navigation Company, personally made to the libellant. In this case of The Penn the supplies were ordered by Roger A. Rhodes, agent for the Navigation Company at Norfolk. In each case there arose the question whether the supplies were ordered by a person in authority within the meaning of the Act. Having found in both cases that the Navigation Company, assignee of the charterer, was the corporate "person to whom the management of the vessel at the port of supply (had been) intrusted," and that, in consequence, it was the person "presumed (by the act) to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel," it became necessary to determine whether St. Johns and Rhodes—one or both—were such "officers and agents" of the intrusted person as could speak for it within the meaning of the Act. We found in The Lord Baltimore that St. Johns was an "officer" with such authority, and in The Penn—by what we regarded as a necessary exclusion—that Rhodes was not an "agent" with such authority. On rehearing we discover error in this finding. This error was based on the fallacy, in which we indulged, that if St. Johns had authority, Rhodes could not have authority. On careful reading, we find that the record discloses that St. Johns was not the representative of the Navigation Company resident at Norfolk but was the General Manager resident at Washington, whose orders for supplies bound his company without regard to the place in which they were given. It also appears that Rhodes was the sole representative of the Navigation Company resident at Norfolk; that he had his office on the Company's dock; that he ordered the supplies, checked their delivery and transmitted the bills to his principal at its home office in Washington. But for the previous transaction of St. Johns we would have had no doubt of Rhodes' authority to act for the Company. That transaction by St. Johns, under his authority as General Manager, we now find was not inconsistent with, but was independent of, the action of Rhodes under his authority as agent—each, in his respective position, having the requisite authority to speak

for his corporate principal. We also find, as in The Lord Baltimore, that there was nothing disclosed by the evidence to put the libellant on notice "that because of the terms of the charter party * * * the person ordering * * * supplies or other necessaries was without authority to bind the vessel." The Yankee, 233 Fed. 919, 147 C. C. A. 593; The Oceana, 244 Fed. 80, 156 C. C. A. 508.

It follows, therefore, that the decree below must be reversed.

CAMOU v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1921. Rehearing Denied December 5, 1921.)

No. 3661.

Poisons ⊂=9—Conviction for violation of Harrison Narcotic Act held based on sufficient indictments and supported by evidence.

Conviction of a defendant for concealing smoking opium knowing that it had been imported in violation of law, and for having in his possession, with intent to sell the same, certain narcotic drugs without having registered and paid the special tax as required by Act Dec. 17, 1914, § 1, as amended by Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), in violation of section 8 of said act (Comp. St. § 6287n), *held* based on sufficient indictments and supported by the evidence.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Criminal prosecution by the United States against P. J. Camou. Judgment of conviction and defendant brings error. Affirmed.

Geo. D. Collins, Jr., of San Francisco, Cal., for plaintiff in error.

Frank M. Silva, U. S. Atty., and Wilford H. Tully, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. We have given to the record of the case attentive consideration, and find in it no ground whatever for the reversal of the judgment.

There were two indictments against the plaintiff in error, which, being of the same general nature, were by stipulation of the counsel in the court below consolidated for trial and were so brought and submitted here. One alleged that at a certain time and place within the jurisdiction of the trial court the defendant thereto unlawfully, willfully, and knowingly received, concealed, and facilitated the transportation and concealment after importation of certain specified opium prepared for smoking purposes, which he then and there well knew had been imported into the United States contrary to law.

The other indictment contained two counts, in the first of which it was alleged that the defendant at a certain time and place within the jurisdiction of the court did unlawfully, willfully, and knowingly vio-

late a provision of the act of Congress of December 17, 1914, entitled "An act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives, or preparations, and for other purposes," as amended February 24, 1919, in that, being a person required to make the designated registration, he unlawfully, willfully, and knowingly had in his possession, with intent to sell, a certain derivative of cocoa leaves, to wit, 50 ounces of cocaine hydrochlorate, without having registered with the collector of internal revenue, and without having paid the special tax required by the said act.

The second count alleged that at a certain time and place within the jurisdiction of the court below the defendant to the indictment violated the same act of Congress as so amended, and then being a person required to make the designated registration, unlawfully, willfully, and knowingly had in his possession, with intent to sell, a certain derivative of opium, to wit, 8¼ ounces of heroin hydrochloride, and 17 ounces of morphine hydrochloride, without having registered the same with the collector of internal revenue, and without having paid the special tax required by the act.

There is no doubt, we think, that the indictments were sufficient. And as respects the evidence there was uncontradicted testimony going to show that the defendant was the manager of a certain hotel at 55 Columbus avenue, San Francisco, to which officers of the government went on the occasion in question, armed with a search warrant, and requested permission to examine the premises; that they found the defendant there and asked him for the keys to the basement of the building, where they found a large number of trunks; that they asked the defendant whether he had the keys to any of the trunks, and he thereupon denied that he had; that they then started to search him for the keys, when he surrendered a package of keys; that upon examination they found that certain of the keys fitted three of the trunks, and upon opening them they found the prohibited articles designated in the indictment.

On the trial no objections were made or exceptions taken worthy of mention, and no exception to any instruction given by the court.

The judgment is affirmed.

BENTALL v. UNITED STATES.

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

No. 5732.

War ⊜33—Prosecution for violation of Espionage Act not abated by termination of hostilities.

The termination of war hostilities *held* not ground for abatement of prosecutions for violations of the Espionage Act or other war acts committed during hostilities, especially in view of Act March 3, 1921, expressly so providing.

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

Criminal prosecution by the United States against Jacob O. Bentall. Judgment of conviction, and defendant brings error. Affirmed.

Thomas E. Latimer, of Minneapolis, Minn., for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

CARLAND, Circuit Judge. The defendant below, Bentall, was convicted and sentenced on counts 1 and 3 of an indictment charging violations of section 3, tit. 1, of the act of Congress of June 15, 1917 (40 Stat. 219 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c]). The complaint that there was no evidence to show that the registered seamen mentioned in count 3 were ever spoken to by the defendant or that they ever heard of each other is without merit. They were part of the audience that defendant was addressing, and we cannot presume that the defendant was indulging in speechmaking for his own amusement alone. It is next claimed that the judgment below ought to be reversed or the indictment abated, as the United States is no longer at war. The United States was at war when the offense was committed, and the joint resolution of Congress approved March 3, 1921, in relation to the construction to be placed upon certain war legislation contains this language:

"Provided further, that the Act entitled 'An act to amend section 3, title 1, of the act entitled "An act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes,' approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted.

"Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any act hereby repealed or which may be committed while it remains in force as herein provided."

41 Stat. 1359.

These are the only points which have been argued by counsel. Judgment below affirmed.

BROWN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1921. Rehearing Denied August 19, 1921.)

No. 2910.

Indictment and information ⇐110(31)—Indictment for maintaining nuisance held sufficient.

An indictment under National Prohibition Act, tit. 2, § 21, for maintaining a nuisance, which follows the language of the statute, is sufficient, and it is not necessary to allege that defendant was in possession or control of the building wherein the nuisance was maintained.

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

Criminal prosecution by the United States against Lewis E. Brown. Judgment of conviction, and defendant brings error. Affirmed.

James Dwyer, of Danville, Ill., for plaintiff in error.

McCauley Baird, of Olney, Ill., for the United States.

Before EVANS and PAGE, Circuit Judges, and CARPENTER, District Judge.

PER CURIAM. Brown, plaintiff in error, was, with one Hall, indicted, and in five counts of an indictment charged with various violations of the National Prohibition Act (41 Stat. 305). Hall pleaded guilty, while Brown denied guilt. Upon trial he was found guilty of (a) possessing intoxicating liquor, (b) selling intoxicating liquor, and (c) maintaining a nuisance. He was acquitted of the other two offenses charged in the indictment.

The errors he has assigned have directed our attention to the evidence admitted over objection, to the sufficiency of the count charging the maintenance of a nuisance, and to the sufficiency of the evidence to support the verdict.

We find no reversible error.

We deem it unnecessary to set forth the evidence. It would serve no useful purpose to point to the testimony of the witnesses that is persuasive of guilt. Taken as a whole, it amply supports the verdict. Applebaum v. U. S., 274 Fed. 43.

The evidence to which objections were made was admissible. While it may not have been relevant or competent so far as it related to the counts charging defendant with possessing and selling liquor, yet it was receivable under the count charging Brown with maintaining a nuisance, which offense permits the government to show numerous sales and dealings in liquor.

The count charging Brown with maintaining a nuisance followed the language of the statute, and we see no necessity for requiring the government to allege that defendant was in possession or in control of the building wherein the nuisance was maintained.

The judgment is affirmed.

In re NADER.

CLAIM OF NATIONAL CASH REGISTER CO.

(District Court, E. D. Michigan, S. D. October 31, 1921. On Petition for Rehearing, November 22, 1921.)

No. 4758.

1. **Courts ⇐366(14)—Bankruptcy court held bound by decisions of state court as to construction of contract.**

As to whether a contract is a purely conditional sale or an absolute sale with reservation of title for security, in which latter case contract would be void within the statutes of the state where the contract is to

be performed, a bankruptcy court is bound by a decision of the highest court of that state.

2. **Chattel mortgages ⟸6—Instrument held a chattel mortgage, not a conditional sale.**

A contract under which a cash register was sold *held* an absolute sale reserving a lien by way of security; that is, a chattel mortgage, and not a conditional sale, though it reserved title in the vendor until payment of the purchase price and taxes.

3. **Courts ⟸368—Binding effect of state court decisions not affected by prior inconsistencies.**

The binding effect on the bankruptcy court of a decision by the highest state court is not affected by prior inconsistent decisions of the state court, in the absence of any showing that the cause of action in the bankruptcy court accrued in reliance on the prior decisions of the state court establishing a settled rule of property, abrogated by the later decision to the extent or impairing a vested right.

On Petition for Rehearing.

4. **Evidence ⟸461(1)—Preliminary intentions merged in written contract.**

The undisclosed, or even the orally disclosed, purpose or intention of the parties in entering into a written contract, cannot be considered in construing such contract, at least where it is not claimed that the parties have, by acts or conduct subsequent to the making of the contract, put a binding construction thereon.

In Bankruptcy. In the matter of Aboud Nader, bankrupt. Claim of National Cash Register Company, as to which one of the referees certifies a question. Question answered.

Joslyn & Perry, of Detroit, Mich., for claimant.

Martin J. Wanamaker, of Detroit, Mich., in pro. per.

TUTTLE, District Judge. One of the referees in bankruptcy has certified to this court for its opinion the question whether a certain written contract, under which a cash register was furnished by the claimant to the bankrupt before the filing of the voluntary petition in bankruptcy herein, which cash register came into the possession of the trustee, should be construed as evidencing a pure conditional sale, with absolute reservation of title until payment of the purchase price, or as an absolute sale with reservation of title merely as security for the payment of such purchase price. As the contract was not filed for record in accordance with the statute governing the filing of chattel mortgages, such contract is void as to the creditors of the bankrupt, if it is to be construed as a contract of absolute sale with retention of title as such security only, or, in other words, as a chattel mortgage, but otherwise is valid.

The contract involved was in words and figures as follows:

"City, Detroit; County, Wayne; State, Mich.

"The National Cash Register Company, Dayton, Ohio: Date, Aug. 25, 1920. Please manufacture and ship, freight prepaid, to 1736 E. Forest St., Detroit, Wayne county, Mich., or to the nearest railroad station, Detroit, Mich., of your No. 730 registers, mahogany finish, denomination of keys—for use on—counter, novelty business, for which undersigned agrees to pay you one hundred fifty dollars ($150.00), as follows: $15 cash, cash on arrival of register; $135 in 9 monthly payments of $15, and undersigned to give you his promissory

note for $135, payable in similar payments as collateral security for such payment. Five per cent. discount for cash settlement on arrival of register, but no discount allowed on credit for exchange registers, or on autographic registers. Upon refusal of undersigned to accept the register when tendered, or to make any cash payment, or to execute and deliver the note, or make any payment provided for therein, you, or any person authorized by you, if you so elect, may immediately repossess the register, and retain, as rental for use of said register, all payments theretofore made. Should the register get out of order from ordinary use within one year from shipment, you will, without charge, repair it, provided undersigned pays the transportation charges on it to and from the factory, or nearest agency able to make the repairs, or traveling expenses of repairman. Undersigned to pay for any repairs made without your authorization, and to pay all taxes on the register, and, in event of default, to reimburse the company to full extent of taxes paid by it.

"The register shall remain your property until the price is paid in full.

"This contract covers all agreements between the parties and shall not be countermanded.

"Sign here: [Signed] Aboud Nader.
"Aboud Nader

"Print purchaser's name plainly on this line."

On the delivery of said register by the claimant to the bankrupt, the latter executed and delivered to the former the note mentioned in said contract, which was in the following words and figures:

"Promissory Note.

"City, Detroit; County, Wayne; State, Mich.
"Date, 9—28—1920.

"For value received, I promise to pay to the order of the National Cash Register Co., Dayton, Ohio, U. S. A., one hundred thirty-five dollars ($135.00) at N. C. R. office, Detroit, in payments, payable as below:

Date Paid.	Collection No.			
11—30—20	1	month	after date	$15.00
12—6—20	2	"	"	15.00
1—3—21	3	"	"	15.00
	4	"	"	15.00
	5	"	"	15.00
	6	"	"	15.00
	7	"	"	15.00
	8	"	"	15.00
	9	"	"	15.00

"It is agreed that default in the payment of any of the above payments shall, at the option of the holder hereof, render the unpaid balance of this note immediately due and payable.

"This note represents monthly payments only—not price of register.

"Register No. 1845482, style and finish 730 Mah. business novelty.

"Notice to Agents: Write name of customer plainly on this line:

Sign here:
"Aboud Nader. [Signed] Aboud N. Nader.

"No. 1736 E. Forest Street,
"City, Detroit, Mich."

Only the first three monthly installments called for in said note were paid by the bankrupt, who owed on said contract and note to the claimant a balance of $90 at the time of the adjudication in bankruptcy.

[1] As this contract, whether operating as a purely conditional, or an absolute sale of property, was to be performed in Michigan, if its meaning and effect have been passed upon and determined by a de-

cision of the highest court of that state, this court is, of course, bound by such decision. Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; In re Ducker, 134 Fed. 43, 67 C. C. A. 117 (C. C. A. 6); Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328 (C. C. A. 6); Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43 (C. C. A. 6); Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268 (C. C. A. 6); In re Stoughton Wagon Co., 231 Fed. 676, 145 C. C. A. 562 (C. C. A. 6).

[2] As, therefore, the identical contract involved in the present proceeding was involved in the case of National Cash Register Co. v. Paul, 213 Mich. 609, 182 N. W. 44, and there construed by the Michigan Supreme Court as one of absolute sale with reservation of title as security only, and therefore a chattel mortgage, and as in all substantial respects the facts in that case were the same as those presented herein, I cannot doubt that this court is bound to follow that decision

[3] Nor would the binding effect upon this court of such a decision by a state court be affected by the fact, if, as is urged by claimant, it were a fact, that the latter decision might appear to this court to be inconsistent with prior decisions of such state court (Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193; In re Floyd & Hayes [D. C.] 225 Fed. 262, affirmed in 232 Fed. 119, 146 C. C. A. 311 [C. C. A. 4]; Denver & Rio Grande R. R. Co. v. United States, 241 Fed. 614, 154 C. C. A. 372 [C. C. A. 8]), where, as here, there is an absence of any showing that the cause of action in question accrued in reliance upon prior decisions of the state court establishing a settled rule of property, which was abrogated by the later decision of that court to the extent of impairing a vested right (Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968).

The question, therefore, certified by the referee, is answered accordingly.

On Petition For Rehearing.

TUTTLE, District Judge. Since the filing of the opinion of this court in connection with this matter, the petitioner has filed a petition for a rehearing on the grounds (1) that said opinion failed to refer to the recital in the stipulation herein to the effect that "it was the purpose and intention of the parties to enter into a conditional sale contract, and it was the intention of both parties that the title to the register should not pass to the said Aboud Nader until the full purchase price had been paid by him," and that such opinion also failed to refer to an alleged agreement between the parties to the effect that the contract in question constituted a conditional sale; and (2) that this court erred in holding in its said opinion that "there is an absence of any showing that the cause of action in question accrued in reliance upon prior decisions of the state court establishing a settled rule of property which was abrogated by the later decision of that court to the extent of impairing a vested right." Both of these contentions of petitioner have received careful consideration.

[4] 1. The clause in the stipulation between the trustee and the petitioner to which the latter now calls attention was not overlooked

by this court in the preparation of its former opinion herein. As, however, the language of the stipulation in that connection merely referred to the "purpose and intention of the parties," and not to any agreement between such parties, that portion of the stipulation was deemed immaterial to any issues here involved, as it is, of course, obvious that the undisclosed, or, indeed, in the present case, even the orally disclosed, purpose or intention of the parties in entering into the written contract involved cannot be considered in construing such contract, at least where, as here, it is not claimed that such parties have, by any acts or conduct subsequent to the making of the contract, put a construction thereon which is binding on this court. Regarding the contention of petitioner that my previous opinion "fails to refer to the agreement between counsel that each of the parties to the controversy would testify upon a hearing in lieu of the stipulation that it was agreed between the parties and understood between them that the contract constituted a conditional sale contract," it is sufficient to say that neither in the stipulation mentioned nor anywhere else in the record before this court can any such language or agreement be found.

2. It is further urged in substance by petitioner that this court did not in its former opinion give proper weight to the contention of petitioner that the case of National Cash Register Company v. Paul, 213 Mich. 609, 182 N. W. 44, was so inconsistent with the settled rule of property established by prior decisions of the Michigan Supreme Court, in reliance upon which the contract in question was entered into, that the decision in the case last cited should not be followed by this court. Careful consideration of the contention and argument of petitioner in this connection is convincing that the present case, even upon the record as it now stands, is not one calling for the application of the principle thus invoked by petitioner and alluded to in the final paragraph of my prior opinion herein. It is true, as was pointed out by the Circuit Court of Appeals for this circuit in John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539, and by this court in Re American Steel Supply Syndicate, Inc., 256 Fed. 876, that (in the language of this court in the case last cited) "until recently the decisions of the Michigan Supreme Court on this subject seemed to furnish no such clear and definite rule as would be controlling in this court." In view, however, of the recent decisions of the Michigan Supreme Court in the cases of Atkinson v. Japink, 186 Mich. 335, 152 N. W. 1079, and Young v. Phillips, 202 Mich. 480, 168 N. W. 549; Id., 203 Mich. 566, 169 N. W. 822, cited and followed by this court in Re American Steel Supply Syndicate, Inc., supra, and in Re Robinson Machine Company (D. C.) 268 Fed. 165, and cited by the Michigan Supreme Court in its opinion in National Cash Register Company v. Paul, supra, which decisions, together with others mentioned in the last cited case, were rendered before the making of the contract involved herein, I am not prepared to hold that the decision in National Cash Register Co. v. Paul is so inconsistent with previous decisions of the Michigan Supreme Court that it ought not to be followed by this court.

Nor can I agree with the intimation suggested, rather than urged, by petitioner that the decision in National Cash Register Company

v. Paul is inconsistent with the decision of this court in Re Robinson Machine Co., supra, where it was held that the mere giving of a promissory note by the vendee in a conditional sale contract did not convert such contract into one of absolute sale. The extent to which this court there went in this direction is indicated by the language in my opinion in the later case of In re Bonk (D. C.) 268 Fed. 1012, to the effect that "the mere fact that promissory notes are given under a contract providing for the retention of title until payment of the purchase price is not necessarily inconsistent with an intention that no title shall pass until the payment of the purchase price." This is far from holding that every contract under which promissory notes are given is necessarily one of conditional sale. In fact, in the case last cited, the contract involved was held to be one of absolute sale, with retention of title as a lien for security. The conclusion announced by the Michigan Supreme Court in National Cash Register Company v. Paul, supra, was not rested upon the fact that promissory notes were executed under the contract there involved, but that fact was merely referred to as one of the circumstances to be considered in construing such contract.

The careful thought and attention which I have devoted to the petition for a rehearing leave me fully satisfied that such petition should be, and it hereby is, denied.

POLK et al. v. PAGE, Collector of Internal Revenue.

(District Court, D. Rhode Island. November 17, 1921.)

No. 152.

1. **Internal revenue ⊜28—Time and manner of distraint for transfer tax is limited by Revenue Act alone.**
   Revenue Act Feb. 24, 1919, §§ 406, 408 (Comp. St. Ann. Supp. 1919, §§ 6336¾g, 6336¾i), providing that the tax on decedent's estate shall be due one year after death, though Commissioner may grant extension of time for payment not to exceed 3 years, and that if tax is not paid within 180 days after due, collector shall proceed to collect it under the provisions of general law or commence appropriate proceedings, limit the time and manner for collection, and the collector is not entitled, after the expiration of the 1 year, but before the 180 days expires, to distrain under the general provisions of Rev. St. § 3187 (Comp. St. § 5909), authorizing distraint on refusal of any person liable to pay any taxes within 10 days after notice.

2. **Internal revenue ⊜28—Taxes due not always collectible immediately by distraint.**
   It does not follow as a matter of course that, because the tax is not paid immediately at the time which the statute fixes as date at which it is due, it is immediately collectible by process of distraint.

3. **Internal revenue ⊜2—Statute not superseded by regulations.**
   Regulations, directing or authorizing manner and time of collection of revenue, cannot supersede the plain terms of the Revenue Act.

4. **Internal revenue ⊜28—Statute, forbidding enjoining assessment or collection of tax, does not forbid restraining unauthorized distraint.**
   Rev. St. § 3224 (Comp. St. § 5947), prohibiting suit to restrain assessment or collection of a tax, did not prohibit restraining a collector from

distraint to enforce the collection of a tax before time authorized for distraint.

5. Internal revenue ⊜28—Enforcing collection 180 days before permissible held irreparable injury warranting injunction.

Under Revenue Act Feb. 24, 1919, §§ 406, 408 (Comp. St. Ann. Supp. 1919, §§ 6336¾g, 6336¾i), making transfer tax payable within a year, and warranting distraint 180 days thereafter, an enforcement, depriving the estate of such 180 days, may be regarded as an irreparable injury, authorizing enjoining the method of collection.

In Equity. Suit by Frank L. Polk and another, as executors of Josephine Brooks, deceased, against Frank A. Page, individually and as Collector of Internal Revenue, to enjoin distraint for collection of a tax before time fixed by statute, in which defendant files motions to dismiss. Motions to dismiss denied, and injunction granted.

Selden Bacon, of New York City, and William R. Tillinghast, of Providence, R. I., for plaintiffs.

Norman S. Case and Harold A. Andrews, both of Providence, R. I., for the United States.

BROWN, District Judge. The plaintiffs seek an injunction against the defendant individually and as collector of internal revenue for this district, restraining him from proceeding by distraint for the collection of an estate tax before the time fixed by section 408 of the Revenue Act of February 24, 1919, 40 Stats. 1057 (Comp. St. Ann. Supp. 1919, § 6336¾i).

The plaintiffs, as executors of the will of Josephine Brooks, late of Newport, R. I., who died August 17, 1920, allege that an estate tax of $245,787.67 was duly assessed by the Commissioner of Internal Revenue, and that the period of 1 year and 180 days from the death of said Josephine Brooks will not expire until the expiration of the 13th day of February, 1922.

The bill alleges that despite the provisions of sections 406, 408, 1307, and 1400 of the United States Revenue Act (title IV, Act of February 24, 1919, 40 Stats. 1057 [Comp. St. Ann. Supp. 1919, §§ 6336¾g, 6336¾i, 6371½g, 6371¾a]), the defendant collector threatened immediately to distrain the assets of the estate for the payment of this tax unless plaintiffs paid the same in full to the collector for the district of Rhode Island before the 8th day of October, 1921. They seek to enjoin the defendant from making any seizure, distress, or distraint under pretense of collecting said tax, or any part thereof, until the expiration of the 13th day of February, 1922, but no longer, and for general relief.

[1] The plaintiffs insist that the sole right to distrain is conferred upon the collector by section 408:

"Sec. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States * * * to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax,

together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto."

It is the contention of the collector that he is entitled to distrain under Rev. St. § 3187 (Comp. St. § 5909), the pertinent part of which is as follows:

"If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels or effects, including stocks, securities, and evidences of debt, of the person delinquent as aforesaid: Provided," etc.

It will be observed that under this section the collector is to proceed to collect not only the tax, but 5 per centum additional; further, it provides for "interest as aforesaid" at the rate of 1 per centum a month. See Rev. St. §§ 3184, 3185 (Comp. St. §§ 5906, 5907).

The collector contends that section 408 above quoted must be read in connection with section 406:

"Sec. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year * * * would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax."

The inconsistency of the provisions of Rev. St. § 3187 and of sections 406 and 408 concerning interest and the amount collectible is apparent.

The collector's contention amounts to this: That by section 3187, a general provision, he is authorized to nullify the specific provisions of section 406 relating to the amount to be collected, as well as the specific provision of section 408 as to the time at which payment may be enforced under the provisions of general law or by suit.

He contends that section 408 is applicable only after 1 year and 180 days, and that the provisions of general law (section 3187) are applicable before. But clearly both are not applicable, since if section 3187 is enforced nothing remains to be done according to the provisions of sections 406 and 408.

This is clearly a case where the general and special provisions of law cannot be applied so as to give effect to both, and where the special provisions render inapplicable the general provisions of law until the time fixed by section 408 for enforcement.

The contention of the collector seems to be based upon the provision of section 406 of the Revenue Act that "The tax shall be due one year after the decedent's death." It does not follow, however, that because the tax accrued or became due at this date, it was immediately enforceable by distraint. It is common in tax legislation to fix a date at which the tax accrues, a later date up to which it may be paid with-

out interest, and a further date at which proceedings for its enforcement may be begun.

[2] Because the statute fixes a date at which a tax becomes due, and because it is payable at any time after that date, it by no means follows that it must be immediately collectible by the process of distraint. United States v. State Bank of North Carolina, 6 Pet. 29, 36, 8 L. Ed. 308, shows that the word "due" is sometimes used to express the mere statement of indebtment, and then is an equivalent of "owe" or "owing." See, also, the decision of this court in Re B. H. Gladding Co. (D. C.) 120 Fed. 709; In re West Norfolk Lumber Co. (D. C.) 112 Fed. 759, 767; Wiggin v. Knights of Pythias (C. C.) 31 Fed. 122, 125.

The collector relies also upon the provisions of section 406:

"But in any case where the Commissioner finds that payment of the tax within one year * * * would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date."

The provision is peculiar, in that the power of the Commissioner to extend the time of payment is based upon the finding of hardship in paying before the due date; but the grant of power to the Commissioner to extend the time of payment for a period not to exceed 3 years from the due date does not conflict with the section which imposes a statutory duty upon the collector in the absence of any extension of time by the Commissioner under section 406, as in this case. Can it be said that the provision for an extension of the time of payment by the Commissioner implies an authority of the Collector, in the absence of such extension, to proceed at once under section 3187, despite the specific provision of section 406 that interest at 6 per cent. from one year after the decedent's death is to be added if the tax is not paid within 1 year and 180 days after the decedent's death, and of the statutory direction to the collector as a ministerial officer contained in section 408:

"That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law," etc.

The plaintiffs urge that the statute, by providing a 180-day period after the due date for payment without interest, and by providing for action by the collector after the expiration of that period, has given a substantial right to the executors of a decedent's estate in recognition of the difficulty of converting assets into cash for immediate payment of large sums for estate taxes. The time is given that loss, through immediate conversion of assets into cash, may be avoided.

The provision of the 180-day period is significant, in view of the fact that under section 208 of the Revenue Act of 1916 (Comp. St. § 6336½i) the period of but 60 days was provided. It would hardly be contended that this period of 60 days could be cut off by resort to section 3187.

It is also significant that under the income tax provisions of the Act of February 24, 1919, section 250(e)—being section 6336⅛tt—expressly excepts the estates of deceased persons from the provision that if any

tax remains unpaid after the date when it is due, and for 10 days after notice and demand by the collector, there shall be added as part of the tax 5 per centum, plus interest at the rate of 1 per centum per month.

A construction of title IV (sections 6336¾a–6336¾k) which imposes upon the estate payments from which the income of an estate is relieved by the provisions of the same Revenue Act is to be avoided.

In the district of Rhode Island the difficulty of immediately converting estates of decedents into cash for payment of large estate taxes, and the danger of great loss to the principal of estates, were so serious that legislative relief was sought and was granted by the Rhode Island Legislature, by empowering executors and administrators to raise funds by mortgaging or pledging the personal estate of decedents in their hands. Public Laws of Rhode Island, January Session 1921, c. 2030.

The intent of Congress to give to the estates of decedents a substantial benefit from the 180-days provision is manifest, and the judgment of Congress that a period of 180 days without interest and without distraint was proper in respect to the collection of estate taxes cannot be questioned; nor can it be assumed from the length of this period (180 days) that it was intended that this period fixed by Congress in legislative enactment should be shortened either by regulation or by act of the collector.

[3] I am of the opinion that the plaintiffs' contention that sections 406, 408, and 1307 of the Revenue Act are exclusive of the present application of the provisions of section 3187 is sound, and that the threatened distraint is without statutory authorization. If this is correct it does not matter that there are regulations which direct or pretend to authorize this, since express provisions of the Revenue Act cannot be repealed by regulation.

[4] The collector objects to jurisdiction, relying upon Rev. St. § 3224 (Comp. St. § 5947):

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

As we have said, the validity of the tax, the obligation of the plaintiffs to pay, and the right of the United States to collect in accordance with the statute, are not contested. A restraint, however, is sought upon action not authorized by statute.

There appears to be here no element of interference with the discretion of the Commissioner of Internal Revenue in making an assessment, and the case does not involve interference with any quasi judicial function; it seems to be merely a question of the statutory right of the collector, a ministerial officer.

Section 3224 was before the court in Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557, and in Dodge v. Brady, 240 U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560. In Dodge v. Osborn it was said:

> "* * * It declares, by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment (assessment) and claim that it is valid."

No question of that character is before us. The collector's authority to distrain is statutory; his duty purely ministerial. The plaintiffs acknowledge the validity of the law and of the assessment, and the right of the collector, while pursuing the provisions of the statute. Does the provision of section 3224, that no court shall restrain the collection of a tax, prohibit a suit in which the plaintiff seeks to restrain a collector from proceeding prematurely and otherwise than in accordance with the statute that provides the method of collection?

This case must be distinguished from cases in which the right to collect is denied because of the asserted invalidity of the law or of the assessment. To restrain a premature enforcement, at a date earlier than that fixed by statute, protects the rights of the taxpayer without impeding the execution of the law.

The system of "stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete" (Dodge v. Osborn, 240 U. S. 121, 36 Sup. Ct. 276, 60 L. Ed. 557); but it seems inapplicable when the only wrong complained of is a violation of the statute by premature action of a ministerial officer whose power is defined by statute.

The term "collection of a tax" implies a statutory procedure.

Does section 3224 require that the executors of an estate must comply with a demand which destroys the right to 180 days for the conversion of the estate into cash?

Dodge v. Osborn recognizes that there may be exceptional cases to which the provisions of section 3224 are inapplicable. The circumstances of an estate tax are so unusual as to lead Congress to make a special provision; a most unusual provision of 180 days. This is congressional recognition of the unusual situation, demanding unusual delay.

It may be said that plaintiffs seek only protection against action which is not a collection of a tax in the sense of the statute (section 3224) but, on the contrary, a violation of a statute (section 408). There is no legal remedy for the loss of that time which Congress thought necessary. They cannot recover if they pay the tax, in any event more than interest, and it is doubtful if they may recover that.

We may look into the statute sufficiently to determine whether the act complained of is "the collection of a tax" or a merely illegal and unauthorized act of a person without statutory authority.

If, as stated by Bouvier (2 Bouv. [3d Rev.] 1569), "The writ of injunction may be regarded as the correlation of the writ of mandamus," etc., we should now observe the distinction between controlling the purely ministerial act of an officer directed by a statute, which leaves him no discretion, and the acts of officers having judicial or quasi judicial functions to perform in the assessment of taxes.

The question of the power of a collector to distrain before the time fixed by the statute from which his power is derived is a judicial question. Acting without statutory authority, the distraint would be merely an unlawful seizure of property.

[5] The loss of that substantial period of time—180 days—expressly granted by Congress for the conversion of assets, may be regarded as an irreparable injury, for which the statutes providing for recovery of taxes illegally assessed or collected afford no remedy. If the plaintiffs pay now, they lose all benefit of the provision of the 180-day period, and suffer any loss from compulsory shortening of that period. As the payment, if made within 180 days after the due date, is without interest, the estate will lose upwards of $5,000 by enforced payment at the earlier date, under section 3187.

As the tax is payable at the due date, it is doubtful if interest, in any event, could be recoverable; but assuming that such recovery is possible, there remains irreparable damage in the loss of the benefit that Congress extended to estates of decedents by fixing the time of distraint at 180 days after the due date.

The plaintiffs, in my opinion, make a case justifying the interposition of a court of equity, in order to prevent irreparable injury from an unlawful act. Furthermore, I am of the opinion that section 3224, R. S., does not forbid an injunction against a ministerial officer proceeding without authority and in violation of the controlling statute, since by the term "collection of a tax" is meant a proceeding in accordance with law, and not a merely unlawful and unauthorized act.

Defendant's motions to dismiss are denied.

A draft decree for an injunction against procedure otherwise than as authorized by section 408 may be presented by the plaintiffs.

W. S. TYLER CO. v. DEUTSCHE DAMPFSCHIFFFAHRTS GESELLSCHAFT HANSA, BREMEN, GERMANY, et al.

(District Court, N. D. Ohio, E. D. November 10, 1921.)

No. 672.

War ⇐12—Unliquidated claim against alien enemy not a "debt" within the Trading with the Enemy Act.

A shipper's unliquidated and unproved claim against an alien enemy owner of a steamship for value of goods shipped, before commencement of war with a nation of which such owner was a subject, *held* not a "debt" within the Trading with the Enemy Act, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), as amended June 5, 1920, providing that one to whom a "debt" may be owing from an enemy whose property shall have been seized and impounded may recover the amount thereof from the alien property custodian, since a "debt" within such statute must be an amount which is fixed, or which may be definitely ascertained, independently of extraneous circumstances, and not a claim for an unliquidated amount.

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

In Equity. Suit by the W. S. Tyler Company, a corporation, against the Deutsche Dampfschifffahrts Gesellschaft Hansa, Bremen, Germany, and others. On defendant's motion to dismiss. Motion sustained.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for plaintiff.

Thomas W. Miller and Frank White, Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio, and Dean Hill Stanley, Sp. Asst. Atty. Gen., for defendants.

WESTENHAVER, District Judge. This is a suit in equity, brought against the Alien Property Custodian and the Treasurer of the United States pursuant to section 9, act of Congress approved October 6, 1917, known as the Trading with the Enemy Act (Comp. St. 1918 Comp. St. Ann. Supp. 1919, § 3115½e) and as amended June 5, 1920 (41 Stat. 977). Plaintiff's petition, in addition to the necessary jurisdictional averments, alleges in substance that, on or about July 7, 1914, it shipped by the steamer Rauenfels, a vessel owned by an alien enemy, the Deutsche Dampfschifffahrts Gesellschaft Hansa, certain wire screen and iron netting of the value of $2,532. 26, such shipment being made from the port of New York and consigned to a certain consignee in Port Natal, Africa; that when the steamer arrived in sight of its destination it was sighted by a British cruiser and driven ultimately into the port of Brahia, Brazil; and that at this last-named port certain parts of the cargo, including this wire screen and iron netting, were sold to defray the expenses of said steamship and its crew. Plaintiff alleges that it was damaged in the sum of $2,532.26, which by this suit it seeks now to recover from money of the alien enemy owner of said steamship seized by the Alien Property Custodian and now in possession of the Treasurer of the United States. Defendants incorporate in their answer a motion under new equity rule 29 to dismiss on the ground that a cause of action is not stated. This motion, having been heard, is now the matter to be decided.

Whether a cause of action in the plaintiff is stated by the allegations above summarized, against the alien enemy owner of said steamship, it is not necessary to decide, since the parties have argued only one question arising on motion. The material considerations on this motion are that plaintiff's right to recover and the amount of its recovery depend upon facts which are or may be disputed, and can be determined only by a trial of the issue of liability and an assessment of damages. A carrier by sea, it is conceded, is generally held responsible for all losses of cargo except such as are inevitable, including perils of the sea, and such as arise from the act of God or the public enemy, and if the loss is not total, apportionment is to be made under the rules of general average. See 36 Cyc. 236–242; Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960; Allanwilde Corp'n v. Vacuum Oil Co., 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15. Thus it clearly appears that, although plaintiff's cause of action may grow out of a breach of a contract to carry safely, the carrier's liability for that breach may depend on negligence, and that in this case both the plaintiff's right to recover and the amount of its recovery are unestablished and unascertained, depending upon what may be shown by evidence.

Defendants' contention, and the only proposition argued by counsel, is that section 9, as amended, of the Trading With the Enemy Act,

under favor of which alone this suit is brought and can be maintained, authorizes and permits a suit in equity only to recover a debt due and owing to the plaintiff from an alien enemy whose property has been seized and impounded. More specifically, this contention is that the word "debt" as used in that act includes such liabilities only as are within the usual and accepted legal meaning of the word "debt"; that is to say, liquidated demands or sums of money due by certain and express agreement, or, in other words, sums of money reduced to a certainty or susceptible of being reduced to a certainty as distinguished from uncertain or unliquidated damages yet to be determined. Plaintiff seems to concede that liabilities for pure tort damages are not included, but insists that liabilities arising out of breaches of contract are included, even though the amount of such damages remains to be determined upon conflicting evidence. This difference of view must be settled by an examination of the provisions of section 9 as amended June 5, 1920.

Both the original and amended sections are too long to quote in full. The most material, if not the only material, part thereof is as follows:

> "That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian * * * or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed," etc., "may file with the said custodian a notice of his claim," etc.

Authority is thereupon given the President to order the surrender or payment to the claimant in accordance with his demand. Provision is also made for suit in equity against the Alien Property Custodian or the Treasurer of the United States in the event of the failure or refusal of the President to make such an order. It will be observed that plaintiff's right to relief depends on whether or not its claim falls within the meaning of the words "to whom any debt may be owing." The word "debt" is used again three times in this section. Once the expression is "debt so claimed"; again, "nor any debt allowed under this section to any person"; and, lastly, "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917."

Counsel for defendants insist that this word must be given its ordinary and usual meaning, as has already herein been briefly defined. This word "debt," it is urged, is found in a statute carefully prepared, presumptively by persons learned in the law and familiar with the legal meaning of a debt as distinguished from a mere liability, and that if nothing appears from the context or other provisions of the section or the entire act indicating a broader or different meaning, then the courts in construing and applying the act must adopt its correct legal definition. These arguments appear to be sound. An examination of original section 9 as amended, as well as the entire act and the several amendments thereto, discloses internal evidence that it was carefully drafted, and in other respects accurate use is made of technical legal terms. Nothing appears therein tending to enlarge the ordinary meaning of the word "debt." On the contrary, such aid as

is thus obtained tends to support the conclusion that it was used with its usual legal signification. Thus, paragraph C, amended section 7, in describing the property of aliens which the President shall seize, uses the following words:

"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." (Comp. St. Ann. Supp. 1919, § 3115½d).

It furnishes evidence that the draftsmen of the act were familiar with and knew how to make use of legal terms adequate to describe and include any and all kinds of liabilities owing from one to another, as well as mere debts. If this language had been used in section 9 instead of the word "debt" or in addition thereto, no doubt would exist that plaintiff's cause of action was included. The omission of these or similar words after the word "debt" in section 9 is therefore entitled to great weight.

Furthermore, paragraph F, amended section 9, repeating a provision of original section 9, is not without weight. It is:

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

Here again we find a number of technical legal terms clearly and accurately used and definitely and specifically expressing the thought the draftsman of the act had in mind. They are typical of the skill with which use is made of legal terms throughout the entire act. This provision expressly limits rights and remedies of persons having debts, claims, demands or liabilities against alien enemies, so that except as a right or remedy is conferred by the preceding provisions of section 9 all such persons are without right or remedy. They are remitted either to the common-law remedies such as exist during or after the end of a war between citizens of separate and independent states or to such redress as the President and Senate in negotiating a treaty of peace, or Congress in disposing of seized property and funds, may in their sound discretion see fit to provide.

Upon careful reflection I am of opinion that the word "debt" is used in section 9 with its usual and definite legal meaning. It should and must be thus construed unless from the context or some other part of the act a different and broader meaning appears to have been given it. This does not so appear. On the contrary, upon a consideration of the context and of all the provisions of the act it appears that it was the intention of Congress to confine and limit the word to its usual and ordinary legal meaning. The reason therefor seems plain. A debt, as legally defined, is a sum of money due by certain and express agreement such as was recoverable at common law in the well-known action of debt. It is no doubt broad enough to include penalties or forfeitures provided by statute or judgments of courts of record. It may in some instances include the proceeds of property wrongfully converted yet in the wrongdoer's hands. It is, however, of the essence of a debt that the amount is fixed or may be definitely ascertained in-

dependently of extraneous circumstances and without the intervention of a jury. Sound reasons exist why Congress should have been willing to authorize the President to pay liabilities the amount of which was fixed and certain, and neither the obligation to pay on the part of the alien enemy nor the amount thus to be paid depended upon extraneous evidence or circumstances requiring a decision both as to liability and amount upon conflicting evidence, and should have denied the power and withheld the burden when they did. Congress in its wisdom would seem to have decided that it was not wise in the latter case either to vest this power in the President or to burden him with the performance of this difficult duty. The right to sue depends upon the President's failure or refusal to order payment. The right of suit in the event of such failure or refusal is no broader or different as respects the nature of the claimant's demand than is the power and duty vested in the President.

Extended citation of authority is not required to show that plaintiff's demand is not in law a debt, but is at best a mere liability. It will be sufficient to refer to standard texts and a few well-considered cases. 3 Black. Com. 154; Black's Law Dictionary, 334; Anderson's Law Dictionary, 315; 18 Cor. Jur. 2; Stockwell v. U. S., 13 Wall. 531, 542, 20 L. Ed. 491; Clinton Mining & Mineral Co. v. Beacon (3 C. C. A.) 266 Fed. 621; Jackson v. Bell, 31 N. J. Eq. 554; Gray v. Bennett, 3 Metc. (Mass.) 522; Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; Holbrook v. American Insurance Co., 6 Paige (N. Y.) 223; Howlet v. Strickland, Cowp. 56; Lindsay v. King, 23 N. C. 401; Baum v. Tonkin, 110 Pa. 569, 575, 1 Atl. 535; Little v. Dyer, 138 Ill. 272, 27 N. E. 905, 32 Am. St. Rep. 140.

Certain cases arising under bankruptcy, attachment, and similar statutes are cited on behalf of plaintiff in which the word "debt" is given a meaning broad enough to include unliquidated damages arising out of contract, either express or implied. Of these cases, Gray v. Bennett, supra, may be taken as a good illustration. An examination thereof, speaking generally, shows that the broader meaning was given only because the context or other provisions of the law showed that the word "debt" was intended to include obligations and liabilities of that nature. They do not support the proposition that the word "debt," used in a statute, standing alone and thus unaided, is ever given a meaning different from its standard and accepted legal definition.

Defendants' motion to dismiss is sustained.

THE SNETIND.

(District Court, D. Maine. November 1, 1921.)

No. 660.

1. **Subrogation ⊂=23(7)—One paying vessel's bills becomes subrogated to claims.**
   Where one, at the request of the master of a vessel, advances money to pay the crew and to pay accounts against the vessel for labor and supplies, when, if the money had not been advanced, the parties paid would have enforced liens on the vessel, and the one advancing the money is only partly repaid by the vessel, he becomes subrogated to the rights of the lienors, and is in the same position as the party actually furnishing the labor, materials, or supplies.
2. **Maritime liens ⊂=17—Statute changes method of proof.**
   Comp. St. §§ 7783, 7784, giving a lien to one furnishing repairs or supplies to a vessel upon authority of the owners, and providing that "it shall not be necessary to allege or prove that credit was given to the vessel," does not change the general maritime law, but only the method of proof.
3. **Maritime liens ⊂=2—For supplies furnished in foreign country, libelants may invoke law of forum.**
   As to their claims for moneys advanced to pay the crew of an American vessel in an English port and repairs and supplies there furnished at the master's request, the libelants could, in enforcing their rights under the general maritime law, invoke the law of the forum, Comp. St. §§ 7783, 7784, where the law of England was not pleaded or proven, for, by sending his vessel into an English port, the American owner is deemed to give the master authority to bind the vessel, not under the English law, but under the American law, or, in other words, the law of the flag which floats over the vessel.
4. **Admiralty ⊂=25—Amendment denying jurisdiction because of receivership not allowed as too late.**
   Where libel for advances, repairs, and supplies was filed in July, and the answer thereto was filed the following October, containing a general denial and admitting the court's jurisdiction as alleged in the libel, and bond was given releasing the vessel, the court would not allow, at the trial more than a year later, after all the evidence had been taken, an amendment denying the jurisdiction of the court, and alleging that, at the time of the seizure of the vessel, she was under the jurisdiction of a receiver appointed by the federal court of another district, that the libel was filed after such appointment, and that the libelants did not obtain from the appointing court permission to sue, for, if the amendment had been seasonably filed, the libelants could have sought permission to sue from the appointing court, and, in any event, even if the amendment had been allowed, it would necessarily be ruled that the receiver had voluntarily waived his rights by affirming the court's jurisdiction, taking his property, and giving bond in place of the ship.
5. **Maritime liens ⊂=33—Interest allowed from refusal of payment.**
   In libel for advances, repairs, and supplies, libelants *held* entitled to interest, not from inception of their claims, but from the time the claimant filed his answer denying the allegations of the libel and refusing to pay.

In Admiralty. Libel by Mills & Knight, Limited, and another, against the motor schooner Snetind. Decree for libelants.

Bullowa & Bullowa, of New York City, and Nathan W. Thompson, of Portland, Me., for libelants.

Arthur J. Dunton, of Bath, Me., and Duncan & Mount, of New York City, for claimant.

HALE, District Judge. This action in rem is brought by two London corporations, to recover from the American motor schooner Snetind for labor and materials supplied, and advances made, to render her seaworthy, while she was lying at Charlton Buoys, in the River Thames, after having completed a voyage which left her in need of repairs. The answer made a general denial of liability.

The proofs, taken by deposition, under a commission issued by this court, directed to the American Consul at London, show as follows:

[1] The respondent vessel is a large motor schooner of American registry, and was, at the time in question, engaged in general cargo business between this country and foreign countries; Mills & Knight, Limited, a corporation of ship builders and repairers in London, during the months of January, February, and March, 1920, at the request of the master of the schooner, furnished to the schooner labor, material, and supplies; Park & Co., Limited, a ship broker and ship's agent, advanced money to pay for certain materials and supplies used on the schooner; the schooner was then lying at Charlton Buoys, in the Thames river, in an unseaworthy condition, due to a rough passage on her trip across the ocean; the libelants acted solely upon the request of the master, who was unknown to either of them, and who applied to Mills & Knight, Limited, stating that the schooner was in need of a new anchor, 90 fathoms of cable, a new band for rigging, a new chain plate, new oil tank, and other material; these were installed under the captain's supervision; and, when the work was complete, an itemized account for same was presented to the master, who, in the presence of an agent of the libelant corporation, approved and signed the account, as is shown by the receipted accounts attached to the deposition; the master of the schooner applied also to Park & Co., Limited, representing the schooner to be in need of money to pay off the crew, and to pay for the new equipment necessary to make the vessel seaworthy; upon the request of the master, the money was advanced to pay the crew, and to pay accounts against the vessel for labor and supplies; stevedores were also furnished by it; and no bill was paid by it unless upon the sanction of the master; it appearing that, if the money had not been paid by Park & Co., Limited, parties to whom the money was paid by this corporation would have enforced liens on the vessel; the bills having been paid by this libelant to prevent liens attaching, and having been repaid in part only by the vessel, the libelant became subrogated to the rights of the lienors, and is in the same position as the party who actually furnished the labor, materials, or supplies. The Puritan (D. C.) 258 Fed. 271; The Emma B (D. C.) 162 Fed. 966, 970; The Underwriter, 25 L. T. (N. S.) 279.

The proofs sustain the allegation that the supplies were furnished the ship, and that the advances were made, as alleged in the libel; and that these supplies and advances were made upon the request of the master who was the proper agent to bind the vessel. The bills themselves are produced as exhibits and are signed and approved by the

master who acknowledges receipt of the articles. The evidence shows that the vessel had a rough passage and had lost her necessary gear; that she needed the anchor, lines, chains, repairs, and towage furnished; and that she needed the advances made. The master is not made a witness, and no denial is made of the testimony taken by the libelant.

The court must come to the conclusion that the supplies, repairs, and advances were made and delivered to the vessel, in a foreign port, at the request of the master, and that they were necessary in order to make the schooner seaworthy. The amounts of the claims proved are as follows:

The amount proved by Park & Co., Limited, is £1226 7s. and 5p. The amount proved by Mills & Knight, Ltd., is £534 9s. and 6p. The rate of exchange to-day fixes the value of the English pound at $3.93. The proven claim of Park & Co., Limited, therefore, in United States money, is $4,819.64, and the proven claim of Mills & Knight, Limited, in United States money, is $2,100.49.

[2] 1. The libelants allege a lien upon the schooner for these supplies, repairs, and advances which I have found to have been furnished to the vessel in a foreign port.

Do the proofs sustain the alleged lien?

The Act of Congress of the United States of June 23, 1910 (Compiled Statutes 1916, § 7783), provides:

"Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. (36 Stat. 604.)"

The following section (7784) provides:

"The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. (36 Stat. 604.)"

Previous to the passage of this statute, whoever furnished repairs or supplies to a vessel, on the authority of the owners, had a lien therefor under the general maritime law, on proof that credit was given to the vessel. The Alligator, 161 Fed. 37, 39, 88 C. C. A. 201. It will be seen that the present statute provides that "it shall not be necessary to allege or prove that credit was given to the vessel." Under this act, then, any person furnishing repairs or supplies to a vessel, foreign or domestic, upon the order of the owner, has a maritime lien upon her, and need not allege or prove that credit was given to the vessel. The Charles A. Day (D. C.) 265 Fed. 422, 423; Ely v. Murray & Tregurtha Co., 200 Fed. 368, 118 C. C. A. 520; The Ha Ha (D. C.) 195 Fed. 1013.

It was clearly the intention of Congress not to change the general maritime law, but only to change the method of proof. In Piedmont & Georges Creek Coal Co., v. Seaboard Fisheries Co., Clmt., 254 U. S. 1, 12, 41 Sup. Ct. 1, 4 (65 L. Ed. ——), in speaking for the Supreme Court, Mr. Justice Brandeis said:

"The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority."

[3] In the case at bar the supplies and advances were made in England. At the hearing, the claimant contended that the rights of the libelant were governed by the general maritime law, and that this law did not allow such lien. In a brief, filed since then, the claimant goes further and claims that the libelants' rights are solely under British law, and that, not having pleaded or proven British law, the libel should be dismissed. I cannot sustain this contention. The rights of the libelant to have a lien on the vessel were governed by the general maritime law which has not been altered by the lien statute. The statute gives no rights not already given under the maritime law. It merely shifts the burden of proof necessary to establish a lien. It altered the procedure necessary to establish a lien, which the maritime law had already given.

In enforcing their rights, under the general maritime law, the libelants clearly may invoke the law of the forum, the law of England not having been pleaded or proven. The theory of the law is that, in sending his vessel into an English port, the American owner gives the master certain authority to bind the vessel, not under the English law, but under the American law, in other words, the law of the flag which floats over the vessel. The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

In Pope v. Nickerson et al., Fed. Cas. No. 11274, Mr. Justice Story, in speaking for the United States Circuit Court of Appeals, said:

"If the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for, and to bind the owners, must be measured by the laws of that country, unless he is held out to persons in other countries, as possessing a more enlarged authority."

And further:

"Any other rule would subject the principals to the most alarming responsibility, and be inconsistent with that just comity and public convenience, which lies at the foundation of international private law." Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; The Kaiser Wilhelm II (D. C.) 230 Fed. 717.

In Cuba Railroad Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40, a common-law action for personal injuries, the Supreme Court held that the law of the forum did not apply, because the plaintiffs and defendants were foreigners; but, in speaking for the court, Mr. Justice Holmes confined his ruling to the questions of fact involved in that case, and said:

"It may be that in dealing with *rudimentary contracts* or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared."

In the case at bar, the court is clearly dealing with a promise of payment of money for goods and services; and there can be no question but that the lex fori should be enforced, no other law having been pleaded or proven.

In The Kongsli (D. C.) 252 Fed. 267, 271, this court had occasion to pass upon a similar question, and said:

"In the case at bar the libelant has a lien given by the general maritime law of the United States. Such lien may be enforced by an action in rem. This right is given by the laws of the United States; and the laws of the United States are supreme in our courts over French law. There appears, indeed, to be no reason in French law, under the principle of reciprocity for dismissing the libel and leaving the question to the French courts, in a case which has not already proceeded to judgment. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. The maritime usages of foreign countries are not obligatory upon the courts of the United States, and will not be respected as authority, except so far as they are consonant with the well-settled opinions of English and American jurisprudence. This is well settled by the Supreme Court. The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413."

I cited, also, the Bold Buccleugh, 7 Moore (P. C.) 267, 19 L. T. 235; The Maggie Hammond, 9 Wall. 435, 461, 19 L. Ed. 772; The John G. Stevens, 170 U. S. 113, 127, 18 Sup. Ct. 544, 42 L. Ed. 969.

It is the prevailing doctrine of our maritime courts that the laws of the United States are supreme in our courts over foreign law; that, indeed, the pendency of an action in a foreign court is no bar to a suit in the federal court; but, if a foreign law has been invoked, and a definite judgment has been rendered, in a foreign court, it is, of course, otherwise. In the case before me the libelants have, in my opinion, shown themselves entitled to a lien under the general maritime law. The proper law by which such a lien in rem is enforced is the lex fori. They have proceeded under that law, and I am of the opinion that their proofs sustain the alleged lien.

[4] 2. At the trial of the cause the claimant offered to amend his libel denying the jurisdiction of the court and setting up that, at the time of the seizure of the vessel, she was in the possession of a receiver appointed by the order of the United States District Court for the Southern District of New York; that the alleged contract, upon which the suit was founded, arose without the United States, prior to the appointment of the receiver; that the libel was filed after such appointment; that the order appointing the receiver contained the usual injunction as to suits against the receiver and interference with property in his possession; and the libelant did not obtain permission from the appointing court to bring suit.

This libel was filed on July 2, 1920. The answer, filed October 21, 1920, made a general denial of the allegations of the libel, and admitted the jurisdiction of the court as alleged in the ninth article of the libel. A bond was given releasing the vessel, and this bond now takes the place of the ship. At the time of the trial, more than a year later, after all the evidence had been taken out, this amendment was presented. Admiralty courts are most lenient in allowing amendment to pleadings in all matters of form and in all matters of substance where the justice of the case requires it, and where the amendments conform with the proof. If this amendment had been seasonably filed before the proofs were taken in the case, the libelants could have gone to the court appointing the receiver and asked for permission to bring the suit. Clearly the justice of the case should not permit a receiver to lie in wait until

the res in which the libelants had an actual property right has passed beyond the control of the libelants, and then present an amendment to his answer which deprives the libelants of their security, taken in place of the vessel. Moran v. Sturges, 154 U. S. 256, 285, 14 Sup. Ct. 1019, 38 L. Ed. 981. The court has always had jurisdiction of the subject-matter; and it would be a gross injustice to permit the claimant to invoke the rule that the question of jurisdiction may be presented at any time before judgment, when the claimant himself has so acted as to deprive himself of this privilege.

In The Santa Clara (D. C.) 206 Fed. 179, the District Court in New York held that, where, in a suit in rem by a seaman to recover for personal injuries, the claimants intend to rely upon the fact that the ship belongs to a foreign country, under whose laws an action in rem for such injuries cannot be maintained, notice of such defense must be given in the pleadings. In passing upon the case, Judge Ward said:

"The answer put in issue only the allegations of the libel, and set up an affirmative defense that the libelant's injuries were due to his own negligence or that of his fellow servants, and not to any fault or negligence of the steamer or her owners.

"At the trial the claimant asked leave to amend the answer by alleging that the steamer was British, with a view of proving that under the British law the libelant was entitled to no lien, and therefore could not maintain this action. The Lamington (D. C.) 87 Fed. 752. Neither the claim, nor the stipulation, nor the answer gave any intimation that the steamer was British, or that the British law would be relied on to defeat the libelant because of his method of procedure. Such pleading would deceive many, if not most, of the practitioners at this bar, and might leave an ignorant seaman with a good case, without remedy after the steamer had left the jurisdiction. When a shipowner intends to rely upon such a defense, it is but fair to notify the opposite party of it in the pleading, and not to lead the unwary into a trap. Therefore I refuse to allow any amendment, and will dispose of the case on the issues actually joined."

In the case at bar, the receivership proceedings were started in the District Court of New York, and the ship was in the District of Maine. Previous to her arrival here, she had been in a foreign country. There was clearly no reason why this amendment should be interposed in a maritime suit of this character at the trial of the case and long after the pleadings had been filed. I, therefore, refused to allow the amendment, and proceeded to dispose of the case on the issues actually joined.

It must further be said that, even if the amendment had been allowed, I should have been compelled to hold that the receiver had voluntarily waived his rights, by affirming the jurisdiction of the court, taking his property, and giving bond in place of the ship. After doing so, he cannot turn around and deny the jurisdiction at a time when the court can no longer administer relief in the case. Trocon et al., Appellee, v. Scott City Railway Co., Appellants, 91 Kan. 887, 139 Pac. 357; The Abbey, Fed. Cas. No. 14.

[5] 3. The libelants, having proven the allegations of their libel, and having established their lien, are entitled to judgment upon the amounts of their claims.

I do not think they should recover interest from the inception of the claims; but I see no reason why they should not recover interest since

the claimant filed his answer denying the allegations of the libel and refusing to pay.

I will, therefore, allow interest since October 21, 1920. A decree may be presented in favor of the libelant Messrs. Park & Co., Limited, in the sum of $5,116.81, and in favor of the libelant Mills & Knight, Limited, in the sum of $2,229.99, with costs.

In re NEW YORK & BALTIMORE INLAND TRANSP. CO.

(District Court, D. Delaware. October 8, 1921.)

No. 356.

1. **Corporations ⟸477(2)—Resolution held to authorize mortgage.**
Where a corporation was organized to carry out the terms of an agreement to acquire certain tugs and barges to be paid for by an issue of stock and an issue of bonds, a resolution of the directors, providing for such acquisition and for an issue of bonds, was to be read in the light of the agreement, and thereby understood to provide for a "first mortgage" bond issue.

2. **Corporations ⟸432(4)—Presumed seal was affixed by authorized person.**
In the absence of evidence that the corporate seal affixed to the corporation's mortgage was affixed by an unauthorized person, it is presumed to have been affixed by an authorized officer or agent.

3. **Pledges ⟸25—Lien dependent on possession.**
The lien of a pledgee continues only so long as he retains possession of the pledged property.

4. **Liens ⟸7—Equitable lien created by acquisition of property under agreement to give mortgage therefor.**
Where a corporation acquired tugs and barges under an agreement to give a mortgage thereon, the promisee acquired an equitable lien on such property.

5. **Bankruptcy ⟸161(2), 188(3)—Trustee vested with title freed from liens enforceable only against bankrupt; prior equitable lien not a "transfer"; "present consideration."**
By the 1910 amendment to Bankruptcy Act, § 47a (2), being Comp. St. § 9631, the trustee is vested with title to the bankrupt estate freed from all liens that were enforceable only as against the bankrupt, which includes equitable liens;, hence an equitable lien created by an agreement to mortgage, made more than four months before bankruptcy, is not such a "transfer," under section 60b (section 9644), as to validate a mortgage within the four months period, otherwise voidable as a preference, nor was such mortgage one for a "present consideration," under section 67d (section 9651); the title to the property having passed when it was delivered some four months prior to the mortgage, and the fact that the mortgage purported to be a purchase-money mortgage not being controlling.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transfer; Second Series, Present Consideration.]

In Bankruptcy. In the matter of the New York & Baltimore Inland Transportation Company, bankrupt. On petition for review of order of referee holding the bankrupt's mortgage invalid. Order affirmed.

Caleb S. Layton, of Wilmington, Del., for trustee.

Thomas F. Bayard, of Wilmington, Del., W. Thomas Kemp, of Baltimore, Md., and Frank A. Sweezy, of New York City, for claimant.

MORRIS, District Judge. Thomas H. Hayes having filed his proof of claim against New York & Baltimore Inland Transportation Company, a Delaware corporation, bankrupt, for $100,000, secured, as therein alleged, by a mortgage made within four months before the filing of the petition in bankruptcy, pursuant to an agreement antedating that period, upon assets in the custody of the trustee, the latter by exceptions challenged the validity of the mortgage. The referee, after hearing, held the mortgage invalid, both at law and as effecting a voidable preference under section 60b of the Bankruptcy Act (Comp. St. § 9644). The matter is here upon a petition for review.

The voluntary petition in bankruptcy of the Delaware corporation was filed in this court September 14, 1920. The mortgage from that corporation to Hayes, covering four tugs and nine barges, was made on August 23, and recorded on September 3, 1920. The agreement between Hayes and the New York & Baltimore Inland Transportation Company, a Maryland corporation, then the owner of the tugs and barges, was made on November 13, 1919. By that agreement Hayes undertook to advance to the Maryland corporation the sum of $73,000 with which to pay the debts and liens existing against it and its property, and that company agreed to liquidate and dissolve under the jurisdiction of a court of equity of Baltimore city, and further agreed to transfer and assign to Hayes all its property—

"upon delivery to it of $90,000 of the preferred stock and $25,000 of the common stock of a new company to be formed by said Hayes under the laws of Delaware, after said new company shall have first become the owner of said property, and the capital of which company shall be $100,000 7 per cent. cumulative preferred stock and $200,000 common stock, and against the property of which company there shall have been issue [issued] a $100,000 first mortgage 7 per cent. bond issue."

Hayes paid the sum of $73,000 to the Maryland corporation, and in March, 1920, caused the Delaware corporation provided for in the agreement, the bankrupt, to be organized. The Maryland company was dissolved, as it had agreed to be, and a receiver of its property and assets was appointed. On March 19, 1920, the receiver presented to the court of his appointment a petition, referring to the agreement with Hayes and setting forth the payment by Hayes of all the liens and claims against the tugs and barges of the Maryland corporation, "that the said Thomas H. Hayes is now ready to consummate his said agreement, and to issue said $90,000 preferred stock and $25,000 common stock upon delivery to him of bills of sale for said tugs and barges, and the transfer to him of all other property of the said corporation, * * *" and praying for an order authorizing the receiver to execute and deliver to Hayes, or his nominee, bills of sale for the tugs and barges, and to transfer and deliver to him all other property of the corporation, upon delivery by Hayes to him of $90,000 of the preferred stock and $25,000 of the common stock of the Delaware corporation; "said corporation having [first] acquired, however, as a basis for the issuing of said stock, the property aforesaid." An order in conformity with the prayer of the petition was entered.

Upon the day following the entry of that order, namely, on March 20, 1920, a special meeting of the board of directors of the Delaware

corporation was held, at which Hayes was elected its president and the following resolution was adopted:

"Resolved, that this corporation, the New York & Baltimore Inland Transportation Co., purchase from The New York & Baltimore Inland Transportation Company, a corporation * * * of the state of Maryland, through Ernest W. Beatty, receiver for said company, appointed by the circuit court of Baltimore city, the tugs Pennsylania, Elfrida, Merrill, and Virginia, and barges No. 1 to No. 9 (both inclusive), * * * and all other property used by said company in the transportation business lately conducted by it between New York and Baltimore; all of said property being subject to liens thereon in favor of Thomas H. Hayes, * * * said liens aggregating the sum of one hundred thousand ($100,000) dollars.

"Resolved, further, that this corporation issue to said Ernest W. Beatty, receiver as aforesaid, in exchange and full payment for the said property of the New York & Baltimore Inland Transportation Company, subject to the liens aforesaid, nine hundred (900) shares of the preferred stock of this company, of the total par value of $90,000, and twenty-five hundred shares of the common stock of this company, of the total par value of $25,000.

"Resolved, further, that this corporation issue its ——— year 7 per cent. gold bonds (in form to be approved by the corporation's attorney) in the amount of $100,000, and that this corporation deliver said bonds to the said Thomas H. Hayes in full satisfaction of his aforesaid liens against the said property."

The evidence does not directly and expressly disclose the date upon which the capital stock called for by the resolution was issued, but I think a proper inference is that it was issued promptly and without delay. The record expressly discloses that barge No. 9 was delivered to the Delaware corporation by the receiver on April 9, 1920, and I think the evidence warrants the inference that the tugs and other barges were delivered to that corporation on or about March 20, 1920. Bills of sale for the four tugs and the barges Nos. 1 to 8 were executed on March 20, and for barge No. 9 on August 23, 1920. All the bills of sale were received by the Delaware corporation on August 23d, and on that day the Delaware corporation made to Hayes its four promissory notes, for $25,000 each, and its mortgage, for $100,000, covering the four tugs and the nine barges. The mortgage purports to be, as therein stated, "for the purchase money of said thirteen vessels," and "for the purpose of securing the payment of said purchase-money debt." The bills of sale and the mortgage were recorded in the office of the collector of customs at Baltimore on September 3, 1920, that being the place at which the tugs and barges were registered and enrolled. Upon the Delaware corporation being adjudged a bankrupt, the tugs and barges came into the custody of this court. Thereafter they were all sold under maritime liens, and the remnants and surplus arising therefrom, impressed with the lien of Hayes, if any, paid to the trustee.

[1, 2] The trustee first urges that the mortgage is invalid, even as against the bankrupt itself, without regard to the provisions of the Bankruptcy Act, in that, as is contended, the execution and delivery of the mortgage was not authorized by the board of directors of the mortgagor, because the mortgage was executed by the mortgagor's vice president, who was a brother of the mortgagee, and because the corporate seal of the mortgagor, affixed to the mortgage, was not attested by the secretary of the company. I think the execution of the mort-

gage was authorized by the board of directors. The agreement of November 13, 1919, provided for a "first mortgage bond issue." The Delaware corporation, mortgagor, was organized pursuant to and for the purpose of carrying out the terms of that agreement. The day after the receiver obtained authority to complete on his part the performance of the contract the Delaware corporation, with full knowledge of the contract of November 13, 1919, adopted the resolution of March 20, 1920, providing for the acquisition by it of the tugs and barges pursuant to the terms of that agreement, and also providing for an issue of bonds in form to be approved by the corporation's attorney in the amount of $100,000 and delivery thereof to Hayes. Under these circumstances the resolution must be read in the light of the agreement, and when so read it must, I think, be understood to provide for a "first mortgage" bond issue.

Whether the mortgage should be made direct to Hayes or to a trustee pertained more to form than to substance, and consequently, under the express terms of the resolution, was to that extent within the control of the corporation's attorney. The fact that the officer executing the mortgage in the name of the corporation was a brother of the mortgagee, if entitled to any weight, as showing the mortgage was given in fraud of the corporation, becomes of no importance after a finding that the execution and delivery of the mortgage was authorized by the board of directors. It is not disputed that the seal affixed to the mortgage is the seal of the mortgagor. Nor is there any evidence showing or tending to show that it was affixed by an unauthorized person. In the absence of such evidence the presumption that it was affixed by an authorized officer or agent (Fletcher's Cyc. Corp. § 757) must prevail. The mortgage bears the signatures of two witnesses to the execution, neither of whom was the secretary, and the seal was not attested by the secretary. But, the mortgage having been duly authorized by the corporation and the seal having been regularly affixed thereto, I shall, for the purposes of this case, assume, without deciding, the sufficiency of the execution.

The trustee next urges that the mortgage, even though otherwise valid, is voidable as a preference under section 60b of the Bankruptcy Act. The trustee has sustained this contention by establishing all the elements of a voidable preference, unless a mortgage which otherwise constitutes a voidable preference is deprived of that character by the fact that it was made pursuant to a contract providing therefor, entered into more than four months before the filing of the petition. I think the evidence supporting this finding is so clear that a review thereof is unnecessary.

The crucial question, therefore, is whether the agreement saves the mortgage. This depends, as I see it, upon what was "the time of the transfer" to Hayes of the mortgaged property. If the transfer occurred at the date of the agreement, or at the time of the advancement by Hayes of the money provided for therein, the time of the transfer falls without the period of voidability fixed by the bankruptcy act. If, however, there was no transfer, within the meaning of that statute, until the delivery of the mortgage, the other elements of a voidable pref-

erence having been found, the mortgage must be adjudgd invalid. It is manifest that, if the antecedent agreement is of such a character as to be wholly inoperative as a transfer of the property to which it relates, there is nothing upon which a ruling that the transfer occurred at the date of the agreement may be predicated. Consequently it becomes necessary, in pursuing the main inquiry, to consider whether the agreement, coupled with the advancement by Hayes of the moneys therein provided for, was sufficient to establish a lien or assignment valid in law or in equity, and, if it was, whether such lien or assignment is, under the circumstances here present, recognized by the Bankruptcy Act. The contract expressly provides that—

"Beginning as of November 1, 1919, and pending liquidation aforesaid, said Hayes may operate said nine barges and four tug boats, * * * accounting therefor to the company to be formed by him."

[3] It has hereinbefore been found that Hayes advanced the sum of $73,000 to the Maryland corporation, and the evidence justifies the inference that the delivery of the tugs and barges to Hayes as contemplated by the contract was made. It is clear, therefore, that Hayes in the first instance became a pledgee having a common-law lien. But Hayes surrendered the possession of the pledged property to the Delaware corporation in March, or at least not later than April 9th, and it is a well-settled principle of law that the lien of a pledgee continues only so long as he retains possession of the pledged property.

[4] The agreement of November 13th, however, provided for a $100,000 first mortgage bond issue against the property of the Delaware corporation. The Delaware corporation acquired the tugs and barges under the terms of that agreement, and by resolution of March 20, 1920, provided for such bond issue. What rights, if any, did such acquisition of the tugs and barges confer upon Hayes? Pomeroy's Equity Jurisprudence (4th Ed.) § 1235, says:

"* * * That every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice."

[5] That statement of the doctrine was approved by the Supreme Court in Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865. Though not free from doubt, I am inclined to think that the application of that rule to the facts of this case requires a finding that Hayes acquired an equitable lien upon the tugs and barges at the time or times they passed into the possession of the Delaware corporation. Does such a lien constitute a "transfer," within the meaning of section 60b of the Bankruptcy Act? Standing alone, it apparently would not. True, it was held in Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577—

"The trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."

This doctrine was reaffirmed in York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. For the very purpose, however, of avoiding that construction of the Bankruptcy Act, the amendment of 1910 to section 47a (2), being Comp. St. § 9631, was enacted. Loveland on Bankruptcy, 445; Collier on Bankruptcy (12th Ed.) p. 728. As was said in Re Kruse (D. C.) 234 Fed. 470, that amendment clothes—

"the trustee, as to all property in the custody of or coming into the custody of the bankruptcy court since that amendment, with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings upon such property so coming into the custody of the court of bankruptcy. Under this amendment, therefore, the trustee no longer stands simply in the shoes of the bankrupt; but as to all property acquired by the bankrupt since the amendment, and so coming into the custody of the court of bankruptcy, the trustee is entitled to all the rights of a creditor holding a lien by legal or equitable proceedings upon such property at the date of the bankruptcy, and the prior decisions, holding that he has no other rights than the bankrupt had at the time of the bankruptcy, are no longer controlling."

The trustee can no longer be said to have the limited title of the bankrupt. In re Gehris-Herbine Co. (D. C.) 188 Fed. 502; In re Hammond (D. C.) 188 Fed. 1020; In re Collins (D. C.) 235 Fed. 937; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 846, 136 C. C. A. 589, Ann. Cas. 1916A, 1268 (C. C. A. 6); In re O'Brien (D. C.) 215 Fed. 129; In re Pittsburg-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81 (C. C. A. 7). The effect of the amendment as thus interpreted seems necessarily to be to vest the trustee with title to the bankrupt estate freed from all liens that were enforceable only as against the bankrupt. Consequently, an equitable lien, which is without effect as against incumbrancers of the property without notice (Pom. Eq. Jur. § 1235), would seem to be as unknown to the bankruptcy law as amended as it is to the common law.

If this view be correct, such a lien is a nullity as against the trustee, and is not a "transfer" within the meaning of section 60, which deals, not with nullities, but with transfers that, save for that section, would be valid and binding as against the trustee. The courts have many times, both before and since the amendment, considered whether an agreement antedating the four months period and of the character to create an equitable lien is sufficient to validate an ensuing mortgage, otherwise invalid as constituting a voidable preference. Judge McPherson, sitting in the Eastern district of Pennsylvania, in Re Sheridan (D. C.) 98 Fed. 406, held that an agreement to pledge certain chattels, made more than four months prior to the filing of the petition, was ineffective to validate an otherwise voidable preferential transfer, where delivery of the goods was made during the four months period, and in so holding said that the pledgee's title to the goods attached, not at the date of the agreement, but at the date of the actual delivery. Judge Cross, sitting in the district of New Jersey, held, in Tilt v. Citizens' Trust Co. (D. C.) 191 Fed. 441, as stated by the syllabus:

"Transfers of property to a creditor by an insolvent within four months prior to its bankruptcy, which would otherwise constitute a voidable preference, are not deprived of that character by the fact that they were made pursuant to a prior agreement made more than four months before bankruptcy."

In reaching that conclusion the court adopted the reasoning of the Circuit Court of Appeals for the Eighth Circuit in Re Great Western Mfg. Co., 152 Fed. 123, 127, 81 C. C. A. 341. Upon appeal the Court of Appeals for this circuit affirmed the decree, for the reasons stated in the opinion of Judge Cross. Other similar cases are Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620 (C. C. A. 2), In re Mandel, 135 Fed. 1021, 68 C. C. A. 546 (C. C. A. 2), affirming (D. C.) 127 Fed. 863, Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555 (C. C. A. 4), Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 336 (C. C. A. 4), In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, and Lathrop Bank v. Holland, 205 Fed. 143, 123 C. C. A. 375 (C. C. A. 8).

There are numerous other decisions upon this question, some of which, however, arrive at a contrary conclusion; but I shall not undertake to review them, for I am not only convinced of the soundness of the doctrine sustained by the Court of Appeals for this circuit in the Tilt Case, but that case is in any event controlling, unless it be found that the principle there enunciated has been subsequently modified or denied by that court or by the Supreme Court. I have found no case decided by the Circuit Court of Appeals that even by inference might be thought to modify the Tilt decision, unless it be Zehner v. Southern Surety Co. (C. C. A.) 272 Fed. 954. In that case, however, the court found the sale made before the period of voidability was a transfer valid at law. The matter of an equitable lien was not involved, and the Tilt Case was, in my opinion, left unmodified thereby.

Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and Hurley v. Atchison, Topeka & Santa Fé Ry., 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, were all decided before Citizens' Trust Co. v. Tilt, 200 Fed. 410, 118 C. C. A. 562 (C. C. A. 3), and it may not be presumed that those or similar cases were not there considered. In Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, the Supreme Court, when considering a like question, said, "* * * A general promise to give security in the future is not enough," and in referring to the arrangement between the creditor and the bankrupt added, "It purported not to promise, but to transfer." In Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, it was found that neither the creditor nor the bankrupt knew that the latter was insolvent at the time of the supposed preference, or that there were any transfers with intent to defraud creditors, and also that the actual lien was acquired before any knowledge of insolvency. Those are distinguishing facts. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, is in principle the same as Zehner v. Southern Surety Co., supra.

Johnson v. Root Mfg. Co., 241 U. S. 160, 36 Sup. Ct. 520, 60 L. Ed. 934, the only remaining decision of the Supreme Court necessary, as I see it, to be discussed, is more nearly in point, but in that case a specific fund was set aside in a third hand more than four months before the

filing of the bankruptcy petition to pay a certain class of claims. This was done "after conferences of all parties concerned." The essence of the decision seems to me to be expressed in the words:

"* * * That the fund being thus appropriated and set aside, it does not matter that the formal ascertainment of the specific beneficiary was made within four months of the bankruptcy proceedings."

In short, the "transfer" there under consideration was actually made before the beginning of the four months period. Hence I find that Citizens' Trust Co. v. Tilt, supra, stands unmodified, and that the "transfer" to Hayes occurred within four months before the filing of the petition.

It is further contended by Hayes that the mortgage was made "for a present consideration," and that by reason thereof the transfer, even if made within the period of voidability, did not effect a preference under section 60b of the act, and that section 67d of the statute (Comp. St. § 9651) expressly preserved the lien of the recorded mortgage. Was there a "present consideration" for the mortgage? As I see it this involves two questions: First, whether an equitable lien is such consideration. From what has been hereinbefore said, this must be answered in the negative. The mortgage, and not the prior transactions, diminished the bankrupt estate. Second, when did Hayes become a creditor of the Delaware corporation? It seems clear that he became such creditor at the time that corporation acquired the subject-matter of the agreement of November 13, 1919. Maryland Apartment House Co. v. Glenn, 108 Md. 377, 70 Atl. 216; Cook v. Sterling Electric Co., 150 Fed. 766, 80 C. C. A. 502; Fletcher on Corporations, vol. 1, § 152.

It has been hereinbefore found that delivery of the tugs and barges was made on or before April 9, 1920. Title thereto passed at the time of delivery, and not at the time of the delivery of the bills of sale. The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428 (C. C. A. 3). Consequently, the mortgage was not given for a present consideration, but operated as security for an antecedent debt. The fact that the mortgage purports to be a purchase-money mortgage is not controlling. Burnett v. Frederick, 263 Fed. 681 (C. C. A. 3).

I am of the opinion that the order of the referee should be affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BROOKLYN RAPID TRANSIT CO., et al.

CENTRAL UNION TRUST CO. OF NEW YORK v. SAME.

(District Court, S. D. New York. October 6, 1921.)

Nos. E 15-347, E 16-164.

1. Mortgages ⇐131—Intent of parties as to after-acquired property controls.
In construing after-acquired property clauses in mortgages the court must ascertain the intent of the parties.

2. Corporations ⇐478—Parties held to intend to bring after-acquired property in as security.
A mortgage of a rapid transit company, containing the granting clause "all and singular the property and franchise of the said transit com-

pany whether now owned or hereafter acquired, including particularly the property hereinafter described, and does hereby pledge and hypothecate the same, that is to say," etc., *held* to intend that the lien should cover after-acquired property other than that specifically mentioned.

3. **Mortgages ⇐101—Words not treated as useless.**
In construing mortgages the court will not treat as useless words or phrases to which a natural meaning can be given.

4. **Mortgages ⇐106—Surrounding circumstances considered.**
The court may look to the surrounding circumstances to aid in interpreting a mortgage.

5. **Mortgages ⇐131—After-acquired property when covered by mortgage.**
Where property is acquired by a later bond issue, under circumstances where it is plain that the later bonds or their proceeds would not have been created and utilized to acquire such property without the safeguard of a first lien, then property so acquired is not first subject to the lien of a prior mortgage, unless the prior mortgage by express language warns subsequent mortgagees that such after-acquired property will be subject to the lien of the prior mortgage.

6. **Mortgages ⇐131—Mortgage covering after-acquired property creates equitable lien good against subsequent mortgagee with notice.**
A mortgage covering after-acquired property of a transit company creates an equitable lien which is good as against a subsequent mortgagee with notice.

In Equity. Suits by the Westinghouse Electric & Manufacturing Company and by the Central Union Trust Company of New York, respectively, against the Brooklyn Rapid Transit Company and others. Respective rights of trustees under mortgages determined.

Larkin, Rathbone & Perry, of New York City (Henry V. Poor, James L. Banks, Jr., and Stephen A. Van Ness, all of New York City, of counsel), for Central Union Trust Co. as trustee.

Murray, Prentice & Aldrich, of New York City (George Welwood Murray, William Roberts, and Henry C. Place, all of New York City, of counsel), for defendant Equitable Trust Co. of New York, trustee.

Collin, Wells & Hughes, of New York City (John L. Wells, of New York City, of counsel), for 1895 Bondholders' Committee.

Chadbourne, Hunt & Jaeckel, of New York City (William M. Chadbourne and Frank Marsh, both of New York City, of counsel), for Committee of Contract Creditors of Brooklyn Rapid Transit Co.

MAYER, District Judge. There is pending a foreclosure suit which is brought by Central Union Trust Company of New York to foreclose what is known as the first refunding gold mortgage of Brooklyn Rapid Transit Company, dated July 1, 1902.

The B. R. T. executed a mortgage, dated October 1, 1895, to Central Trust Company, trustee, under which mortgage the Equitable Trust Company of New York is now acting as substituted trustee. As the latter trustee claims that its mortgage operates as a first lien on certain property, it was deemed desirable that certain issues should be decided by the court in the first instance; for, if the decision were adverse to the trustee of the 1895 mortgage, it was thought that the proceedings before the special master could be much abbreviated. To that end the court entered an order, dated April 1, 1921, providing, inter alia:

"(1) That the orders of this court dated October 20, 1920, and February 24, 1921, respectively, referring to Hon. E. Henry Lacombe, as special master, the issues raised by the pleadings in the above-entitled constituent cause, in equity, No. E 16–164, are hereby so modified as to withdraw after April 5, 1921, from further consideration by said special master all questions and issues relating: (a) To whether the defendant Equitable Trust Company of New York, as trustee under the mortgage of Brooklyn Rapid Transit Company, dated October 1, 1895, has any claim against or lien upon the stocks, bonds, and certificates of indebtedness deposited with Central Trust Company of New York, as trustee under the first refunding gold mortgage of Brooklyn Rapid Transit Company, dated July 1, 1902, and the properties formerly of Transit Development Company and embraced in its agreement, dated March 29, 1907, and its indenture dated July 24, 1915; and/or (b) to the relative priorities of the plaintiff and the defendant Equitable Trust Company of New York, as trustee as aforesaid, in and to said stocks, bonds, certificates of indebtedness, and other properties above mentioned."

For brevity:

(1) The mortgage dated October 1, 1895, will be referred to as the 1895 mortgage.

(2) The first refunding gold mortgage, dated July 1, 1902, as the 1902 mortgage.

(3) Brooklyn Rapid Transit Company, as B. R. T.

(4) Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Company et al. (C. C. A.) 263 Fed. 532, as the Sea Beach Case.

(5) The four paragraphs in the 1895 mortgage covering specifically described property, as the four items. Sometimes, as will appear infra, it may be necessary to refer particularly to the items of existing property as distinguished from the after-acquired property provisions in these paragraphs, and vice versa.

On January 18, 1895, B. R. T. was organized under the Business Corporations Law of New York (Consol. Laws, c. 4) for the following purposes and with the following powers as stated in the certificate of incorporation:

"Second. The purposes for which it is to be formed are: The construction, extension, repair, improvements, equipment of, and furnishing the motive power for, railroad and other works, and aiding any corporation or individual in such construction, extension, repair, improvement, equipment, and furnishing of motive power.

"Third. The said corporation shall be authorized to purchase, acquire, hold, and dispose of the stocks, bonds, and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds, or other obligations."

Under date of January 30, 1896—i. e., after the date of the B. R. T. incorporation—B. R. T. executed and delivered the 1895 mortgage. It was dated as of October 1, 1895. This antedating, it is agreed by counsel, was not significant, so far as the testimony discloses, except to fix the date from which interest should run.

The mortgage was to secure the issue of $7,000,000 face amount of 50-year 5 per cent. gold bonds. It may be here noted that of this issue $6,970,000 are outstanding in the hands of the public, $5,000 in the treasury of B. R. T., and $25,000 are pledged in the Brooklyn City Railroad Company guaranty fund.

The 1902 mortgage was executed and delivered to Central Trust Company of New York, as trustee, securing an authorized issue of $150,000,000 as face amount of 100-year 4 per cent. gold bonds. $57,240,000 of these bonds have been authenticated and delivered, of which $29,619,000 have been converted into B. R. T. stock and canceled, leaving $27,621,000 distributed as follows: $3,439,000 in the hands of the public; $5,092,000 in the treasury of the receiver; $7,079,000 pledged to secure bank loans antedating the receivership; $10,000,000 pledged to secure Brooklyn Rapid Transit Company 6-year 5 per cent. secured gold notes; $250,000 pledged under the Brooklyn city guaranty fund; $1,761,000 owned by the Nassau Electric Railroad Company.

Between 1902 and December 31, 1918, the date of the receivership, there had been pledged and deposited with Central Union Trust Company of New York, and it now holds, as trustee under the 1902 mortgage, a large amount of the stock, bonds, and certificates of indebtedness of various companies.

The controversy, in part, is as to the lien of the respective mortgage trustees in respect of these stocks, bonds, and certificates of indebtedness.

The 1895 mortgage recited, inter alia, as follows:

"Whereas, the transit company has purchased and is about to acquire possession of all of the property and assets of the Long Island Traction Company, a Virginia corporation, including the capital stock of the Brooklyn Heights Railroad Company, the lessee, under an indenture of lease dated February 14, 1895, of all and singular the railroad and railroad routes and other property of the Brooklyn City Railroad Company; and

"Whereas, the transit company, in order to make payment for the property so purchased by it, and for other purposes of its incorporation, desires to borrow money, and, to that end, its board of directors has resolved to issue and dispose of the bonds of said transit company, secured by its mortgage of and upon all of its property, and has authorized the execution and delivery of these presents and the execution, delivery, and issue of said bonds to the aggregate amount of seven million dollars. * * *"

The granting clause of the mortgage was as follows:

"The said Brooklyn Rapid Transit Company, in consideration of the premises and of the sum of one dollar to it in hand paid by the trustee, the party hereto of the second part, receipt whereof by the said transit company is hereby acknowledged, and to secure the payment of the principal and interest of said bonds, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, set over, and deliver unto the trustee, the party hereto of the second part, its successor or successors and assigns, all and singular the property and franchise of the said transit company, whether now owned or hereafter acquired, including particularly the property hereinafter described, and does hereby pledge and hypothecate the same, that is to say:

"I. All the right, title and interest which the said transit company now owns or may hereafter acquire in and to the entire capital stock of the Brooklyn Heights Railroad Company, consisting of two thousand shares of the par value of one hundred dollars each.

"II. All dividends, income, interest, and increase to which the said transit company now is or may hereafter become entitled, by reason of its right, title, and interest in and to the capital stock of the Brooklyn, Queens County & Suburban Railroad Company, which said right, title, and interest is, however, subject to be diverted to and vested in the Brooklyn City Railroad Company in the contingency mentioned in a certain tripartite agreement

made and executed by and between the Long Island Traction Company, the Brooklyn, Queens County & Suburban Railroad Company, and the Brooklyn City Railroad Company, dated January 16, 1894.

"III. All net profits of or in any wise derived or receivable by said the Brooklyn Heights Railroad Company, as lessee as aforesaid under the above-mentioned lease of February 14, 1893, and also all other income of the Brooklyn Heights Railroad Company, after discharging its obligations under the said lease and remaining after paying an annual dividend of 10 per centum upon its capital stock, such remainder of said income having been duly granted and assigned by said the Brooklyn Heights Railroad Company to the Long Island Traction Company pursuant to agreement dated April 7, 1893, which said agreement is about to be assigned and delivered to the said transit company simultaneously with the delivery of these presents; also all right, title, and interest in and to the guaranty fund of $4,000,000 provided under the terms of the above-mentioned lease of the Brooklyn City Railroad Company to the Brooklyn Heights Railroad Company which, by the above-mentioned agreement of April 7, 1893, was granted and assigned by said the Brooklyn Heights Railroad Company to the Long Island Traction Company, and which by the assignment and delivery of said last-mentioned agreement to said transit company is now, or shall hereafter be vested in said transit company.

"IV. All the right, title, and interest of the transit company in and to the amount of the cost of all property, extensions, branches, additions, improvements, and equipments, heretofore and hereafter made, acquired, and paid for by the Brooklyn Heights Railroad Company or said transit company out of their own funds for use in connection with the operation of the railroads of the Brooklyn City Railroad Company, less the cost of such part thereof as shall or may be required to preserve said railroads, extensions, branches, additions, improvements, and equipments in good repair and serviceable condition during the existence of the lease hereinabove mentioned from said the Brooklyn City Railroad Company, as lessor, to the Brooklyn Heights Company, as lessee, and less the cost of such part thereof as shall or may be necessary to preserve and secure efficiency in the operation of such railroads; such cost, as aforesaid, being payable under the terms of the lease above mentioned by said lessor company to said lessee company, in the event of the expiration of said lease or other sooner termination thereof."

It was further provided as follows:

"Bonds of the issue hereby secured to the amount of four million eight hundred and seventy-five thousand dollars par value shall be certified by the trustee and issued to or upon the order of the transit company for use in making payment of part of the purchase price payable by the transit company for the property hereby mortgaged. The remainder of said bonds, amounting to two million one hundred and twenty-five thousand dollars par value, shall be certified and issued from time to time, as required for use by the transit company for its corporate purposes."

It will be seen from the foregoing that the bonds issued on the mortgage security were to be used: First, to pay for the Long Island Traction Company property; and, secondly, for other purposes for which the B. R. T. could use money in the proper exercise of its corporate powers. It further appears that it was estimated that not more than $4,875,000 par value of bonds would be needed for the purchase of the specific property then mortgaged, thus leaving $2,125,000 par value of bonds to be certified and issued from time to time as required for use by B. R. T. in carrying on its corporate business.

[1] In construing the after-acquired property clause, we start with

the time-worn canon of construction that the court must ascertain the intent of the parties.

The parties had concluded that the cost of acquiring the specific property mentioned in the mortgage would not exceed $4,875,000. There were still available for future purposes $2,125,000 of bonds. The corporate powers of B. R. T. were broad, and there is no language in the mortgage which indicates an intent to limit the use of the $2,125,000 of bonds to expenditures on the specific then existing property. On the contrary, the language is definite that the $2,125,000 of bonds should be certified and issued from time to time, "as required by the transit company for its corporate purposes"—i. e., for any of such purposes. To illustrate, if the proceeds of the reserved bonds were to be used to buy the stock of a railroad not referred to in the 1895 mortgage and the after-acquired clause were limited to the four items, then such new property would be free of the lien of the 1895 mortgage. It is difficult to conclude that so unbusinesslike a result was contemplated or that it could have been supposed that either the Stock Exchange would list these reserved bonds or that the public would buy them, if the security to which the bondholder could look did not include the property acquired with the proceeds of such bonds and was confined to an additional load solely on the existing property and the acquisitions mentioned in the four items.

[2] In other words, the intent of the parties as gathered from the instrument itself must have been to strengthen the security upon which purchasers of the $2,125,000 of bonds could rely by bringing in under the mortgage at least the property after acquired with the proceeds of these reserved bonds. In such circumstances it would be expected that the after-acquired property provision of the granting clause would not be confined to the four items. What has been said supra in respect of the reserved bonds is not to be understood, however, as limiting the after-acquired property clause to property acquired with these bonds, but as explaining at least one of the reasons why an after-acquired property clause was to be expected. In 1895 after-acquired property clauses had long been known, as the court may assume from reported cases. Their meaning and scope must, of course, be ascertained from the language used.

When the language of this granting clause is examined, it will be found that comprehensive words are used; i. e., "all and singular the property and franchises of the said transit company, whether now owned or hereafter acquired." If the clause had stopped there, no one would have doubted that it was intended to cover after-acquired property in addition to that mentioned in the four items. If, on the other hand, the word "acquired" had been followed immediately by "that is to say" and the four items, then Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637, would have been controlling authority; for in the four items are words of after acquisition, and it could be soundly contended that the words "that is to say" were words of limitation, holding the granting clause down to the property then existent and to the income, etc., thereafter to accrue, as described in the four items. But inter-

mediate the words "hereafter acquired" and the words "and does hereby hypothecate and pledge the same" are the words "including particularly the property hereafter described."

[3] It is another time-worn canon of construction that the court will not treat as useless words or phrases to which a natural meaning can be given. It is apparent from the mortgage itself that the only property contemporaneously susceptible of immediate description was that comprised within the four items. If it had been intended to confine the mortgage lien to that property and the after acquisitions mentioned in the four items, that intention could have been simply expressed by a phrase in substance as follows: "All and singular the following property and franchises, that is to say," 1, 2, 3, and 4. Items 1, 2, 3, and 4 contained within themselves all the future or after-acquired property clauses necessary and relevant to the subject-matter, such as: (1) "Hereafter acquire" Brooklyn Heights Railroad Company stock; (2) dividends, etc., to which B. R. T. "may hereafter become entitled"; (3) all right to the guaranty fund which "shall hereafter be vested" in B. R. T.; (4) all right "to the amount of the cost of all property, extensions * * * hereafter made, acquired, and paid for. * * *" If it was intended to limit the granting clause to the four items, then the "including" clause was meaningless.

There is, however, no mystery about this clause. Ordinarily the public is relied upon to absorb bond issues of this character, and it constitutes the market. An indefinite clause that a mortgage covers all the property a corporation now owns or may hereafter acquire does not convey any detailed information. Language showing that a mortgage covers certain specifically described existing property as well as property which the corporation may hereafter acquire calls attention, in any case, to the specifically described existing property, which is unquestionably mortgaged. Also, as between the parties, such language sets at rest from the outset any question as to what specific property is mortgaged in any event. It is quite usual and indeed sound draftsmanship to describe as clearly as possible the property in esse which the mortgage covers at the time it is created. The fact that such a clause is usual and not extraordinary is well illustrated by a clause in the 1902 mortgage precisely similar in this regard with the clause in the 1895 mortgage, reading "all and singular the property and franchises of the said transit company whether now owned by the transit company or hereafter acquired by the transit company with the proceeds of said bonds, including particularly the property hereinafter described, that is to say."

That the draftsman of the 1895 mortgage was quite devoted to the word "including" is further seen in the recital supra as to the purchase of the Long Island Traction Company property "including the capital stock of the Brooklyn Heights"—an expression very similar to that later used in the granting clause.

It is urged, however, that certain provisions of the 1895 mortgage indicate that it was not contemplated that the after-acquired property clause should embrace more than the after-acquired provisions in the

four items. It is pointed out that in article 2 of the 1895 mortgage specific provision is made that the company is to receive the dividends on the Heights stock, dividends, income, and increase from the Suburban stock, all income of the Heights Company in any way receivable by the B. R. T., and also the guaranty fund if it became payable, but that the article does not contain any general expressions whatever, and that there is not anywhere in the mortgage any provisions as to the income of property other than that specifically described.

Article 3 refers only to the safe-keeping of the Brooklyn Heights stock only, and article 4 is, in substance, limited to references to the same stock. Since 1895 instruments of this character have become more frequent and familiar, and draftsmen have had the advantage of more precedents and more experience. It is plain that what this draftsman had in mind was the making of appropriate provisions for specific property then known to all concerned, and his failure to make similar provisions for property then unknown which might thereafter be acquired should not be regarded as so significant as to destroy the otherwise plain meaning and intent of the after-acquired property clause; and it would be straining the meaning of the parties and avoiding their expressed intent to whittle such a clause down to specific existing items, because of limited references dealing with administrative details in subordinate provisions of the mortgage.

[4] The discussion thus far has dealt only with the construction of the instrument unaided by reference to surrounding circumstances. It is said, however, both in Smith v. McCullough, supra, and in the Sea Beach Case, that the court may look to the surrounding circumstances in aid of interpreting the mortgage. Particularly is this applicable here, because the Long Island Traction Company purchase is referred to in the 1895 mortgage.

The organization of B. R. T. and the execution of the 1895 mortgage both grew out of the insolvency of the Long Island Traction Company and the foreclosure of its collateral trust deed, dated August 1, 1894. The committee representing the holders of the collateral trust notes and the stockholders of the Long Island Traction Company caused B. R. T. to be formed and the 1895 mortgage to be executed in carrying out the foreclosure of the collateral trust deed and the reorganization.

The collateral trust deed of the traction company (Exhibit 38) had been executed in 1894 to secure $3,000,000 principal amount of collateral trust notes, of which $1,875,000 were in the hands of the public, and approximately $900,000 were pledged to secure a note for $620,000. The collateral trust deed had pledged under it as security the specific property mentioned in the four items, but did not contain any general after-acquired property clause; and the existing property described in the four items was the only property specifically named in each mortgage. On reorganization the old note holders of the Long Island Traction Company received for their notes an equal amount of bonds issued under the 1895 mortgage (viz. $1,875,000), $2,125,000 of bonds were reserved for corporate purposes, and the old stockholders of the Long

Island Company purchased $3,000,000 of bonds issued under the 1895 mortgage for $3,000,000 in cash. The $3,000,000 of cash was used as follows:

To acquire and provide for notes outstanding, about	$620,000
To acquire and provide for obligations and expenses of the receiver of the Long Island Traction Company to July 1, 1895, about	600,000
To provide for claims for damages and otherwise against the Brooklyn Heights Company, the Traction Company and its Receiver, about	500,000
To be used for betterments, for expenses of reorganization and other purposes	1,280,000
	$3,000,000

Of the last-mentioned amount $889,704.87 was turned into the treasury of B. R. T. for use in its general corporate purposes.

Accordingly, when B. R. T. began business, it had acquired and paid for the existing property named in the four items, and also had approximately $900,000 of cash in its treasury, together with $2,125,000 of its 1895 mortgage bonds applicable to corporate purposes. As B. R. T. was a holding company, with practically no operating expense, and as these funds were not surplus of B. R. T. and could not be used for dividends, it must have been contemplated that the $900,000 (approximately) of cash and the $2,125,000 of reserved bonds would be used by it later in acquiring properties.

Prior to July 1, 1902, B. R. T. had applied to the Stock Exchange from time to time to list the $2,125,000 of bonds. These applications had been granted to the extent of all but $375,000. The bonds had been disposed of and property had been bought with their proceeds. (Exhibits 99-102, inclusive, refunding foreclosure; Exhibit 103 refers to the application as to $375,000 of bonds dated December 30, 1907.)

When, therefore, the 1902 mortgage was executed and delivered, the facts, readily ascertainable, would have demonstrated that the lien of the 1895 mortgage was not intended to be confined to the four items; for it had taken only $1,875,000 of bonds to wipe out the notes, and, in round numbers, $2,100,000 to clean up other reorganization expenses, making a total of $3,975,000 in round numbers, and there was thus available, from the start, about $3,025,000 in cash and bonds with which to acquire new property.

It is strongly urged, however, that under the Sea Beach Case this court must hold that the 1895 mortgage is confined to the four items. Of course, this court would feel itself bound to follow the decision of the Circuit Court of Appeals.

The Sea Beach Case, however, was different in several respects. In that case the court below considered only the questions discussed at page 537 et seq. of the opinion in the Sea Beach Case. The record now has been supplemented, inter alia, with the data showing the circumstances under which the 1895 mortgage was executed and delivered. The securities here under consideration are not in the possession of the receiver. The question here is as to liens between two mortgage trustees, not as to the rights of a receiver in possession of securities. It will be observed also that in the Sea Beach Case the court said:

"Its specification of the different kinds of property pledged indicates an intention to confine it to such properties as would be held in the ordinary course of the Brooklyn Rapid Transit Company's business as a holding company."

The securities purchased with the proceeds of the $2,125,000 of bonds and those securities in controversy which are in the possession of the 1902 trustee are securities which B. R. T. had the power to buy, sell, exchange, or hold in the ordinary course of its business. It must be assumed, therefore, that the decision of the Circuit Court of Appeals in the Sea Beach Case was intended to be confined to the particular controversy then before the court, and, as the questions of law and fact on this record are not the same as those presented in the Sea Beach Case, it is consequently the duty of this court to dispose of this case on its own record.

[5] The next question is the relation of the 1895 mortgage to the 1902 mortgage. The after-acquired property clause of the 1895 mortgage, under the construction given to it in this opinion, was broad; but, as said by Judge Taft in Harris v. Youngstown Bridge Company, 90 Fed. 322, at page 329, 33 C. C. A. 69, at page 75:

"Where the legal or equitable title of the mortgagor ripens and is acquired only through the outlay or expenditure of another, under such circumstances that, as between the other and the mortgagor, the former has a lien in equity upon the interest of the latter, the prior mortgage with an after-acquired property clause attaches only to the interest of the mortgagor subject to the same lien."

Analogously, where property is acquired by a later bond issue under circumstances where it is plain that the later bonds or their proceeds would not have been created and utilized to acquire such property without the safeguard of a first lien, then property so acquired is not first subject to the lien of a prior mortgage, unless the prior mortgage, by express language, warns subsequent mortgagees that such after-acquired property will be subject to the lien of the prior mortgage.

It is true, of course, that a mortgagor and a subsequent mortgagee cannot change the rights of a mortgagee under a prior mortgage; but that elementary principle does not mean that the mortgagor may not acquire new property with the funds of a third party under circumstances where the third party either protects himself or is protected in equity by a purchase-money lien.

As was also said by Judge Taft in the Harris Case supra:

"It may very well be that, unless the purchase money is secured by a first lien, no addition will be acquired. The security of the first mortgage is increased by the difference between the value of the addition bought and the part of the price which the mortgagor did not pay. It is not perceived what prejudice the mortgagee suffers by the transaction. His security is certainly not worse, and it may be a great deal better."

In the case at bar some or all of the transactions engaged in under the terms of the 1902 mortgage may not have given rise, technically, to purchase-money liens, but equity will not be deterred from protecting the 1902 trustee in those cases where the use of bonds or their proceeds and the acquisition of new property were part of the same trans-

action, and the title, if any, of B. R. T. was a mere incident of the same transaction.

As was further said by Judge Taft in the Harris Case, supra:

"There is a clear distinction between the obligations of a mortgagor under a mortgage in which the property described as mortgaged, though definitely described, is yet to be bought and constructed, and the obligations of one under a mortgage in which the property described as mortgaged is in existence as a completed thing, and the after-acquired property clause is inserted only to increase the original security. In the former class of cases the mortgagor is impliedly bound to buy and complete the thing mortgaged as described, and bring it under the lien of the mortgage, without burden or incumbrance. Such was the case of Wade v. Railroad Co., 149 U. S. 327, 13 Sup. Ct. 892; and such, too, is the case of Benner v. Trust Co. (decided to-day by this court) 90 Fed. 348. In the latter class of cases the mortgagor is bound neither to make additions, nor, if he does make them, to free them from prior liens arising in and out of the act of acquisition."

So in the case at bar there is a marked difference between (1) the property acquired by B. R. T. after the 1895 mortgage with funds over which it had unrestricted control and (2) property acquired with the 1902 bonds or their proceeds under an agreement that, as a condition of the acquisition by B. R. T., such property must be deposited with the 1902 trustee and subjected to the lien of the 1902 mortgage. The latter class of property was intended to be created only if the lender were secured by the very property to acquire which the bonds were to be authenticated and delivered.

The terms of the 1895 mortgage were quite different from those discussed in Boston Safe Deposit Trust Co. v. Bankers' & Merchants' Tel. Co. et al. (C. C.) 36 Fed. 288. In that case, in order to gain control of the American Rapid Telegraph Company, it was agreed that the first mortgage should cover, inter alia, property thereafter to be built or acquired by the Bankers' & Merchants' Telegraph Company. The language was plain, and the transactions showed the intent of the after-acquired property clause. No such language is used in the 1895 mortgage. Indeed, in item IV of the 1895 mortgage it will be noted that the after-acquired property there mortgaged is the right, title, and interest of B. R. T. in and to "the amount of the cost of all property, extensions, branches, additions, improvements, and equipments * * * hereafter made, acquired, and paid for by" Brooklyn Heights or B. R. T. "out of their own funds for use in connection with the operations of the Brooklyn City Railroad Company. * * *" Surely "out of their own funds" could not have been intended to mean funds created by a new bond issue under circumstances which did not permit B. R. T. to deal with the property acquired by such funds in its uncontrolled discretion, but required that such property should be placed under the lien of the later mortgage.

In the 1902 mortgage, while (referring to existing property) it was realized that the mortgage was "subject as to certain portions of said property hereby mortgaged and pledged to the lien of" the 1895 mortgage, yet at the same time it was intended that procedural machinery should be erected whereby property acquired after the 1902 mortgage with 1902 bonds or their proceeds should be subject to its first lien. Such machinery was erected.

Under article 1, section 2, of the 1902 mortgage, contemporaneously with the execution and delivery of the mortgage and a certified copy of the resolution of the B. R. T. directors, the trustee was required to authenticate and deliver to or upon the order of the president or vice president of B. R. T. $5,000,000 of bonds. B. R. T., however, was not authorized to use these bonds as it pleased, nor to dispose as it pleased of property acquired with those bonds or their proceeds. It was provided:

"The said bonds and all other bonds authenticated and delivered under the provisions of this section shall be held and used by the transit company as a fund for the purpose of making, furnishing, or acquiring equipments, betterments, improvements, additions, and extensions to its own property or to the property of any corporation * * * and for the purpose of acquiring by purchase, exchange, or otherwise additional stocks, bonds, securities, obligations, or property of any description. For any such bonds or the proceeds thereof used for the purpose of making, furnishing, or acquiring equipments, betterments, improvements, additions, and extensions to the property of any corporation except the transit company, the transit company shall take stock or obligations of the corporation benefited and deposit such stock or obligations with the trustee. No part of the bonds issued under the provisions of this mortgage or the proceeds thereof shall be used in payment of the operating expenses of the transit company, or of any such corporations, or of any of the constituent corporations of the transit company, or in payment of the interest on any bonds or other obligations of or for rentals payable by the transit company or any of said corporations. * * *"

It will be noted from the foregoing that the bonds or their proceeds were to be used for purposes specifically named, and that B. R. T. "shall" take stock or other obligations of the corporation benefited by the expenditures. B. R. T. could not then do what it pleased with such stock or obligations. It was required ("shall * * * deposit") to deposit such stock or obligations with the trustee. The $5,000,000 was in the nature of a revolving fund. Hence, carrying out the scheme of the mortgage, it was provided:

"Any and all property acquired by the transit company by the expenditure from time to time of any part of such bonds or the proceeds thereof shall be transferred to or deposited with the trustee and shall immediately become and be subject to the lien of these presents, with the same effect as if it were specifically described, conveyed, and assigned in and by this mortgage at the time of the execution thereof."

Certain provisions are then made in sections 3 and 4 of article 1 in respect of underlying bonds, and then under section 5, "Issue of Bonds to Acquire Additional Property," the following appears:

"The remainder of the bonds authorized to be issued under and secured by this mortgage shall be authenticated and delivered from time to time by the trustee, and shall be used by the transit company only for the purpose of acquiring by purchase, exchange, or otherwise stocks, bonds, securities, or other property of any kind whatsoever which the transit company shall be legally authorized at the time to purchase or acquire.

"Whenever, from time to time, the transit company shall request the authentication and delivery of any bonds for any of the purposes mentioned in this section, the principal amount at par of the bonds issued, authenticated, and delivered therefor shall in no event exceed the actual cost to the transit

company of the stocks, bonds, securities, or other property as acquired by the transit company.

"The bonds to be issued under this section shall be authenticated and delivered by the trustee to or upon the order of the president or a vice president of the transit company, upon conveyance, delivery, or transfer to the trustee of the bonds, stocks, securities, or other property for acquiring which bonds are authorized to be authenticated and delivered under this section, and upon request of the transit company expressed in a resolution of its board of directors or executive committee, requesting authentication and delivery thereof, stating the amount and purpose or purposes for which such bonds are required, together with an affidavit of the president or a vice president of the transit company giving a detailed statement of the actual cost to the transit company of the stocks, bonds, securities, or other property acquired as aforesaid and transferred to or deposited with the trustee. * * *

"All of the stocks, bonds, securities, and other property acquired by the transit company with the bonds or the proceeds thereof, so authenticated and delivered, for any of the purposes mentioned in this section, when conveyed, delivered, transferred to, or deposited with the trustee as aforesaid, shall become and be subject to the lien hereof as fully and completely as though specifically described herein as being mortgaged or pledged hereunder."

It may perhaps be variously argued that section 5, supra, is susceptible of one of the two following constructions: (1) That bonds were to be authenticated and delivered to B. R. T. contemporaneously (in the sense of the same transaction) with the acquisition of property by B. R. T.; or (2) that bonds were to be authenticated and delivered whenever B. R. T. so requested, even though B. R. T. had previously acquired the property with general funds or in some manner otherwise than with bonds authenticated and delivered for the purpose of acquiring the property contemporaneously—i. e., in the sense of the same transaction.

As between the parties (i. e., B. R. T. and the 1902 trustee), it does not make any difference whether property was deposited with the trustee in accordance with one theory or the other or both. As between the two trustees, however, only that property can escape the lien of the 1895 mortgage which was acquired with bonds which had been authenticated and delivered for the purpose of enabling B. R. T. to acquire property from a third party, as distinguished from transactions where B. R. T. acquired property, not with 1902 bonds nor with their proceeds, but with general funds or in some way other than with the 1902 bonds or their proceeds, and thereafter obtained bonds from the 1902 trustee for such property.

The words "bonds" and "proceeds of bonds" have been used supra as interchangeable terms, because, while the granting clause uses the words "proceeds of said bonds," the context (article 1, sections 2 and 5, particularly) indicates that "bonds" and "proceeds of bonds" are synonymous terms.

In brief, the purpose of the 1902 mortgage was to acquire new property with a string attached which should draw the new property under the lien of that mortgage by a procedure analogous with that which assures a purchase-money lien. Whether this purpose was successfully carried out depends in each instance upon what, in fact, was done.

In the foregoing discussion the expression "same transaction" has been used on several occasions. It is not practicable to define this ex-

pression theoretically. What is "the same transaction" depends largely on the facts, and in this case it may well be that the liens in respect of some of the property in controversy cannot be determined without an inquiry into the history of the acquisition and disposition of such property.

[6] In the foregoing discussion also it has been assumed that it is now settled that under the law of New York a mortgage covering after-acquired property of the character here in controversy creates an equitable lien which is good as against a subsequent mortgagee with notice. Titusville Iron Co. v. City of New York, 207 N. Y. 203, 100 N. E. 806; In re P. J. Sullivan Co., 254 Fed. 660, at page 662, 166 C. C. A. 158.

The conclusions arrived at may be thus summarized:

A. The 1895 mortgage has a first lien in equity on: (1) Property acquired with the proceeds of the $2,125,000 of bonds; (2) property acquired with the $889,704.87; (3) such property after acquired by B. R. T. as is not subject to the lien of the 1902 mortgage as indicated in C, infra.

B. The 1895 mortgage has an equitable lien subject to the first lien of the 1902 mortgage in after-acquired property of the character referred to in C, infra.

C. The 1902 mortgage has a first lien on: (1) Property acquired with the proceeds of bonds under article 1, section 2, of the 1902 mortgage where the procedure therein set forth was followed; (2) property acquired with bonds authenticated and delivered to B. R. T. where such property was acquired by B. R. T. and deposited with the 1902 trustee under circumstances where the authentication and delivery of bonds, the acquisition of property, and the pledge with the trustee were all parts of the same transaction.

D. The 1902 mortgage has a lien junior to the 1895 mortgage, where property was deposited with the 1902 trustee under circumstances not falling within those outlined in C.

In view of the foregoing conclusions, it is apparent that the court is unable upon this record to determine in detail the liens on the property involved, and it becomes necessary, therefore, to send the issues back to the special master, unless counsel can devise some simpler method of attaining a result upon which a decree may be predicated.

The court has been requested to determine upon which trustee rests the burden of proof, but this and other questions will not be anticipated. The master, who is highly experienced, may apply to the court for instructions from time to time, as he may be advised.

It will be observed that questions of practical construction, knowledge of trustees in certain respects, and other questions have not been discussed, because regarded as not necessary for the purposes of this opinion. Whether such questions need be later considered will be, in the first instance, for the master to determine, as the litigation progresses.

It is to be understood that this opinion is confined solely to the question of liens as between these two trustees. Other questions of fact

and law may apply to the status of claims of general creditors or to the status of certain of the securities, where transactions have occurred which affect the rights of parties other than these trustees.

Settle order on notice.

GENERAL BAKELITE CO. v. GENERAL INSULATE CO.

(District Court, E. D. New York. July 31, 1921.)

1. **Patents ⟸328—For methods of making synthetic gums or resins valid and infringed.**
   The Baekeland patents, No. 942,699, claims 1, 2, and 4, No. 942,852, claims 5 and 6, and No. 939,966, claims 1, 2, and 3, relating to processes for producing an infusible and insoluble material as a condensation product of the chemical union of phenol and formaldehyde, and the products of such processes, which material when molded or formed is used for insulating and many other purposes, *held* valid and infringed.
2. **Patents ⟸165—No broader than claims.**
   A patent can be valid for no more than is covered by the claims of that patent.
3. **Patents ⟸167(1), 170—Claims limited by disclosure and prior art.**
   The claims of a patent, when limited by the disclosure of the specifications and by the condition of the prior art, may be valid, even though the language of the claims be so broad as to cover other matters, if viewed out of their proper context.
4. **Patents ⟸168(1)—Procedure in Patent Office may limit claims.**
   The procedure in the Patent Office and the acts of the patentee with respect thereto may be used in determining limitations on his claims and in discovering the precise meaning of a claim as allowed.
5. **Patents ⟸168(2)—To determine state of art, disallowed claims may be looked to.**
   The claims of a patentee which are disallowed, and the extent of acceptance of the ruling will frequently show what point the prior art had disclosed to the examiner and the patentee, and in this way create a limitation of possible broad language in the claims or indefiniteness in the specifications.
6. **Patents ⟸160—File wrapper may be resorted to.**
   The file wrapper in a patent application may be resorted to, in order to throw contemporary light on the development of the prior art, and to determine whether or not the patentee has attempted to enlarge his claims, or to modify the scope of his invention as subsequent discoveries come to the notice of the patentee.
7. **Patents ⟸157(2)—Claims construed narrowly to give validity.**
   Patent claims, if ambiguous, or capable of a broad and a narrow meaning, should be construed narrowly, if they may thereby be held valid, and a broad interpretation should not be used if the result is to cause invalidity.
8. **Patents ⟸66, 120—Separate patents may be secured for process and the product, and one does not anticipate the other.**
   If applications for process and its product are copending, separate patents may issue therefor. The earlier patent issued is not an anticipation of the other.

In Equity. Suit by the General Bakelite Company against the General Insulate Company. Decree for complainant.

Charles Neave, of New York City, C. P. Townsend, of Washington, D. C. (Maxwell Barus, of New York City, of counsel), for plaintiff.

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

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., and Messimer & Austin, of New York City (John H. Lee, of Chicago, Ill., and J. Edgar Bull, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff is the assignee of a number of patents granted to Leo H. Baekeland, on applications filed from February 18, 1907, until the 13th of December, 1910. Patents were issued on these applications at various times, beginning November 16, 1909 (No. 939,966, one of the patents in suit), and continuing until June 13, 1916.

[1] These patents have, as the foundation for their existence, the production of a synthetic material from the chemical union of carbolic acid and formaldehyde. The term "carbolic acid" is the common or trade name of certain phenolic bodies in liquid form. The chemical substances used in making the synthetic material above referred to embrace a number of these phenolic bodies, including phenols, cresols, and xylenols. The term "formaldehyde" embraces different compounds of methylene groups, and the reaction product takes, as the first separable form, a viscous or plastic semisolid gum, which, upon concentrating or drying after separation from the liquid of the reaction, hardens to resemble, in superficial respects, natural gums or resins of the types commonly familiar and called shellac or copal.

By certain processes, which need not now be described, these gum-like synthetic substances can be made transparent with high refractive indices and resembling glass. Some of the substances produced resemble, and can be worked as, amber. Again, these substances can be given certain colors and hues from the pigments with which they have been mixed, and they can be mingled, at the proper stage of preparation, with suitable pulverized solids or fillers, in order to produce materials for many purposes in the arts and commercial trades.

The processes, including certain of the materials obtained by some of these processes and certain improvements in producing the desired results, are the subject of the series of Baekeland patents above referred to.

The defendant is a commercial manufacturing concern, which purchases synthetic material in the forms of comminuted powder, or hard, brittle sheets. In both forms the synthetic material is, in commercial work, combined physically with certain fillers, coloring matter, and binding material, the precise purpose, preparation, and composition of each of which will be discussed and stated more fully in taking up the patents in detail.

The defendant company has been in business for a number of years. It and its officers have had long experience in placing upon the market molded or pressed objects composed of some soluble, fusible, and generally inflammable natural gum mixed with coloring material, fillers such as pulverized rotten stone or earth, and binding materials of various sorts, like asbestos or wood fiber.

These products turned out by the defendant company resemble what is known as hard rubber. Their color has ordinarily been black, like the color of hard rubber, but the possibility of giving any desired

color is easily understood and has been well known. The materials used by the defendant company have been prepared by pulverizing in the ordinary type of machine sold for such purposes, i. e., grinding mills, like those used in the preparation of other materials. Differential rolls have been employed, in order to prepare the sheets of material for further comminution or to mix and prepare the mass for treatment in the molds intended to be used.

The defendant company and others in the trade have used and well understood the principles of heating the appropriate materials in order to render them more plastic or easily molded, to make them more fusible, so as to set or solidify upon cooling, or even to be welded at the proper temperature, and thus united into a solid body.

In dealing with natural gums, in which the required temperature must be limited so as to prevent combustion or stickiness, the practice of molding has been to heat the substance or the molds to the point desired, and, as soon as the requisite pressure has been applied, to cool by water or other means the mold and the contents until contraction occurs and the mold can be safely discharged of its hardened product.

The defendant company uses, in a similar way, differential rollers in preparing material from synthetic gums. It grinds the material, when that is necessary, in a similar sort of grinding mill. It adds colors and filling materials, and mixes them by stirring and by the use of the differential rolls, in the way in which this mixing would occur with the natural gums. It uses heat to obtain plasticity and to make the various substances fusible when pressed in a mold. It thus gives the shape or design of the mold to the materials, and it discharges the molded objects from the mold, after some cooling. But the hardening process and the shrinkage, which allows the object to be freely discharged from the mold, are not, in the case of the synthetic gums, attributable to the lowering of the temperature and the setting of substances which would again become fluid if the temperature were sufficiently raised.

It thus appears that the defendant must meet, upon the merits, the charge that in manufacturing articles for the market from synthetic gum, it is infringing upon the patents, if those patents are valid, which in terms secure to the plaintiff the right to control the manufacture of articles from these synthetic gums, by methods described and claimed in the patents, and that it is infringing the patents protecting the processes or methods involved in the manufacture of such articles, if these patents be held valid, and if they are broad enough in their valid claims to cover the uses, by the defendant, above referred to.

As has been stated, the defendant makes use of synthetic gums in the production of its commercial articles. It obtains these synthetic gums from an entirely independent concern known as the Redmanol Company, having its place of business in Chicago, Ill., and having no authorized representative and no office within the Eastern district of New York.

The trial of the present action has necessarily brought into the case consideration of the nature of this synthetic product furnished by the Redmanol Company. The record shows that in fact the Redmanol

Company has stood behind the defendant in the trial of this action, and in so far as investigation of the prior art and discussion of questions of patentability are concerned, the Redmanol Company has as freely and fully presented its evidence as if the action had been against the Redmanol Company, for infringement of the plaintiff's patents, in the manufacture of the synthetic gum itself.

There has been some discussion in the record between the plaintiff and the Redmanol Company, with respect to the bringing of an action charging infringement against the Redmanol Company; but in so far as the present suit is concerned, the Redmanol Company, as such, is not a party. The defendant is charged only with violation of those particular patents which the plaintiff claims cover the operations and process of molding these synthetic materials, as performed by the defendant, and we must carefully keep in mind this limitation of the actual issues in the case, while considering broadly the defenses of nonvalidity and lack of invention which are urged substantially against all of the plaintiff's patents, but more particularly and with direct application against those of the plaintiff's patents which are involved in this action.

The defendant claims these substances to be but substances of the prior art, that is, substances which any one has the right to use in the way necessary in molding, if their original manufacture does not render the manufacturer liable to a charge of infringement. On the last point, the defendant insists that it is not guilty even of contributory infringement, since the Redmanol Company, while the object of attack, is not a party to the present action, and the method of preparing the material sold to the defendant is claimed by the plaintiff to be immaterial to the issue.

Before reciting the plaintiff's various patents and the patents in suit, a short reference to the prior art will simplify consideration and save repetition.

As early as 1872, the formation of synthetic material by the reaction of formaldehydes and phenols upon each other was known and discussed in the publications by Ad. Bayer and his pupils. Long before this, the preparation and vulcanizing of rubber from a natural gum had been discovered (Goodyear patents, 3,633 of June 15, 1841, and 8,075 of May 6, 1851), and many products of rubber were on the market in which coloring materials and fillers had been used.

It was well known that during the vulcanizing process under pressure chemical reactions or changes took place in the rubber, both because of the sulphur introduced and because of the composition of the coloring matter of the fillers themselves. It was known that rubber, when vulcanized with heat and pressure, swelled, even when setting, and that the molds in which hard rubber materials were formed could not therefore be cooled and the objects released before the entire process of vulcanizing had been completed.

In the years after 1872, various processes had been discovered and articles placed upon the market, by means of the reactions upon cellulose or cellular material by acids, and these substances, by a combina-

tion with gum camphor, produced what is known as celluloid. This material possesses great flexibility and high degree of hardness and can easily be molded with coloring matter and fillers for the making of commercial objects. But celluloid is inflammable, splits easily, is more or less brittle, and is not suitable for use in the electric arts. The great developments in the use of electricity, and a rise in price of camphor at the time of the Russo-Japanese War, are stated as the impelling circumstances which led the plaintiff to investigate the use of phenolic condensation products as a substitute for celluloid in various applications.

The testimony shows that the plaintiff was a man of broad chemical knowledge and experience, who, while born in Belgium and educated there, had studied in France and Germany and was familiar with the languages and the patent literature of those countries, as well as of England and of the United States, to a large extent. He had emigrated to the United States and had done considerable work in this country in chemical research and commercial pursuits, particularly in the matter of film coatings for photographic purposes. This work was to an extent of a kindred nature with the subject of synthetic compounds such as we have now under consideration. He had also had experience in the obtaining of patents, and these facts all enter into the amount of understanding and appreciation which must be presumed in considering the meaning of various acts on his part, when obtaining the patents in suit as well as the other patents issued to him, and of the formation, amendment, and scope of the claims which were ultimately allowed upon his various applications to the Patent Office.

[2-5] A patent can be valid for no more than is covered by the claims of that patent. The claims of a patent may be limited by the disclosure of the specifications and by the condition of the prior art, even though the language of the claims be so broad as to cover other matters and hence to be invalid if not plainly directed at a valid concept. The procedure in the Patent Office and the acts of the patentee with respect thereto may be used in determining limitations upon his claims and in discovering the precise meaning of a claim as allowed, with the resultant acquiescence by the patentee. By contrast, the claims of the patentee which are disallowed, and the extent of acceptance of the ruling will frequently show what point the prior art had disclosed to the examiner and the patentee, and in this way create a limitation of possible broad language in the claims or indefiniteness in the specifications.

[6] Frequently, also, the file wrapper in a patent application may be resorted to in order to throw contemporary light upon the development of the prior art, and to determine whether or not the patentee has attempted to enlarge his claims or to modify the scope of his invention, as subsequent discoveries come to the notice of the patentee.

[7] Having in mind the proposition that patent claims, if ambiguous or capable of a broad and a narrow meaning, should be construed narrowly, if they may thereby be held valid, and that a broad interpretation should not be used if the result is to cause invalidity, it follows that unless estopped by the contents of the file wrapper, the patentee is entitled to assert that he intended to claim only patentable novelty, and

that he did not expect to render his patent invalid by covering, in general language, what manifestly was part of the prior art. Thus many patents can be held valid, and frequently are not infringed, which would, if construed broadly enough to cover infringement, be evidently invalid upon the prior art.

In the present case, no patent has been cited directly as an anticipation. The prior art contains few patents for synthetic phenolic condensation products, and even though the plaintiff's patents should be construed so broadly as to bring in doubt their validity, as inventions over the prior art, still no one of the prior art patents is exactly an anticipation of the subject-matter which evidently was the invention of the plaintiff's assignor in the particular patent.

It is unnecessary to cite the many patents from the prior art relating to the subjects of molding and hot pressing various materials, whether to form the molded object by cooling or to cause chemical change under heat and pressure. Nor is there need of citing from the prior art the many patents in which inventors have attempted to protect particular formulas of compositions for so-called artificial or imitation ivory, ebonite, amber, and similar substances for use in the manufacture of billiard balls, doorknobs, buttons, electrical apparatus, etc. These patents show novel physical combinations or substitutes for substances, whose use, when pressed cold or hot, was obvious, or they teach various chemical and physical aggregations to imitate natural products or to provide varnish, insulation, or solids of elastic and other qualities. They taught nothing as to the creation of synthetic condensation products, and left the prior art with mere knowledge of melting, dissolving, solidifying, pressing, turning, boring, polishing, and cutting materials, which proved the demand for substances which were never thought of until phenolic condensation products were discovered. To guess that the new substitute material could be used as a substitute, or that similar uses were desirable, was not invention. But to find how to make the substitution successfully was invention, and so was the discovery of methods solving the difficulties encountered.

When we consider the prior art patents for the making of synthetic compounds of phenols with formaldehyde, more careful consideration of the patents is necessary.

The earliest patent that should be considered is that issued to Otto Manasse, in the United States, No. 526,786, October 2, 1894. Manasse was seeking to describe a method or process of producing phenol-alcohols by using alkaline or neutral condensing agents, in aid of the reaction of formaldehyde on phenol or phenol-like substances. After mixing the phenol dissolved in the alkaline or neutral condensing agent with formaldehyde, and acidulating the resultant mixture, he separates the oxybenzylalcohol from the watery solution by extraction by ether. He then evaporates the solution so as to obtain a semifluid mixture which is treated with steam, thus driving off the residues of formaldehyde and phenol which have not entered the reaction. On cooling and filtering a resinous body is left, which apparently is the synthetic product in which both the plaintiff and the defendant in this case are in-

terested. But Manasse rejects this resin and treats further the solution in order to obtain crystals, which in turn, when dissolved in benzine, show a separation of oxybenzylalcohol from the parahydroxy-benzylalcohol which remains in the form of an amorphous powder in the solution.

The next patent, that of Blumer, Great Britain, No. 12,880, of 1902, refers to the Bayer experiments and others by Dobner and Lucker, by Voges and others, performed "with a view to the synthesis of resinous substances, but these have failed to yield any advantageous practical result." The Blumer patent consists in the synthesis of resinous substances by the condensation of oxy-acids with phenols with the interaction of formaldehyde. He obtains resins by operation of the various formulas set forth in the patent, which he says are of great practical value and are similar to shellac in all its properties.

Blumer used only the materials which he calls oxy-acids. In each case he has an acid reaction and there is no indication that his substance, prepared with acid, would be available either in the electrical arts or that such a resin would be infusible or insoluble. In his complete specification he states that they are readily soluble and that they are available for use as varnishes. He did not solve the problem of commercial availability nor teach what he did not accomplish.

The Smith United States patent, No. 643,012, of February 6, 1900, and the Smith, German, patent, No. 112,685, issued July 6, 1900, sought to obtain the production of a new material for electric insulation, and for many purposes for which ebonite, wood, and such substances were used in making electrical apparatus. He used acetic paraldehyde methylated spirits and liquid carbolic acid. He saturated his methylated spirits with hydrochloric acid gas, kept the temperature below 80 degrees F., and poured the mixture thus obtained into a mold which had been properly greased. After setting, he dried the molded article at 212 degrees F. In some instances he impregnated the article with paraffin. He produced a substance controlled by an acid solvent.

Smith never produced a practicable substance in which he could identify a reactive resin for the production of any infusible and insoluble material. His acid product was unworkable and useless.

The next patent is that of Luft, United States, No. 735,278, August 4, 1903, corresponding to the British patent No. 10,218, of 1902, and the German patent, No. 140,552, of March 28, 1903.

Luft states that he is seeking to obtain a plastic compound, which in the German patent he calls a "resinous mass," by making use of the "known fact that upon boiling phenols with aldehydes, and especially with formaldehyde, in the presence of acid, a mass results which when fresh is viscous and very plastic," and is capable of use in the arts.

Luft apparently began to work with the resinous mass which Manasse filtered out and discarded. This mass, Luft says, if dried, "ultimately becomes brittle." This mass is noninflammable and is not attacked by hot concentrated mineral acids or alkalies. He finds that a solution of camphor, rubber, glycerin, alcohol, or similar materials, prevents the hardening of this mass, and that the mass therefore remains more or less plastic if mixed with one of these substances. He

finds, also, that a harder or more elastic mass is obtained if the latter has been pressed in slightly warmed devices. If the viscous body, after washing with water boiled in the presence of an aqueous solution of alkali or alkaline carbonate, and then thoroughly washed, is dissolved in a suitable solvent such as a mixture of formalin and glycerin, and then thickened by continuous boiling, and thereafter poured into molds and dried at a temperature of 50 degrees C., it will be found that the mass is transparent, more or less plastic, useful for insulating purposes, and available as a substitute for celluloid, bone for billard balls, buttons, handles, rosettes, and the like. By the addition of suitable dyes and filling bodies, imitation amber, tortoise shell, meerschaum, resin, vulcanite, coral, etc., may be obtained.

Luft's process is expensive, and he never, so far as his own knowledge or the disclosure of his patent is concerned, got beyond the fusible and soluble state. It is evident, as was shown in court, that present knowledge of the art in the hands of an expert makes it possible to so manipulate the Luft process as to produce an insoluble and infusible final product, but Luft never did this nor taught it by his patent disclosure alone.

The next patents are those to "De Laire," which is said to be the name of a company in Paris, France. The British patent, No. 15,517, of 1905, the French patent, No. 361,539, of 1906, and the Belgian patent, No. 192,590, of 1906, are all stated to be for the manufacture of products of condensation of phenol alcohols resembling natural resin and capable of use as substitutes for amber, copal, etc.

Several examples of these products of condensation, or rather of formulas and directions for making them, are given. Phenolalcohols, in turn, are described as made "by condensing, in known manner, formaldehyde with phenol, its homologues, or derivatives, or with naphthols." Two of the examples describe a resin formed from saligenin and from paroxybenzyl alcohol, both of which are insoluble "in alcohol."

The novelty of the De Laire invention is to heat the phenolalcohols under reduced pressure. That is, De Laire seeks to obtain his result by the use of a condenser, working in as good a vacuum as possible, and the resins are obtained by solidification as water is evaporated, and the heating is continued until the water has all been removed or until the solid mass appears. He seeks to remove the brittleness of the soluble Luft resin and to produce a gum which can be turned, bored, etc. He does not disclose the idea of forming, shaping, and finishing the article in the process of producing the gum. He did not realize or disclose the ultimate insoluble and infusible product which now may be worked out of his suggestions.

The Story patents—British, No. 8,875, of 1905, French, No. 353,995, of September 25, 1905, and the French addition, No. 9,861, applied for September 29, 1908—describe the production of a condensation product by the action of aldehydes on phenols, which are useful in contrast with the products of United States patent No. 735,278, German patent No. 140,552, and British patent No. 10,218, of 1902,

to Luft, which are said to be of little use and too expensive for practical purposes.

Story uses commercial carbolic acid containing 95 per cent. of phenols with formalin containing about 40 per cent. of formaldehyde. He pours his viscous product into molds which he dries at a temperature below 100 degrees C. He takes 50 parts of commercial carbolic acid and 30 parts of formalin and produces a substance which, having once become hard and dry, he states is insoluble in any known solvent and is not attacked by acids or alkalies. He states that in the viscous state it may be dissolved in alcohol, acetone, benzol, or other suitable solvent, and furnishes a good varnish for many purposes, from which the solvent may be removed by heat.

The Story patent is particularly interesting because the Redmanol Company manufactures and is putting upon the market in large quantities a product which evidently is produced according to the Story description. This result is obtained by long drying and heating, in some instances this period of heating at temperatures around 50 degrees C. lasting for over a year. Story suggests the adding of coloring matter or inert substances while in gelatinous state, and suggests in the addition patent drying at much higher temperatures in order to produce hardness and insolubility.

Experiments during the course of the trial have satisfactorily shown that Story, as well as Luft and De Laire, can be ultimately operated so as to produce the infusible and insoluble substance which is known as "Bakelite C." This is the same substance which is shown and described in the Aylesworth United States patent, and which is also referred to in United States patent to Stephan, No. 812,608, February 13, 1906, on application filed December 6, 1904. But Stephan was seeking to make an antiseptic powder. His insoluble product was an accidental and not desired substance, obtained if his compound was heated too long. He produced an acid product, and certainly was not teaching the production of the insoluble substance, nor did he anticipate any of the other patents under consideration.

United States patent to Lebach, No. 965,823, July 26, 1910, application filed December 21, 1908, shows an improvement upon the Smith patent (supra) by postponing the addition of the acid or acid salt until the final reaction, thus enabling the resin or gum, or the product entering into the final reaction, to be kept for a considerable period of time, or to be transported in a way which would be impossible in the Smith reaction. This Lebach patent is objectionable through the use of the acids which Lebach suggests can be washed out after the product has been completed by the use of alkalies or alkaline solutions, such as ammonia, etc.

The criticisms urged against the Smith patent are all valid against Lebach, but in addition Lebach is subsequent to the applications for the Baekeland patents, and his statement, that he is working on the well-known methods of production of insoluble and infusible condensation products, as distinguished from those which remained fusible and soluble, shows that he was not attempting to claim invention or antici-

pation, for the discovery of the products themselves. Nor does the Lebach patent throw any light upon the condition of the prior art at the time of the Baekeland applications.

It is unnecessary to refer at length to the statement by Kleeberg, who as long ago as 1891 evidently produced an insoluble and infusible substance by the condensation of formaldehyde on phenols, but who could not control his reaction, and who thus hardened a foaming mass which was of no useful purpose.

Baekeland was in his experiments attempting to put to some useful purpose the reaction which Kleeberg could not control. The substance which Baekeland was seeking as his ultimate substance was similar in chemical analysis to Kleeberg's, and therefore solely as a substance; the insoluble and infusible material of Baekeland was not patentable when separated from his methods of reaching that result.

In a similar way, the patent to Blumer (supra), No. 12,880, British, June 5, 1902, who employed an oxy-acid in producing his reaction, and whose product was soluble like a natural resin, and the various chemists whose work was referred to in the De Laire patent (supra) and who produced either brittle or soluble resins of one sort or another, do not in any way affect the validity of the Baekeland patents, or of the other patents described in this action by which infusible products are obtained.

Baekeland has, throughout the testimony and in his literature in evidence, classified the shellac substitutes under the name of "Novolak." These substances are all permanently fusible and permanently soluble. They are characterized in most instances by an excess of phenol over the molecular proportions necessary to produce with formaldehyde the infusible and insoluble product. An excess of formaldehyde, on the other hand, does not prevent the formation of the infusible and insoluble product, if this excess be taken care of or removed during the reaction, and if the proportion of the products entering into the reaction be equi-molecular.

The earliest application of any one of the Baekeland patents was February 18, 1907, and the public description of Baekeland's researches was made in 1909, when various articles were read before the New York Section of the American Chemical Society, and printed in the Journal of Industrial and Engineering Chemistry during that year. These dates will become of importance when we consider the Baekeland patent involving the use of hexamethylenetetramin, which patent was in interference in the Patent Office with applications by Redman, Goldsmith, and Steinmetz, and out of which interference a patent was issued to Goldsmith for the so-called dry hexamethylenetetramin method, and to Baekeland for the wet hexamethylenetetramin method. The date is also important in connection with the defendant's claim that Baekeland did not know of the prior art patents when he applied for the heat and pressure patent in 1907. But he discussed these patents in his amendments of March 17, 1908.

In one of these articles, almost the last paragraph calls attention to researches by one Oscar Low, who "many years ago" called attention

to the formation of formaldehyde by the chemical action of sunlight on CO_2 in the presence of water in chlorophyl as a starting point for the synthesis in plant life. Baekeland also calls attention to the fact that the willow tree produces, in its cells, glucocides of saligenin. Saligenin or oxybenzyl alcohol in the presence of more formaldehyde CH_2O gives Bakelite.

Baekeland calls attention to articles published several years before, in which the phenolic nature of resinous substances, such as Japanese laquer, show some analogy with Bakelite and similarity to the exudation of the plant known as poison ivy.

This paragraph throws a strong light upon the entire nature and construction of synthetic resins, and clears up much of the mystery which to the lay mind arises from the incomprehensibility of the organic reactions.

It will be well to catalogue, therefore, the Baekeland patents, and to state briefly the extent of each one, particularly looking to the earliest statement as to the production of the insoluble and infusible product, as well as the earliest disclosure of the use of pressure for the purpose of molding, as distinguished from counter pressure, for the purpose of preventing foaming and cracking, and also the earliest disclosures of the use of fibrous material as a filler, in distinction from the impregnation and coating of cellular tissue, in its integral form.

In the case of General Bakelite Co. v. Nikolas (D. C.) 225 Fed. 539, at pages 544 to 549, there is set forth a detailed statement of the different applications, proceedings in the Patent Office, and ultimate allowance of the various Bakelite patents. It does not seem that a repetition of this statement is necessary, but some reference to these applications and patents must be made in order to observe the chronology of the patentee's work.

A later reference will be made to patent No. 1,038,475, in which Baekeland states (line 74, p. 1, of patent):

> "Instead of ordinary formaldehyde, I may use the polymers of formaldehyde, or such substances as engender formaldehyde during the process."

If used in conjunction with ammonia as a base, Baekeland says that this "will immediately react with formaldehyde, to form hexamethylenetetramin, as pointed out in my prior United States patent, No. 942,809, issued December 7, 1909. This patent, No. 942,809, was issued upon an application filed October 15, 1907, at a time when many of the other Baekeland applications were in the Patent Office.

He refers in the application for patent No. 1,038,475 (which was filed July 6, 1911, by a division of an original application filed October 4, 1909) to the contents of patent No. 942,809, which was not issued until December 7, 1909, or after the original application of October 4, 1909, had been filed. This would indicate that the precise language of the specifications in this regard was used at the time when the application was divided, that is, around the 6th of July, 1911, or later, and at a time when the Redman application of June 17, 1910, Goldsmith application of July 27, 1910, Baekeland application of December 13,

1910, and the Steinmetz application, of October 20, 1911, were all in interference.

In this interference Redman, in a brief filed, points out the Wetter British patent No. 28,009, of 1907, containing a direct statement that—

"Formaldehyde may be replaced also by its polymerization products, as well as by substances which yield formaldehyde, such, for example, as hexamethylenetetramin."

Redman tried to distinguish from Wetter by specifying proportions, and argued that Baekeland had disclosed the use of hexamethylenetetramin in his prior patents, citing Nos. 942,808, 942,809, 942,700, and 939,966.

In this interference Redman claims that the so-called wet hexamethylenetetramin process was anticipated by the prior art, and then claimed that the dry hexamethylenetetramin process, as set forth in the Redman and Goldsmith applications, contained the only novelty and was patentable.

It is intimated in the testimony in the present case that the parties acquiesced in the result of the Patent Office action along these lines, viz., that Redman was to be allowed by Baekeland undisputed activity in the dry hexamethylenetetramin field, while Baekeland used the wet hexamethylenetetramin process, and that Baekeland assumed the dry hexamethylenetetramin process would be commercially impracticable.

This is not admitted by the plaintiff in the present case, but is immaterial, for the plaintiff alleges that even if the Redmanol Company makes the molding mixture used by the defendant by a dry hexamethylenetetramin process, its use in molding by the defendant constitutes infringement, and also claims that the real difference rests in differentiation between the so-called two-step and the so-called one-step processes rather than between the wet and dry processes themselves.

It is apparent that if ammonia be added in excess of the slight proportion of base specified in patent No. 942,809, the gum can be formed and violent reaction can be prevented without confining the mixture by treating a part of the formaldehyde with ammonia, and thus through the formation of hexamethylenetetramin holding the ammonia and the methylene until the reaction with the phenols and cresols has quietly taken place. Ammonia will be driven off from the product by the application of heat, and the nitrogen present will impart a yellow or brownish color to the transparent final result.

If this process be performed, using at first a relatively small quantity of ammonia, a portion of the formaldehyde will immediately form hexamethylenetetramin or hexamethylenetetramin triphenol with an excess of phenol, unreacted upon by formaldehyde, resulting in a series of products known as saliretins, called by Baekeland novolaks, and by Redman phenylendeka-saligeno-saligenin. By heating at this point, the water present can be driven off. Ammonia will also be driven off, which can be collected and used to form, outside of the reaction, an additional supply of hexamethylenetetramin. By adding then an additional quantity of hexamethylenetetramin largely in excess of the amount of ammonia required by the patent No. 942,809, the whole of

the resin or nonreactive gum can be transformed into the final stage of the reactive substance, and this will give off ammonia if heated.

Thus we may have a two-step process, whether ammonium hydroxide or hexa be used as the original condensing agent for the reaction. It is also evident that no ammonia can be added without forming hexa, and we thus have hexa present in either the wet or the dry reaction.

Evidently Baekeland was aware of the chemical formation of hexa as early as the proceedings in the Patent Office resulting in patent No. 942,809, which was issued December 7, 1909. He specifies the use of ammonia as early as October, 1907 (application No. 397,560). There seems to be no reason why his patent No. 1,038,475 should be held invalid because it makes use of certain knowledge described in a co-pending application, even though that co-pending application was of an earlier date.

Even if Redman was entitled to a valid patent for the description of the preparations used by him in the so-called dry hexa method, the defendant using the Redman product would still be liable to a charge of infringement of the patents in suit, whether the hexa be added in a two-step or a one-step process, or in a wet or dry reaction. But the two-step process has in some respects a commercial advantage.

It is also urged that the use of hexa does not in any event infringe the Baekeland patents calling for use of formaldehyde and ammonia. This is a mere verbal argument, as hexa is well within the limit of equivalents but may still be the basis for an improvement of the method patent.

It will be necessary to return to this subject before the defense of invalidity is completely disposed of, inasmuch as Baekeland classifies ammonia (that is, the ammonium hydrate and the theoretical substance ammonium) as a base and contends that it was not disclosed by his reference to the use of "salts" and "alkaline solutions" as condensing agents or washing material of his earliest application, resulting in patent No. 949,671. Ammonia is alkaline and frequently called an alkali, but the substance ammonium is still fugitive and the reference to 949,671 is too indirect to anticipate the definite employment of ammonia as a base reacting agent of the later patents. Nor does Luft in speaking of an "aqueous solution of alkali or alkaline carbonate" seem to refer to ammonia or describe the action of ammonia so as to suggest its use.

But great difficulty persists throughout the case in confining the issues to the claims of the patents in suit, and to the acts of the defendant, the General Insulate Company, as distinguished from the rights and practices of the Redmanol Company.

The plaintiff charges infringement of patent No. 942,699, called by the plaintiff the "heat and pressure patent," No. 942,852, called by the plaintiff the "indurated product patent," and of patent No. 939,966, called by the plaintiff the "comminuted mixture patent."

Patent No. 942,699 grew out of an application filed July 13, 1907. It begins with the use of an oily, viscous, or semiplastic condensation

product, produced through some method in which the reaction has been controlled sufficiently to be arrested at the stage desired. The phenolic substances actually entering into the reaction are prevented from being present in excess by using formaldehyde in the molecular proportion required for the reaction, or having it present in excess. The filling material and the color is to be added before going on with the reaction, and the material is compounded as india rubber is compounded, that is, by mixing upon rolls proceeding at different speeds. After this compounding, the condensation product is poured or pressed into a mold, and while the pressure of the mold is maintained, a suitable temperature, from 110 degrees to 140 degrees C. or higher than that if the time for hardening is to be reduced, is created within the mold, and the heating or baking thus obtained completes the chemical reaction necessary to produce the infusible and insoluble product.

The claims in issue are 1, 2, and 4 (patent No. 942,699):

"1. The method of producing a hard. compact. insoluble and infusible condensation product of phenols and formaldehyde, which consists in reacting upon a phenolic body with formaldehyde, and then converting the product into a hard. insoluble and infusible body by the combined action of heat and pressure.

"2. The method of making articles containing an insoluble and infusible condensation product of phenols and formaldehyde. which consists in reacting on a phenolic body with formaldehyde, producing thereby a reaction product capable of transformation by heat into an insoluble and infusible body, forming the article from said reaction product, and rendering the article hard. insoluble and infusible by application of heat and pressure."

"4. The method of making articles containing an insoluble and infusible condensation product of phenols and formaldehyde, which consists in reacting on a phenolic body with formaldehyde, producing thereby a reaction product capable of transformation by heat into an insoluble and infusible body, forming the article from said reaction product compounded with a filling material, and rendering the article hard, insoluble and infusible by application of heat and pressure."

In this patent Baekeland avoids the necessity of eliminating water from the finished article, as is necessary under patent No. 949,761, and in this respect it resembles the so-called dry process of Redman, in that both proceed by two separate steps, in which the water of reaction is driven off during the first step, any moisture from the filling material or wood fiber is driven off during the working upon the rubber rolls, and the final reaction is a so-called "dry" process.

This disclosure makes it difficult to see why the defendant criticizes the third patent in suit (No. 939,966) and the Bakelite Company for not specifying the use of differential rolls to the defendant when it tried to use Bakelite as it had used natural gums. The argument and delay were unpleasant for Mr. Rockhill, but have no bearing on this case.

The next patent in suit, No. 942,852, was a division of the application for the previous patent, No. 942,699, and the claims in issue are 5 and 6:

"5. As a new composition of matter wood cell tissue impregnated with an infusible and insoluble condensation product of phenol and formaldehyde."

"6. As a new composition of matter, a fibrous or cellular material impregnated with an infusible and insoluble condensation product of phenol and formaldehyde."

A third patent in suit, No. 939,966, was issued upon an application filed January 28, 1909, under No. 479,869. It refers to three previous applications, No. 383,684 filed July 13, 1907, which resulted in patent No. 942,699; No. 397,560 filed October 15, 1907; and No. 405,021 filed December 4, 1907—each of which describes a method of obtaining the final condensation product.

This application No. 474,869 was filed prior to the division of application No. 383,684 by which on March 17, 1908, the patentee filed the application resulting in No. 942,852.

The claims of patent No. 939,966 in suit are:

1. The method of molding articles which consists in comminuting a partial reaction product of phenol and formaldehyde, molding the mass under pressure, and transforming the same into an insoluble and infusible condensation product.

2. The method of molding articles which consists in comminuting a partial reaction product of phenol and formaldehyde, molding the mass under pressure, and transforming the same in the mold into an insoluble and infusible condensation product.

3. The method of molding articles, which consists in preparing a comminuted mixture of a partial reaction product of phenol and formaldehyde and a filling material, molding said mixture and transforming the partial reaction product into an insoluble and infusible final condensation product.

Many fillers have been used in the prior art in all sorts of compounds. Some of them acted as coloring materials as well as fillers. In patent No. 942,699, Dr. Baekeland suggested as filling materials, "as for instance asbestos fiber, wood fiber, other fibrous or cellular materials, rubber, casein, lampblack, mica, mineral powders as zinc oxid, barium sulfate, etc., pigments, dyes, nitrocellulose, abrasive materials, lime, sulfate of calcium, graphite, cement, powdered horn or bone, pumice stone, talcum, starch, colophonium, resins or gums, slate dust, etc."

These fillers have many and various qualities. Some are better than wood flour or wood cell tissue, some of them stand higher temperatures without charring, some of them have less water subject to liberation, others interfere less with the flowing qualities of the mixture for introduction into molds. But one quality of fibrous material, such as wood flour or asbestos fiber, was made use of because of a habit of these phenolic condensation products at the time of final hardening, in that they then contract materially and develop internal stresses, which make them easily shattered in spite of their hardness and tremendous tensile strength.

Baekeland sets forts in his specification that rubber when hardening in the vulcanizing process swells, that shellac and celluloid neither swell nor contract, and that shellac and celluloid are more flexible than the final condensation product with which the patent deals. But the use of fibrous or cellular filling materials causes a physical change in the product, which enables it to withstand shocks and makes it useful for commercial purposes, particularly in the electrical arts. The qual-

ities of wood fiber were known, but the employment of these qualities and the appreciation of their availability was invention.

The third patent in suit was the first to describe three stages in the phenolic condensation reaction. It must be borne in mind that as soon as we have gotten away from gums or synthetic resins of the novolak type, we begin to deal with what is called in the testimony a "reactive resin."

In the previous case (General Bakelite Co. v. Nikolas, 225 Fed., supra) a reactive film was defined as a film which could be transformed by subjecting it to heat, light, air, motion, or electricity, without the addition of any chemically acting substance. In the present case we are dealing with reactive resins, that is, condensation products which can be transformed by the application of heat alone, or transformed and controlled by the application of heat and pressure, or transformed by the application of heat followed by evaporation or drying, into an infusible or insoluble product, without the addition of chemical substances to carry on the reaction.

It must also be borne in mind that in processes like Smith, De Laire, Luft, or Story (supra) acids or solvents may be neutralized by alkalies or removed by washing in water to obtain the reactive resin. The phenolic gum may thus be removed from the novolak class to the reactive class, but when once in the reactive class, the final infusible and insoluble product may be obtained through the chemical changes induced by heat alone. But undue or uncontrolled exothermic heat will produce a useless substance like that found and discarded by Kleeberg. So a viscous, sticky, oily and plastic mass, even though it is capable of transformation by heat, that is, even if it is in the reactive resin class, is still incapable of physical mixing with dry powders or substances, and is incapable of long preservation and convenient handling or transportation.

This difficulty Baekeland sought to obviate by the old idea of drying or hardening into a form of substance which could be ground or broken into fragments or even into powder. The idea of doing this was old. The idea of mixing fillers and pigments or coloring materials with such a dry and fragmented product was old. The idea of mixing the last (whether it be final or merely cooled novolak material) product was old. Luft and De Laire had both made use of the idea of mixing their products with coloring material and fillers, and of pressing these materials in molds, or of letting them set by cooling and drying so as to obtain the desired shapes, or so as to obtain materials which could be planed, turned, bored, worked, or machined in any desired way. But Baekeland undertook to obtain a material in which the mixing or preparation with the filler and coloring material could be done before reaching the last stage of his product. He did not desire to have his product merely set or harden and contract in the mold, or after removal from his mold, and he wished to have the reaction take place after the fillers and coloring material had been added. He therefore claimed as invention the method which would produce, as the final step in the chemical reaction, that product which was obtained at the close of the final step in the physical operation of molding, and by which the finished

article, when released from the mold, would, without further work or machine treatment, conform exactly to the qualities and measurements of the article desired. He was not, therefore, using the same method as Luft and De Laire and Story to produce the same product as Kleeberg. He was not using the methods of the prior art in merely mixing fillers and using molds for shaping under pressure; in fact, in none of the Baekeland patents is the material, which Kleeberg obtained in useless form, sought to be patented. What Baekeland claimed was a new method of producing the material, or commercial products containing the material, which Kleeberg had described, which had been found by others, and which experiments conducted during the course of the trial show that De Laire, Luft, and Story might have obtained, that is, an infusible and insoluble condensation product of phenol and formaldehyde. Luft, however, was not seeking and did not describe this insoluble and infusible product, except in so far as he apparently found, under certain conditions, that his product, insoluble in alcohol but soluble in other solvents, when mixed with fillers and dies, capable of molding by pressure under low heat, produced a gum or substance resembling amber, which could be turned, bored, or polished. In some of his experiments Luft evidently found the nondescript substance which was not soluble, as were the novolaks, and which approached the insoluble qualities of Kleeberg's experiments. But these only caused him difficulty, and it needed much further development of the art before the ideas that were present in the mind of Luft could be identical with the invention of Baekeland, who made use of the Kleeberg chemical substance as the principal constituent of the insoluble and infusible product, which was the ultimate end and also the entire basis of the Baekeland claims.

De Laire was trying to avoid the acid reactions of the Luft product, and progressed no further than Luft in making use of the final reaction product as the medium with which to produce the commercial products which he wished to use as substitutes for natural gum products, and which he undertook to use in just the way in which natural gum products were treated.

Story, like Luft and De Laire, depends upon the solvent (in his case an excess of phenol or cresol) to hold back the violence of reaction, and then evaporates the solvent. His product shrinks or diminishes in size. An exposed surface is necessary. In his patent he says formaldehyde is given off throughout the process. Evidently he carried the drying only to the point of a few hours instead of days or months. As practiced by the Redmanol Company, Story is an open air process as distinguished from the heat and pressure process of Baekeland. The defendant, even if he starts with material which in the early stage is made with hexa but following Story in general methods, then proceeds to use the reactive resin with heat and pressure and departs from the Story patent.

The prior art as stated by the witnesses in the case representing the manufacture and use of hard rubber and of insulating material composed of fillers, coloring matter, and natural gums, shows plainly that

all phases of molding were old; that the use of the differential rolls was old; that the evaporation of moisture while the material was being worked on the rolls was well known; that the amount of heat and the duration of its application must be governed by the material used and the object sought to be obtained. This prior art shows also the employment of fibrous materials as binders. But Baekeland did much more than take a material shown by the prior art, whether it be called Luft, Story, or Kleeberg, and mold or treat it by methods which, of course, were open to the use of any one, with respect to any substance which they wished to employ.

If Baekeland had claimed as invention the operation of mixing the rejected gum of Manasse with fillers and coloring matter, heating this to any temperature which he thought would make it easily shaped in a press, and then to press it, either with a maintained heat or an increased heat, or to immediately apply some cooling means so as to harden the material and then release it from the mold, there would be no novelty in any of these steps except that he had put together a combination of materials and pressed them and that they had not been thus united before.

But there would have been no novelty of result or process in such a combination. The defense attacks the Baekeland patents as if they were describing mere combinations in which the new material was nothing more than an equivalent for one of the materials of the prior art in carrying out the particular combination of the process patent.

If this were all that Baekeland did, he would be anticipated by Luft, De Laire, and Story, for he describes processes in which he uses either different materials or different steps, which in that sense are merely equivalents for the materials or the steps described by these prior art patents. But Baekeland is describing the manufacture of certain materials, in which a realization of certain desirable qualities is accomplished by the use of certain processes which are analogous or even similar to the combination of steps or process used by the inventors of the prior art. Baekeland claimed as invention the processes by which with certainty he produced just the result which he desired, and described this as a new method rather than a mere combination or aggregation of materials and steps. And he also claimed as a product the commercial result or the material which was available for commercial use and which was obtained by just those processes and the use of just those materials which Baekeland realized would produce the steps which he desired.

As was said in the case of General Bakelite Co. v. Nikolas, supra, if artificial diamonds could be produced, no one could claim as invention the substance already known as diamonds, and if the imitation could not be told from the original, no inventor could control all the material of that nature, whether produced naturally or artificially, but the inventor who does finally invent a process for manufacturing genuine diamonds, by artificial means, will be able to claim as an inventive product that material which any one is producing by the steps covered by his invention, if he obtains a patent therefor.

Thus in all the Baekeland patents, the product which is sought to

be patented is not the material which can only be identified as an infusible and insoluble condensation product of phenol and formaldehyde. But Baekeland can validly claim a new product which is produced by exactly the steps which he has described and which makes use of the ideas which he recognized and claimed as invention, in arriving at a result which may then contain or even be substantially composed of a substance that of itself is not patentable, provided it can be shown that it was manufactured in a way not taught by the prior art, and can be identified by the original methods or steps in the process.

Baekeland could also obtain valid patents for a varnish, for an indurated material and method for the making of a solid substance out of impregnated or filled cellular tissue, for obtaining a simple and desirable reaction product by the use of small amounts of accelerating base, or by the use of substances engendering ammonia, if in each of these patents his claim for invention depended upon recognition by him of the processes and principles which he had discovered and which had not been described in the prior art.

[8] A separate patent application for each of these processes or products could be successfully maintained in the Patent Office and separate patents could issue thereon, if these applications were co-pending. The date of allowance and issue of any one of these patents would not determine the validity of any other of the co-pending applications, nor could these earlier patents be cited as prior art against the other applications pending at the same time.

The defendant takes a reactive synthetic product of phenol and formaldehyde, manufactured by the Redmanol Company (which sells this in granulated and in sheet form), it mixes it with coloring matter and fillers, it works the mixed material upon the rubber rolls, and thus dries out moisture from the wood filler, it applies a considerable degree of heat (around 400 degrees F.), it employs pressure sufficient both to prevent foaming or bubbling, and to accomplish molding it maintains this pressure for a considerable time, thus allowing the reaction to take place in the heated product under pressure in the mold. It thus follows rather the art of vulcanizing rubber than the art of molding with natural gums.

When the defendant first tried to use Bakelite, it had difficulties in this direction, because the heat applied was in degree and in duration of application like that which had been employed for molding natural gum products. The defendant attempts to show that the Baekeland patents do not sufficiently disclose the methods necessary to secure a commercial article, because these patents do not specify the precise way in which the heat shall be applied, with the amount of heat and the time of the application, nor in each patent prescribe mixing on differential rolls.

But these patents do not claim the invention of a mechanical process of molding; they claim invention in that the molding is used to produce the chemical reaction and to turn out the completed product. The one skilled in the art, therefore, who is to read these patents, must read them as a chemist and not simply as a molder, but he should

also use his knowledge as a molder. It is evident that the defendant now understands sufficient of the chemistry involved so that it obtains the final and desired result.

But it is no defense to the charge of infringement to say that it did not earlier understand the patents and that it met with failure. The Redmanol Company manufactures and places on the market, in large quantities, the Story product, which is formed by the evaporation of the solvent. Until this evaporation occurs, the great excess of phenol plainly differentiates the process from any of those covered by the Baekeland patents. Story says, in his French addition, that by long heating at about 50 degrees C., a much harder product will be obtained, but he adds that formaldehyde will continue to be thrown off.

The testimony in this case shows that the release of formaldehyde ceases substantially in about 24 hours. The Redmanol Company takes months for the setting and evaporation of its so-called Story product. It then has a product which is nonreactive, as it has reached its final stage, which cannot be further molded under heat and pressure so as to undergo further chemical change, and which cannot then, in its ultimate state, be mixed with coloring matter and dyes and molded further.

The defendant contends that no infringement has been shown because the evidence shows that the material used for molding is not entirely or absolutely insoluble and infusible. In other words, the Redmanol Company, for commercial purposes, stop a little short of the completed reaction and sells a still potentially reactive resin. But this applies to the Redmanol product rather than to the defendant's molded objects, and does not contradict the proposition that the patents in suit are actually infringed.

In so far, therefore, as the defendant does not use the Story material of the Redmanol Company, there would seem to be little question but that it is using the various processes covered by the claims of the Baekeland patents in suit, in that it has a reactive condensation product, used with fillers and coloring materials, molded under heat and pressure, in order to form the final product, or in order to form the commercial articles composed of the final product and the filling and coloring materials desired. It even goes so far as to employ its old material, wood filler, for the exact purposes claimed by Baekeland, who, as has been held, showed invention in the choice of materials to meet particular needs and to get particular results.

The material which the defendant purchased from the Redmanol Company for its processes of molding is, however, not Story; it is a reactive phenolic condensation product, made by the condensation of hexa upon phenols or commercial carbolic acid purchased in England and containing a large percentage of cresols.

The defendant seeks to escape the charge of infringement by urging the defense presented by the Redmanol Company, that hexa was not covered or disclosed by the specifications and claims of any of the Baekeland patents, until patent No. 1,038,475, and that the use of hexa by Redman constituted a new invention, giving him the right not only to manufacture synthetic reactive gums, with this substance and

with carbolic acid, but also to make the various products by the use of dyes and fillers and the employment of molding processes, which Baekeland has attempted to obtain by the patents in suit, and the others described in this case.

As has been stated in his earlier patents, Baekeland discloses the use of substances engendering formaldehyde. It is apparent that hexa is immediately formed upon the introduction of ammonia and formaldehyde. The independent discovery by Redman of the possibility of using hexa, in order to avoid the necessity of drying out the water or moisture remaining in the original reaction product, was antedated by Baekeland's writings and patent specifications, which specifically claim ammonia and the substances engendering ammonia as a part of the Baekeland series of inventions. Redman's invention is therefore dependent upon his methods of manufacture at atmospheric pressure and with a dry compound of formaldehyde and ammonia, rather than from the use of hexa as such.

The use of hexa, therefore, does not get the synthetic gum outside of the Baekeland disclosures and claims. If the defendant makes use of the processes patented by Baekeland, when applied to the substances described by Baekeland, in the production of the commercial material covered by the Baekeland inventions, then it cannot escape the charge of infringement by showing that this material was produced by the Redmanol Company with hexa, instead of with formaldehyde and ammonia separately. In other words, hexa is but an equivalent for formaldehyde and ammonia, and the defendant company is using this equivalent material in carrying out the process of the Baekeland patent. In this sense the defendant is in a position analogous to a contributory infringer if the Redmanol Company were a primary infringer.

But when suit is brought against the defendant directly for infringement by what it does with a material which does not itself infringe, then the maker of the material might perhaps be charged with contributory infringement if it purposely causes the infringing use. The distinction is not of importance in the present case. We have only the defendant to consider, and it has been shown to have committed acts, used methods, and made products infringing the claims and patents in suit.

The defendant contends that the specifications and claims of the heat and pressure patent (No. 942,699) show only, and that the evidence in the case proves that Baekeland had in mind only, the use of counter pressure to prevent violent expulsion of ammonia. It is claimed that he later attempted to include molding pressure, when he realized the need of securing the chemical reaction during the molding and heating process. But while the original claims were not as broad as those finally allowed and were evidently drawn without any attempt to include in words the molding pressure, the language of the specifications shows clearly both understanding of the need and use of molding pressure, and indicates Baekeland's intent to include it in his claims. His subsequent amendments were therefore allowable, and there is no reason for limiting the valid range of the patent as issued.

In a similar way, the defendant argues that the only novel feature claimed in the indurated material patent (942,852), as originally presented, was to secure the removal of moisture during an old or well known reaction for the purpose of impregnating or hardening wood. The separation of water was an essential step, but was not the only one disclosed, and the specifications fully support the claims as finally allowed. One of the materials to be indurated was cellular wood flour, and the impregnation and induration was had in order to make this into blocks or solids. The history of the patent in the Patent Office shows that Baekeland appreciated, at least, the possibility of claiming more than was expressed by the apparent understanding of the examiner and the present contention of the defendant.

The claims are valid and cover molding, with wood flour, and coloring material.

Patentability having been shown, the claims upheld in form, and the defendant proved to have infringed, the plaintiff may have a decree.

DAVIS v. PHILADELPHIA & R. RY. CO.

(District Court, M. D. Pennsylvania. March Term, 1921.)

No. 1244.

1. **Master and servant ⟸137(4)—Trackwalker's injury by train held not actionable.**
   A railroad company *held* not liable for the death of a trackwalker struck and killed by a train from behind, though he could have been seen from the engine after reaching a point 2,200 feet from the place of the accident, and no warning signal was given; it appearing that the train was operated in the usual manner, and there being no evidence that he was actually seen by those on the engine.
2. **Master and servant ⟸204(1)—Assumption of risk defense under federal act.**
   A trackwalker assumes the risk of injury by trains operated in the usual and customary manner, and this rule is not changed by federal Employers' Liability Act (Comp. St. §§ 8657–8665).

At Law. Action by Mary A. Davis, administratrix of the estate of Earl F. Davis, deceased, against the Philadelphia & Reading Railway Company. On motion to take off nonsuit. Denied.

John R. Geyer, of Harrisburg, Pa., for plaintiff.
John T. Brady, of Harrisburg, Pa., for defendant.

WITMER, District Judge. This action was brought by the administratrix of a deceased employee of the Philadelphia & Reading Railway Company under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), averring that the defendant was engaged in interstate commerce, and that plaintiff's deceased, Earl F. Davis, was employed by it, and was also engaged in that business at the time of the injuries received, which resulted in his death. Defendant is charged with the want of exercising due care on the part of its employees in charge of

the train that killed Davis in this particular, that the train on the occasion was run at a high rate of speed without keeping proper lookout on its track ahead of it, and without giving any notice or warning of any kind of its approach, although Davis was within plain view of the operator in charge of such train.

[1] Davis was a trackwalker on the main line of the defendant company, connecting Harrisburg and Reading, Pa., and as such was on the day of the accident at work near Hershey Station in Dauphin county, more particularly described as a short distance east of Derry Church grade crossing. At this point the main line consists of three tracks; two east-bound and one west-bound. Upon the outer of the east-bound tracks (No. 4) slow trains are moving; the other track (No. 2) being used for fast or passenger train travel. In the course of his employment, Davis discovered that a certain plate connected with a rail in the east-bound track required repair, and was returning from the toolhouse with the necessary tools to make such repair. After leaving the toolhouse, located to the south of the track at the crossing, he traveled diagonally across track 4, going east upon such, and then proceeded in the same direction on track 2. While proceeding eastwardly, a freight train came from the west on the east-bound No. 4 track, and, while this train was on the crossing, an engine and caboose running at about 35 miles an hour overtook and struck him on the middle east-bound track about 585 feet from the crossing, killing him almost instantly.

It was shown that from the direction the train was moving to the point where he was struck there was a straight stretch of track to at least a distance of 2,200 feet, for which distance he was in plain view of those in charge of the train, and could have been seen had they looked ahead and observed. In the failure to do so, and to give proper notice or warning, lies the negligence imputed to the defendant.

The only witness to the occurrence was the crossing watchman, who says that while he (witness) was at the watch box located at the crossing on the south side of the track, Davis came and got a bar, wrench, angle plate, and hammer, and started out, going east, cutting catty-cornered on No. 4 track across to No. 2, walking ordinary gait down this track about 195 steps, or 585 feet, from the crossing to where he was struck. Witness says he was at the watch box controlling the crossing. Being asked:

"Q. What was the next you saw or heard? A. The next I saw—I seen a train coming down on track 4, and got out on the crossing to keep anybody from crossing.

"Q. That was not the train that struck him? A. No, sir.

"Q. And then what did you see? A. After that the fellow was over the crossing while 1700 came around the corner.

"Q. You mean after the train had gone over the crossing? A. Yes, sir.

"Q. You mean the train? A. About the center of the train when I saw him.

"Q. Then you saw 1700 coming around the corner? A. Yes.

"Q. Near the corner at the west? A. Yes.

"Q. What was 1700—a full train? A. No, sir; just engine and caboose.

"Q. And at what rate of speed was he coming? A. Probably 35 miles an hour.

"Q. On what track? A. No. 2.

"Q. And going in what direction? A. East.

"Q. What did he do? A. Didn't do nothing. Didn't make any kind of sign as I heard of.
"Q. No whistle or bell? A. Not that I heard.
"Q. And you were watching the crossing? A. Yes.
"Q. And then what did you do when he passed you that way? A. I signaled the fireman to whistle. I pointed ahead that there was a man walking.
"Q. He could not see the man ahead walking? A. Yes.
"Q. Which side of the engine was the fireman? A. Left side.
"Q. On your side? A. Yes.
"Q. What did the engineer do when you motioned him and called for him to whistle that there was a man on the track? A. You mean to say the fireman. He went for the automatic brake to stop it.
"Q. What did you see next? A. I seen him—that is all. I seen a man flying out on the side of the track."

The witness was quite deaf and on cross-examination regarding whether the engineer gave the accustomed crossing signal, he replied, on being interrogated:

"Do you remember shortly after the accident, when he called to see you to get a report about this accident, that you then said you could not tell whether the engine whistled or not? A. That is what I said; yes, sir.
"Q. You do not know whether it whistled or not? A. No, sir.
"Q. (by Mr. Geyer). Did you hear it whistle? A. No, I did not hear it.
"Q. Did you hear any bell, or warning of any kind? A. No, sir."

The witness testified that he was on the north side of the track, and the engine that struck Davis was on track 2 between the train on track 4 and the witness. He admitted that there was considerable noise from the movement of the train on track 4, and more from the engine and caboose on track 2.

[2] The question presented by this motion to take off the compulsory nonsuit entered on closing plaintiff's case is whether the evidence offered warranted submission of the case to the jury. The evidence is clear, and plainly discloses that there was nothing unusual in the operation of the train that injured Davis. There was no violation of a statutory requirement, nor was there failure of compliance with any orders or recognized custom or rule adopted for the safety and protection of employees. Thus, in the absence of evidence showing that those in charge of the engine were aware of Davis' presence on the track where he was injured, or, having discovered him, recklessly ran him down, they should not be held guilty of negligence. To hold the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would remove the entire responsibility of caring for the safety of those employed upon the track, and place it upon the shoulders of those having to do with the operation of the engine and train, involving attention to signals of every degree of importance, and entirely relieve those who have nothing but their own safety at stake. Nor could it be held that, notwithstanding, the risk was assumed, since in order to constitute negligence such conduct must be regarded as unusual, and consequently not assumed, though it has been held that a railroad trackwalker employed to walk over, watch, and repair tracks where there is a constant passing of trains necessarily assumes the risk of being struck by trains properly or ordinarily operated. Connelley v.

Pennsylvania R. Co., 228 Fed. 322, 142 C. C. A. 614. In delivering the opinion, Circuit Judge Buffington said:

"It is an obvious fact that many occupations, as, for example, a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When therefore a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows therefore that the employer violates no legal duty to his employee in failing to protect him from dangers which cannot be escaped by any one doing such work. Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

"It is obvious that, even where a railroad operates its trains and moves its switch drafts in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law. Thus in Norfolk & W. Ry. Co. v. Gesswine, 144 Fed. 56, 75 C. C. A. 214, it was said: 'This man was one of a number of men who were employed as section men on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out crossties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way; manifestly, a place of danger. A railroad does not suspend the operations of its trains until the track can be put in order, and the proposition to these sectionmen was, "We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains," and the sectionmen accept the employment upon these terms, and if an accident occurs, and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad. It is not the fault of the railway company.'

"So, also, in Aerkfetz v. Humphreys, 145 U. S. 418 (12 Sup. Ct. 835, 36 L. Ed. 758), where an experienced trackman was injured by a moving train in a switching yard, it was said: 'Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the train at any slower rate of speed. They were not bound to assume that any employee familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and sounding of whistles on trains going and coming and switch engines moving forward and backward would have simply tended to confusion. * * * It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant.'

"Indeed, in thus making self-protection the substantial safeguard of trackwalkers and section men, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operations of railroads. As said in Keefe v. Railway Co., 92 Iowa, 182 (60 N. W. 503, 54 Am. St. Rep. 542), 'These rules are founded upon the necessities of the business of operating railways,' and in Rosney v. Erie R. Co., 135 Fed. 311 (68 C. C. A. 155): 'An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns, and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.' This rule has the uniform support of courts in all sections of the country. Morris v. Boston & M. R. R., 184 Mass. 368, 68 N. E. 680; Bancroft v. Boston & M. R. R., 67 N. H. 466, 30 Atl. 409; Railroad Company v. Hester, 64 Tex. 401; Carlson v. Cincin-

nati, S. & M. R. Co., 120 Mich. 481, 79 N. W. 688; Pennsylvania R. Co. v. Wachter, 60 Md. 395."

In Curtis, Adm'r, v. Erie R. R. Co., 267 Pa. 227, 109 Atl. 871, where the decedent was employed to repair tracks and remove snow and ice from the yard of the defendant company, and while carrying it across the tracks, was struck by a switching engine operated in the usual way, moving backwards without warning, running 2 or 3 miles an hour, recognizing the doctrine of assumption of risk as modified by the federal Employers' Liability Act, and defined in Seaboard Air Line R. R. v. Horton, 233 U. S. 498, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, and Boldt, Adm'x, v. Penn. R. R., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the court held that since the evidence was insufficient to establish a custom to provide protection by furnishing a lookout for trains using the tracks of the switching yard, and there was no proof of any rule or custom requiring those in charge of the engine engaged in switching cars to ring a bell or sound a whistle, it was not negligence on the part of the company to afford such protection or to neglect giving such warning; and that the danger of being injured by the engine in the absence of these precautions was a risk assumed by a yard workman as incident to the employment.

It is true that some distinction has been recognized in favor of accidents occurring on main line tracks. For instance, in Van Zandt v. P., B. & W. R. R., 248 Pa. 276, 93 Atl. 1010, Glunt v. Penna. R. R., 249 Pa. 522, 95 Atl. 109, and McGovern v. P. & R. Ry., 235 U. S. 389, 35 Sup. Ct. 127, 59 L. Ed. 283, the accident occurred while the injured person was engaged in work on main line tracks. The same distinction appears in Seaboard Air Line R. R. v. Koennecke, 239 U. S. 352, 355, 36 Sup. Ct. 126, 127 (60 L. Ed. 324), where decedent was killed by a train in the act of entering the yard from the main line track, the basis of which decision appearing from the following quotation:

"The jury might have found that the case was not that of an injury done by switching engine known to be engaged upon its ordinary business in a yard, like Aerkfetz v. Humphreys, 145 U. S. 418, but one where the rules of the company and reasonable care required a lookout to be kept."

On examination of the cases where recovery was allowed for accidents occurring on main line tracks, it will be observed that failure to observe a known rule or order of the company, coupled with want of reasonable care, is assigned as a foundation upon which such recovery is rested. In the cases depended on by defendant's counsel, the distinction from the case in hand may be noted as bearing on the conclusion reached.

In Glunt v. Penna. R. R. Co., supra, the plaintiff had been informed by his foreman that the middle track, known as track No. 2, would be used on the day in question for east-bound trains only. Without notice to the contrary or warning a train running west-bound on this track struck the plaintiff.

In Van Zandt v. P., B. & W. R. R. Co., 248 Pa. 276, 93 Atl. 1010, supra, the injured plaintiff was the employee of an independent contractor doing work on a bridge covering a period of five or six months prior to the accident. His presence on the bridge was known to the

company and its employees, and the court held that he was entitled to warning.

In McGovern v. P. & R. Ry., supra, the foreman in charge warned the men off track No. 4 in order to let a local train pass. McGovern, with others, was working on track No. 2. There was no call to them, and they continued working and were struck by a train coming in the opposite direction. The customary notice of the foreman to the section men was the negligence assigned. Counsel is prepared to concede that under the common-law doctrine the negligence in this case was the negligence of a fellow servant, of rank less than a vice principal, for which no recovery could be had, but he insists that this defense was taken away by the federal Employers' Liability Act. His contention is to the effect that the ordinary negligence of a fellow servant is a risk not assumed by his coemployee under the provisions of the act, stoutly insisting that the language in the syllabus of Dutrey v. P. & R. Ry. Co., 265 Pa. 215, 108 Atl. 620, that "the servant assumes the risks incident to the negligent acts of the officers, agents and fellow employees of the master, but he does not assume the risks of unusual and extraordinary acts of negligence," does not correctly express the established rule.

Without following the ingenious argument of counsel, it is enough to note the conclusion of Mr. Justice McReynolds, expressed in Boldt v. Penna. R. R. Co., 245 U. S. 441, supra, on page 446, 38 Sup. Ct. 139, 140 (62 L. Ed. 385), saying:

> "The risk held to have been assumed in the Horton Case certainly arose from negligence of some officer, agent or employee; and if the negligence of all these should be excluded in actions under the Employers' Liability Act it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk."

Applying, then, the principles recognized, the opinion is expressed that the incidents assigned as the negligent acts of the defendant were not unusual and assumed by the employee in his unfortunate situation where death overtook him.

The motion is denied, and new trial is refused.

WINDOW GLASS MACH. CO. et al. v. PITTSBURGH WINDOW GLASS CO. et al.

(District Court, W. D. Pennsylvania. January 18, 1921.)

No. 240.

Patents ⊂=328—834,165, for a glass drawing and shaping machine, held void for inoperativeness.

The Raspillaire patent, No. 834,165, for a glass drawing and shaping machine, *held* void as covering a machine consisting of both a drawing implement and former, which is inoperative. Claim 15, for a drawing implement in a machine for drawing glass, adapted to be dipped into a glass bath and to draw glass therefrom, said implement provided with a groove to receive the molten glass, cannot be construed separately from the machine of which it forms a part as intended to cover the invention of a cold bait or drawing implement.

In Equity. Suit by the Window Glass Machine Company and the American Window Glass Company against the Pittsburgh Window Glass Company, the Pittsburgh Plate Glass Company, and Walter A. Jones. Decree for defendants.

Decree affirmed 276 Fed. 849. See, also, 276 Fed. 197.

Bakewell, Byrnes & Stebbins, of Pittsburgh, Pa., for plaintiffs.
Charles Neave, of Boston, Mass., for defendants.

THOMSON, District Judge. In this suit infringement is alleged of claim 15 of Raspillaire patent, No. 834,165, for a device designated as a "glass drawing and shaping machine." The Pittsburgh Window Glass Company is charged with the infringement; the Pittsburgh Plate Glass Company and Jones, because of certain interests held in the patent in suit, being joined as defendants.

Briefly stated, the position of the plaintiffs is that the claim in suit is a broad pioneer claim for a hollow, cold bait, having an internal ledge or groove over which the glass flows and forms a chilled ring, by which a cylinder or other hollow glass article may be drawn; that two different inventions are disclosed in the patent, namely, the "former" and the "bait," either of which may be used without the other; and that it was the intention of the patentee to broadly protect his new cold bait for any purpose in drawing hollow glass articles, whether used with a former or without; that the claim in suit is for a complete, separate, operative device, that is, a cold bait, forming a distinct advance in the glass art; that the bait is operative, in connection with the Raspillaire former, and also when air distension is used; but that, if all else in the patent is held inoperative and worthless, claim 15 is still good and valid; that if the Raspillaire bait can be shown to be operative with any form disclosed by Raspillaire in any of his patents, the court cannot strike down claim 15 for lack of utility; and finally that because the defendants use a bait of hollow ring form, with an internal annular ledge, over which the glass flows where it is chilled, making an anchor by which the draw is made, therefore infringement is established.

The defense is that Raspillaire did not in any degree advance the glass art; that the machine disclosed by the patent is entirely inoperative and useless; that the claim in issue does not purport to be for a cold bait, and is invalid in view of the prior patents; and that defendants use a bait created years after the Raspillaire patent operated in a new manner and on different principles, and has therefore taken nothing from Raspillaire.

Three patents were issued to Raspillaire, two in the fall of 1905, and one in the spring of 1906. All the applications were pending at the same time, the patent in suit being the second to issue on an application last filed.

In all these patents a core or former is provided, which imposes its shape on the article being drawn; the shape of the core being altered to accord with the desired shape of the draw. At that time in the art, the cylinder was shaped by distending air entering the cylinder through the bait; a uniform diameter being maintained by regulation of the air pressure. By this means and in no other, the cylinder took and maintained its form, rising from the bath of molten glass in contact with no shaping surface whatever. The draw was made by a bait preheated to a temperature so high that when lowered into the bath the glass and the metal fused, and by the firm adherence of the glass to the bait, the cylinder was drawn. The cold bait operates on a wholly different principle. It is constructed with some form of a groove or ledge, so that when lowered comparatively cool into the bath, there is no fusion, but the molten glass running into the ledge, when chilling occurs, forms a novel sufficiently strong to draw and support the rising cylinder.

It is not controverted that the cold bait, being more durable, more economical in operation, and requiring less skill to manipulate, is of high utility, being now almost solely in use in the numerous glass factories of the country.

I am constrained to find against the plaintiffs under the claim in suit, for the following reasons:

1. The invention "relates to a machine for simultaneously drawing glass from a molten mass of glass and imparting the desired shape to the draw"; that is, a machine to draw and shape. The shape is effected by what is termed the "former, which determines and imposes upon the draw the desired shape." No distending air is used, the glass being shaped solely by the former, without the aid of any auxiliary device or mechanism, the drawing glass being in contact with the shaping surface of the former. The means co-operating therewith to draw the glass about the former is the bait. This has an operatively close fit to the former, the cross-sectional dimensions and configuration of the one conforming to the other.

2. I am satisfied that this drawing and shaping machine disclosed by the patent, which proposes to draw articles of any shape desired, solely by means of the former and the drawing implement therewith, is a totally inoperative and worthless device. To hold otherwise, we would have to forget all the lessons taught by Lubbers, who founded and largely worked out the manifold problems of this delicate and intricate art. We must remember that the draw must start from a molten bath

and the glass must be brought into form while in a molten state at a high temperature, and must be kept in a molten state throughout the draw; that when the Raspillaire patents were issued only cylinders could be drawn; and that those cylinders then, as now, were during the draw so plastic and sensitive that no valve was ever found sufficiently delicate in operation to regulate the slight air pressure required to keep the cylinder of uniform diameter; that the rising cylinder is almost as susceptible to the action of air currents as a silk gown, and during the draw it had a breathing action like the rising and falling of the chest in respiration; that by means of surface tension, the cylinder has a tendency to travel across the bath, to overcome which Lubbers found that he must start with, and maintain, symmetry of heating and cooling conditions around the center of the draw; that failing in this, the cylinder would contact with the side of the receptacle and pull apart. Raspillaire did not propose to change in any way the properties or character of the molten glass, nor attempt to eliminate a single problem which always confronted the art when any draw was attempted. He simply proposed the impossible method of drawing this sensitive molten mass by direct contact with an internal solid body, to give it shape. In doing so, he utterly ignored the problem of surface tension, the differences in temperature between the molten glass and the former, and the sticking or adherence of the glass to the former, which would inevitably pull apart and destroy the cylinder. There is no evidence whatever that any cylinder, much less any article not cylindrical in form, was ever drawn by the machine disclosed by Raspillaire. And certainly there is no sort of demonstration that the patent discloses an operative method and apparatus for making window glass.

3. The patent does not teach the use of a drawing implement dissociated from the former and mechanism described in the patent. The bait described was a special drawing implement for a special purpose, definitely disclosed. It was to be combined with the former, to have an operatively close fit to the former, so that the glass will contact with the active shaping surface of the same. The glass is to be held in the drawing implement by being chilled and setting. This is brought about by the combined action of both the bait and the former. A cooling fluid circulates through the lower portion of the former, which, when lowered and partially submerged in the glass, results in chilling the glass from which the draw is made. When the bait is lowered and the glass flows into the groove, the lip or anchor thus formed is further chilled by the application of the presser device described. As the bait moves away from the bath, and along the cooled surface of the former, this "chills and imparts sufficient set to the glass to prevent the walls of the draw collapsing." The patent thus plainly teaches that the chilling of the glass, effected through the combined action of the bait and the former, is an essential factor in the successful operation of the device; and the art is given no information as to the use of the drawing implement except in connection with the former.

4. Claim 15 reads as follows:

"In a machine for drawing glass, a drawing implement adapted to be dipped into a glass bath and to draw glass therefrom, said implement provided with a groove to receive the molten glass."

This claim on its face does not purport to be for a cold bait, as nothing is said as to the temperature at which it is to be used. It is a claim for a bait having a groove. It does not appear that when the application was pending, it was ever suggested that the claim was for a cold bait. But the contrary does appear in this way: Claim 15 was originally claim 6 in the application as filed. That claim was rejected in view of the prior Proeger patent 763,633. In the amendment of January 29, 1906, claim 6 was canceled and reinstated as the present claim 15. At the time of the amendment, the applicant called attention to the fact that the application for his patent 804,173 was filed March 18, 1903, before the application for the Proeger patent, and that as his present application stood as a division of the application of March 18th, the Proeger patent had no standing as a reference. In other words, the situation was that the claim would have been held anticipated by Proeger, had not Raspillaire disclosed the subject-matter of the claim at an earlier date than Proeger, and on this position the claim was allowed. An examination of Raspillaire patent 804,173 shows that it discloses a hot bait, one in which "the thickness of the plunger regulates the thickness of the glass." Figure 5 shows the molten glass adhering to the bottom, the outside and inside of the bait. These are characteristics of the hot bait alone, and the witnesses seem to agree that in that patent a hot bait was disclosed.

5. There is some evidence in the patent, and it may be true, that Raspillaire intended to use this drawing implement without any preheating, as when he speaks of the lip of glass in the groove being chilled by contact with the presser device and with the material of the bait; and when the inventor describes detaching the two-part bait from the glass, by opening the plunger head. But certain it is that the patentee did not teach to the art the use of a cold bait. Though the patents were issued in 1905 and 1906, no one made use of anything disclosed therein. The art remained as before. As the Commissioner of Patents said in the interference case:

"No advance practically followed from Raspillaire's suggestion. For four or five years after his patents were granted the art was conducted exactly as it had been conducted since glass cylinders have been made by machinery."

From the foregoing considerations, claim 15 in suit must be disallowed and the bill dismissed at plaintiffs' cost. Let a decree be so drawn.

PITTSBURGH PLATE GLASS CO. v. AMERICAN WINDOW GLASS CO.

(District Court, W. D. Pennsylvania. May Term, 1919.)

No. 248.

1. **Patents ⇐112(3)—Patent Office decisions reinforce presumption of validity.**
The legal presumption of validity of a patent is strengthened by decisions of successive tribunals of the Patent Office sustaining it on contested interference proceedings.

2. **Patents ⇐62—Oral testimony held insufficient to establish prior use.**
Oral testimony of witnesses speaking from their recollection of a brief experiment made ten years previously, and unsupported by any record or exhibit evidence, *held* insufficient to establish prior use.

3. **Patents ⇐120—Essentials of double patenting stated.**
While an inventor may not sustain a subsequent patent for an invention actually claimed and secured in a prior patent nor for an essential element of an invention secured by a former patent, without which that invention would not have been patentable, the maker of several patentable inventions resulting in a new and useful machine or process may at his option secure all these inventions by a single patent or each patentable invention by a separate patent, and the fact that he may describe all of them in an application for an earlier patent to secure one of them does not invalidate a subsequent patent to him for those inventions therein described but not claimed.

4. **Patents ⇐328—1,208,851, claims 1–4, for method of drawing glass cylinders, held valid, but not infringed.**
The Spinasse patent, No. 1,208,851, claims 1–4, for a method of drawing glass cylinders by the use of a cold bait, *held* valid against the defenses of anticipation and double patenting, but not infringed.

In Equity. Suit by the Pittsburgh Plate Glass Company against the American Window Glass Company. Decree for defendant.

Decree affirmed 276 Fed. 849. See, also, 276 Fed. 193.

Marshal A. Christy and James C. Bradley, both of Pittsburgh, Pa., for plaintiff.

Bakewell, Byrnes & Stebbins, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. In this action, infringement by the defendant is charged of four claims of patent No. 1,208,851, granted to the plaintiff as assignee of A. E. Spinasse, the inventor. The case presents a voluminous record, a history of proceedings in the Patent Office protracted and somewhat involved, and a number of complicated questions of law and fact, more or less relevant to the issue here. But by keeping in mind certain well-established legal principles which control these questions, I think the ultimate solution is not difficult.

The broad subject-matter involved is that of cold baits, but the claims in issue are method claims. The patent does not cover the drawing implement known as a cold bait, but a method of using the cold bait by which a certain result is secured. That is to say, a novel supported upon a bait without fusion, with such relative formation of the novel and bait that there is an assured capability of relative

movement of the glass novel upon the bait, so that rupturing pressures are avoided during the drawing operation.

Admittedly, both plaintiff and defendant use a cold bait. By this term we mean, generally speaking, a bait used at a temperature below that at which the glass will fuse with the metal of the bait. This fusion, with the resulting firm adhesion of the glass to the bait, is the principle on which cylinders are drawn by the hot bait method. Where the temperature is so low that no fusion of the metals occurs, another lifting or drawing method was introduced; that is, when the bait is immersed in the glass, the glass flows over some form of ledge or groove, usually in the interior of the bait, and by the chilling action of the bait thereon, a supporting head or novel is formed of sufficient strength to draw the cylinder.

The plaintiff claims infringement, because the defendant draws glass cylinders from a body of glass with a metal bait, having its bottom open and its interior thereabove of larger dimensions than the opening, and when immersed in the bath, the glass flows upward into the enlarged interior, where it is chilled by the relatively low temperature of the bait, the glass within the bait supporting the cylinder as it is drawn, and being free to shrink radially toward the center of the bait.

The defendant denies the validity of the claims in suit, in view of the prior patents of Raspillaire and Spinasse; because of double patenting; and because of the prior invention and use of Mambourg, whose cold bait Spinasse saw in 1908, and from which he acquired and appropriated the claims in issue; and further that, if the claims in suit be held valid, defendant has not infringed them.

While the first four claims of the patent are in issue, the case can be disposed of by a consideration of the first claim. This claim is as follows:

"The herein described method of drawing glass cylinders from a body of glass with a metal bait having its bottom open and its interior thereabove of a larger diameter than the opening, which consists in maintaining the bait at a temperature to chill the glass, immersing the bait while at such temperature to such a depth as to permit the glass to flow upward into the enlarged interior where it is chilled by the relatively low temperature of the bait, and then raising the bait supporting the cylinder as it is drawn by the glass within the bait and applying air pressure to its interior, with the glass upon the interior of the bait supported free to shrink radially toward the center of the bait."

This claim was involved in an issue of interference in the Patent Office between Slingluff, Sweet, and Spinasse, and was heard before the primary examiner, by the examiner of interferences on final hearing, and on appeal by the board of examiners in chief, the Commissioner of Patents, and the Court of Appeals. Each of these tribunals awarded priority of invention to Spinasse in opinions filed. Sweet moved to dissolve on the ground that the issue was not patentable to any of the parties, in view of patents 834,165 and 839,421 to Raspillaire, and two prior patents, 915,899 and 921,747, to Spinasse. After fully considering the references relied on by Sweet, the issue was held patentable over them, and the motion of Sweet denied.

During the progress of the interference, the Commissioner, in view of certain affidavits filed, granted permission to Sweet's assignee to take testimony to demonstrate the operativeness of the Raspillaire device. Such testimony was accordingly taken and passed upon. It would unduly extend this opinion to quote from the opinions of these patent tribunals, each of which bears evidence of clear discernment and painstaking consideration of the questions involved. In substance, however, it was held as to the Spinasse patents that they provide for the use of hot baits, and were therefore not applicable. It was held as to Raspillaire that although it is stated in Patent No. 839,421 that the bait when dipped into the molten glass is cool, or comparatively so, nothing is found in it, or in either of his other patents, which is regarded as a disclosure of the method defined in the issue of interference. It is further held as to the last-named patents of Raspillaire that there was nothing to indicate as a feature of the invention, that it was intended to dispense with the initial heating of the bait, a step regarded at that time as essential in the art, or that it was intended that the bait described should be used without the former.

[1] In addition to the legal presumption of validity which exists in favor of the patent in suit, this presumption is greatly strengthened by the decision of the successive Patent Office tribunals. The presumption is by no means so strong where the proceeding is ex parte, with no opportunity to be heard by a party adversely interested. On the other hand, it is greatly enhanced and reinforced, where, as here, the conclusion is reached after a full hearing and a heated contest followed through all the tribunals.

In harmony with the views of the Patent Office, I find that the claims of the patent in suit are valid over the prior art patents of Raspillaire and Spinasse.

In the case of Window Glass Machine Co. et al. v. Pittsburgh Window Glass Co., 276 Fed. 193, in an opinion herewith filed, I held the Raspillaire device for drawing and shaping glass articles by means of a bait and former, where no distending air is used, the glass being shaped solely by the former, to be wholly inoperative; that the patent does not teach the use of the bait dissociated from the former, but was a special drawing implement for a special purpose definitely disclosed. The same reasoning would apply to the other two patents of Raspillaire, to which reference has been made. I think this conclusion is entirely supported by the tests introduced by the respective parties in relation to the device of Raspillaire. In those tests, where success in drawing a cylinder was obtained, it was solely because the cylinder was shaped by air distension and not by a former; in other words, because the shaping method disclosed by Raspillaire was wholly ignored. It must be kept in mind that Raspillaire, in all his patents, disclosed a machine in which the shape of the draw could be varied at will by the shape of the former; this element being distinctly substituted for shaping by air distension. In any test where air was in fact used for distension instead of for chilling purposes, or for so-called lubrication, it was a use wholly

unwarranted by any disclosure of Raspillaire's. The defense of invalidity by reason of the prior art cannot be sustained.

[2] Nor can I find invalidity from the alleged actual use of the patented invention by Mambourg prior to the date of Spinasse's invention, and public use thereof by him more than two years prior to Spinasse's application, or that the invention was that of Mambourg, from whom Spinasse derived his knowledge. I have examined and considered with care the testimony on this subject, which is both voluminous and contradictory. The testimony of Mambourg himself was so inconsistent with many well-established facts as to raise very grave doubts as to his truthfulness. His course of conduct in 1911, when, less than three years after he claims to have himself made the invention, he voluntarily acts as agent in endeavoring to sell Spinasse's invention to the American Window Glass Company, and wholly failing to disclose to that company any claim of his own thereto, further greatly detracts from the credibility of his testimony. I cannot stop to discuss the evidence in detail. The alleged facts sought to be shown by the defense are so narrow and elusive that observation and recollection might well be at fault. The witnesses were speaking of occurrences ten years before, as to casual observations, all concerning a brief experiment, all the evidences of which are lost or forgotten, and of which no tools, machinery, drawings, or contemporaneous records remain. The burden rests heavily on the defendant to satisfy the court of the facts which it asserts. The inaccuracy of observation, the forgetfulness of witnesses, their liability to mistake, their tendency to shape their evidence in sympathy with the eagerness of interested parties, aside from the temptation to actual falsehood, all go to place such testimony in the doubtful class. As the Supreme Court said in Deering v. Harvester Works, 155 U. S. 288, 15 Sup. Ct. 123, 39 L. Ed. 153:

"Oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented, is, in the nature of the case, open to grave suspicion."

Authorities to the same effect are so abundant that the proposition is no longer open to question. The testimony here is very unsatisfactory. It falls far short of that high measure of proof which, in these circumstances, all the authorities agree should be applied. This defense must therefore fail.

[3] Nor do I believe, although the question is close, that the patent is void for double patenting. Of course, the real question is the identity of the invention, and not the question of phraseology by which that invention is disclosed. As was held in Century Electric Co. v. Westinghouse Co., 191 Fed. 350, 112 C. C. A. 8, an inventor may not sustain a subsequent patent for an invention actually claimed and secured in a former patent, nor for an essential element of an invention secured by a former patent, without which that invention would not have been patentable. But the maker of several patentable inventions resulting in a new and useful machine or process may at his option secure all these inventions by a single patent, or each pat-

entable invention by a separate patent; and the fact that he may describe all of them in his application for an earlier patent to secure one of them does not invalidate a subsequent patent to him for those inventions therein described but not claimed. Nor does a patent void a later patent for an improvement thereon; or a patent for an improvement void a later patent for an invention on which the improvement is made. In other words, the ultimate question is always one of identity of invention.

While the application of Spinasse for the patent in suit was pending, and before its issue, he filed an application on a method for drawing glass cylinders, and obtained a patent, No. 1,085,068, which antedated the issue of the patent in suit. Defendant claims that the disclosure of the two patents is essentially the same in all respects, rendering void the patent in suit. This question was before the examiner of interferences in the interference issue, and was resolved in favor of the validity of the patent. It there appeared that the application in issue was recognized as a division of a prior application which disclosed a method of drawing glass cylinders, and also apparatus intended for use in practicing that method; while the claims of the divisional application involved in that issue are confined to the method alone. The application which resulted in the patent now set up as a bar contains but a single claim for a method of drawing glass. I think there is a substantial difference between the method there disclosed, and that in the claims in suit. In the former, the bait has what is termed "a novel supporting pocket," and the method consists in using the cold bait to form the novel in the pocket with room for movement at its inner end and receding from the orificial walls of the pocket, permitting the novel to externally set to this form before blowing. No such limitation is found in the claims of the patent in suit. In the latter, the glass flows "upwardly into the enlarged interior, the glass upon the interior of the bait supported free to shrink radially toward the center of the bait." A substantial difference thus appears in the methods disclosed. I think that the defense of invalidity on the ground of double patenting cannot be sustained.

[4] The claims of the patent being valid, we come to the question of infringement; and this involves the question of the scope or breadth of the invention. The patent does not cover, or pretend to cover, the drawing implement known as a cold bait. That was the result of a prior invention. The claims cover a method of using the cold bait to accomplish a certain result, that is, to prevent the crushing of the novel supporting the cylinder during the drawing operation. The claims are not basic in character, but narrow method claims, and therefore entitled only to the construction applicable to such claims. The authorities recognize a broad distinction between pioneer inventions permitting a wide range of equivalents, and those of a narrow character, which are limited to the construction shown. While it can never be contended that the result of a method is covered by the patent, we are apt to conclude that another combination to effect the same result is its equivalent and therefore infringes. In-

fringement is a tort, and the burden of establishing it, by evidence that is clear, satisfactory, and convincing, rests upon the plaintiff.

After a very careful consideration of the case, I am clearly of opinion that plaintiff has failed in such proof, and that, on the other hand, the defendant has established noninfringement by the strong preponderance of the evidence. My conclusion is based on the following considerations:

First. Spinasse's statement of invention recites that—

"My invention resides in the formation of a glass novel with a bait of a special structure and in such a manner that there will be an assured capability of relative movement of the glass novel upon the bait during the expansive and contractive actions which inevitably result during the drawing operation, and which necessarily are the source of the existing great percentage of breakage."

The special structure of the bait in which to form the novel and provide for its movement upon the bait clearly appears in the drawings and specifications; that is, a bait having its bottom open and its interior thereabove of larger dimensions, "having upwardly diverging working surfaces," and having "a lineal departure point at the orifice." By this is clearly meant a down-sloping ledge with "outwardly curved lips for the orifice of the bait pocket." Such is the construction of the bait.

Now as to the formation of the glass novel. We are instructed by the patent that while there is no definitely constant temperature at which the bait is operative, it must be low enough to prevent fusion, and "insure a lax clinging action of the novel upon the bait"; the inventor stating that he obtained the best results when the bait is below 200 degrees Fahrenheit. The inventor describes, as another main feature of the method, "the necessity for having a definite and ascertained initial formation of the novel upon the bait." His meaning here is made plain by the explanation that if the bait is dropped into the glass, it must be dipped no farther than will admit of a relative movement of the glass and bait; and that if the glass enters the bait through suction, care must be taken against forming the novel of such shape and expanse as will make the relative movement impossible. This is further explained on the second page at line 51, as showing why the bait must not be dipped too deep, because "this is only possible by so forming the novel as to length that it will not reach the widest point of the working surface before its upward movement under contraction"; and "there must be sufficient space left upon the working surface of the bait to afford room for the upward movement of the novel thereon."

A third feature claimed for the method "resides in the regulation of the density of the air at the juncture of the bait and the novel." It is stated that this is for the purpose of initially forming the glass article so that it will be assured of a capability of relative movement. It is explained that—

"This regulation of the density of the air may be by increasing or decreasing the volume of air at this point of juncture."

In other words, if the bait is dipped too deep, when the novel in its upward movement passes the widest portion of the bait, its movement will be obstructed by the inwardly inclining walls of the bait; while the outwardly curved lips of the orifice prevent the gripping of the neck of the novel by the mouth of the bait, thus again allowing freedom of movement.

It will thus be readily seen that in this method the structure of the bait as to downwardly sloping ledge, and outwardly curved lips at the orifice, and the formation of the novel, with a lax clinging action to the sloping walls of the bait, in conjunction with a loose neck, furnish "an assured capability of relative movement of the glass novel upon the bait during the expansive and contractive actions." And "a relative movement takes place between the glass and the bait, and the novel moves upwardly upon the working surface of the bait." That is, in the language of the claim, we find "the glass upon the interior of the bait supported free to shrink radially toward the center of the bait."

These are the vital steps in the method claim, with the result that rupturing pressures are avoided during the drawing operation. This is the clear teaching of the patent; a series of steps, definitely defined, to secure a definite result, that is, that the novel may not be crushed in the drawing operation, of which freedom of movement is the distinguishing characteristic.

Second. As bearing on the construction of the claims: Spinasse in his amended application had a number of claims broadly drawn to cover the forming of any novel in such a way that rupturing pressures are avoided during the drawing operation. The first claim was as follows:

"The process of drawing glass with a bait which comprises procuring thereon a novel supported without fusion, and insuring such relative form of the novel and bait that rupturing pressures are avoided during the drawing operation."

All these claims were later canceled, and the narrow claim suggested in the interference issue retained. After the conclusion of the interference, all the claims were canceled, except claim 13, being the claim in interference, and claim 1 of the patent in suit. The remaining claims of the patent were then added.

The patentee, or his assigns, is therefore precluded from urging a construction of his claims as broad as that of the claims rejected. On rejection of an application, it is well settled that every limitation and restriction inserted for the purpose of obtaining the patent is conclusive against a broader construction.

Third. In defendant's practice, a different method is employed with the same result, that the novel is not ruptured during the drawing operation.

In this method, there is no arrangement or provision for movement of the novel upon the bait. On the contrary, the effort is to prevent movement, keeping the novel and bait in contact without relative movement during the drawing, there being constant pressure of

the bait on the novel, but not sufficient to break it until after the cylinder has been capped off. This absence of movement is effected by the construction of the bait, and its temperature at the time the draw begins. The vitally essential element of Spinasse, the downsloping ledge to allow for movement, has not been used by defendant since 1914. In defendant's practice, there is no "pocket with upwardly divergent working surfaces"; no "lineal departure point at the orifice." On the other hand, the defendant's plain bait has a slight upward slope of the ledge. They have also used pin baits successfully. In these, the glass runs in on the ledge around the pins, making movement between the bait and novel impossible. They have also used for about two years, with great success, the lock groove patented by Clark. This bait, so far from providing for movement, is constructed to prevent it. Instead of drawing the bait upwardly from four to six inches above the bath without air, and holding the bait there until the neck is set before distending air is used, as in plaintiff's practice, defendant leaves the bait only a fraction of an inch above the bath, and then turns on the air as soon as the glass has chilled sufficiently to anchor on the ledge. In this way, the neck, instead of being free from the edge of the bait, as with plaintiff is blown out against the mouth of the bait, and there being no outwardly curved lips for the orifice, no relative movement whatever is provided for. It will thus appear that so far as the structure of the bait is concerned, the shape of the ledge, the position of the novel on the ledge, and the pressure of the neck against the lips of the orifice of the bait, all tend to prevent movement as between the bait and the novel.

But again: Movement is prevented by raising the initial temperature of the bait far above that employed in plaintiff's practice. This appears to be between 500 and 600 degrees Fahrenheit. In using this practice, defendant employs the method of Wells, whose patent it owns. When the Wells patent was applied for, the board of examiners in chief, in allowing the claims, stated that they constituted a distinctly different process than that of Spinasse. They pointed out with great clearness that Wells aims to maintain a close fit between the bait and the novel, while that of Spinasse is to constantly maintain a loose fit. That the latter forms his novel so as to recede from the orificial walls of the pocket, allowing it to set before blowing, so that when the pocket contracts its walls will not come in contact with the novel; that this method requires a downwardly extending flange to permit motion; that Wells has an upwardly extending flange which precludes the use of Spinasse's method, as that would result in fracturing the novel; that "applicant must accordingly maintain a uniform expansion and contraction of the pocket and novel throughout his operation, and this is the result that his methods seek to accomplish." They then explain that the bait is initially heated to several hundred degrees, immersed in the glass, and kept there until heated to a temperature slightly below the fusing point, and then commencing the draw; that the bait thus has its highest temperature before the drawing begins, and during the draw

the contraction is substantially equal to that of the glass novel, and the two will therefore be maintained in substantial contact without a tendency to break the glass as it cools; that while the bait has a higher coefficient of expansion than the glass, it has a lower temperature and is subject to a lower rate of change of temperature during the cooling operation; and thus the two will contract at a substantially uniform rate, causing little change in the relative diameters of the bait and novel.

This scientific theory is sustained by the testimony of Profs. Bishop and Hower, scientists of high standing, who familiarized themselves with the practical glass drawing operation, studied the problem of contraction as between the bait and the glass novel in the cooling process, and who demonstrated by scientific tests that in fact no relative movement takes place between the bait and the novel in defendant's method and practice. The correctness of this theory is further shown when we remember that in the hot bait method, we are dealing with the same metals, with the same problem of varying temperature and resulting contraction of the iron and glass; and that if movement between these occurs, the glass would fracture at its junction with the bait and the cylinder fall with a crash. We know that to prevent this result the Thornburg cooling retarder was devised and used successfully to regulate the temperature conditions, and prevent any actual movement between the two metals.

From the foregoing, it will appear that the two methods are distinctly different, both attaining the same result. In the one case fracturing pressures on the novel are avoided, by providing for relative movement in the cooling process. In the other, the purpose is to prevent movement, keeping the bait and novel in constant contact, but preventing rupturing pressures by keeping substantially constant the relative diameters of the bait and novel by adjustment of temperature conditions.

This statement really covers the whole question of infringement. It is idle to argue that there must necessarily be movement between the novel and the bait because of contraction, even if practiced with the lock bait and the temperature conditions specified by Wells. Even if this were true, it would not avail the plaintiff. If movement between the two metals necessarily follows in any cold bait operation, and if thereby there is infringement of plaintiff's method, it is clear that plaintiff would have under his method patent an exclusive right to use the cold bait as against all others. Of course, this cannot be.

Without further elaboration, I am satisfied that the method employed in defendant's practice exonerates it from the charge of infringement, and therefore the bill must be dismissed at the costs of the plaintiff.

A decree may be drawn accordingly.

GARVAN, Alien Property Custodian, v. CERTAIN SHARES OF INTERNATIONAL AGRICULTURAL CORPORATION IN THE NAME OF WINTER AND VON METZSCH and three other similar cases.

(District Court, S. D. New York. January 31, 1921.)

War ⇐12—Court has jurisdiction to compel transfer of corporate stock issued to alien enemy to Alien Property Custodian.

The fact that outstanding negotiable certificates of stock issued by a corporation, or by voting trustees representing the beneficial interest in such stock, to an alien enemy, may have been transferred to a bona fide holder not an alien enemy, *held* not to deprive a District Court of jurisdiction, under Trading with the Enemy Act, § 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), to require the cancellation of such certificates and the issuance of new ones to the Alien Property Custodian, leaving any bona fide transferee of the original certificates to enforce his rights under section 9 of the act; and it is immaterial that the original certificates may not be within the jurisdiction of the court or the government.

Seizure Proceedings under Trading with the Enemy Act. Libel by Francis P. Garvin, Alien Property Custodian, against certain shares of International Agricultural Corporation, registered in the name of Max Winter and Gertrude von Metzsch, with three other similar cases. Decrees for libelant.

Libels under section 17 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), in some instances for certain shares of the International Agricultural Corporation, a New York corporation, and in others for interest under a voting trust agreement in respect to the shares of said company, standing respectively in the names of certain individuals or corporations, determined in accordance with the provisions of the act to be alien enemies.

The British Public Trustee claims by virtue of the alleged seizure in Great Britain of the original trust certificates under the British Trading with the Enemy Acts. Both prior to and subsequent to the bringing of the libel, the voting trustees and the corporation offered to issue duplicate certificates of the beneficial interest and shares respectively standing in the names of the alleged alien enemies, but subject to the right, title, and interest of any person or persons other than the alien enemies which might have been acquired by a valid transfer of the outstanding certificates. They further offered to institute or appear in proper judicial proceedings to have the title to the outstanding certificates and the claims of the Alien Property Custodian judicially determined. The original certificates are not alleged to be within the United States, and no judicial proceedings have heretofore been instituted to determine by whom they are held.

Francis G. Caffey, Dist. Atty., and Earl B. Barnes, Asst. Dist. Atty., both of New York City, for libelant.

Hawkins, Delafield & Longfellow, of New York City, for one of the voting trustees.

Hughes, Rounds, Schurman & Dwight, of New York City, for claimant International Agricultural Corporation and for some of the voting trustees.

Coudert Bros., of New York City, for O. R. A. Simkin, Public Trustee under British Trading with the Enemy Acts.

MACK, Circuit Judge (after stating the facts as above). In accordance with the views expressed in Bank v. Palmer (D. C.) 256 Fed. 680, I held originally, in some of the cases of this group, that if the Alien Property Custodian required the aid of this court for the seizure of property under section 17 of the Trading with the Enemy Act, the court had power to determine the adverse claims to the possession of the property.

The decision of the Supreme Court in Trust Co. v. Garvan, and other cases, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. ——, rendered January 24, 1921, affirming (C. C. A.) 265 Fed. 477, 481 (see Garvan v. $25,000 Canadian Southern Bonds, 270 Fed. 217, 2d C. C. A. November 10, 1920), settles this question adversely to the views then expressed by me.

These opinions and Judge Learned Hand's very full and excellent consideration of the scope and purposes of the act in Kahn v. Garvan (D. C.) 263 Fed. 909, with which I fully concur, render further discussion of these matters unnecessary.

The question before me is one of jurisdiction of the res. If this court has jurisdiction over the res, petitioner is entitled to the decree as prayed for.

Section 7-C of the Trading with the Enemy Act as amended November 4, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), clearly contemplates the transfer for custodial purposes of stock shares, that is, of the obligation owing from a corporation to the shareholders, irrespective of the existence or location of any stock certificate. Does the fact that this obligation or the correlative right is to a great extent incorporated in a negotiable certificate which, not being within the jurisdiction of the court, or, so far as shown, within the jurisdiction of the government, is itself incapable of seizure, prevent the government from requiring and asking the aid of the court in compelling the cancellation of the original registration, the substituted registration of the Alien Property Custodian, and the issuance to him of a certificate in recognition of that registration for the purpose of effectuating, as to an incorporeal right, the equivalent of the seizure of chattels?

The respondents by their own offer in effect concede both the right of the government and the jurisdiction of the court to compel such a registration as will enable the Alien Property Custodian to exercise such rights in respect to the corporation as the registered alien enemy shareholder, without possession of the certificate, could have exercised, that is, the right to vote and to receive dividends. They contend, however, that in view of the lack of jurisdiction over the certificate itself, its negotiability, the possibility that it may be outstanding in the hands of some individual or government other than an alien enemy, and the liability of the corporation thereunder, there is neither jurisdiction over the stock, nor, even if there be jurisdiction, can the corporation constitutionally be compelled to issue any unconditional new certificate capable of transfer to a bona fide purchaser, and thereby subject itself to a double liability—the recognition of such a purchaser as its stockholder and an action for damages by the holder of the old certificate.

It is unnecessary to consider whether there would be jurisdiction in

this court to determine adverse claims to the stock or otherwise, either under section 9 (section 3115½e) or otherwise. For in the case of shares, as in the case of chattels, the object of such a proceeding as this is merely to vest the custody and the rights incident thereto in the Alien Property Custodian, not to determine the ultimate property rights either to the shares or to the certificate.

Furthermore, what the rightful owner of the shares is concerned with is not primarily the certificate, but the shares themselves. As to these, he has exactly the same rights under section 9 of the act that the claimant to chattels has. By proper and prompt proceedings thereunder, the holder of the original certificate, not an alien enemy, may recover from the Alien Property Custodian the new certificate on surrender and cancellation of the old one, and thereby obtain the full status of a shareholder with the only outstanding certificate. If through lack of knowledge of the seizure or for any other cause he fail to act promptly and thereby lose this right, nevertheless, in lieu thereof, he may enforce a claim to the proceeds of any disposition by the Alien Property Custodian of the shares as represented by the new certificates. These actions are the statutory substitutes for his claim for damages against the corporation. And in this respect there is, in my judgment, no substantial difference between chattels and shares of stock. The obligation of the corporation or of the voting trustees, whether based upon contract or estoppel, to recognize the bona fide holder of a certificate as its shareholder and on demand to register him as such, is no more absolute than the contractual obligation of an agent to hold chattels subject only to the specific orders of his principal. In each case the obligation is subject to the superior right of the government to actual seizure or its equivalent, under the war powers. While the exercise of this right may result eventually in loss of ownership of the chattel or shares, the statute provides what in law must be deemed an adequate compensation or substituted right and remedy, in the claim to the proceeds of any sale thereof.

The certificates of voting trustees of corporate shares, representing the beneficial interest in these shares, are for practical purposes similar to certificates of the shares of stock. The obligations of the voting trustees in respect to the recognition of transferees is no different from the obligation of the corporation itself in respect to transferees of stock certificates. Union Trust Co. v. Oliver, 214 N. Y. 517, 108 N. E. 809. They are not to be differentiated in proceedings under section 7–C.

I hold, therefore, that the shares of the corporation and the equivalent obligation of the voting trustees are the res in question; that the government may demand the transfer thereof to the Alien Property Custodian in the manner specified in the statute as it may demand the custody of a chattel; and that, on refusal, the court that has jurisdiction over the corporation or the trustees may by its decree compel such transfer.

Decree for libelant.

DUNAWAY et al. v. PURYEAR et al.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1921. On Motion to Modify Judgment, December 15, 1921.)

No. 3497.

1. **Appeal and error ⊂=931(1), 1009(4)—Conclusions of trial judge presumptively correct, and conclusive unless evidence clearly preponderates against them.**
Conclusions of the trial judge in an equity case on disputed question of fact (where testimony is taken in open court) are presumptively correct, and will be accepted on appeal, unless the evidence clearly preponderates against them.

2. **Mortgages ⊂=32(1)—Contract and deed held absolute conveyance.**
A written contract, providing, not merely for a conveyance, but for a "sale and conveyance" of an undivided one-third interest in land, *held* to evidence an absolute conveyance, and not a mortgage, notwithstanding a further provision that "on extinguishment of said debt this contract shall end"; the contract providing that the grantee of the third interest go on the land and by cutting timber pay off a mortgage thereon, and that such interest in the land be reconveyed in case the grantee die before the expiration of the contract.

3. **Contracts ⊂=10(1)—Deeds ⊂=17(1)—Contract and deed held not lacking in mutuality or consideration.**
A contract and deed conveying absolutely a one-third interest in land, whereby grantee was to go into possession of the land, furnish labor for cutting timber to pay off an existing mortgage, and under which he personally assumed one-third of the mortgage debt, *held* not lacking in mutuality or consideration.

4. **Deeds ⊂=70(5)—Contract and conveyance held not unconscionable.**
As bearing on the issue of constructive fraud, a contract and deed whereby grantee was conveyed absolutely a one-third interest in land, in consideration that he personally assume one-third of the mortgage indebtedness, and take possession of the land, cut timber, and pay off the existing mortgage, which amounted to only one-third of the value of the land, but which the owners were unable to pay, was not unconscionable, where the owner was not a desirable man to deal with financially.

5. **Deeds ⊂=70(5)—Unconscionableness must be tested by conditions existing at time.**
The question of the unconscionableness of a contract conveying a one-third interest in mortgaged property, in return for services to be exerted toward payment of the mortgage from timber on the land, must be tested by the conditions which existed at the time of the conveyance.

6. **Deeds ⊂=71—Grantee of interest in land and mortgagees held not guilty of oppression.**
In an action to cancel a contract and deed, whereby a one-third interest in land was absolutely conveyed in consideration that the grantee assume one-third of mortgage indebtedness, enter on the land, cut timber, and pay off the mortgage indebtedness, which amounted to one-third of the value of the land, but which the owners could not pay off, *held*, that neither the grantee nor the mortgagees, who were threatening to foreclose and sell the land, were guilty of oppression and duress.

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall and Andrew M. J. Cochran, Judges.

Suit in equity by Cora A. Dunaway and husband against J. N. Puryear and others. Decree for defendants, and plaintiffs appeal. Affirmed.

John Cashman, of St. Louis, Mo. (George Fryer, of Paris, Tenn., on the brief), for appellants.

S. P. Fitzhugh, of Memphis, Tenn. (Fitzhugh & Rye, of Paris, Tenn., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Appellants are husband and wife and reside at St. Louis, Mo. Mrs. Dunaway owned a tract of land in Henry county, Tenn., containing about 1,200 acres, partly timbered and partly cultivated. December 18, 1916, the Dunaways borrowed, in substance, from the Cottage Grove Bank & Trust Company, located at Cottage Grove, Tenn. (hereinafter called the bank), $9,000, giving a note for $9,900 (being the principal and interest at 10 per cent. for one year), payable one year from date, securing the same by deed of trust (hereinafter called a trust mortgage) upon the land, running to appellee Rainey, a prominent stockholder in the bank. The note was not paid at maturity, and Rainey instituted foreclosure proceedings, advertising the land for sale on April 8, 1918. The Dunaways, being unable to pay the mortgage, made on June 1, 1918, a written contract with appellee Puryear—who at the time the loan was made was cashier of the bank, but who had resigned about February 1, 1917—under which the Dunaways conveyed to Puryear an undivided one-third interest in the tract (Puryear assuming the payment of one-third of the mortgage debt), and whereby the entire tract was to be delivered to Puryear's exclusive possession, management, and control for a period not exceeding five years from the 2d day of September then next,[1] for the purpose of cutting ties, cutting and removing timber, and converting the same into lumber or merchantable products, to be disposed of according to Puryear's judgment, as well as for the cultivation of the land then or thereafter cleared. Puryear was to advance the necessary funds for carrying out the contract, and was to receive the income and profits from all sources; his determination in the management of the land, timber, and lumber and "making of contracts" was to be final and conclusive. The contract provided that all income and profits, after deducting expenses, should be applied to the extinguishment of the mortgage debt, "and for the joint benefit of the parties to" the contract. There was express provision that, if the mortgage indebtedness should not be fully paid off and discharged during the contract period, Puryear should still owe one-third of the balance of the debt, and the Dunaways the other two-thirds. There was further express agreement, that in the event of Puryear's death during the life of the contract, Mrs. Dunaway should be entitled to a reconveyance of the one-third conveyed to Puryear, upon the payment to the latter's representative of $200 per month from September 3, 1918, until Pur-

[1] Mrs. Dunaway was given until September 3, 1918, in which to pay the mortgage debt, in which event the contract should at once terminate.

year's death. After about September 2 or 3, 1918, Puryear took possession of the tract and proceeded to carry out the contract, cutting and selling ties and timber.[2]

In March, 1919, Puryear obtained in a state court of Tennessee an injunction restraining asserted interference by Dunaway with Puryear's operation under the contract, and on April 30, 1919, this suit was brought by Mr. and Mrs. Dunaway in the District Court below against Puryear, Rainey, the bank, and five workmen, asking a cancellation of the contract and deed of June 1, 1918, for the recovery of damages for alleged waste and other alleged misconduct by Puryear, for the elimination of asserted usurious interest on the mortgage loan, and for injunction against Puryear from further operations on the land, and against the bank from foreclosing the trust mortgage. The prominent grounds on which the right to such relief was asserted, so far as necessary now to be stated, were that the making of the contract and the conveyance of a one-third interest in the tract to Puryear, as well as the latter's possession of the entire tract, were obtained by active fraud, especially in that Puryear had agreed, as asserted, to make and deposit in escrow a reconveyance to Mrs. Dunaway of the one-third interest conveyed to him, to be delivered and become fully operative as soon as the mortgage debt should be fully paid off; in that connection, that the two instruments of June 1, 1918, were represented by Puryear as desired by the bank and were intended to be an additional security merely for the benefit of the bank and for the payment of its mortgage debt;[3] that the contract lacked consideration or mutuality, and was unconscionable; that Puryear's operation under the contract had been inefficient and wasteful, resulting in delaying the proper payment of the mortgage indebtedness; and that he had refused to account for the moneys received under the contract.

Rainey, Puryear and the bank filed answer and cross-bill,[4] denying all the material allegations of the bill respecting misconduct and misrepresentation, and expressly denying an agreement by Puryear to reconvey the one-third interest, or that the contracts under date of June 1, 1918, were taken merely for the benefit of the bank, asserting Puryear's ownership of the undivided one-third interest in the tract, his proper performance of the contract, unlawful interference by Dunaway with Puryear's operations thereunder, and praying the enforcement of the contract, the foreclosure of the deed of trust, the distribution of the proceeds of the contract's operation after payment of the mortgage indebtedness between the Dunaways and Puryear in the proportions of two-thirds and one-third, and for receivership and injunction.

Final hearing was had on the merits before the late District Judge McCall; the testimony of the Dunaways, Puryear, and Rainey, and

[2] The Dunaways had paid nothing upon the mortgage debt, except as Puryear, on the signing of the contract, indorsed to them a note for $400 to carry the interest from June 1st to September 3d.

[3] We treat the bill as broad enough to include, as a ground of relief, the alleged fact that the deed and contract were taken as security for the mortgage debt to the bank.

[4] The other defendants joined in the answer proper.

of the more important witnesses to the merits, being taken in open court. Judge McCall found as facts that the deed to Puryear of the one-third interest was intended as an absolute deed, that there was no agreement for reconveyance thereof upon the payment of the mortgage debt, that the contract and deed were not intended as additional security for such payment, that the contract was not unconscionable, but was advantageous to the Dunaways, in that the contract and deed were executed to prevent the sale of the land under the mortgage, and to enable the Dunaways to save all of it, except the one-third conveyed to Puryear for his assistance. By the final decree the Dunaways recovered usurious interest to the extent of $495 (an excessive 2 per cent. per annum), and were awarded one-fourth of the costs of the case; otherwise, the bill was dismissed. The contract and deed of June 1, 1918, were declared valid and binding. Temporary injunction against Dunaway's interference was made permanent. This appeal is from that final decree.[5]

[1, 2] The equitable principles involved in this hearing are elementary. If the making of the contract and deed were in fact obtained by the alleged fraud, or if the two instruments were, when made, intended as a mortgage, or if they were without mutuality or consideration, or if the contract with its attendant conveyance was unconscionable, or has been used in actual oppression or duress of plaintiffs, relief should be given. The final determination of the case turns wholly on disputed questions of fact, as to which the conclusion of the trial judge is so far presumptively correct that we are bound to accept it, unless the evidence clearly preponderates against it. In re Snodgrass (C. C. A. 6) 209 Fed. 325, 126 C. C. A. 251. The questions whether the contract and deed were obtained by fraud and whether they were intended as additional mortgage security are interrelated subjects. The question of actual fraud, so far as distinguished from the mortgage quality of the instruments given, turns upon the question whether Puryear agreed to make and deposit in escrow a reconveyance to Mrs. Dunaway of the one-third interest conveyed to him, to take effect as soon as the mortgage debt should be fully paid off. The trial court found that "such promise was never made by Puryear, the bank, or any one." We think this conclusion amply sustained by the weight of the evidence. The written contract in plain and unambiguous language provides, not merely for a conveyance, but for a "sale and conveyance" to Puryear of an undivided one-third interest in the land. Equally clearly and unequivocally, and in harmony with the consideration just stated, Puryear assumed the payment of one-third of the mortgage debt, in express terms made to extend to the balance, if any, of the debt which might remain unpaid at the expiration of the contract period.

The effect of these explicit provisions is not, in our opinion, overthrown by the further provision that "on extinguishment of said debt

[5] After the decree was entered, motions for leave to amend the bill to meet asserted proofs and for rehearing were denied. If the decision on the merits was correct, these denials are unimportant, and they are not discussed in the briefs of counsel.

this contract shall end." Considered in connection with all the other contract terms, including the provision that the contract should be ended in case Mrs. Dunaway should succeed in paying off the debt by September 3d, following the making of the contract, the natural and plain meaning carried by the face of the written instrument is that, on the extinguishment of the debt through Puryear's management and operation, the contract relating to such management and operation (not the deed of a one-third interest given as part payment therefor) should cease. The evidence does not justify rejecting this natural meaning, so disclosed by the face of the contract. The testimony, given by both plaintiffs, of the actual making by Puryear of the claimed representations, is disputed, not only by Puryear, but by the disinterested draftsman of the instruments,[6] both of whom say that the alleged promise to reconvey referred only to the contingency of Puryear's death during the contract period, which was expressly provided for in the written contract. The facts appearing in the record otherwise strongly discredit the testimony of both plaintiffs, as well as that of another witness, who testified to alleged admissions by Puryear.

The trial judge in terms found that "the evidence decidedly fails to support the contention" that the deed and contract were intended as additional security to the mortgage debt. We think the weight of the evidence sustains that conclusion. Here, again, plaintiffs' contention is in the face of the unambiguous language of the written contract, and the proof offered to sustain it is anything but convincing. Plaintiff's testimony to the effect stated is disputed by both Puryear and Rainey, and in part by two other witnesses. The trial judge well said that there was no need for additional security, inasmuch as the land was worth three times the amount of the mortgage debt; that the conveyance of one-third of the tract added nothing to the mortgage security; that three months were given plaintiffs to afford additional opportunity to pay off the mortgage, and that Puryear himself arranged for money to pay the interest on the note during that three months; and that the contract and deed were executed to prevent sale under the mortgage and to enable plaintiffs to save all of it, except the one-third which they conveyed to Puryear for his assistance in the matter. The evidence, taken together, is not convincing that the bank had any interest in the deed or contract, or that the giving of these instruments had any relation to the bank's benefit, except as the bank undoubtedly preferred to have the debt paid without foreclosure and sale, and so was willing to delay such sale in the event of an arrangement such as that with Puryear, which seemed reasonably to assure such payment. In our opinion the charge of conspiracy between Rainey, the bank, and Puryear is not made out. The fact that when this case was heard below Puryear had become president of the bank is not of great significance.

[3-5] We see no merit in the contention that the contract and deed were lacking in mutuality or consideration. Both these elements are

[6] The trial judge says of this draftsman: "He is a good lawyer, and did this work for these parties not as an attorney for either party but for an accommodation."

found in the assumption by Puryear of one-third of the mortgage debt, his agreement to furnish the funds for operating the contract, and the assumption of labor and responsibility on his part in that regard, and the distinct advantage to plaintiffs in such arrangement, in view of their manifest inability otherwise to raise the money at the time to prevent the foreclosure sale under the trust mortgage; a condition which is not negatived by the fact that after Puryear had actively begun operations under his contract opportunity may have been had to raise money elsewhere. The evidence sustains an inference that Dunaway was not a desirable man to deal with financially. These considerations effectively answer the charge that the contract was unconscionable. The trial judge said:

"When the consideration passing to plaintiffs for the one-third interest conveyed to Puryear, as disclosed by the evidence, is considered, it cannot be said of a truth that it is unconscionable. Indeed, when considered in the light of the facts and attending circumstances as of the time of the transaction, it appears that the contract was advantageous to plaintiffs."

In this conclusion we fully agree. An opposite conclusion is not justified by the changed conditions which Puryear's efforts and the better financial situation which followed the Armistice in November, 1918, had effected. It may well be that, if plaintiffs had been able to defer the foreclosure sale until a reasonable time after the close of the war (a date then wholly conjectural), they might have saved the entire of the land (less the mortgage) without Puryear's help; but the record is to the contrary of such ability. The question of unconscionableness must be tested by the conditions which existed on June 1, 1918, when the foreclosure proceeding was ripe for final sale, and plaintiffs were without means to avoid the same, except through some unusual arrangement.

[6] We also think the charge of oppression and duress not sustained. The allegations of inefficiency and waste on Puryear's part are overthrown by what he has accomplished. In spite of the difficulties in obtaining and retaining labor, occasioned at first by its scarcity and latterly contributed to by Dunaway's unjustifiable interference with Puryear's operation, in taking possession of portions of the land and intimidating workmen employed by Puryear, it appeared that, when the trial was had below,[7] Puryear had succeeded in paying on the mortgage debt, from the net proceeds of timber and management of the property, $3,471.69, that he already had on hand timber worth net $3,125 (whose application would reduce the note to a little more than $4,000), and that he had reasonable expectation of completing payment of the entire debt within another year. If this probable result is obtained (and the record does not discredit such probability), plaintiffs have saved an undivided two-thirds interest in this tract without incumbrance, and have escaped the reasonable possibility, to say the least, of losing the entire of their interest. The greater the value of the land (Puryear admits it is worth $30,000 to $35,000; plaintiffs claim it is worth $100,000), the greater the benefit to plaintiffs. Giving due weight to all the testimony in the case and the various consider-

[7] The trial was begun October 31, 1919.

ations adduced (we have not attempted to discuss them all on either side), we are convinced that plaintiffs are not shown to have been wronged or overreached, but that the record indicates that the result reached below has worked substantial justice.

The testimony of alleged discouragement by Rainey and Puryear of the refunding of the loan by plaintiffs after Puryear's operation was well under way has no impressive significance. In large part it was either denied, or offer of denial made. If Puryear's contract was valid, he, as owner of a one-third interest, was under no obligation to encourage a refunding of the mortgage debt, which he was then actively engaged in paying off under his contract.

The decree of the District Court is affirmed.

On Motion to Modify Judgment.

PER CURIAM. Appellants ask that the opinion and judgment of this court be so modified as to leave to the discretion of the District Court how far appellants may investigate the good faith of respondent Puryear in executing the contract in question and accounting for proceeds of the timber.

The decree below, which was affirmed by this court, has finally established the validity and enforceability of the contract of June 1, 1918. It constitutes a final rejection of appellants' allegations of waste as affecting the validity of appellants' right to terminate or avoid the contract. It finally dismissed plaintiffs' bill, except in certain particulars not now important. It precludes all further question of the good faith of defendant Puryear in entering into the contract or procuring its execution by appellants.

When the testimony was taken, however, the mortgage had not been fully paid, and there was no occasion for an accounting of receipts and disbursements and operations under the contract. In our opinion, the trial court's action upon the question of damages did not have the effect, in view of the dismissal of the bill, of retaining jurisdiction over an accounting of receipts and disbursements and contract operations.

We find nothing in the previous opinion of this court which affects the question of the extent to which the alleged wastefulness on the one hand, or good faith on the other, in cutting and marketing the timber, or in otherwise carrying out the contract, would be related to or could be considered in any accounting which might be had in another action respecting defendants' operations under that contract, which must be treated as valid and enforceable.

The reference in our previous opinion to the allegation of "inefficiency or waste on Puryear's part," as overthrown by what he had accomplished, was properly addressable to alleged waste, as giving right to terminate a contract otherwise valid.

The petition for modification of judgment is accordingly denied.

BIG SESPE OIL CO. v. COCHRAN.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1921. Rehearing Denied December 5, 1921.)

No. 3666.

1. **Courts ⇐280—Burden of defeating jurisdiction of federal court, properly averred, is on defendant.**
   The burden of defeating the jurisdiction of a federal court, properly averred in plaintiff's pleading, is on defendant, and, where a bill alleged diversity of citizenship and that complainant was a citizen of a certain state, a denial merely that he was a citizen of such state was not sufficient to challenge the jurisdiction.
2. **Equity ⇐415—Not necessary to make all findings to sustain decree.**
   It is not essential for a court to make findings of all facts necessary to sustain its decree.
3. **Limitation of actions ⇐39(9)—Suit for accounting governed by four-year statute.**
   A suit by a judgment debtor against a purchaser of real property at execution sale for an accounting of rents and profits accruing prior to the expiration of the time for redemption under Code Civ. Proc. Cal. §§ 702, 707, *held* governed by the four-year limitation contained in section 343.
4. **Execution ⇐301—Demand for accounting by judgment defendant entitled to redeem held sufficient.**
   A written demand for an accounting of rents and profits made on purchaser of real property at execution sale on behalf of a corporation judgment defendant entitled to redeem, and signed by its attorney, who had previously acted for defendant and had been recognized as such by the purchaser in other transactions, *held* legal and sufficient under Code Civ. Proc. Cal. § 707.
5. **Corporations ⇐618—Delaware corporation held to have power after dissolution to redeem property from execution sale.**
   Under General Corporation Laws Del. § 40, providing that corporations expiring by limitation or otherwise dissolved shall be continued for the term of three years for the purpose of closing and settling their business, conveying property, and prosecuting and defending suits, a Delaware corporation, dissolved under the statute for nonpayment of taxes *held* to have the power within three years thereafter to redeem real property from execution sale under the laws of California.
6. **Execution ⇐293—Right of redemption held assignable.**
   The right of redemption from an execution sale of real property given by Code Civ. Proc. Cal. § 701, to the judgment debtor or his successor in interest in the whole or any part of the property, is a property right which is assignable by a judgment debtor independent of any transfer or an interest in the property.
7. **Execution ⇐281—Purchaser wrongfully in possession accountable for rents and profits.**
   Where, at the time of the sale on execution of the interest of a judgment defendant in real property, it had only a qualified interest, without the right of possession, its estate not having been reduced to possession, the purchaser, which took possession and operated oil wells on the property, is liable to the owner of the legal title as a trespasser for the gains and profits.
8. **Execution ⇐265—Sale of personalty held in trust for defendant does not convey title.**
   A sale on execution of personal property of which the judgment defendant is the beneficial owner, but title to which is in a trustee, does not

convey to the purchaser the legal title, but only the right to enforce the trust.

9. Fixtures ⟸9—Oil wells, derricks, tanks and pump, and camp houses held "fixtures."

Oil wells, derricks, tanks and pump, and camp houses, are "fixtures" under Civ. Code Cal. § 660.

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

10. Mines and minerals ⟸51(5)—Willful trespasser held entitled to no allowances on accounting except for taxes paid.

On an accounting by a willful trespasser which operated oil wells on the property, defendant *held* entitled to no allowance from the proceeds of such operation except for taxes paid on the property.

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

Suit in equity by William H. Cochran and William H. Cochran, as trustee, against the Big Sespe Oil Company. Decree for complainant, and defendant appeals. Affirmed.

This is an appeal from a final decree against the Big Sespe Oil Company, involving right to the possession of certain oil lands in California. Cochran, plaintiff below and appellee here, sued the Big Sespe Oil Company, and McMartin, sheriff, alleging that plaintiff is a citizen of New York; that plaintiff's assignor, the Pacific Crude Oil Company, is a citizen of Delaware, and the Big Sespe Oil Company a citizen of California. The bill alleges that in 1917 in the state court in California, the Big Sespe Oil Company recovered judgment against the Pacific Crude Oil Company for $15,000 and interest; that in March, 1917, upon execution, the sheriff of Ventura county in California sold all the interest of the judgment debtor in and to the certain lands to the Big Sespe Oil Company for $17,340.50, and a certificate of sale was given to the purchaser, and it took possession; that the moneys and profits received by the oil company are a credit upon the redemption money required to be paid. It is alleged that before the expiration of the time for redemption the judgment debtor, Pacific Crude Oil Company, demanded from the Big Sespe Company a statement of moneys and profits, but failed to receive any such statement; that demand was made upon the sheriff and that, as provided by section 707 of the Code of Civil Procedure of California, the sheriff was notified that the time for redemption of the real property was extended, and that until such time was expired the sheriff should not deliver conveyance to the Big Sespe Oil Company.

Further allegations are that about August 29, 1918, the sheriff made an instrument purporting to convey to the Big Sespe Oil Company the title and interest of the Pacific Crude Oil Company to the real property described therein; that when such conveyance was made the lawful time for the redemption of real property had not expired; that the certificate was of no effect; that the sheriff claimed that he delivered the instrument unto Big Sespe Oil Company pursuant to a writ of mandate issued August 29, 1918, out of the superior court of the state, directing the sheriff to make and execute the deed, but that neither the assignor of Cochran, nor Cochran, was a party to the proceeding in which the writ of mandate was issued, and that the writ is not legal warrant for the making or delivery of the instrument of the 29th of August; that the facts relevant to the question of the legal issuance of the writ of mandate were suppressed by the oil company; that the allegation in the petition for the mandamus falsely stated that the period for the redemption of the property from the sale under execution one year from March 3, 1917, had expired; that the court was deceived and misled, and that all the proceedings, including the written instrument of conveyance from the

sheriff, were of no effect as against the rights of the Pacific Crude Oil Company, or it assignee, Cochran; that on June 11, 1919, the Pacific Crude Oil Company assigned and conveyed unto Cochran all of the described redemption and right of redemption which the judgment debtor at any time had or might have unto the real property from the sale under execution, and that since the 11th of June, 1919, Cochran is entitled to make redemption and desires to do so, but cannot determine the amount required until the oil company has given account of money and profits since March, 1917. Accounting is prayed for, also that the proceedings in the mandate proceeding referred to be declared inoperative as against the rights of Cochran, and that the deed of the sheriff be declared void ab initio.

Defendants admitted the extraction of oil, and the realization of about $13,000, denied that such moneys were a credit upon the redemption money, denied the demand for an accounting, and pleaded that from March 30, 1917, Cochran was the holder of the legal title of the real property as trustee for the Pacific Crude Oil Company, and that neither he nor the oil company did the assessment work upon the placer claims described in the complaint for the year 1914, nor paid the taxes due upon the said property for 1914, 1915, and 1916; that in August, 1914, the oil company commenced an action against Cochran as trustee for the Pacific Crude Oil Company, and the Pacific Crude Oil Company, to foreclose this vendor's lien upon the real property described; and that from the beginning of such action to August, 1918, the date of the execution by the sheriff's deed to the Big Sespe Oil Company, Cochran was informed of all proceedings relating to the title to the said property. The answer pleads laches on the part of the Pacific Crude Oil Company and Cochran, and that on June 11, 1919, the Crude Oil Company had no legal existence and possessed no right of redemption.

Interlocutory decree was made in favor of Cochran, and the case was referred to a special master for an accounting. The court adopted the report of the special master and decreed that Cochran had a right of redemption, and that certain sums were due by the Big Sespe Oil Company to Cochran; that the instrument in writing dated August 29, 1918, by the sheriff, purporting to grant the property to the Big Sespe Oil Company under the execution on March 3, 1917, should be set aside and held for naught, and that the Big Sespe Oil Company should surrender the instrument to be canceled. The Big Sespe Company was also restrained in the decree from claiming any right to the premises, the premises were ordered to be surrendered free of all liens and incumbrances, and Cochran was held entitled to recover certain amounts.

Dudley W. Robinson and A. I. McCormick, both of Los Angeles, Cal., for appellant.

Theodore Martin, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Appellant questions the jurisdiction of the lower court in general and specially upon the ground that—

"The evidence was insufficient to show that the cause of action was one between citizens of different states of the United States."

The first allegation of the complaint is:

"Jurisdiction of this case arises and is given to this honorable court by reason of the diversity of the citizenship of the parties hereto. Complainant is now and always has been a citizen of the state of New York. Complainant's hereinafter particularly mentioned and described assignor, Pacific Crude Oil Company, is a corporation formed, organized, and existing under and by virtue of the laws of the state of Delaware, and is also a citizen of the said state of Delaware."

The defendants Big Sespe Oil Company and McMartin, sheriff, in their joint and several answer, set up that—

"They had no knowledge or information sufficient to enable them to form a belief as to the truth of the allegation in paragraph 1 of complainant's bill, that complainant is now and always has been a citizen of the state of New York, and basing their denial upon that ground, deny that complainant is now or always or at any time has been a citizen of the state of New York. Otherwise than as herein set forth, defendants admit every allegation of paragraph 1 of said bill."

It is apparent that defendant's answer was limited in that it did not deny alleged diversity of citizenship, but merely the allegation that plaintiff was a citizen of New York. In Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518, the court said:

"Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet, wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken prima facie as existing, and that it is incumbent on him who would impeach that jurisdiction for causes dehors the pleading to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof both rest upon the party taking the exception."

While consent of the parties cannot give jurisdiction, facts may be admitted which show jurisdiction, and the courts may act judicially upon such admissions. Denny v. Pironi et al., 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657. The denial that plaintiff was a citizen of New York should not be construed as a denial of diversity of citizenship and of jurisdiction.

In Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25, the complaint alleged that plaintiff was a citizen of Indiana, and the defendant a citizen of Illinois. Defendant pleaded to the merits, and also in abatement for want of jurisdiction on the ground that the plaintiff Shirk was a citizen of Illinois. The question of citizenship was tried, and upon appeal to the Circuit Court of Appeals it was contended that the plaintiff below held the burden of showing that at the time of the commencement of the action he was a citizen of Indiana. The court said:

"The proper allegation of jurisdictional facts, prima facie, was true. Simply to deny that * * * Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, whereof plaintiff in error was a citizen. That * * * Shirk was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which, even under a proper plea in abatement, would have fallen on plaintiff in error."

That case was cited in Hunt v. N. Y. Cotton Exch., 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. In Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633, it was alleged by the plaintiff that he was a citizen of Illinois, and that the defendant corporation was organized under the laws of Missouri. There was a general denial under which the contention was made that the citizenship of the plaintiff was put in issue. Plaintiff testified that he lived in Illinois. The court held that the force and effect of a proper pleading of jurisdictional facts made a prima

facie case in favor of jurisdiction, and that such jurisdiction continues until evidence is produced to convince the court that it is without power to proceed. The court also said:

"What the defendant is attempting to do is to challenge the jurisdiction of the court, and in order to do that he must not simply deny the citizenship as alleged in the complaint, but must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state, or make such other averments as shall show directly that the cause is beyond the lawful cognizance of the court."

Petition for writ of certiorari was denied in 214 U. S. 517, 29 Sup. Ct. 698, 53 L. Ed. 1064. In Simkins, Fed. Equity Suit (3d Ed.) p. 125, the author holds that the burden of proof is on the defendant to defeat jurisdiction when the issue is raised.

In Chase v. Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990, the court referred to Sheppard v. Graves, supra, and other earlier decisions, pointing that there was no conflict between the doctrine of those cases and the provisions of the act of 1875, § 8 (Comp. St. § 1039) requiring a federal court of its own motion to dismiss a pending suit when it is found not to be really within the jurisdiction of the court. Other pertinent cases are: Barry v. Edmonds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682. The cases cited sustain the view that the defendant's pleading presented no material issue as to citizenship, and that the pleadings made a prima facie case of existing jurisdiction.

But if we were to assume that there was an issue and reference could be had to the evidence which had any relation to the citizenship of the plaintiff, we should have to find that there was sufficient to sustain the jurisdictional averments of the complaint, for the plaintiff testified that his home was in New York; that he first came to California in 1914 in connection with some business and was engaged by persons who organized the Pacific Crude Oil Company to perform services for them; that he returned to his "home" in July, 1914, but in 1915 was employed to come back to California to carry on this litigation, but again returned to his "home" when his work was finished. In Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, cited by appellant, the point decided was that where jurisdiction depends upon the citizenship of the parties, the requisite diversity must be alleged by the pleadings and must appear of record. To this proposition all must agree. But on the other hand, if there is not a sufficient allegation, yet there does appear to be competent evidence in support of such diversity of citizenship, the court may proceed to exercise jurisdiction.

[2] Nor do we think it is necessary for the court to make a finding as to all the facts necessary to sustain the decree. Liebing v. Matthews, 216 Fed. 1, 132 C. C. A. 245. Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76, decided by this court in 1900, is to be distinguished in that the issue of jurisdiction was there presented by a verified answer, the effect of which was controlled by the then existing rules of practice in equity.

Appellant relies upon laches. The evidence shows that Cochran, in March, 1914, as attorney for the Pacific Crude Oil Company, negotiated for the purchase from the appellant herein of the property involved, and that at various times, and up to the time of a written demand for a statement on March 1, 1918, the appellant and its attorneys dealt with Cochran as attorney and recognized him as such. Cochran's evidence is that after the sale of the property on March 3, 1917, he conferred with the secretary and treasurer of the appellant as to what could be done with the situation into which affairs had drifted; that toward the fall of 1917 he told the secretary and treasurer that he wished a statement of what moneys appellant had received from the property and what expenses had been incurred, so that he would know what moneys were necessary to redeem the property; that the statement was promised but was not furnished; that about January, 1918, he wrote the secretary renewing his request for a statement. The secretary answered this request by referring Cochran to the attorney for the company. Thereafter, formal written demand for statement of rents and profits was made, and thereafter the appellant instituted proceedings in the state court for a mandate to require the sheriff to execute and deliver to appellant as purchaser at the execution sale of March 3, 1917, a deed, and it was in pursuance of the proceeding instituted in July, 1918, that mandate issued, and that the sheriff delivered the purported deed.

It is correct that neither the judgment debtor nor Cochran as trustee intervened formally in that suit, but the evidence is that Cochran as attorney for the Pacific Crude Oil Company and as trustee voluntarily appeared in the state court, and that in that court counsel for the appellant herein formally objected to Cochran's being made a party to the proceeding and to his being heard by the state court, and that the state court did not hear Cochran in that proceeding and that he was not made a party to it.

We can find no ground for sustaining the plea of laches.

It is argued that the demand for a statement was ineffectual. Under section 707, California Code of Civil Procedure, it is provided that if the purchaser shall fail or refuse to give the statement of rents and profits demanded in accordance with other provisions of the section, the debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action the right of redemption is extended to such debtor. In the present case the judgment debtor in due season made the demand in writing required by this section, but the defendant, appellant here, failed to give the statement demanded. This gave a right of action for an accounting to the complainant. Furthermore, the refusal of the statement operated to extend complainant's time to redeem until 15 days after the final determination of this suit.

[3, 4] Section 343 of the California Code of Civil Procedure provides that an action for relief not theretofore provided for must be commenced within four years after the cause of action shall have accrued. This being an action for accounting is within the four-year lim-

itation. Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39. Under the California statutes regulating redemption—

> The judgment debtor may redeem at any time within 12 months after the sale, he paying the amount of the purchase together with other amounts specified, and the purchaser from the time of the sale until redemption is entitled to receive the rents of the property sold or the value of the use and occupation thereof, "but when any rents or profits have been received by the judgment creditor or purchaser * * * from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the * * * judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor * * * a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser * * * to such * * * debtor. If such purchaser * * * shall, for a period of one month from and after such demand, fail or refuse to give such statement, such * * * debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action, the right of redemption is extended to such * * * debtor." Sections 702 and 707, Cal. C. C. P.

Defendants argue that the judgment debtor could not have acquired legal title to any real property within California nor could any one transact business in California on the judgment debtor's behalf because the debtor had not registered in California as a foreign corporation, and because the demand was not signed or executed by the Pacific Crude Oil Company or any proper authority, and that W. H. Cochran, who signed the demand as attorney and otherwise for the debtor, was not authorized to act as he did. The demand was signed as follows:

> "Pacific Crude Oil Company, by Wm. H. Cochran, its Attorney; Wm. H. Cochran, as Trustee for Pacific Crude Oil Company, and Wm. H. Cochran."

There is ample evidence that Cochran, a member of the bar of the state of New York, was retained by the Pacific Crude Oil Company as its attorney, acted in California for his client, negotiated with defendant appellant for the purchase of the property, was in frequent contact with defendant and its attorneys, and was dealt with by defendants as attorney for the judgment debtor for several years prior to March 1, 1918. It is also plain that Cochran was retained by the Pacific Crude Oil Company to return to California and do what he thought was best in legal proceedings and otherwise so that the property would not be lost to the corporation. In the light of the evidence, we agree with the District Court that the demand for statement was legally and properly made and that it was the duty of the Big Sespe Oil Company to make the statement.

[5] Appellant urges that the Pacific Crude Oil Company forfeited its charter in Delaware on January 28, 1918, and thereafter had no legal existence, and that upon such forfeiture the directors of the company became its trustees, and that it was only such trustees who could make or authorize the making of the written demand for statement.

Granting that under the franchise tax laws of the state of Delaware (Rev. Code 1915, § 111), section 74, the charter of the company became void on January 28, 1918, for nonpayment of taxes then due the

state of Delaware, nevertheless by section 40 of the General Corporation Laws of Delaware (22 Del. Laws, c. 394) it is expressly provided that—

"All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall, nevertheless, be continued for the term of three years from such expiration or dissolution of bodies corporate, for the purpose of prosecuting or defending suits by or against them, and of enabling them gradually to settle or close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established."

Under the section quoted the Pacific Crude Oil Company was continued as a body corporate with certain powers for the term of three years from January 28, 1918. Such appears to be the rule established in Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 805, affirmed by the Supreme Court of Delaware in 9 Del. Ch. 411, 84 Atl. 229. Hanan v. Sage (C. C.) 58 Fed. 651; Olmstead v. Distilling & Cattle Feeding Co. (C. C.) 73 Fed. 44. The principle of the decisions cited is that under section 40, supra, provision is made for the continuance of the corporation in order that the company itself may settle and close its business. Thus, the corporation itself under the statute became a trustee for the purpose of converting and dividing its property and otherwise winding up its affairs.

Appellant questions the validity of the assignment by the judgment debtor to Cochran upon the ground that the Pacific Crude Oil Company is not bound thereby.

The assignment of the right of redemption appears to be regular in form, signed by the president of the Pacific Crude Oil Company, acknowledged before a notary public in Pennsylvania, to which is attached the certificate of the prothonotary of the court of common pleas to the effect that the officer who subscribed to the certificate of the acknowledgment was a notary public, to whose acts full faith and credit should be given, and that his signature was genuine, and that the instrument was executed and acknowledged in conformity with the laws of the state of Pennsylvania. The court below rightly admitted the assignment in evidence as in compliance with section 1951 of the Code of Civil Procedure of California and section 1189 of the Civil Code of California.

[6] We cannot uphold the contention of the appellant that inasmuch as the statute of California, section 701, C. C. P., provides for redemption by the judgment debtor or his successor in interest in the whole or any part of the property, the debtor cannot clothe a stranger as assignee with the right of redemption independent of a transfer of some interest in the property. The statute gives the judgment debtor the right to redeem, and the general rule is that statutes giving such right do not make the actual ownership at the time of sale or redemption a condition precedent, as the right follows the person and not the land and continues for the period prescribed by the statute, although the debtor meanwhile may have parted with his title. So. Cal. Lbr. Co. v. McDowell, 105 Cal. 99, 38 Pac. 627, was a case where the judgment debtor never had any title to or interest in a certain part of

the property sold at the execution sale, but the court held that he was entitled to make redemption. The same doctrine is sustained in Yoakum v. Bower, 51 Cal. 539. The statutory right of redemption where property has been sold at an execution sale is as a rule assignable, the assignee succeeding to all rights and interests of his assignor. 17 Cyc. 1329. Section 655, Civ. Code, recognizes that there may be ownership of rights created or granted by statute, and we cannot perceive why a judgment debtor may not have ownership of a right of redemption, and why such right is not property, and why, if the right to assign the right of redemption exists, the assignor may not also assign the right to enforce such right.

[7] It is argued that as appellant the purchaser at the execution sale, acquired no right of possession of the property, he could not take possession until after the expiration of the period within which redemption from such sale could be made. But the material question is: What are the rights acquired by the appellant as purchaser at the execution sale of the then existing rights and interests of the Pacific Crude Oil Company in the real property involved in the present litigation? Clearly, when the execution sale was had, Cochran was the holder and owner of the legal title to the property, in actual possession, and operating the same. The Pacific Crude Oil Company had then no right of possession. Cochran doubtless was under obligation to convey the land to the Pacific Crude Oil Company upon demand by that corporation, but as the Pacific Crude Oil Company never made any demand on Cochran to convey and never brought any action to compel such conveyance, appellant's argument is irrelevant to the point involved in the present case.

Under section 707 of the California C. C. P., the purchaser from the time of sale until redemption became entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. The purchaser acquired merely a qualified estate in the property sold until the time for redemption expired. The purchaser is not entitled to possession of the sold property, but may only receive the rents from the tenant in possession, if there be one, or the value of the use and occupation should the owner himself remain in possession and use of the property. Harris v. Reynolds, 13 Cal. 515, 73 Am. Dec. 600; Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648.

In the present case the judgment debtor, not in possession, may have had a right to obtain possession under certain conditions and in a lawful manner, but under no circumstances did the Pacific Crude Oil Company have more than a qualified estate which it had not reduced to possession. The District Court so held and advanced to the logical conclusion that inasmuch as the Big Sespe Oil Company had no right to possession its possession became a trespass.

[8] Error is assigned to the action of the District Court in restraining the defendant Big Sespe Oil Company from asserting or setting up any claim of right to the personal property, machinery, and fixtures, or to the rents from the real property since March 3, 1917, by virtue of the execution sale or the deed made in pursuance thereof.

The appellant bases its claim of ownership of the personal property on the certificate of sale from the sheriff of Ventura county, Cal. The certificate sets forth that by virtue of the execution placed in his hands in the suit in the state court the sheriff sold personal property according to law after due and legal notice to the Big Sespe Oil Company. The appellees contend that no ownership or title was acquired under the sheriff's sale. The deeds of March 30, 1914, conveyed unto Cochran, as trustee for Pacific Crude Oil Company, all of the real property involved in this litigation, "and also all and every the personal property in, on or about the said premises, and more particularly described in the schedule of personal property" annexed to the deed. The personal property described in the schedule includes that which is claimed by the appellant herein. Cochran, by virtue of those deeds, not only acquired legal title to the realty, but also the legal ownership of the personal property on the realty. It would therefore follow that what was sold by the sheriff in 1917 was the right of the Pacific Crude Oil Company to enforce the trust in connection with the property against the trustee, and the purchaser at the sale acquired no greater interest in the personal property than was the right of the Pacific Crude Oil Company. If this is the correct view, the Big Sespe Company did not purchase the property itself and did not own it, but merely acquired right of the judgment debtor to enforce a trust.

[9] Included in the schedule as personal property are certain derricks and camp houses and wells and tanks. Under section 658, Cal. C. C., real or immovable property consists of land and that which is affixed to land, and that which is immovable by law. "Fixtures," under section 660, are deemed to be things attached to the lands or imbedded in it, as in the case of walls permanently raised upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Camp houses and the pump house would be brought within the definition of fixtures, so would be the five tanks and the four wells. Goss v. Helbing, 77 Cal. 190, 19 Pac. 277; section 661, Cal. C. C.; Malone v. Big Flat Gravel Co., 76 Cal. 578, 18 Pac. 772.

Cochran as trustee filed a petition to intervene on November 17, 1920, which was nearly seven months after the interlocutory decree herein was rendered, and after the cause was set down for settlement on the report of the special master and the final decree. The intervention was allowed under Equity Rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), which authorizes any one claiming an interest in the litigation at any time to assert his right by intervention, subject to certain restrictions, and as the appellant in his petition for intervention set forth that if the report of the special master should be confirmed as filed defendant, appellant here, might be left subject to another suit or action by the trustee for the very same moneys, rents, and profits. We find no error in the action of the court. By the intervention the disposition of any claims Cochran may have had could be had without separate prolonged litigation.

[10] It is said that the decree erred in directing appellant to deposit in court $3,843.84 together with interest found to be the surplus of

profit over the amount required to be redeemed. The master went into the accounts in great detail, and we are by no means satisfied that he erred in his final adjustment. Inasmuch as the Big Sespe Oil Company was a willful trespasser on the property, no allowances should have been made in its favor except for taxes which it had paid on the property. The master adopted this rule, and properly proceeded to assess damages as indicated in E. E. Bolles Wooden Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230.

The master and the District Judge carefully considered the items in the accounting, and, as appellant has failed to show error in their conclusions, we affirm the decree.

Affirmed. Costs to be taxed to appellant.

WARDELL, Internal Revenue Collector, v. BLUM et al.

(Circuit Court of Appeals, Ninth Circuit. October 24, 1921.)

No. 3670.

1. **Internal revenue ⇐8—Inheritance tax only on property of deceased.**
   All inheritance taxes are imposed on the transfer of the net estate of the deceased, and the property upon which such a tax is imposed must, in truth, be the property of the deceased, under 39 Stat. 777, §§ 201–203.

2. **Internal revenue ⇐8—Interest subject to inheritance tax determined by law of state where property is situated.**
   The interest of a decedent subject to inheritance tax under 39 Stat. 777, §§ 201–203, providing that the tax be upon the transfer of the net estate of the decedent "to the extent of the interest therein of the decedent," etc., is to be determined by the law of the state where the property is situated.

3. **Internal revenue ⇐8—Only one-half of community property in California subject to inheritance tax.**
   Only one-half of community property is subject to federal inheritance tax under 39 Stat. 777, §§ 201–203, in view of Civ. Code Cal. § 1402, and St. Cal. 1917, p. 880.

Hunt, Circuit Judge, dissenting.

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

Action at law by James B. Blum and another, as executors of the last will and testament of Rosa Blum, deceased, against Justus S. Wardell, as Collector of Internal Revenue for the First District of California. From a judgment overruling demurrer to complaint (270 Fed. 309), defendant brings error. Affirmed.

Frank M. Silva, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal. (Carl A. Mapes, Solicitor of Internal Revenue, of Washington, D. C., and H. Maurice Darling, Special Atty., of Washington, D. C., Bureau of Internal Revenue, of counsel), for plaintiff in error.

John C. Altman and Richard S. Goldman, both of San Francisco, Cal. (Thos. P. Boyd, of San Rafael, Cal., John W. Preston, of San Francisco, Cal., and H. W. B. Taylor, of San Anselmo, Cal., of counsel), for defendants in error.

A. L. Weil, Forrest A. Cobb, and Perry Evans, all of San Francisco, Cal., and Lloyd M. Robbins, Luther Elkins, and Carey Van Fleet, all of San Francisco, Cal., amici curiæ.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This suit was brought for the recovery of an estate tax paid to the government under protest on the half interest of the wife of the decedent Blum in the community property which passed to her under the laws of the state of California upon the death of her husband.

[1] All inheritance taxes are imposed on the transfer of the net estate of the "deceased"; from which the conclusion is inevitable that the property upon which such a tax is imposed must, in truth, be the property of the deceased. In the case entitled In re Moffitt's Estate, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, the Supreme Court of that state held that the share of the surviving wife in the community property was subject to the inheritance tax imposed by the statute of the state, citing a number of its previous decisions to the effect that upon the death of her husband the wife took one-half of the community property only as "heir" of her husband, and reaffirming the correctness of that holding. If she took only as heir, as a matter of course, the whole of the community property belonged to the husband at the time of his death, and was accordingly liable to the inheritance tax imposed by the then state statute.

But in 1917 (Stat. 1917, p. 880) the Legislature of California so changed its inheritance tax law as to expressly declare that for the purposes of the act the half of the community property which goes to the widow on the death of the husband shall "not" be deemed to pass to her as "heir" of her husband, but shall go to her as for a valuable and adequate consideration, and shall not be subject to the inheritance law of the state.

That manifestly is a clear statutory declaration that the wife's half of the community property is not part of the property of the deceased husband, at least so far as the state inheritance taxes are concerned.

[2] The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent "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." Sections 201–203, 39 Stat. 777.

How is that interest to be determined?

[3] Manifestly, we think, by the law of the state where the property is situate. In the present instance the law of that state is declared by the statute enacted in 1917, providing that so far as state inheritance taxes are concerned, the wife of a decedent acquires upon his death

one-half of the community property in her own right, and not as heir of her husband; in effect, therefore, that in so far as state inheritance taxes are concerned, the estate of a decedent has no interest of any sort in the wife's half of the community property. That, in our opinion, settles the question here presented against the contention of the government; for we not only see nothing in the above-quoted provision of the United States statute to indicate any intention to impose a federal inheritance tax upon the wife's half of community property which the statute of the state where the property is situate expressly declares passes to the wife upon the death of her husband in her own right and not as his heir, but the federal statute, as will be seen, expressly declares as one of the essential conditions to the imposition of a federal inheritance tax that the net estate of the decedent shall be "subject to distribution as part of *his* estate."

It must not be forgotten that the sole question here is one of federal inheritance tax and, even if the case was not controlled by the California statute of 1917 above referred to, applying to it the rule of law announced by the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 311, 320, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, the result, it seems to us, must be the same. That court there said:

"It is very plain that the wife has a greater interest than the mere possibility of an expectant heir."

Under that rule, one half of the community property would go to the surviving wife, the other half being subject to the testamentary disposition of the husband by virtue of section 1402 of the Civil Code of California, which declares, among other things:

"Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants."

The judgment is affirmed.

HUNT, Circuit Judge (dissenting). U. S. Stat. L. vol. 39, p. 777, §§ 201, 202, and 203, provide:

"That a tax * * * is * * * 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. * * *

"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."

"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 * * * 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."

Turning to the Civil Code of California, the following sections are pertinent:

"Sec. 172. The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate." (Enacted March 21, 1872.)

In statutes of California 1901, p. 598, an amended section 172 was made to read as follows:

"Sec. 172. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided also, that no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property shall be made without the written consent of the wife."

In 1917, chapter 583, Civil Code of California 1917, the following law was passed:

"The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or incumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

Again, in 1917, chapter 583, Statutes of 1917, California Civil Code, the Legislature added a new section (172a), which provided with respect to the management and control of community real property:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

The statute for distribution of common property on the death of the husband, section 1402, Civil Code of California, provides:

"Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, * * * and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

The California inheritance tax laws, page 880, Statutes of 1917, provide as follows:

"The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interests therein of the testator, intestate * * * passing or transferred to individual legatees, devisees, heir, next of kin, * * * or successors, and shall include all personal property within or without the state; provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section 1402 of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act; provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivisions (3) or (5) of section 2 of this act, one-half of the community property to transferred shall not be subject to the provisions of this act; and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain for the purpose of this act as against any claim by the state for the tax hereby imposed; but the burden of proving such property to be community property shall rest upon the person claiming the same to be community property."

The Supreme Court of the United States, in Moffitt v. Kelly, 218 U. S. 400, 31 Sup. Ct. 79, 54 L. Ed. 1086, 30 L. R. A. (N. S.) 1179, held that the nature and character of the right of the wife in the community for the purpose of taxation is "peculiarly a local question," to review which the Supreme Court had no power. That all question as to the rule of decision in California prior to 1917 has been determined is entirely clear. In Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537, the decisions are collated and referred to and with evident appreciation of the importance of the question the court, in a concise and able opinion by Justice Shaw, held that—

Prior to an additional proviso in 1891 "it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all of the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him."

And furthermore, the limitation which the statutes put upon the husband's testamentary power was not understood "to vest in the wife during the marriage any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power." The court also held that if the husband undertook to dispose of all the community property by will, giving the wife less than one-half thereof, such disposition was not absolutely void, but had the effect of putting her to her election whether to take under the statute or under the will, and that the testamentary disposition in such a case was voidable, though not absolutely void. The statute of 1891 was commented upon by the court, and two cases, Fulkerson v. Stiles, 156 Cal. 704, 105 Pac. 966, 26 L. R. A. (N. S.) 181, and Fanning v. Green, 156 Cal. 281, 104 Pac. 308, were cited in support of the doctrine that the wife has no interest or estate in community property during the marriage relation, and that the husband is the absolute owner thereof subject to the limitation upon his power of disposition.

Again, referring to the legislation of 1891, the court said:

"Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long-settled doctrine that the entire estate therein [in the community property] is in the husband during the marriage relation, a doctrine that had become a fixed and well-understood rule of property, it is not to be supposed that the Legislature would have made a change of so radical a character without plain language to that effect."

Schneider v. Schneider (1920) 191 Pac. 533, is not a recession by the court from the directly expressed earlier views.

But the more important point is whether by the state legislation of 1917 (heretofore referred to) the rule as theretofore announced by the decisions cited has been modified. In Moffitt's Estate, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, decided in 1908, the court passed upon an appeal by the widow and executors of the will of a deceased husband from a decree directing payment to the county treasurer of Alameda county, an inheritance tax upon the interest of the widow in the community property of herself and her deceased husband. The 1905 inheritance tax statute of California prescribed that all property which passed by will or intestate laws of the state from any person who died seized or possessed of the same should be subject to a tax provided for in the act. Confining its decision to the question whether the surviving wife's share in the community property was subject to the inheritance tax, the court, after holding that it was to be presumed that the Legislature enacted the law imposing inheritance taxes with full knowledge that it had been repeatedly held by the Supreme Court that the wife took her share of the community property upon the death of her husband by succession as his heir, decided that the widow's share of the community property should bear the inheritance tax as would the portion of the husband's separate estate which might come to her by will or by the laws of succession. The court said:

"In other words, since the Legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject to this tax, it would have made provision that it should be excepted from the operation of the law."

Presumably with knowledge of that and other decisions the Legislature, by the statute of May 23, 1917, exempted the interest which the wife has received upon the death of her husband. That is very clear; and I think the language of the proviso was employed with special care to limit the amendment to the purpose of the act, which pertained solely to inheritance taxes and the levy and collection thereof. The title of the statute and the only subject-matter thereof relate to inheritance taxes, to the property interest upon which they can be levied, and to their collection and to gifts. Chapter 589, Statutes of California, 1917, p. 880.

As I read the statute, in exempting the interest taken by the wife upon the death of the husband it was assumed that she took as an heir, and that not till the death of the husband could the interest "go, pass or

be transferred to her." There is no language which shows an intent on the part of the Legislature to establish any more extended right in personal property than such as the law as declared by the Supreme Court of the state recognized she is entitled to. Certainly there is no direct expression changing the law defining her interest, and I fail to find ground for the inference which the defendants in error ask to be drawn. Therefore I feel constrained to adopt the view recognized in Spreckels v. Spreckels, supra, that if the Legislature had intended to disturb the long-settled doctrine that the entire estate in the community is in the husband during the marriage relation, it was not to be supposed that such a radical change would have been made "without plain language to that effect." Section 172a, also adopted in 1917, and hereinbefore cited, provides that the wife must join in executing any instrument by which the community real property or any interest therein is leased or conveyed or incumbered for a longer period than one year, provided the sole lease or conveyance of the husband holding record title to community realty, made to a person without knowledge of the marriage relation, shall be presumed to be valid, but no action to avoid such instrument shall be commenced after one year from filing of record the instrument.

Inasmuch as the case does not call for decision as to the right of the wife in real estate, I pass the question merely expressing doubt whether section 172a has enlarged the interest of the wife in the realty as such interest was defined by the cited decisions of the Supreme Court. But as to personalty I believe that the reasonable presumption is that the Legislature of 1917, in repeating the law which had been in force, meant to make no change in respect to the relation it bears to the community.

The case of Arnett v. Reade, 220 U. S. 311, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, is cited by defendants in error to sustain the argument that since 1917 the federal courts must follow the construction which the Supreme Court has put upon statutes similar to those of California. If I could consistently reach the point where I could agree that the amendments of 1917 effected a change in the nature of the interest of the wife in personalty, the position taken would be strong. But the question involved in Arnett v. Reade, supra, arose in the territory of New Mexico and turned upon the true construction of a statute of the territory passed in 1901 providing that—

"Neither husband nor wife shall convey, mortgage, incumber or dispose of any real interest or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." Laws N. M. 1901, c. 62, § 6.

In Reade v. Lea, 14 N. M. 442, 95 Pac. 131, the Supreme Court of the territory held that that statute did not apply to community real property acquired before its passage because the husband was the absolute owner of such property and would be deprived of vested rights if the statute were construed as applicable to property acquired before its passage. This view was reversed by the Supreme Court of the United States upon the ground that the position taken by the territorial court was in conflict with the old law of New Mexico, which in

effect was that, after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property and subject to the payment of the debts of the decedent the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution. It was accordingly held that prior to the passage of the statute of 1901 the wife had a greater interest than a mere possibility, and that the statute did not change the estate which the husband had prior to the passage of the statute. The case is to be distinguished, in that in California prior to the enactment of 172a the husband had absolute ownership of the community. In Spreckels v. Spreckels, 116 Cal. 343, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, it was distinctly held that the statute requiring the consent of the wife to gifts of community property did not apply to property acquired prior to the passage of the statute of 1891, for such a construction, if adopted, would deprive a husband of his vested property rights in the community.

Warburten v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555, also cited, is authority for invoking the principle that the federal courts should abide by the judicial construction put upon statutes relating to community property as expounded by the highest tribunal of the state; and although, in the course of the opinion by Chief Justice White, it is said, perhaps in a general way, that it is a misconception of the community system to suppose that because power was vested in the husband to dispose of the community acquired during marriage as if it were his own, therefore by law the community property belongs solely to the husband, nevertheless the Supreme Court adhered to the principle that the decisions of the Supreme Court of Washington would be followed.

In Badover v. Guaranty Trust & Savings Bank (Cal.) 200 Pac. 638, August, 1921, decided since the present case was submitted, the Supreme Court, speaking through Chief Justice Angellotti, again cited the earlier cases and reaffirmed the "well-settled doctrine" in California "with relation to the status of community property," and held that the wife during the marriage has no existing property right in the community property. "She may enforce certain limitations established by statute on the husband's control thereof, but this gives her no present interest in the property," or, as put in Estate of Burdick, 112 Cal. 387, 393, 44 Pac. 734, "no right or title of any kind in any specific property." That case was commenced in 1917, hence the decision is not upon the effect of the amendments of 1917, but it is the last authoritative word in recognition of the generally established rule of property in California, a rule which it seems to me has not been set aside by the amendments of 1917 to the inheritance tax law and section 172 of the California Code.

VAN KANNEL REVOLVING DOOR CO. v. WINTON HOTEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1921.)

No. 3532.

1. Patents ⟸328—Reissue 14,255, for revolving door, claims 3, 23, and 24, held valid and infringed.
   The Van Kannel reissue patent, No. 14,255 (original No. 836,843), *held* validly issued as to claims 3, 23, and 24, on the ground of inadvertence. Claims 1, 2, 13, and 22 *held* void for lack of invention over the prior art. Claims 3, 23, and 24 *held* valid and infringed.
2. Patents ⟸136—"Inadvertence" which authorizes reissue.
   If a patentee, though his solicitor, without intending to do so, drafted or accepted claims not commensurate with the invention such act is an inadvertence within the meaning of Rev. St. § 4916 (Comp. St. § 9461), which entitles him to a reissue.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inadvertence.]
3. Patents ⟸141—Whether reissue is for same invention not determined by claims of original patent.
   What constitutes the "same invention" as applied to a reissue granted under Rev. St. § 4916 (Comp. St. § 9461), is not to be determined by the claims of the original patent, but from the description, and such other evidence as the Commissioner may deem relevant.
4. Patents ⟸141—Claims may be either narrowed or broadened by reissue.
   Claims may be either narrowed or broadened by a reissue to express the real invention.
5. Patents ⟸144—Inadvertence authorizing reissue question primarily for Commissioner.
   Whether there was inadvertence authorizing a reissue is a question primarily for the Patent Office, and its decision will not be reviewed unless inconsistent with other facts appearing in the record.
6. Patents ⟸147—Invalidity of claims in reissue does not invalidate other claims.
   The fact that some of the claims of a reissue are invalid does not invalidate other claims.
7. Patents ⟸237—Structure may infringe patents for broad device and for improvements thereon.
   A structure may be the mechanical equivalent of a broad device and also of an improvement thereon and may be an infringement of patents for each.

Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the Van Kannel Revolving Door Company against the Winton Hotel Company. Decree for defendant, and complainant appeals. Affirmed in part, and reversed in part.

For opinion below, see 263 Fed. 988.

Titian W. Johnson, of Washington, D. C. (Titian W. Johnson, of Washington, D. C., and Hull, Smith, Brock & West, of Cleveland, Ohio, on the brief), for appellant.

T. Kennedy Helm, of Louisville, Ky. (Trabue, Doolan, Helm & Helm, of Louisville, Ky., and D. A. Christopher, of Cleveland, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit upon reissue patent No. 14,255, February 6, 1917, to Van Kannel, plaintiff's assignor, on collapsible revolving doors of the "panic-proof type." The claims in suit are Nos. 1, 2, 3, 13, 22, 23, and 24. The original patent, of which the patent here in suit is a reissue, is No. 836,843, February 27, 1906, to Van Kannel. The defenses are (1) lack of novelty and invention, (2) invalidity of reissue, and (3) noninfringement. The district judge held all the claims invalid for lack of novelty and invention, and dismissed the bill, without passing upon the remaining two defenses.

Referring briefly to the prior art: Van Kannel had in 1888 been granted a patent (No. 387,571) upon a revolving door having a series of wings rotating in a casing, in which the wings fitted so snugly as to exclude at all times wind, rain, snow, and dust. While that patent provided for so hinging one or more of the wings at or near the central post as to permit their being thrown back against a fixed wing, it contained no feature by which the wings could be automatically collapsed or released from radial position in case of great pressure on opposite wings. The entire door structure was to be mounted on a base secured to the doorway so lightly as to be capable of being moved out of the way to permit free exit, and the fastenings so frail as to be readily broken or torn from their place in case of a sudden rush from the inside, thus causing the entire door structure to be thrown out. As a "panic-proof" device, this invention was quite impracticable, judged by present standards.

In 1900 Van Kannel was granted another patent (No. 656,062) for an automatically collapsible panic-proof door, the wings of which were held normally in radial position by a series of spring bolts or lugs carried respectively by the arms of a "spider" attached to a revolving ceiling, each lug engaging the end of one of the wings, which were respectively of two parts (separated by a longitudinal connection), the inner part being hinged to a central standard, the outer part being bothway hinged to the inner part. The construction was such that the application of abnormal pressure to the wings caused them to bend or buckle at the line of hinge connection, their consequent shortening automatically releasing the lugs engaging the upper ends of the wings, causing them to collapse. The invention of the 1900 patent was both practical and valuable. It was repeatedly sustained and held infringed.[1] In view of the various adjudications of the patent of 1900, we pass without comment several other patents relating to the revolving door art, including one or more issued to Van Kannel. They are sufficiently referred to in the adjudications just cited. The invention of

[1]Van Kannel Revolving Door Co. v. Revolving Door & Fixtures Co. (1914), C. C. A. 2, 219 Fed. 741 (claims 1, 2, 8 and 13), 135 C. C. A. 439; Louisville Trust Co. v. Van Kannel Revolving Door Co. (1916), C. C. A. 6, 231 Fed. 166 (claims 2 and 8), 145 C. C. A. 354; Van Kannel Revolving Door Co. v. Straus (1916), C. C. A. 2, 235 Fed. 135 (claims 2 and 8), 148 C. C. A. 629; Van Kannel Revolving Door Co. v. Lyon & Healy (1917), C. C. A. 7, 247 Fed. 329 (claims 1, 2 and 8), 159 C. C. A. 423; Van Kannel Revolving Door Co. v. Uhrich (1916, D. C.), 247 Fed. 344 (claims 1, 2 and 8).

Van Kannel's patent of 1906, and of the reissue here in suit, dispenses with the spider and lugs engaging the tops of the wings, whose adjacent faces are connected with each other only by flexible ties secured in fixtures near the longitudinal center of the faces of the one-piece wings, by which ties the wings are normally held in radial position; abnormal pressure, however, upon the face of any wing causing the fastening thereon to be released automatically. This release of one tie practically effects a direct and immediate collapse of all the wings without disturbing the fastenings upon more than one wing—a result not effected by the invention of the 1900 patent. A more prominently outstanding feature of the invention of the 1906 patent, however, is the employment of a hinge connecting the wings with the central standard, of such character as to enable the compact folding of all the wings side by side in one operation, as well as their restoration to normal radial position and operable condition by merely reconnecting the one tie so released.

[1] We first consider claims 1, 2, 13, and 22, for the reason that neither of them involves the hinge of the reissue patent, and the conclusion reached makes it unnecessary to consider either of the defenses which were passed by below. Original claim 1 calls for "a central spindle, a series of wings pivoted thereto, and fixtures connecting the adjacent sides of the wings, and provided with automatically detachable fastenings adjusted to permit the automatic collapsing of the wings under abnormal pressure." Claim 1 of the reissue differs from original claim 1 in substituting "flexible ties" for "fixtures" and adding the clause, "whereby upon the application of excessive pressure to some of the wings, the tie connection there between is broken, and the other wings folded, without releasing the ties therebetween." Original claim 2 differs from original claim 1 principally in including the casing as an added element, in the use of "ties" in place of "fixtures," and in the addition, at the end of the clause, "to permit the collapsing of the wings." Reissued claim 2 differs from the original of that number only in substituting "flexible ties" for "ties," and substituting for the last clause of original claim 2 the words, "the tie connection between the wings subjected to abnormal pressure breaking and the wings folding without disturbing the tie connections between the other wings." Original claim 13 called for a "strap or cord fastened upon one wing, of a fastening device upon the adjacent wing arranged and operated to grasp the end of such strap detachably and to resist the normal pressure upon the wings, and adjusted to release the strap under abnormal pressure, whereby the wings are automatically collapsed under such pressure." Claim 13 of the reissue differs from the original in substituting "flexible tie" for "strap or cord" and "tie" for "strap," and in substituting for the last clause of the original claim, "the flexibility of the tie being such that upon the breaking of the connection between the adjacent sides of two wings, the wings will be permitted to be automatically folded without disturbing the other sides." Claim 22 of the reissue is entirely new. It substantially combines the elements of claims 1, 2, and 13, and calls for a connection of the ends of the "flexible ties" with "the wings at points intermediate the top and bottom

thereof, approximate to the points of application of the pressure upon the wings." Several of the claims of the 1906 patent have been adjudicated. The Circuit Court of Appeals for the Second Circuit, in the decision already cited, which held several claims of the 1900 patent valid and infringed, also held claims 1, 2, 13, and 14 of the 1906 patent void for lack of invention, as "evidently an attempt to extend the monopoly of the earlier patent by changing the names of the various elements," and saying of claims 13 and 14 that they "disclose nothing but a combination of old elements which would be evident to an ordinary mechanic."[2] This court, in its decree which sustained the Van Kannel patent of 1900,[3] held claims 1 and 2 of the 1906 patent void for lack of invention over the patent of 1900, as involving "merely a change of location of the holding devices, not rising to the dignity of invention." Claim 13 was held not infringed, even if valid.

In our opinion neither claim 1, 2, 13, nor 22 of the reissue involves invention over the prior art. There was nothing new in the use of a flexible tie. Van Kannel himself had shown such a tie in his 1888 patent. As we said in Louisville Co. v. Van Kannel Co., supra (231 Fed. at page 170, 145 C. C. A. 354), it was the flexibility of the "strap or cord" of claim 13 which effected the immediate and direct collapse of the wings when one tie connection was released. In our opinion not only do claims 1, 2, and 13 of the original patent of 1906 lack invention in view of the prior art, but the situation is not altered by the changes made in the claims as reissued. It results, we think, from what we have said, that claim 22 is equally without invention. We are thus brought to claims numbered 3, 23, and 24 of the reissue.

Claims 23 and 24 were added by the reissue. With the qualification stated in the margin,[4] neither of the three claims we are now considering has been passed upon by any court, so far as we are advised. The novel hinge of the patent in suit is sufficiently described in the specification, from which we quote in the margin.[5]

Claim 3 (original) reads:

"A revolving door having a suitable casing, a spindle centered therein with hanger-disks near its opposite ends and a series of wings *having fulcrum-pins*

[2]Van Kannel Revolving Door Co. v. Revolving Door & Fixtures Co., 219 Fed. 741, 135 C. C. A. 439.

[3]Louisville Trust Co. v. Van Kannel Revolving Door Co., 231 Fed. 166, 145 C. C. A. 354.

[4]Claim 3 of the 1906 patent (before the reissue) was held void by District Judge Pollock, but the appeal from that holding (Van Kannel Co. v. Uhrich [D. C.] 247 Fed. 344) was dismissed on appellant's motion without prejudice, by reason of the adverse holdings before referred to as to the validity of claims 1, 2, 13 and 14 of the original 1906 patent.

[5]"The wings in the present invention are pivoted upon the central spindle in a novel manner by providing a grooved disk near each end of the spindle and furnishing each wing with two fulcrum-pins adapted each to engage the groove in one of the disks. A pinion is provided upon the spindle adjacent to each disk, and a toothed segment meshing with such pinion is attached to each of the wings and made concentric with the fulcrum-pin, and the fulcrum-pins are thus enabled to change their position upon the fulcrum-plate when the wings are moved from their normal position by their constant engagement with the groove in the disk during the rolling of the segment upon the teeth of the pinion."

movable upon such fulcrum-disks, for holding all of the wings together upon one side of the spindle."

That claim, as reissued, differs from the original in substituting for "disks," "plates * * * having guide grooves therein," and, second, in substituting for the matter we have italicized the words:

"Adapted to be moved to side by side position to make emergency exits, and having fulcrum-pins floating in said grooves whereby a series of wings may be collapsed to folded position from any direction."

Claim 23 of the reissue is a new claim, and an exact copy of claim 3, with the following addition:

"Said wings being provided with automatically detachable fastenings adjusted to permit the automatic collapsing of the wings upon the application of excessive pressure applied to the wings."

Claim 24, which is likewise new, is substantially like claim 3 with this addition:

"And flexible ties between the adjacent sides of the wings, and serving to hold the wings in normal radial relation to each other, and permitting all of the wings to be folded upon the release of one of the ties."

[2-6] As applied to claims 3, 23, and 24, we think the reissue was validly made as against the criticisms that the original patent had not been held void for inadvertence, accident, or mistake, and that the application for reissue was not made within a reasonable time. The specification of the 1906 patent was broad enough to support the claims contained in the reissue. There was no change in the drawings, and the changes made in the specification were only in the interest of further elaboration and explanation. They introduced no substantial new matter. The substantial basis of the application for reissue was that the claims were not commensurate with the invention. If Van Kannel, through his solicitor, without intending to do so, drafted or accepted claims not commensurate with the invention, such act is an "inadvertence" within the meaning of Rev. Stat. § 4916 (Comp. St. § 9461), which entitled him to a reissue. What constitutes the "same invention" is not to be determined by the claims of the original patent, but from the description and such other evidence as the commissioner may deem relevant. Whether the act was inadvertent is a question primarily for the Patent Office, whose decision will not be reviewed unless inconsistent with other facts appearing in the record. American Co. v. Porter (C. C. A. 6) 232 Fed. 456, 146 C. C. A. 450. It is not important whether the patentee considered the claims, as drawn, too broad, rather than too narrow. Claims may be either narrowed or broadened to express the real invention. American Co. v. Porter, supra; Specialty Co. v. Ashcroft (C. C. A. 2) 213 Fed. 35, 40, 129 C. C. A. 629; Robert v. Krementz (C. C. A. 3) 243 Fed. 877, 881, 156 C. C. A. 389. In our opinion the decision of the Patent Office that the reissue was proper is not inconsistent with facts otherwise appearing in the record. The proposition that the original claims were not sufficient to protect the real invention is not overthrown by the fact that the holdings of invalidity of the claims of the 1906 patent, so far as made, were based upon lack of invention. Neither of the claims held

invalid involved the hinge feature to which we have referred. The fact that some of the claims of a reissue are invalid does not invalidate other claims. Vandenburgh v. Concrete Steel Co. (C. C. A. 2) 258 Fed. 143, 169 C. C. A. 138, certiorari denied 250 U. S. 664, 40 Sup. Ct. 11, 63 L. Ed. 1196. The statute does not fix any absolute period within which reissue must be applied for; the only inflexible requirement is that of reasonable diligence. Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; Milloy Co. v. Thompson-Houston Co. (C. C. A. 6) 148 Fed. 843, 78 C. C. A. 533. No rights of inventors have intervened. In the Circuit Court of Appeals for the Second Circuit (219 Fed. 741, 135 C. C. A. 439) the patent (claims 1, 2, 13, and 14) was held void December 15, 1914. This was the first final adverse holding. We think plaintiff was not bound before that decision to apply for reissue. There was then pending in this court the case already referred to (231 Fed. 166, 145 C. C. A. 354), involving the patent of 1906. We think plaintiff was entitled to await the decision of this court before surrendering his 1906 patent. That decision was made March 7, 1916. In May following plaintiff presented to the Patent Office an application for reissue, which was not allowed to be filed because of a requirement that the application be made by the original patentee. The formal filing of the application was accordingly delayed until December 27th following. Showing was made of inability to induce earlier action by Van Kannel. In our opinion the authority to reissue is not shown to have been exercised without jurisdiction or improvidently.

The patent of 1906 marked an important improvement in the art in question, and we think the validity of claims 3, 23, and 24 of the reissue depends upon whether or not there was invention over the 1900 art in the improvement disclosed in the Van Kannel patent of 1906. There is nothing in the adjudications respecting the 1906 patent which to our minds discredits the existence of novelty and invention in these three claims. We find both of these features present in each of the three claims in question. The device of this patent produced a new and useful result, and by a new combination of elements. It was the first to effect not merely the immediate collapse of all the wings on the release of one fastening, but the immediate, compact side-by-side holding, by one action, of a series of one-piece wings, as well as the restoration of the wings to normal position by one movement. The hinge itself is novel and contains invention.

[7] We see no merit in the contention that Van Kannel was precluded from obtaining the patent of 1906 by the fact that he had already obtained the 1900 patent. The fact that he had a valid and broad patent for the 1900 invention did not preclude him from obtaining a patent for the specific improvement thereon disclosed by the 1906 patent. O'Reilly v. Morse, 15 How. 62, 121, 14 L. Ed. 601; Cantrell v. Wallick, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017, and cases there cited. Nor do we see any merit in the proposition that plaintiff is estopped from asserting against defendant the validity of the 1906 patent, or the reissue thereof, from the fact that he obtained adjudications sustaining the patent of 1900 and adjudging its infringe-

ment, and even by structures containing the same hinge and in all other respects the same as that asserted here. True, infringement in each case assumes mechanical equivalency, but mechanical equivalency is a relative term, and does not import actual identity. A structure may thus be at one and the same time the mechanical equivalent of a broad device and of an improvement thereon, the less being included in the greater. Curry v. Union Co. (C. C. A. 6) 230 Fed. 422, 429, 144 C. C. A. 564; Electric Co. v. Electric Controller Co. (C. C. A. 6) 243 Fed. 188, 193, 1007, 156 C. C. A. 54, 664; Dunn Co. v. Toronto Co. (C. C. A. 6) 259 Fed. 258, 264, 170 C. C. A. 326.

In fact, the distinctive feature of the 1906 improvement patent, viz., its hinge, was not involved in any of the adjudications referred to.

We also think infringement shown. We think defendant's so-called trammel hinge the mechanical equivalent of the hinge of the reissue in suit; in other words, defendant has, in our opinion, the equivalent of hanger-plates near the opposite ends of the spindle, with guide-grooves therein and fulcrum-pins floating in the grooves, enabling the collapsing of the series of wings to a folded position from any direction. As counsel say:

"The wings rock both upon their pivots and from their original pivotal points, and swing to one side of their disks to lie side by side in the same direction."

We summarize in the margin a specific description of defendant's hinge, and a comparison with that of plaintiff, as given by plaintiff's expert witness.[6]

We are impressed that infringement is not defeated by the absence from defendant's hinge of the toothed pinions upon the spindle and the toothed segments upon the wings engaging the pinions. Indeed, the three claims we are considering omit the call for toothed pinions and toothed segments, although all call for "guide grooves" in the hinge plates and for "fulcrum-pins" floating therein. The principal purpose of the gear and pinion of plaintiff's hinge is to hold the wings so

[6]Fulcrum-plates are carried by the spindle near its top and bottom, each plate having on its under side a groove, the outline of which is square when viewed from below. On top of each plate are four radial grooves, each arranged to intersect the center of one of the sides of the square grooves on the bottom of the plate, each of the door wings being cut away to receive a fulcrum-box which carries studs fitting and moving in respectively both the square outlined grooves on the under side and the radial grooves on the upper side. When the wing is swung from its radial position the studs traverse the square groove and move outwardly in the radial groove. The substantial difference is that Van Kannel uses for each wing a single fulcrum-pin traveling in a slot on a hanger plate and a gear traveling on a pinion on the spindle, while defendant uses two fulcrum-pins, one of which travels in a groove of a hanger plate, which groove follows the contour of the plate's periphery, while the other pin follows the radial slots, the object in both cases being to provide a definite location of the wings in relation to the spindle, while permitting one of the pivotal points of the wing to have a movement different from a single hinge, in order to give a given wing a greater amplitude of motion than the other one would otherwise have, to get it around to a point where it will lie parallel to the others. In each case there is one fulcrum-point or pin which shifts laterally in respect to the spindle, and it is this one which gives the desired amplitude of motion.

that they will revolve around the central post and lie side by side, but, as plaintiff's expert says, the hinge would not be inoperative without the gears; "the doors will swing on the pivots and the doors will swing on the grooves, whether the gears are there or not. All these folding functions can be performed in the absence of the gears," although it would not be commercially successful without the gears or without "provision of other or equivalent means to take the place of" the gears and pinions. The difference in the forms of detachable fastenings employed is not important. In fact, neither of the claims in suit includes the form of this detachable device. Nor is it important that in defendant's structure the giving way of the fastening is occasioned by pressure applied to a handrail instead of directly against the door. See Van Kannel Co. v. Lyon & Healy, supra, 247 Fed. at page 331, 159 C. C. A. 423.

The decree of the District Court is affirmed so far as concerns claims 1, 2, 13, and 22, and reversed as to claims 3, 23, and 24, and the record will be remanded, with directions to enter a new decree in accordance with this opinion. The costs of this court will be divided.

LAUGHNER et al. v. SCHELL et al.

(Circuit Court of Appeals, Third Circuit. September 10, 1921.)

No. 2687.

Corporations ⟸426(1)—Must ratify or repudiate contract as entirety.

Where the directors of a corporation authorized, and both directors and stockholders ratified, a sale of property by an agent, with the understanding that it was agreed that the agent should receive a commission of 3 per cent. for his services, which commission was paid, neither the corporation nor a stockholder in its behalf can repudiate the agreement for the commission and recover the amount from the agent, or the officers who paid it, while retaining the benefit of the sale.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Ella F. Schell and another against the Minnetonka Oil Company, P. O. Laughner, C. A. Cooper, and others. Decree for complainants, and defendants Laughner and Cooper appeal. Reversed.

Arthur E. Young, of Pittsburgh, Pa., for appellants.

John G. Frazer and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellees.

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

DAVIS, Circuit Judge. This was a stockholders' bill, filed against the Minnetonka Oil Company, hereafter called the company, a corporation of the commonwealth of Pennsylvania, and P. O. Laughner, president, C. A. Cooper, treasurer, and H. J. Wheeler, a director, to account

to the company for $41,250 commission, paid to A. V. Laughner for negotiating the sale of the property of the company to the Prairie Oil & Gas Company, hereafter called the Prairie Company, located at Tulsa, Okl., for $1,375,000. The company desired to dispose of its property, and A. V. Laughner, son of P. O. Laughner, was employed to sell it. He owned 17 shares of stock, but had no other connection with the company. He was in New York City trying to sell the property on February 5, 1917, when a letter came from the Prairie Company inquiring if the defendant company's property in Oklahoma was for sale. The directors of the company conferred with A. V. Laughner over the prospect and terms of selling the property to the Prairie Company and finally sent him to Oklahoma to sell it. He was to receive a commission of 2 per cent. if he sold the property for $1,250,000. He agreed "to go on that condition, providing they would split all he got over $1,250,000"; but the company would not agree to the proposition, apparently fearing that, if he asked more than $1,250,000, negotiations would be broken off and a sale would not be effected. The vice president instructed Laughner not to ask more than $1,250,000, for that "would queer the deal, for it wasn't worth any more than that." With these instructions, A. V. Laughner, with a letter of authority as the company's agent, went to Oklahoma on February 11, 1917.

Upon his arrival at Tulsa, he surveyed the situation and began to negotiate with the Prairie Company. It offered $1,000,000, and Laughner asked $1,500,000. After numerous conferences between Laughner and the Prairie Company, and communications between Laughner and his father and the company, these negotiations resulted in an offer by the Prairie Company, of $1,375,000 for the property, exclusive of the company's gas and water works, which were included in the price of $1,250,000 originally agreed upon. These works were subsequently sold for $50,000, making $1,425,000 the company received for the property which it instructed Laughner to sell for $1,250,000; in other words, the company received $175,000 above its asking price.

While these negotiations were going on, Laughner took up with the company, through his father, the question of a larger commission. On Saturday night, February 17, 1917, the office of the company being closed, he telegraphed to his father that he "must have 3 per cent. to handle any more." After several other telegrams and a telephone conversation on Sunday, in which A. V. Laughner told his father that the Prairie Company offered $1,375,000 for the property, not including the gas and water works, conditioned upon a commission of 3 per cent. to him, P. O. Laughner on Monday called a meeting of the directors and submitted the proposition to them. All of the directors were present, and all but J. D. Conway voted to accept the offer. Their action was telegraphed to both Laughner and the Prairie Company, and they executed the agreement. On Thursday, February 22, 1917, Laughner returned to Pittsburgh with a check for one-half the purchase price. On February 24, 1917, another meeting of the board of directors was called, and all the members were present except J. D. Conway, who refused to attend because he "expected a ratification of what they had done" on February 19, 1917. The board, Conway absent, voted to

ratify the execution of the contract by A. V. Laughner, with a commission of 3 per cent. to him. On February 26, 1917, the holders of 401 shares of capital stock of the company ratified the sale.

There is no contention that this was not a good sale. All the directors and stockholders are not only satisfied, but gratified, with the price received, and consequently there is no desire on the part of any one to set aside the sale. The complainants, Ella F. Schell and J. E. Schell, and Mr. Conway, however, think that some of the directors should have made the sale personally and gratuitously, and thus saved the commission. Therefore the Schells brought this suit for the purpose of having Laughner return the commission paid him by the company.

The District Court held that the commission was illegally paid, and ordered P. O. Laughner and C. A. Cooper to repay it to the company, with interest, aggregating $50,696.25. It further held that the testimony was not sufficient to connect H. J. Wheeler with the payment to justify including him in the order. The reasons for the conclusions of the learned trial judge are briefly stated in the following paragraph from his opinion:

"Notwithstanding testimony to the effect that it was stated at the meeting of the board of directors on the 19th of February, 1917, that A. V. Laughner was to receive the full commission of 3 per cent., this court must find the fact to be that it was not clearly and definitely stated. The court reaches this finding because there is no evidence as to the exact language used by those who have testified that the information was given to the board, because the definite language used in the resolution indicates that A. V. Laughner was not to receive the commission, because the telegrams which P. O. Laughner had in his pocket indicated that the deal was held up by the demand of somebody other than A. V. Laughner because of the positive testimony of the director, J. D. Conway, that no such information was given, and because the board had some time previously been informed by A. V. Laughner, who was figuring upon a sale of this property in New York, that he would be compelled to give the man in New York a commission to put the deal through. In addition to this, the very witnesses who testified that information was given at that meeting of the board that A. V. Laughner was to receive the commission testified positively that, at different times after that meeting, Director J. D. Conway repeatedly asked who was to receive the commissions."

The complainants take the position here that neither the employment of A. V. Laughner nor the payment of a commission to him was ever authorized or ratified; that he "did not earn a commission," and, even if he was employed and did earn a commission, he forfeited his right to it by his actions.

If the board of directors authorized Laughner to execute the contract, including 3 per cent. commission to him, with the Prairie Company, or ratified it, the commission should be paid. The board of directors evidently thought it had authorized the contract with the commission by its resolution on February 19, 1917. A. V. Laughner telegraphed on February 17, 1917, to P. O. Laughner that he "must have 3 per cent." Four witnesses testified that at the meeting two days later P. O. Laughner said that he had received a telegram from A. V. Laughner, stating that he could make a sale of the property for "$1,375,000, conditioned on 3 per cent. commission to him." "That was definitely understood," they said. With this information the board of directors passed the following resolution:

"The board of directors hereby authorize A. V. Laughner to sign contract for sale of our property in Oklahoma as agreed upon between the Prairie Oil & Gas Company and A. V. Laughner."

All the directors except J. D. Conway voted for it, and it was telegraphed to A. V. Laughner and the Prairie Company.

The directors doubtless thought they ratified on February 24, 1917, what they authorized on February 19, 1917. They also thought their action was ratified by four-fifths of the stockholders on February 26th, two days later. If there was a contract, it must be either ratified or repudiated as a whole. It may not be ratified in part and repudiated in part. Mundorff v. Wickersham, 63 Pa. 87, 3 Am. Rep. 531; 31 Cyc. 1257.

If there was not an express contract to pay Laughner a definite amount, there was an implied contract to pay him what his services were reasonably worth, and, since a commission of 3 per cent. has been paid, the question to be determined, on this view of the case, is whether or not that amount was unreasonable, or such as to shock the conscience of the court. It appears to us that A. V. Laughner did a remarkably clever piece of work in the sale of the property. No one had an idea that the company could get $1,375,000 for it, without the gas and water works. The company asked only $1,250,000. If he had obeyed instructions, the company would have received, clear of commissions, $1,225,000 for the property, and apparently everybody, even Mr. Conway, was satisfied with that. The first offer by the Prairie Company was $1,000,000, and many a man according to instructions would have asked only $1,250,000; but Mr. Laughner exceeded his authority and asked $1,500,000. Because he followed his own judgment, the company received for that property, including the gas and water plants, clear of commission, $1,383,750.

The fact that A. V. Laughner disobeyed instructions, exercised independent judgment, and sold the property for $1,375,000, is evidence that the company used good judgment in selecting him as its agent. Besides negotiating the sale, he looked after the abstracts of title of all the property sold and did all the work in connection with the transfer of the property, so that the company was not compelled to employ a lawyer. Laughner was an experienced man in the oil business and in the sale of oil properties. He was treasurer of the Schell Oil & Gas Company, secretary and treasurer of the Crescent Oil & Gas Company, and connected with the National Products Company and the Malou Oil Company. He sold oil companies both before and after the sale in question, and was said to know more about the Minnetonka Company than any other person. In view of all the facts in the case, we cannot say that 3 per cent. commission is unreasonable.

There is an aspect of this case which, in our opinion, is dispositive of it, and renders it unnecessary to pass upon the various questions raised in the opinion and briefs: Neither an individual nor a corporation may accept the benefits of a contract, though unauthorized, and refuse its burdens. Presbyterian Board v. Gilbee, 212 Pa. 310, 61 Atl. 925; First National Bank of Bangor v. Am. Bangor Slate Co., 229 Pa. 27, 77 Atl. 1100; Hartzell v. Ebbvale Mining Co., 239 Pa. 602, 86 Atl. 1093.

What the corporation itself may not do may not be done by two stockholders acting in its behalf. Neither the company nor any director or stockholder acting individually has seen fit to repudiate or to start proceedings to repudiate the sale. Admittedly it was a good one, as all parties interested well know. It follows that the payment should stand, and the decree of the District Court should be reversed, unless A. V. Laughner "forfeited his right to a commission by his actions."

The general rule is that every contract, both express and implied, must fall before fraud. An agent who perpetrates a fraud upon his principal in executing his agency forfeits his right to compensation for services. Pratt v. Patterson, 112 Pa. 475, 3 Atl. 858; Shaeffer v. Blair, 149 U. S. 248, 258, 13 Sup. Ct. 856, 37 L. Ed. 721; 2 Corpus Juris, 760. Was Laughner guilty of such fraud in this case as bars compensation, express or implied, for his services? It is true that, after Laughner discovered that he could secure $1,375,000 without the gas and water works, he began negotiations for a 3 per cent. commission. A careful examination of the testimony convinces us that he disclosed to the company every material fact necessary to enable it to act understandingly at its meetings on February 19 and 24, 1917, and apparently everybody except Mr. Conway fully understood the terms of the contract with the Prairie Company and with him. We fail to see any concealment or fraud that deceived any one, or that forfeits his right to a commission. The decree of the District Court will therefore, with instructions to dismiss the bill, be reversed.

MEINTS v. HUNTINGTON et al.

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

No. 5727.

1. **False imprisonment ⊜15(1)—Joint liability not dependent on conspiracy.**
   All persons knowingly joining in a party which falsely imprisoned another are liable jointly and severally, regardless of the extent of their personal participation or of whether or not there was a prior conspiracy.
2. **False imprisonment ⊜5—Forcible removal from state held actionable.**
   Defendants, who, with others, to the number of 75 or more, went to a house where plaintiff was and by a show of force compelled him to go with them, taking him in an automobile across the line into another state and ordering him not to return to the county in which he had resided for many years, *held* chargeable with false imprisonment.
3. **False imprisonment ⊜5—Extrajudicial restraint constitutes "false imprisonment."**
   Prima facie any restraint put by fear or force on the actions of another is unlawful and constitutes a "false imprisonment" for which damages are recoverable, and it is not necessary to allege or prove malice or want of probable cause where the detention is extrajudicial.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Imprisonment.]
4. **False imprisonment ⊜10—Consent no defense.**
   In an action for false imprisonment, it is not a defense that plaintiff consented to what was clearly an unlawful restraint of his liberty.

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

5. **False imprisonment ⊜15(1)—Persons chargeable liable for acts of others in execution of common purpose.**
   Where defendants and others unlawfully seized plaintiff and forcibly carried him to the state line, where he was delivered to masked men, who assaulted, beat, and otherwise maltreated him, defendants *held* liable for the acts of such masked men committed in the execution of a common purpose.

6. **False imprisonment ⊜10—Intent to prevent similar wrong by others no defense.**
   In an action for false imprisonment and the assaulting and beating of plaintiff, it is not a defense that defendants' unlawful acts were committed to protect plaintiff from similar action by others which might have resulted in his greater injury or death.

7. **False imprisonment ⊜25—Evidence of reputation of parties held incompetent.**
   In an action for false imprisonment and assault and battery, the admission, over objection, of evidence that plaintiff had the reputation of being disloyal during the war, that he refused to buy Liberty Bonds to the amount others thought he should, and that defendants had a reputation for loyalty and good character, *held* error.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action at law by John Meints against O. P. Huntington and others. Judgment for defendants, and plaintiff brings error. Reversed.

Arthur Le Sueur, of St. Paul, Minn. (Tom Davis, of Marshall, Minn., and Earnest A. Michel, of Minneapolis, Minn., on the brief), for plaintiff in error.

Charles Bunn, of St. Paul, Minn. (E. H. Canfield, of Luverne, Minn., and Butler, Mitchell & Doherty, of St. Paul, Minn., on the brief), for defendants in error.

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

LEWIS, District Judge. John Meints, a resident and citizen of South Dakota, brought this action against O. P. Huntington and others, residents and citizens of Rock County, Minnesota, to recover damages, on the charge that they deported him from Minnesota to South Dakota on the night of August 19, 1918, and maltreated him on the way. After a lengthy trial, exhibited here by 1100 pages of testimony, the greater part of which relates to the loyalty of the defendants and the disloyalty of plaintiff during the late World War, there was verdict and judgment for defendants.

The plaintiff was born in Illinois, went to Rock County, Minnesota, and resided there in the town of Luverne for sixteen or seventeen years prior to the summer of 1918. In the spring of that year he was suspected of being interested in or of having contributed to the support of a Non-Partisan League newspaper printed and published in that town; on account of that, and also because it was claimed that he was disloyal, a large body of men, including some of the defendants, went to his house about midnight of June 19th, woke him up, compelled him to dress and come out, and some of them in automobiles

took him across the State line into Iowa, a distance of about fifteen miles, told him not to return and left him there. He then went to St. Paul and reported the occurrence to a U. S. Government agent in the Department of Justice. That agent sent two men to Rock County to make an investigation, and on their report, Mr. Campbell of that Department advised plaintiff to return to Rock County but to go to the home of his two sons, some twelve miles out from Luverne, and remain there. He did return the latter part of July and went to his sons' home. On the night of August 3rd, men in eight or nine automobiles went out to the sons' house. Among them were the defendants Huntington, Connell, Ihlan, Miner, Turnbull and Kimmerling. They tried to enter the house by unlocking the doors with keys which they had, but were not able to do so, and finally obtained entrance by going through the cellar. They were hunting for plaintiff, but could not find him. In the late afternoon of August 19th some seventy-five to eighty men in about twenty-five automobiles, most of them from Luverne, met at a church about four miles from the sons' house, and proceeded from there in a body, arriving at the sons' house about dusk. The plaintiff and his sons saw them coming, went into the house and fastened the screen door on the inner side. The married son's wife and children were also in the house and shortly became greatly excited and alarmed, as their outcries demonstrated. Huntington and others went to the door and demanded to know where the plaintiff was, and that they be permitted to enter. The son who stood inside the door refused to open it and declined to admit them. The defendant Long at once forced the door open and a number of men immediately entered, including Long and Huntington. The son testified that he was assaulted by them and thrown out of the house. They denied that, and testified that his bloody face was caused by his own struggles while they held him to prevent violence on his part. The plaintiff stood at the head of the stairway with a gun and a fork handle. At first he refused to come down or to permit anyone to come up. The other son was induced by some of the defendants, or others with them, to go up and tell his father that they did not intend violence. The plaintiff sent back word by his son that the defendant Long might come up and he would talk with him. He then came down with Long and was taken in Huntington's automobile to Luverne. Huntington drove, and some of the other defendants were in the car with him and the plaintiff. Most of the crowd went with them, but a few turned west toward the South Dakota line before Luverne was reached. Plaintiff was held at Luverne until about eleven o'clock, and while there was refused permission to see his wife or to talk with her over the telephone. About that hour he was again put in Huntington's car. Defendants Huntington, Long, Michaelson and Smith also got in, and they started for the South Dakota line, some fifteen miles away, accompanied by another auto in which were defendants Turnbull, Connell, Kimmerling and McDermott. They reached the State line about midnight, and were stopped there by armed men whose faces were masked. They took Meints from Huntington's car, assaulted him, whipped him, threatened to shoot him, besmeared his body with tar and feathers, and

told him to cross the line into South Dakota, and that if he ever returned to Minnesota he would be hanged.

[1] The complainant alleges a conspiracy on the part of the defendants. The only purpose that such an allegation could serve would be to hold liable those of the defendants not present, if any, who had counseled or advised that the plaintiff should be deported. But there was no proof tending to show that any defendant was not present during some time on the night of August 19th and was joined as a party on the claim that he had advised and counseled the doing of what was done. In other words, plaintiff's case as made consisted of admissions by some of the defendants that they were present and participated, and of proof that others of them, though not all, were also present at times and took part in what was being done. And while the facts as to the meeting at the church, the moving of the seventy-five to eighty men in a body from there to the sons' home, the show there of aggregated power and coercive force, and the taking of the plaintiff from the sons' home, was ample proof to establish a conspiracy by them to do what was done, still the question as to whether there was a conspiracy became wholly immaterial; for as to each participant the law is unconcerned with the extent or degree of his activity when it comes to consider the question of liability, and places all on the same footing, each equally liable jointly and severally, regardless of whether a conspiracy theretofore had been entered into. Cooley on Torts (2d Ed.) p. 145, and cases cited; Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227; James v. Evans, 149 Fed. 136, 80 C. C. A. 240; Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184; 12 C. J. 585.

[2, 3] On the foregoing facts, openly admitted by many of the defendants,—and aside from what occurred on the nights of June 19th and August 3rd,—there can be no doubt that from the time the crowd reached the sons' house and on up to the time Meints crossed the State line, he was coerced and compelled by a show of force to submit himself to the will of others, that he was unlawfully restrained of his liberty,—falsely imprisoned for the time being,—and assaulted and abused, and that this was done by those who took part in it in execution of their common purpose to drive him from the State of Minnesota. And so we say at once that the trial court erred in refusing to instruct a verdict for the plaintiff and against all defendants who took part; for it cannot be maintained that because Meints may have been, in their opinion, disloyal, and was interested in and gave support to the Non-Partisan League Newspaper, that that would put him at the mercy of defendants and invest them with the right and power to adjudge and inflict punishment, nor would the fact that the defendants were loyal men, to establish which much evidence was introduced over plaintiff's objection, have the slightest tendency to excuse or justify in the eyes of the law the acts charged against them. Unlawful interference with or injuries to the liberty of a citizen is a violation of his natural, inherent and absolute rights, from which damage results as a legal consequence. Adler v. Fenton, 24 How. 407, 16 L. Ed. 696. Mr. Cooley, in his work on Torts, says:

"False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion. Prima facie any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment."

See Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

It was an indictable offense at common law, 3 Blackstone, Com. 127, 4 Blackstone, Com. 218, and relief by the party aggrieved was obtained by an action in trespass vi et armis. The law implies force. 1 Chitty on Pleadings, 186; Rich v. McInerny, 103 Ala. 345, 15 South. 663, 49 Am. St. Rep. 32. Nor is it necessary to allege or prove malice or want of probable cause where the detention is extrajudicial, Colter v. Lower, 35 Ind. 285, 9 Am. Rep. 735; Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506; Akin v. Newell, 32 Ark. 605; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322, though in trespass on the case for malicious prosecution these elements, essential to recovery, must be alleged and proven. Barnes v. Viall (C. C.) 6 Fed. 661, where the difference is pointed out. We think the court erred in its refusal to so instruct the jury.

The court yielded to the contention of the defendants that the plaintiff could not recover for anything that was done prior to the assaults made upon him, when the State line was reached, on the claim that he had consented to everything that had happened before that, and so instructed the jury over the objection of the plaintiff. This was prejudicial error. Can it be seriously thought that it was the wish of plaintiff to leave Rock County? His home was in Luverne, his wife was there, he had lived there for many years, all of his family and all of his interests were in Rock County; he had, to the knowledge of some, if not all, of the defendants but recently returned to remain there. He evidently knew the purpose of these men when he saw them coming, some of them had been hunting for him in the night-time a few days before. He armed himself to resist them, but they came in such numbers and invaded the home in such a ruthless and high-handed manner that resistance was obviously futile. He knew, and every rational thought convinces, that if he had not submitted he would have been more severely treated. Who would have the temerity to argue that they would have permitted him to remain, or after starting, to have alighted from Huntington's auto and return? While they held him for two or three hours in Luverne he was refused permission to see his wife or to talk with her over the 'phone. He was in a large room with a crowd about him who jeered him and asked him questions so thickly that there was no opportunity to attempt to answer, and an attempt, if it had been made, would have been without avail. No argument can blot out the fact, which stands predominant throughout the record, that he was a prisoner from the time these men reached his sons' house until he passed over the State line into South Dakota, and everyone who reads the record must know that resistance on his part to their will would not have been tolerated. In Comer v. Knowles, 17 Kan. 436, it is said:

"False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard."

In Pike v. Hanson, 9 N. H. 491, the plaintiff did not intend to pay a tax, and the collector was so informed. He, in demanding the tax, declared to the plaintiff that he arrested her, and she paid the money under that restraint. It was held that the facts were sufficient to sustain her action for assault and false imprisonment. The court summarized the doctrine announced by Starkie on Evidence, thus:

"That in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person and the plaintiff is accordingly restrained, for he is not obliged to incur risk of personal violence and insult by resisting until actual violence be used."

See Hawk v. Ridgway, 33 Ill. 473; Hebrew v. Pulis, 73 N. J. Law, 621, 64 Atl. 121, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716; McAleer v. Good, 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782; Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005.

In no event could the court determine the fact.

[4] Furthermore, we are of opinion that the law does not permit the citizen to consent to unlawful restraint, nor such a claim to be made upon the part of the defendants. It is so held as to assault and battery, Cooley on Torts (2d Ed.) 188, which is a part of the charge in the complaint, and we think the principle equally applicable to restraint, which includes an assault. In Wharton on Criminal Law, vol. 1, § 751e, it is said:

"No man has a right to take away another's liberty, even though with consent, except by process of law. And the reason is, that liberty is an unalienable prerogative of which no man can divest himself, and of which any divestiture is null."

See, also, Bell v. Hensley, 48 N. C. 131; Shay v. Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Barholt v. Wright, 45 Ohio St. 141, 12 N. E. 185; Jones v. Gale, 22 Mo. App. 637.

[5] The court, acting on its conclusion of fact that plaintiff had consented to everything before the State line was reached, instructed the jury over plaintiff's objection and exception that he could recover only against those who maltreated him at the South Dakota line, and that if the evidence was not sufficient in the judgment of the jury to satisfy them as to the identity of those men they would return a verdict for the defendants, there being no liability on the part of any of the defendants except those, if any, who assaulted him there. This we think was also error. As already said, those who took the

plaintiff from the sons' home, those who participated to any extent in so doing, those who aided in his deportation on the way, and those who abused him at the State line and warned him that if he ever returned to Minnesota he would be hanged, were all actively engaged in the execution of one purpose, and the transaction throughout, from its inception to the end, was for the accomplishment of that purpose. Moreover, those who took him to the State line perpetrated an unlawful act in violation of plaintiff's rights in doing so, and thus directly aided and assisted in bringing about the injuries that were there inflicted upon him.

[6] It is also claimed by the defendants that what was done by them was done to protect the plaintiff against others who might injure him because of his disloyalty, or his reputation for disloyalty. This presents a new doctrine unknown to us, and no authority has been cited to support it. We cannot believe that the law will ever sanction the claim, either in defense or mitigation, that the rights of one may be violated for the purpose of preventing others from doing the same thing.

[7] The defendants were allowed over objection to show that on occasions the plaintiff did not contribute to funds being voluntarily raised in aid of war activities when others thought he should contribute; or did not give as much as others thought he should give; or perhaps did not buy as many bonds issued to maintain and carry on the war as others thought he should buy; that he had contributed fifty dollars to establish the Non-Partisan League newspaper, and that because of this he was required to relinquish his right to continue work on county roads under a contract which he then held; to inquire on cross-examination of some of plaintiff's witnesses as to the loyalty of the witness; to ask the witness if some of the defendants had not been elected to important offices and if the witness had not voted for them, and if he did not know that the defendants were good men and loyal men; to ask defendants and other witnesses about the sentiment against plaintiff in the community and about rumors; to prove conversations about plaintiff between some of the defendants and third parties; to show what was said at political or other public meetings; to show what was said at a meeting in which some of the defendants participated, held to determine what should be done with the Non-Partisan League paper, the premises at which it was printed being thereafter forcibly closed and nailed up; and to permit a deputy sheriff to testify that he told defendant Huntington that Floyd Weatherly had told him that he heard plaintiff and one of his sons say that they were arming themselves. Weatherly testified that he did not hear the plaintiff or his son say that, and that he made no such statement to the deputy sheriff. Much of this was clearly hearsay. That which related to the reputation or character of the litigants was incompetent, because it is the general rule that such evidence is not admissible in civil actions, unless character or reputation is put in issue by the very proceeding itself. 1 Greenleaf on Evidence, §§ 54, 55, 2 Greenleaf on Evidence, § 269; Givens v. Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646; Beal v. Robeson, 30 N. C. 276; Smith v. Hyndman, 10 Cush.

(Mass.) 554. It has been observed that actual malice is not an element of the cause of action, and need neither be alleged nor proved; and there was no claim made by the plaintiff, and no attempt by him to prove, that the defendants were actuated by personal ill will or hatred toward him, other than as it might be found to exist in their acts. Shanley v. Wells, 71 Ill. 78, was an action of trespass for assault and battery and false imprisonment. The plaintiff had judgment. It is said:

"It is also urged, with some apparent earnestness, that a new trial should be awarded, because the evidence does not show that the defendant acted from malice, and without any reasonable or probable cause. This is sufficiently answered by reference to the form of the action. The suit is not for malicious prosecution, but for assault and battery, and false imprisonment. If the plaintiff was assaulted and beaten, or imprisoned, by the defendant, without authority of law, it cannot be doubted that he is entitled to recover, whatever may have been the defendant's motives. * * * The defense of justification not being proved, the defendant's act stands as a wanton violation of the plaintiff's rights—an inexcusable trespass, for which the plaintiff is entitled to damages."

We are of opinon that evidence of the character above-noted should not have been admitted, because it had no tendency to disprove a reckless and wanton indifference to plaintiff's rights, and a deliberate intention to violate those rights; nor did it tend to lessen, modify or ameliorate the effect of those acts, or the intention with which they were done. This conclusion seems to be unavoidable in view of the fact that the acts complained of and established by the undisputed evidence were not done for the purpose of bringing the plaintiff to trial on account of his having committed a criminal offense, or because it was believed on reliable information that he had done so, Beckwith v. Bean, 98 U. S. 266, 25 L. Ed. 124, but those acts were wilfully done to accomplish the unlawful purpose of denying to plaintiff his right to remain in and reside in the place of his choice. The rule applicable to a case of this character was announced by Judge Thayer in Fotheringham v. Adams Express Co. (C. C.) 36 Fed. 252, 1 L. R. A. 474. After noting the claim of the Express Company that the false imprisonment was without malice, he proceeded on that assumption to say:

"With reference to this contention it is only necessary to say that the right of the jury to assess punitive damages in this class of cases does not necessarily depend upon the existence of malice, using that term in its ordinary sense. Punitive damages may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or even when it is done recklessly, —that is to say, in open disregard of one's civil obligations and of the rights of others. The cases on the subject show that in the manner of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrongdoer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others. Huckle v. Money, 2 Wils. 205; Beardmore v. Carrington, Id. 244; Merest v. Harvey, 5 Taunt. 442; Conrad v. Insurance Co., 6 Pet. 268; Day v. Woodworth, 13 How. 363; Voltz v. Blackmar, 64 N. Y. 440; Drohn v. Brewer, 77 Ill. 280; Sherman v. Dutch, 16 Ill. 283; McBride v. McLaughlin, 5 Watts, 375; Turnpike Co. v. Boone, 45 Md. 344; McWilliams v. Bragg, 3 Wis. 424; Green v. Craig, 47 Mo. 90. I have no doubt that it was

within the discretion of the jury in the present case to assess substantial damages as a punishment of the wrong-doer, and to deter others from committing like offenses."

See also Cowen v. Winters, 96 Fed. 929, 37 C. C. A. 628.

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

COTTERAL, District Judge, concurs in the result.

REID et al. v. UNITED STATES.

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

No. 3538.

1. **Criminal law ⟸1159(2)—Weight of evidence not reviewable by appellate court.**
   If there is any substantial evidence to support a verdict of conviction, its weight will not be considered by an appellate court in reviewing denial of a motion for directed verdict.
2. **Intoxicating liquors ⟸138—Permit cannot authorize transportation for beverage purposes.**
   National Prohibition Act Oct. 28, 1919, tit. 2, § 6, does not authorize issuance of a permit to transport liquor except for nonbeverage purposes, and a permit obtained thereunder by false representations as to its purpose affords no protection for transportation for illicit purposes.
3. **Conspiracy ⟸45—Evidence held competent on charge of conspiracy to illegally transport.**
   On a charge of conspiracy to illegally procure and transport liquor in violation of National Prohibition Act Oct. 28, 1919, tit. 2, § 6, evidence that in organizing a corporation, in whose name a permit was obtained, defendants used fictitious names, *held* competent as tending to show a fraudulent purpose.
4. **Criminal law ⟸651(1)—Permitting view of premises by jury held not error.**
   Permitting the jury to view premises occupied by defendants about which testimony was given for the sole purpose, as stated by the court, of enabling the jurors to better understand the testimony, at which view defendants were permitted to be present if they desired, *held* not error.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Criminal prosecution by the United States against John Reid, Ralph E. Hay, and Fred Kriss. Judgment of conviction, and defendants bring error. Affirmed.

H. W. Fraser, of Toledo, Ohio (Marshall & Fraser, of Toledo, Ohio, on the brief), for plaintiffs in error.

Gerard J. Pilliod, Asst. U. S. Atty., of Toledo, Ohio (Edwin S. Wertz, U. S. Atty., and Gerard J. Pilliod, Asst. U. S. Atty., both of Toledo, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiffs in error, together with four others, were indicted for an alleged conspiracy unlawfully to procure,

and unlawfully to transport to Toledo, Ohio, "certain intoxicating liquors, to wit, whisky, contrary to section 6, title II, of the Act of October 28, 1919, entitled the 'National Prohibition Act'" (41 Stat. 310). The overt act charged was the unlawful procuring from the Hayner Distilling Company, at Troy, Ohio, of 30 barrels of Hayner whisky, and its unlawful transportation from that distilling company to the Banner Chemical Company, at Toledo, Ohio, "all without having the permit therefor, as required by law." The indictment was dismissed as to each of the four other defendants, apparently for lack of sufficient evidence. Plaintiffs in error, under their plea of not guilty, were tried and convicted; their motion for directed verdict having been overruled. This writ is to review the judgment of conviction.

According to the undisputed evidence, the three plaintiffs in error, each acting under a fictitious name, employed an attorney to organize a corporation styled the Banner Chemical & Perfumery Company, under the general incorporation laws of Ohio, ostensibly for the manufacture and sale, among other things, of medicinal remedies and toilet articles, two of the plaintiffs in error becoming incorporators (with three other individuals), each of these two plaintiffs in error signing and verifying the articles under fictitious names. Two of the other incorporators seem to have been called in for the purpose of completing the statutory number, the third being one of the defendants dismissed on the hearing. Formulas were prepared for the ostensible manufacture of each of three articles, viz., a toilet water, a hair tonic, and a blood purifier, the first calling for "cologne spirits," the remaining two for "alcohol." Neither called for whisky. There was also issued to the Banner Company by the proper authorities (likewise under application by plaintiff in error Reid as president, and under his fictitious name) a permit to manufacture and sell the three articles before referred to as "proprietary and nonbeverage medicines, perfumes and toilet waters," according to the formulas before mentioned. There were also issued to the Banner Company, likewise under application by plaintiff in error Reid, as such president and in his fictitious name, permits under the National Prohibition Act, respectively to purchase or procure from the Hayner Distilling Company, and to transport from that company to the Banner Company, at Toledo, Ohio, 30 barrels of what in each permit was termed "rectified spirits." Two days before the transportation permit would expire, plaintiff in error Hay presented to the distilling company its warehouse receipts for 30 barrels of "whisky." The distilling company's clerk, after informing Hay that the whisky could not go out as "rectified spirits," and that there were no rectified spirits in a bonded warehouse, sent the permit to purchase to Cincinnati, by messenger, with check for the revenue stamps, and with instructions to ask, if she could change "rectified spirits" to "Hayner whisky." On the return of the messenger two days later, and on his suggestion, the clerk, in the presence of Hay and with his knowledge, substituted for "rectified spirits" the words "Hayner whisky" in the permit to purchase, and "Hayner spirits" in the permit to transport. The 30 barrels of whisky were thereupon

delivered to plaintiffs in error, and were transported by them from Troy, Ohio, to Toledo, Ohio, in two trucks hired by them for the purpose, and were at Toledo put in a building controlled by plaintiffs in error at the address given in the permits as the place of business of the Banner Company. The whisky was seized by the officers soon after its arrival.

There was undisputed evidence that no application was ever made, or permit obtained, to purchase or procure "Hayner whisky" or to transport "Hayner spirits"; that "rectified spirits" does not include commercial whisky; that whisky in order to its conversion into alcohol requires a redistillation by an elaborate and expensive apparatus known as a rectifying still; that such rectification could under the law be carried on only by one who qualifies as a rectifier, pays the special tax, and acts under government supervision.

We consider the prominent grounds of attack upon the conviction, although not in the precise order in which they are discussed in the brief of plaintiffs in error.

[1] 1. It is urged that verdict should have been directed in favor of plaintiffs in error for lack of evidence beyond reasonable doubt that they willfully and knowingly conspired to unlawfully procure and unlawfully transport the whisky in question from Troy to Toledo, contrary to section 6 of the act; and the argument is made that not only is there no evidence that plaintiffs in error had any intention of violating the law in connection with the permits to purchase and transport the liquor, but that, on the contrary, they did everything they could to comply with the law, citing the employment of a skillful and reputable attorney for advice, the use by the attorney of the words "rectified spirits" upon the suggestion of a chemist, that the applications for the permits showed the serial and certificate numbers of the warehouse receipts; that plaintiffs in error did nothing but to sign what their attorney prepared and directed them to sign, and in the belief that the permits were in every way regular; and that plaintiffs in error merely submitted passively to the changes made in the permits at the distilling company's office. But the jury was not bound to draw these inferences.

There was substantial evidence tending to show that the entire scheme entered upon and carried out by plaintiffs in error (including the incorporation, the formulas, the obtaining of permits to manufacture, to purchase, and to transport, the purchasing and transporting, as well as the renting of the building) was conceived for the fraudulent purpose of obtaining whisky for illicit purposes. Plaintiffs in error were provided with a copy of the Volstead Act and of the departmental regulatons thereunder. They presumably knew they could not obtain permits for the purchase and transportation of intoxicating liquors for other than nonbeverage purposes. It was open to inference that they knew that the formulas were prepared as basis for obtaining permits to manufacture; also, that commercial whisky could not be used for manufacturing the articles they claimed they intended to make; and that permits calling in terms for whisky could not be permitted. The testimony strongly tends to negative the theory of

blind following of attorney's instructions and passive acquiescence in the changes made in the permits. In addition to what has already been stated, there was testimony that when Hay presented his [warehouse] certificates to the distilling company, he called for whisky, although that word appeared in neither permit; that on the objection that the certificates did not call for rectified spirits, Hay asserted that he thought that would make no difference, and the question was argued "pro and con" between Hay and the distilling company's clerk; that plaintiffs in error told the attorney, in connection with the making out of the applications for the permits, that they "had the paraphernalia ordered and when the whisky got to Toledo the other would be here"; that Hay told the distilling company's clerk when the permits and certificates were first presented that he "had to have the whisky and would pay any price to get it"; that when the messenger suggested going to Cincinnati Hay said he would "pay any price to send a messenger down," and that he "would have to have it by Saturday as he had three chemists waiting for the whisky." There is an entire absence of competent testimony that plaintiffs in error had ordered any paraphernalia or engaged any chemists to manufacture the preparations in question.[1] There was also testimony tending to show that Hay registered at the Troy hotel on Thursday under the fictitious name of Marshall, Kriss on Friday under the name of Myers, and Reid on Saturday under the name of Howard; that the trucks left Troy at about 9:30 Saturday morning, arriving at Toledo apparently late Sunday night or early Monday morning, the three plaintiffs in error, together with one of the discharged defendants, accompanying the trucks to Toledo, two of them all the way through, the other two joining them at a later point; that the whisky was unloaded from the trucks at about 4 o'clock in the morning; that the building before referred to, in which the whisky was placed, was of one story, containing two vacant rooms, having in it no vats or manufacturing apparatus of any kind, its only contents when raided by the officers being the 30 barrels of whisky, a couple of chairs, a table, and some small glass bottles. There was also testimony that Reid told the chauffeur who drove him to Troy on the occasion in question that he was going there for "30 barrels of booze for blood purifier"; that if he "got rid of this he could pay the debts and then have some money." The fact that the applications for the permits showed the serial numbers of the liquor packages in bond is not of controlling importance. The government's officers were not bound to compare these serial numbers with other records to ascertain the nature of the packages. The suggestion that the revenue officer at Cincinnati approved of the change in the permits is without merit. Not only does it not appear that this officer authorized any change, but he was without power to do so. Moreover, it does not appear that the permit to transport was even taken to Cincin-

[1] The attorney who drafted the applications for permits says the formulas in typewritten form, were brought to him by a gentleman "who was employed as a chemist by these men"; but if it be assumed that the attorney had personal knowledge of the employment, it does not appear that the employment went beyond the preparation of formulas.

nati. There was thus substantial testimony tending to show the formation of the conspiracy charged. This being so, the question whether it satisfied beyond a reasonable doubt was for the jury. We cannot weigh the testimony. Burton v. United States, 202 U. S. 345, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Kelly v. United States (C. C. A. 6) 258 Fed. 392, 406, 407, 169 C. C. A. 408; West v. United States (C. C. A. 6) 258, 413, 421, 169 C. C. A. 429. The motion to direct verdict was properly denied.

[2] 2. It is further contended that the overt act alleged was not proven. It is argued that as the specific offense charged is a conspiracy unlawfully to procure and unlawfully to transport whisky to Toledo in violation of section 6 of the act, and as that section does not (in terms) make the procuring of whisky an offense, it follows that the essential charge is merely a conspiracy to transport the liquor without a permit; and that the only complainable overt act is the actual transportation of the liquor. It is further argued that as the departmental regulations could not authorize the commissioner to require triplicate copies,[2] inasmuch as plaintiffs in error had a permit, the same could not be invalidated by the fact that the remaining two of the triplicate copies did not fully conform thereto; that as the nature of the packages could have been identified by means of the serial numbers contained in the application for permit, neither the commissioner nor the director could have been misled by the use of the terms "spirits" and "rectified spirits"; that the changes made by the distilling company's clerk were thus merely corrections in the interest of truth, and that until the commissioner should revoke the permit plaintiffs in error were protected by it. There is repeated an assertion of the nonresponsibility of plaintiffs in error for the change.

It may be assumed, for the purposes merely of this opinion, that the indictment should be construed as charging only a conspiracy to transport the whisky in question without permit therefor; and the only overt act as its transportation without such permit. But the asserted conclusions do not follow. The act, section 3, explicitly forbids the sale and transportation of intoxicating liquors except for nonbeverage purposes; and it follows that section 6, which forbids selling, purchasing, and transporting liquor without first obtaining a permit therefor, does not authorize or attempt to authorize a permit to transport liquor for other than nonbeverage purposes, but relates only to transportation for lawful purposes; and that a permit fraudulently procured by false representations as to its purpose, with the actual intention and purpose of thereby effecting transportation of whisky for illicit purposes, would afford no protection. It results that even had the transportation permit been issued for "Hayner's spirits" an indictment charging its issue by false and fraudulent representations, and for the fraudulent purpose of thereby effecting the transportation

[2] This proposition is not sustainable. National Prohibition Act, § 1 (7); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Coopersville Co. v. Lemon (C. C. A. 6) 163 Fed. 145, 147, 89 C. C. A. 595.

of whisky for illicit purposes, would be good. We need not consider whether the indictment here would cover such a charge. Such was not the fact. The permit actually issued (the only one) did not cover "Hayner's spirits." It called for "rectified spirits." It did not authorize the transportation of commercial whisky, much less its transportation for other than nonbeverage purposes. It is enough to say that if the fraudulent representation and purpose is found plaintiffs in error are not in position to claim that the change was made merely in the interest of truth, and that the commissioner and director, in issuing the only permit given, were not misled by the use of the term "spirits," and that the permit as changed would protect plaintiffs in error until revoked. The trial judge instructed that plaintiffs in error should not be convicted merely because of the changes made in the permit, but submitted the fact of the change "having regard to all the circumstances of this case"; and charged in substance that if plaintiffs in error, with their associates, were actually engaged in a good-faith effort to procure the liquor for the manufacture of their preparations, for the benefit of the public (although benefiting themselves also) "it would shock conscience to prosecute them for illegal transportation" because of the fact that the transportation permit, issued under the circumstances shown, had been changed as it was changed; and after the close of the charge, and after exceptions thereto had been taken, the court on its own motion further instructed the jury as stated in the margin hereof.[3]

Plaintiffs in error were thus not tried and convicted for participation in a forgery of the transportation permit; nor were they convicted merely because of bad faith generally. They were convicted of conspiring to fraudulently transport (perhaps also to fraudulently purchase) the whisky, the conviction carrying with it the finding of the commission of an overt act, which means merely a step in carrying out the object of the conspiracy, viz., the actual transportation of the whisky without permit therefor. There was substantial evidence of the commission of the overt act charged. Such overt act, even by one plaintiff in error (without the knowledge of the others), if within the scope of the conspiracy (as was fairly inferable here), would bind all the plaintiffs in error. Criminal Code, § 37; Comp. St. 1916, § 10201; Bannon v. United States, 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494; United States v. Rabinowich, 238 U. S. 78, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211; Grayson v. United States (C. C. A. 6) 272 Fed. 553, 557. However, it was fairly open to inference that each plaintiff in error knew and approved of the change made.

[3] "If you find that the defendants were acting all through the transactions in question in good faith, or if you are unable to find beyond a reasonable doubt an absence of good faith, in such a case as that, there could be no verdict of guilty of conspiracy under this charge, because as the court has said, underlying the whole case is the question of good faith, and if the government has not been able to convince you beyond a reasonable doubt these parties were acting in bad faith, the government has not made a case, sufficient, in the court's judgment, to justify you in returning a verdict of guilty beyond a reasonable doubt."

[3] 3. We see no merit in the contention that the use of fictitious names in the incorporation of the Banner Company constituted no evidence of fraudulent intent. The argument that one may lawfully change his name without resort to legal proceedings, and may adopt any name he may choose under which to transact business, and that a certificate of incorporation once duly granted cannot be collaterally attacked for bad faith in obtaining it, is all beside the mark. According to the government's theory, the incorporation was a mere form and a sham, designed to give color of lawful action in executing a fraudulent conspiracy. Inferably the use of fictitious names in the articles was designed to conceal the identity of plaintiffs in error. It had a direct tendency to show lack of good faith in the incorporation and active fraud therein, and thus tended to support the charge of conspiracy. The suggested analogy to the use of dummy incorporators is without force. Plaintiffs in error were not "dummies" in any proper use of that term. It is not material that the state alone could undo the incorporation. Its validity was not necessarily in issue here. The evidence was clearly material and competent upon the charge of fraudulent conspiracy.

4. In the charge the query was raised whether there was ever "with relation to this transaction, a real incorporation," and it was stated as the judgment of the court that the use and signing of fictitious names in verifying the articles of incorporation thwarted the very object of the statute. Even if this instruction was technically erroneous (we do not so declare), it plainly was not reversible error, in view of the explicit instruction that conviction of the charge of conspiracy could not be had in the absence of a finding of bad faith "all through the transactions."

[4] 5. The objection that the jury was permitted to view the premises is in our opinion without force. The jury was told in open court, and presumably in the presence of plaintiff in error, that the purpose of the view was to enable "a clear idea" to be had of the testimony that the government might offer as to what sort of a place it was; that the purpose was "not to gain evidence, but simply to give you the means of better understanding the evidence"; that counsel for the defendants as well as the defendants themselves were at liberty to be present; that there was to be "no discussion of any kind concerning the case in any way, or the kind of place you see"; that talk in the hearing of the jury "shall be nothing more than that which is briefly necessary to identify the place. There will be no discussion of the merits of the case."

The making of such an order was within the court's discretion. Whether plaintiffs in error attended does not appear. It is not suggested that they were in custody. The government's assertion that they were on bail is not denied. Their failure to attend after opportunity given would constitute a valid waiver of the right to be present. Valdez v. United States, 244 U. S. 432, 442, 37 Sup. Ct. 725, 61 L. Ed. 1242; People v. Auerbach, 176 Mich. 23, 47, 141 N. W. 869, Ann. Cas. 1915B, 557. Presumably their counsel attended. In any event, no complaint is made of anything which actually took place

at the view. The suggestion that plaintiffs in error were not tried "upon any possible intentions with regard to the future of that whisky" is answered by the proposition that under the charge an intent to use the whisky unlawfully was inherently necessary to conviction.

6. Of the alleged errors in the exclusion and admission of testimony to which attention is called in brief of plaintiffs in error, it is enough to say that we have considered them all, but find nothing of which complaint can properly be made.

The judgment of the District Court is affirmed.

SELECTASINE PATENTS CO. et al. v. PREST-O-GRAPH CO. et al.*

(Circuit Court of Appeals, Ninth Circuit. October 24, 1921.)

No. 3628.

Patents ⊂=328—1,254,764, for method of delineating or reproducing pictures and designs, held valid and infringed.

The Owens, Beck & Steinman patent, No. 1,254,764, for method of delineating or reproducing pictures and designs in multicolors by the use of a screen, producing an embossed effect, as limited to the use only of a single screen, *held* not anticipated, valid, and infringed.

Hunt, Circuit Judge, dissenting.

Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by the Selectasine Patents Company and another against the Prest-O-Graph Company and others. Decree for complainants with limitation of claims, and complainants appeal and defendants file cross-appeal. Affirmed.

For opinion below, see 267 Fed. 840.

Chas. E. Townsend, of San Francisco, Cal., and Cassius R. Peck, and Griffith, Leiter & Allen, all of Portland, Or., for appellants.

Joseph L. Atkins, Leicester B. Atkins, and Atkins & Atkins, all of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This suit was brought for the alleged infringement of certain letters patent relating to "method of delineating or reproducing pictures and designs."

The gist of the patented process, as we view it, is the building of color upon color in producing their multicolor picture designs, thereby producing a certain embossed effect. The nearest approach to anticipation shown by the record is the English patent to Simon, and we agree with the court below, for reasons stated in its opinion and which, therefore, need not be repeated, that the complainant's process was not anticipated by that of Simon. We think the Patent Office rightly held novel the process here claimed, and that it is highly useful is abundantly shown by the evidence.

That the defendants to the suit infringed by using the same process in the production of their designs and pictures—sometimes, it is true,

---

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

*Rehearing granted January 16, 1922.

by the use of a single screen and sometimes by the use of a plurality of screens—clearly appears from the record. In each instance the same process was used.

It is enough to say, in answer to the contention of the cross-appellees, that the injunction granted should have been extended to the use of a plurality of screens; that none of the claims of the patent sued on covered more than one screen.

The judgment is affirmed.

HUNT, Circuit Judge (dissenting). The patent is for a method of delineating or reproducing pictures and designs. In the specification the patentee stated that the object of his invention is "to provide a method whereby a picture or design containing one or more colors may be delineated or reproduced on smooth surfaces * * * such as paper, cardboard, * * * fabrics, etc., without the use of engraved plates of any kind." The method and operation are briefly as follows:

Having the original sketch to be reproduced, there is a card of a solid color upon which card the multicolored sketch is to be reproduced by the process. There is an open mesh screen of bolting or other suitable cloth tightly stretched on a rigid frame, the screen to be of a size to be superimposed on the sketch to be reproduced. The stretched screen is laid on the master pattern and the outlines of all that portion of the master pattern shown in a solid color and which tones are to be preserved in the reproduction are traced on the screen. These traced portions are then painted over with shellac or a filler to prevent any paint going through. The effect is to protect the base color and thus permit the original color to appear through all successive color runs. The meshes may also be closed by masks or stencils cut from paper or other suitable material. When a color is to be applied the card is placed below the screen or stencil frame so as to procure a perfect register between the card and the frame. The color is poured on the screen surface and forced through the meshes that are not blocked out by passing a scraper or roller, called a "squeegee," over the surface of the screen. Thus the color is forced evenly through the meshes of the cloth screen and adheres to the surface of the card and covers the parts devised. After the first color has been applied, it is necessary to change the stencil to permit the application of the next color. This is done by washing the stencil frame with a solvent which will not affect the protective material; that is, the masks of a previous run remain throughout the operation, and the entire screen except the area for the last color applied is eventually blocked out. The screen is laid on the master pattern and a tracing made on the screen for another color to appear; again masking is resorted to; and this method is repeated for the next color until all colors in the original drawing have been run.

In the application of each color there is a partial overlay; the several colors being superposed in distinct layers, one on top of the other. The patentee specifies that this is of great importance, as it "permits not only a natural modeling and embossing of all designs, but also a

clean-cut margin line and perfect register of all colors." The finished product is given an embossed or built-up appearance, what is spoken of as a plateau effect, and which appealed at once to the public as useful for advertising purposes.

The patentee also stated that the method may be applied in the form of a separate stencil for each color constructed as already described and so arranged that each will register in its proper place to register with preceding colors. "Both plans are part of this method."

Of the ten claims of the patent, typical ones are:

"1. A method of producing multicolored pictures or designs which comprises successively forcing a plurality of colors through a single screen which is partly blocked out after each color run in such a way that at least a part of a succeeding color will extend over part of a preceding color."

"3. A method of producing multicolored pictures or designs having embossed portions which comprises successively forcing a plurality of comparatively thick colors through a single screen which is partly blocked out after each color run in such a way that one or more succeeding colors will at least partly overlay a preceding color."

"9. A method of producing multicolored pictures or designs having embossed portions and clean-cut margin lines which consists in tracing on a screen covered frame from an original which it is desired to reproduce, the outline of a color which it is desired to first apply, blocking out all the surface exterior of the traced lines by filling in with shellac or other material, then placing the screen on the surface upon which the color is to be applied, depositing paint thereon and forcing it through the open meshes of the screen by running a flexible scraper over the screen, again tracing on said screen an outline for a second color and blocking out the remaining surface to cause the second color, when forced through the screen, to partly overlay the first, then proceeding with each individual color until all are applied.

"10. A method of reproducing multicolored pictures which comprehends the application of successive colors making up the picture to be reproduced upon a surface to be treated, through the medium of a tightly stretched screen maintained in close contact with the surface to be treated while a particular color is being applied by means of a squeegee, each color being applied through a partly different portion of the screen from that through which any other color is applied, and blocking out on the screen each successive color area after the preceding color has been applied through the screen so as to render a part of the previously permeable portion of the screen impermeable to the succeeding color runs."

In arriving at a proper construction to be placed upon the claims of the patent, we must consider the action of the Patent Office upon the original application of the patentee, and also examine the prior art. When the patentees first applied for patent, they sought the allowance of three claims as follows:

"1. The herein described method of delineating or reproducing pictures or designs which consists in forcing successive colors through a screen upon a surface.

"2. The herein described method of delineating or reproducing pictures or designs containing a plurality of colors, which consists in forcing each separate color through a partly blocked out screen upon a surface.

"3. The herein described method of reproducing a multicolored design which consists in forcing each separate color through a partly blocked out screen so that one color will overlay another upon a surface."

The Patent Office, on April 29, 1916, rejected all the claims quoted upon Bostwick No. 1,111,002, September, 1914, Simon (British), and

made reference to Vericel (1902) No. 708099, Burdick (1904) No. 757438, Barwolff (1877) No. 192558. The examiner wrote:

"In Bostwick it is to be noted that the several colors or parts of the screen are also blocked off so as to prevent the colors from intermingling. In the British patent it appears that the same steps are carried out as in applicants' case. A screen of wire or suitable material is marked off to indicate the outline of a certain color, whereupon the remainder of the screen is closed up with 'knotting' and the steps of printing with the prepared screen are the same as in applicants' case. While this patentee does not describe the application of several different colors, it is to be noted that the steps of the method would be a repetition of what he has described if he chose to employ his screen for multicolor work."

The applicants amended their claims, and submitted other claims which included claim 1 of the patent now in suit, but again all of the claims were rejected on the British patent to Simon heretofore cited. The examiner wrote that—

It seemed clear that in producing the several "tones of the same color the patentee (Simon) uses a single screen and proceeds in every way like applicants. The fact that he describes this procedure only in connection with protection of different tones of the same primary color is not material, for obviously with this disclosure available it is not invention to employ the same series of steps to get a second color overlaid upon the first; said two colors not having the relation of 'tones of the same color.' While the patentee does not refer to any embossing effect or obtain clean-cut marginal lines between adjacent colors, it seems obvious that these results must follow as soon as the steps of the process appear to be just the same. Greater or less embossing effect would depend largely upon the consistency of the ink or color employed."

In response to the letter of rejection, amendments by way of two new claims were submitted, 1 and 10. Claim 1 of the patent was renumbered as 2, and claim 10 was submitted. What was then numbered as claim 9 (now claim 8 of the patent), as previously drawn, was restricted by the substitution of the words "said screen an outline for," instead of the words, "a screen."

Applicants asked reconsideration of the rejection of the claims on the Simon patent, upon the ground that the disclosure by Simon was very vague and indefinite, in respect to application of the colors so as to obtain clean-cut margin lines, and was insufficient for claims for a process involving the uses of either one or a plurality of screens, or an embossed effect. In November, 1916, claims 1, 3, 9, and 10 were rejected on the patent to Simon, and also on the patent to Vericel, the ruling being that the claims were broad enough to cover a process employing a screen for each separate color, but "as already made of record, this is the process carried out in the British patent to obtain several tones of the same color, and obviously the same series of steps is carried out by Vericel in obtaining a multicolored picture." The remaining claims were allowed. Thereafter, in January, 1917, the original specification of the application was canceled and the specification of the patent, with certain changes thereafter made, was inserted. There was a renumbering of claims and claim 10 was added. Subsequently, claims 1 and 10 were erased, claim 3 became claim 2 of the patent, and claim 9 became claim 8 of the patent. In January, 1917,

when amendment was asked, applicants, by affidavit in elaboration of their contentions as to the features of difference between Simon's and their methods, set forth that Simon's stencil was constructed of chiffon and that, to obtain the embossed effect which was part of their process, it would be necessary to "scrape" color through the mesh of Simon's stencil "under heavy pressure," and that such method would be impracticable because chiffon would not stand the dragging of a rubber squeegee over it under heavy pressure. Affiants declared that Simon specifically confined his claims to the use of chiffon and knotting, but that knotting was not an article of commerce in this country; also, that chiffon has a loosely woven mesh different from bolting cloth used by applicants; also, that Simon required cleaning the screen after each impression, but that in the operation of their process the use of the squeegee automatically cleans all color out of the meshes of the screen after each impression and prepares the stencil for the next operation. Affiants also referred to the dabbing operation spoken of by Simon as one effected by the use of a leather-covered pad for driving stiff inks, or the like, upon the face of a plate, which caused underrunning of the edges failing to produce clear-cut margin lines. Affiants emphasized the use of the squeegee in scraping color, while Simon "dabbed" the color. Affiants said that Vericel's patent had nothing in common with applicant's invention except the use of a scraper. In February, 1917, claims 1, 10, and 11, as then numbered, were rejected on reference to Simon, Vericel, and Pirkis; the examiner saying that claim 1 is not necessarily limited to the use of a single screen, but that the same process could be carried out within the terms of the claim "by the use of a screen for each separate color." On reconsideration claims 1, 10, and 11 were again rejected, the examiner holding that the language of 1 and 10 was broad enough to mean that a single screen is used for the several colors, said screen, however, being differently blocked out for each successive color. Thereafter applicants amended by canceling 1, 10, and 11 and inserting a substitute, claim 10 only, inserted by amendment of April 16, 1917. Thereafter claims 1, 10, and 11 were canceled, and claim 10 of the patent was allowed, and claim 1 of the patent (previously claim 2) took the place of canceled claim 1.

Referring to the prior state of the art, Simon in English patent No. 756, accepted July 11, 1907, for "improvements in or relating to stencils," described a method of screen preparation by stretching chiffon or like material on a cardboard or frame and tightening with blue, placing the frame and chiffon over the pattern, marking on the chiffon the register marks necessary for the repetition of the pattern, outlining the pattern on the chiffon with knotting, filling with knotting all intervening space not intended to be reproduced, and thus leaving the chiffon uncovered only where the pattern is. Simon's method of application was to place the screen on a piece of cloth and with the chiffon pressed close to it spray or daub with a soft stencil brush the color over it, till all the pattern is reproduced. He provided for cleaning and drying the screen and then using it again where one color was to be used, and if two or three are required, then "a screen is made

for each color and each color is treated separately as in the one color description given."

"It is desirable," wrote Simon, "that when three tones of the same color make a form, then the whole of that form is placed on the first screen of that color; the form less the first tone on the second screen of that color; the form, less the first and second tones on the third screen of that color."

The claims of Simon in the described process were: Knotting, making of a stencil by painting over stretched chiffon, or like material, the outline of the pattern direct, and filling in all the ground or intervening space between the ornament not intended to be reproduced, with knotting. Simon also claimed as an article of manufacture "a stencil, viz., a frame covered with chiffon, or like material, tightly stretched and painted over with knotting only where the pattern is not intended to be reproduced."

In 1902 Vericel patented a means for decorating fabrics, using stencils of a stretched composite fabric with open meshes preferably of loosely woven fibers so as to have comparatively large meshes known as "bolting cloth." He forced color through his screen. Barwold patent (1877) was for an improvement in the processes of ornamenting wood. He used stencil patterns, coloring substances, and produced darker tints by superposing colors at proper places, one over the other, until the darker shade was obtained where needed. His one claim was for the use of the pasteboard pattern in his process.

Pirkis (1907) in his patent apparatus for stenciling design brushed paint over the stencil, using flaps which folded, leaving a portion of the design on the card as each flap was used with application of the paint to complete the design. I attach little importance to the Pirkis reference, but gather from the other references that the forcing of color through a single screen long antedates any invention of the patent in suit. Simon shows that a screen partly blocked out after each color-run could be used, while Vericel distinctly claims the use of laying color upon color. Witnesses for the plaintiff say that in the process as described by the witnesses the color after each run of color is left to dry and then another color-run is made through the screen on top of the dried color, the screen having been first washed to remove the paint of the completed run and the area in the screen is reduced by blocking out. But I cannot see that such a process has the elements of novelty upon which patent can be sustained. The use of a painted ground rather than of a plain surface for a run of color and the use of the painted surface for the use of a succeeding screen, by methods commonly known for the laying on of color-runs, is not novelty. The several steps being old in the art, bringing them into positions to produce their own results cannot support a patent claim. Again, the making of an outline for a design on a single screen is the equivalent of making the same outline on different screens. When the single screen has been blocked out, it has no value as to previously blocked out operations unless the screen be cleaned of what are spoken of as stop-outs. Each stop-out of a single screen makes it available for only one stencil at a time.

The argument that a single screen reduced by successive stop-outs enables a better allignment for register than can be had by the use of a plurality of screens is not persuasive. Plaintiffs contend in this litigation that their patent enables them to use a plurality of screens. Obviously, the tracing of the design through the bolting cloth over the picture to be copied is not invention.

There is no force in the suggestion that the use of the word "knotting" is not clear, for plainly it signifies a quick drying substance used for the purpose of stopping-out and generally used for such purpose. Nor are the plaintiffs on firm foundation when they say that bolting cloth is essentially different in its interlocking mesh from chiffon. The one may be stronger than the other, but each is a cross-weave of cloth, and through each can be forced colors dependent upon the consistency of the coloring material. In the British patent a dabbing operation is described as very distinct from the use of a squeegee; but if the dabber is used as it is for driving stiff inks on a plate and the squeegee is used for forcing the material used by the patentees through bolting cloth, there is no substantial difference. Vericel describes the use of a scraper very much as the patentees describe theirs.

The contention that there is a difference between a method in which a series of operations is performed upon a plurality of screens and one in which the same series of operations is performed upon a single screen is not sound, for the only difference in the use of the single screen instead of the plurality is that the same piece of cloth is used for an initial screen and successively in series for subsequent screens. If a plurality is used, each screen is always available so long as it lasts for use. Stress is laid upon the point that the use of a single screen affords a better register in the work of production. But it is in evidence exact registry is not necessary in actual practice, and that with the multiple screen as good a job can be done as with a single screen.

My conclusion is that the patent should not be sustained as valid.

MISSOURI VALLEY CATTLE LOAN CO. v. ALEXANDER et al. BANK OF CARTERSVILLE v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 10, 1921.)

Nos. 5760, 5761.

1. Bankruptcy ⇐440—Order denying petition to set aside adjudication not appealable.

Bankruptcy Act, § 25a (Comp. St. § 9609), does not authorize an appeal from an order denying the petition of a creditor to set aside an adjudication and for leave to defend against the creditor's petition.

2. Bankruptcy ⇐60—Appointment of receiver as "act of bankruptcy."

In order that the appointment of a receiver shall constitute an act of bankruptcy under Bankruptcy Act, § 3a, subd. 4, as amended by Act Feb. 5, 1903 (Comp. St. § 9587), it must be found either (1) that the alleged bankrupt, "being insolvent, applied for a receiver," or (2) that "because of insolvency a receiver * * * has been put in charge of his proper-

ty," and a general finding that he was insolvent and that a receiver was appointed is insufficient.

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

3. Bankruptcy ⟸76(1)—Petitioners held not shown to be creditors.
Subscribers to the stock of a corporation have not the standing of creditors who may maintain an involuntary petition against it, merely on an allegation that their subscriptions were induced by fraud, in the absence of any adjudication that they are entitled to rescind their subscription contracts and recover the amounts paid thereon.

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

In the matter of the Missouri Valley Cattle Loan Company, alleged bankrupt. Involuntary petition of Thomas M. Alexander and others, alleged creditors. From an order of adjudication the company appeals. Reversed. Also appeal by Bank of Cartersville from an order denying its petition to set aside the adjudication. Appeal dismissed.

Arthur R. Wells, of Omaha, Neb. (John F. Stout, Halleck F. Rose, and Paul L. Martin, all of Omaha, Neb., on the brief), for appellants.

Francis A. Mulfinger and Grenville Paul North, both of Omaha, Neb. (William R. Patrick and Michael L. Donovan, both of Omaha, Neb., on the brief), for appellees.

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

CARLAND, Circuit Judge. On July 2, 1920, Peterson, Satterfield, Fuller, Brooke, McNally, Davidson, and Alexander, claiming to be creditors of Missouri Valley Cattle Loan Company, filed an involuntary petition in bankruptcy against it praying that said company be adjudged a bankrupt. The petitioners claimed to be creditors for the reason that they had been induced to enter into contracts for the purchase of the stock of the alleged bankrupt by false and fraudulent representations of its agents, and that in pursuance of said contracts petitioners had given to it cash and promissory notes; that some of the notes had passed into the hands of innocent purchasers. Peterson also claimed to be the owner of a note indorsed by the alleged bankrupt. The alleged bankrupt was declared to be insolvent and while insolvent had committed certain acts of bankruptcy which were stated in general terms. On July 28, 1920, the Farmers' State Bank of Springfield, Neb., Clark H. Fuller, Frank R. Beebe, and Floyd Davidson, claiming to be creditors of the alleged bankrupt, filed an intervening petition wherein they joined in the prayer of the petition of Peterson et al. The claim of the bank arose on account of the ownership by it of certain notes endorsed by the alleged bankrupt. Fuller's claim was based on a judgment. The claims of Beebe and Davidson were of the same character as the original petitioners. The intervening petition alleged specifically that the alleged bankrupt had on July 1, 1920, while insolvent and within four months next preceding the filing of the original petition, applied for a receiver of its property, and further that

on the date aforesaid the alleged bankrupt being insolvent a receiver had been put in charge of its property.

The alleged bankrupt answered the original petition and the intervening petition of the Farmers' State Bank et al. by filing a general denial. On August 2, 1920, Walker, Van Syckle, and Heldman, claiming to be creditors of the alleged bankrupt, were allowed to intervene and they joined in the prayer of the original petitioners. The claim of these interveners arose in the same way as those in the original petition. August 18, 1920, the trial court after hearing a part of the evidence of the petitioners and interveners adjudicated the alleged bankrupt a bankrupt upon the following findings:

"1. That the said petitioners have provable claims against the said Missouri Valley Cattle Loan Company in excess of the sum of $500, and that the indebtedness of said Missouri Valley Cattle Loan Company on July 1, 1920, was in excess of the sum of $1,000.

"2. The court finds that the subscriptions to the capital stock of the respondent corporation were obtained by means of a scheme to defraud stock subscribers in said corporation, which scheme to defraud was set on foot and carried out by one R. V. McGrew, the Missouri Valley Finance Company, and others associated together in said scheme to defraud, and out of all stock subscriptions so obtained, on account of which money, notes, or anything of value was obtained by the company a liability arose from the corporation to the subscriber for the amount so received. The respondent corporation, by reason of such liability and indebtedness to said stock subscribers, was insolvent on the 1st day of July, 1920, and by reason of said indebtedness the indebtedness of said respondent exceeded the fair value of its assets.

"The court further finds that the number of said stock subscribers is large, and the above finding applies to them generally, but is made without prejudice as to any particular claim that may be drawn in question in the bankruptcy proceedings.

"Provided, however, that nothing contained in these findings and order of adjudication shall determine or affect the order of priority among creditors in the distribution of the funds of the bankrupt.

"3. The court further finds that the appointment of receivers for said Missouri Valley Cattle Loan Company on July 1, 1920, was an act of bankruptcy."

[1] August 23, 1920, the Bank of Cartersville filed a petition praying that the adjudication be set aside and that the bank be allowed to contest the involuntary and intervening petitions. August 27, 1920, this petition was denied. The appeal from this order of denial is known in this record as No. 5761. It must be dismissed as the order was made in a bankruptcy proceeding and no appeal is allowed by section 25a, 30 Stat. 553 (Comp. St. § 9609), in such cases. Henkin v. Fousek, 267 Fed. 557, and cases cited.

[2] In regard to No. 5760, being the appeal of the alleged bankrupt from the order of adjudication, we find that section 3a, subd. 4, 30 Stat. 546, as amended by the Act of February 5, 1903, c. 487, § 2 (section 9587), provides:

"* * * Or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

The act of bankruptcy, if any, committed by the alleged bankrupt so far as the record shows, is alleged to have arisen under the language

of subdivision 4 above quoted. Assuming that the trial court correctly found the alleged bankrupt to have been insolvent on July 1, 1920, it still remains true that there is no finding that the alleged bankrupt applied for a receiver of its property or that the receiver was put in charge of its property because of insolvency. It is not necessary that the alleged bankrupt should have applied for a receiver because of its insolvency, but it is necessary that being insolvent it did so apply. By the last clause of subdivision 4, it is not only necessary that the alleged bankrupt be insolvent, but that the receiver must have been appointed because of such insolvency. Hill v. Electric Co., 214 Fed. 243, 130 C. C. A. 613; James Supply & Hardware Co. et al. v. Dayton Coal & Iron Co., 223 Fed. 991, 139 C. C. A. 367. That this is the correct construction to be placed upon the language is shown when we consider that if the appointment of the receiver under the first clause must be because of insolvency, the last clause would be sufficient without the first. In James Supply & Hardware Co. et al. v. Dayton Coal & Iron Co., supra, it was held that if the appointment of a receiver for an insolvent corporation, although in a suit to which it was defendant, was in fact procured by the corporation, it would be as effectively an act of bankruptcy as though the suit had been in its own name as complainant. On the other hand, in the case of In re Connecticut Brass & Mfg. Corp. (D. C.) 257 Fed. 445, it was held upon somewhat similar facts as appear in the present record that it was not shown that the corporation applied for a receiver. In the following cases it appears that the decisions reached were based upon an allegation of insolvency or that the person or corporation was insolvent and for that reason joined in the application for the appointment of a receiver: In re Spalding, 139 Fed. 244, 71 C. C. A. 370; In re Pickens Mfg. Co. (D. C.) 158 Fed. 894; In re Maplecroft Mills (D. C.) 218 Fed. 659; Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C.) 206 Fed. 813.

If we look to the record outside of the findings of fact, we find that to the intervening petition of the Farmers' State Bank et al. there was attached as an exhibit the complaint and answer in the cause in equity in which the receiver was appointed. The action as appears from the exhibit was brought by the stockholders of the alleged bankrupt to wind up its affairs, but the complaint alleges that the corporation was solvent, and the answer of the corporation admitted this allegation and prayed that such relief might be granted as justice and equity might require. It is said by counsel that the question as to whether the alleged bankrupt applied for the appointment of a receiver is not questioned on the record. This cannot be said to be so in the face of the general denial of the allegations of the petition and intervening petitions in bankruptcy filed by the alleged bankrupt and interveners. Reference is made in the briefs to a discussion had between the trial court and counsel at the trial of the bankruptcy action. We are of the opinion that this discussion between the court and counsel cannot be considered by us in the determination of the case. There is found in the record a document called "Appellees' Statement of the

Evidence." This statement is simply an oral opinion of the court made during the trial and before the appellees had finished their evidence and before the appellant had introduced any testimony whatever. To this statement appellant filed certain objections, a part of which were allowed and the others disallowed. The document itself never received the approval of the court so far as the record shows, but is simply certified by the clerk.

[3] The important question sought to be raised by the appeal is as to whether certain persons who subscribed for the stock of the alleged bankrupt can be said to be its creditors. Counsel for the alleged bankrupt claim that they cannot be so considered and cite the decision of this court in Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475. The trial court found the alleged bankrupt insolvent by treating these subscribers as creditors and on this ground alone. When we come to consider the question as to whether these subscribers can occupy the position of creditors or not, we are met with such an insufficient record that we cannot intelligently pass upon that question. Scott v. Abbott, supra, and other cases like it, proceed on the theory that one who has become a stockholder of a corporation, acted as such, and received dividends, cannot when the bankruptcy of the corporation intervenes assume the position of creditor and share in the assets with the other creditors who may have incurred their indebtedness on the strength of these same people being stockholders of the company. The ground upon which the court refused to recognize him as a creditor was that of estoppel. In the present case the evidence, such of it as was given at the trial, is not in the record. We find from the pleadings and findings that certain persons at some time made subscriptions for stock in the alleged bankrupt and that it is claimed that these subscriptions were entered into by reason of the false and fraudulent representations made by the agents of the alleged bankrupt, and it seems to be presumed or assumed that some or all of these persons may have the right to rescind their contracts and to recover the money paid thereon. But no such case has been tried in this proceeding. It does not appear that any person has rescinded his contract or that it has ever been adjudicated what any particular person is entitled to recover. How can the insolvency of the alleged bankrupt be determined until the claims against it have actually been adjudicated? These persons who subscribed for stock, being induced to do so by fraud, and which stock they never received, may have a right to rescind their contract if done promptly, and recover the amount paid; but no such case appears to have been adjudicated. Persons so situated might become creditors with provable unliquidated claims under section 63, 30 Stat. 562, 563 (section 9647), but to file or join in the filing of an involuntary petition, a creditor must be such at the time the petition is filed. We are of the opinion therefore that as there is no finding or evidence that the alleged bankrupt applied for a receiver, or that it was appointed by reason of insolvency, and as there is no evidence or finding upon the issues as to whether the petitioners in the original petition and others in like situation are stockholders or merely subscribers for stock in the alleged bankrupt or whether if stockholders or subscribers as to the

amount of their claims arising from their rescission of their subscription contracts, that the decree of adjudication ought to be reversed, and the case remanded, with instruction to the trial court to proceed therein upon such evidence as has been received and which hereafter may be received and render such decree as may be just and not inconsistent with the views herein expressed.

Reversed.

GEHL v. HEBE CO.

(Circuit Court of Appeals, Seventh Circuit. July 20, 1921.)

No. 2900.

1. **Trade-marks and trade-names and unfair competition ⟸59(5)—"Meje" held infringement of "Hebe."**
   The use of the trade-name "Meje," as applied to a compound of skimmed milk and vegetable fat, infringed the trade-name of "Hebe," applied to the same compound.
2. **Trade-marks and trade-names and unfair competition ⟸93(1)—Proof of confusion of customers unnecessary where names suggest it.**
   In action for infringement of trade-name, evidence of actual confusion on the part of customers is not necessary, where the words themselves suggest it.
3. **Trade-marks and trade-names and unfair competition ⟸55—Good faith in selecting infringing trade-name no bar to relief.**
   Good faith in choosing a trade-name will not bar one already having a similar trade-name from proper relief, if there is in fact infringement.
4. **Good will ⟸5—Trade-marks and trade-names and unfair competition ⟸34—Assignment held to transfer business as well as good will.**
   An assignment reading that, whereas H. Company is desirous of acquiring the trade-mark and "all the business and good will associated therewith," now therefore in consideration, etc., the C. Company has sold, assigned, and transferred to the H. Company the entire right, title, and interest in and to said trade-mark and certificate of registration, "together with all the good will of the business connected with said trade-mark, picture and certificate of registration," *held* intended to convey the business as well as the good will and trade-mark, under 33 Stat. 727, § 10 (Comp. St. § 9495).
5. **Trade-marks and trade-names and unfair competition ⟸98—Good faith in selection of infringing trade-name does not affect actual damage.**
   The fact that one using an infringing trade-name acted in good faith in its selection and use could have a bearing on the question of punitive damages, but would not affect the proposition of actual damage, if any, occasioned by use of the name.
6. **Trade-marks and trade-names and unfair competition ⟸100—Reference decree held to leave open liability for infringement.**
   In an action for damages for infringement of trade-name, an interlocutory decree referring the cause to a master for an accounting of profits and damages *held* to leave wholly open the nature and extent of defendant's pecuniary liability growing out of his ascertained infringement.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Action by the Hebe Company against John P. Gehl. Decree for plaintiff, and defendant appeals. Affirmed.

William H. Churchill, of Milwaukee, Wis., and Bennison F. Bartel, of Chicago, Ill., for appellant.

C. P. Goepel, of New York City, for appellee.

Before ALSCHULER, EVANS and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. The appeal is from a decree finding infringement by appellant of appellee's trade-mark. The Sheboygan Evaporated Milk Company in 1915 registered the trade-mark "Hebe" for "a milk product evaporated." January, 1916, the trade-mark and business was assigned to the Pacific Coast Condensed Milk Company, and in May, 1918, there was an assignment to appellee by the Pacific Coast Condensed Milk Company under its changed name of Carnation Milk Products Company. In 1915, and perhaps earlier, the milk product, which is a compound of skimmed milk and vegetable fats, was put upon the market under the trade-mark "Hebe," sales of which have each succeeding year largely increased, having been advertised extensively and at large expense, so that during the time of the alleged infringement the trade-mark was of considerable value.

Appellant had long experience in manufacturing evaporated milks and in 1917 began to make and sell a milk compound substantially like that sold under the name of "Hebe." He first called it "Carolene," but for certain business reasons abandoned that name and sought another one, employing others to assist him in the selection. He knew of "Hebe," since that had become the commercially leading brand for a milk compound, being the only one which had been widely advertised. While casting about for a name he sold and delivered to jobbers in August, 1919, 20,000 cases unbranded, but somewhat later he fixed upon the name "Meje," and sent out labels bearing that name, which were attached to the unbranded packages.

The record is singularly free from proof of unfair competition and trade practice, beyond the mere fact of the resemblance of the two names. There is no contention of simulation of labels or the employment by appellant of improper means to secure trade aside from the matter of these names.

[1, 2] A question of similarity of trade-names as applied to a particular product must of necessity be largely a matter of impression. From absolute copy of a name to one which is radically and essentially different there are names innumerable, with varying degrees and shades of difference; and it would be impossible to lay down any general line of cleavage between infringing and noninfringing names. While the mind may readily conceive many names other than this which would more nearly approximate that of "Hebe," we are of the impression that "Meje" as applied to the same product is an approximation sufficiently close to be deemed an infringement. The two vowels are the same in both, and most persons would pronounce both of these long, accenting the first syllable of each word. The interest of the average consumer in either of the brands is probably not such that he would charge his mind with the precise form and sound of the word. The general form and sound of the words, having marked similarity, would strongly suggest the likelihood of confusion. Although there was here

no evidence of actual confusion on the part of customers, this is not easily available, nor indeed necessary where the words themselves suggest it.

[3] There was evidence to show how carefully appellant selected the name, how he employed others to formulate a suitable name and to search the records for conflicting names, with the result that he was advised there was nothing registered which was in conflict. A Danish word "mejeri," meaning dairy, was stated as the origin of the name. But appellant's entire good faith in choosing a name would not, of course, bar appellee of its proper relief, if nevertheless it were concluded that this infringed. With so vast a field to choose from, and with appellee's trade-name so well known to appellant, the choice of this name with like number of letters and syllables, like vowels of like place and sound, and with same accent, cannot be wholly justified.

[4] The assignment to appellee is attacked on the ground that by it the business of the assignor was not assigned. The assignment states that whereas the Hebe Company is desirous of acquiring the trade-mark and "all the business and good will associated therewith," now therefore in consideration, etc., the Carnation Milk Products Company has sold, assigned, and transferred to the Hebe Company the entire right, title, and interest in and to said trade-mark and certificate of registration, "together with all the good will of the business connected with said trade-mark Hebe, picture and certificate of registration." The granting part of the assignment does not specifically mention the business. While this, in view of the recital, is probably an inadvertent omission, there would seem to be much difficulty in transferring of the good will of a business wholly apart from the business itself. The good will would not be transferred if the grantor remained at liberty to carry on and contend for the very business as to which the good will of the former owner had by his conveyance passed to another.

As to assignment of registered trade-marks the statute provides:

"Every registered trade-mark * * * shall be assignable in connection with the good will of the business in which the mark is used." 33 St. L. 727, c. 592, § 10 (Comp. St. § 9495).

While it may be that in contemplation of the statute that would not be deemed an assignment "in connection with the good will of the business" which left the assignor free to continue the business as before the assignment, the assignment here is in the form which embodied the statutory provisions, and there is no evidence whatever that since the assignment the assignor continued the business or has asserted any right to do so. We consider the assignment sufficient.

[5, 6] Appellant insists that there was error in referring the cause to a master for an accounting of profits and damages, asserting there was no proof of fraud in the employment of the name "Meje," and that it appears from the evidence that appellee lost no trade through anything that appellant had done, but that, on the contrary, appellee could not fill its orders, and that there is no evidence of sales by appellant.

If it be assumed, as under the evidence it may not be improper to assume, that appellant acted in good faith in its selection and use of

the name "Meje," this would, of course, have a bearing on the question of punitive damages, but would not affect the proposition of actual damage, if any, which the evidence may disclose was occasioned to appellee by appellant's use of this name on its product. Sales were shown of those goods to which appellant's labels were attached before they reached the consumers.

It is apparent however, that in its interlocutory decree the court did not undertake finally to pass upon the question of the kind and extent of defendant's liability, but left this open. While the decree provides that defendant pay over profits and damages suffered by appellee, it states that this is "without prejudice to defendant's rights to raise and contest any issue respecting liability or decree of liability for either profits or damages," and then refers the cause to the master to hear proofs in relation to profits and damages, and to report conclusions. We regard this decree as leaving wholly open the nature and extent of appellant's pecuniary liability growing out of its ascertained infringement.

The decree is affirmed.

DIAMOND POWER SPECIALTY CO. v. MERZ CAPSULE CO.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1921.)

No. 3525.

Patents ⇐328—1,052,164, for boiler tube cleaner, held not infringed.

The Miggett patent, No. 1,052,164, for a boiler tube cleaner using a steam jet, *held* valid as showing a small advance in the art, but limited to a device having a single passage movable nozzle capable of a change of angle relatively to the axis of revolution, by means independent of such rotation, and not infringed by one having a nozzle with a plurality of passages.

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

Suit in equity by the Diamond Power Specialty Company against the Merz Capsule Company. Decree for defendant, and complainant appeals. Affirmed.

Wm. J. Belknap and Chas. B. Belknap, both of Detroit, Mich. (Whittemore, Hulbert & Whittemore, L. J. Whittemore, and Wm. J. Belknap, all of Detroit, Mich., on the brief), for appellant.

V. H. Lockwood, of Indianapolis, Ind. (V. H. Lockwood and Lockwood & Lockwood, all of Indianapolis, Ind., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit on patent No. 1,052,164, to Miggett, February 4, 1913, on boiler-tube cleaners or flue-blowers. The defenses are lack of novelty and invention, noninfringement, and license or permission covering the device of the patent. Upon hearing on pleadings and proofs the bill was dismissed. Hence this appeal.

The blower of the type involved here is arranged horizontally in an opening in the wall in the rear of the boiler, a jet of steam being delivered thereby into the rear ends of the flues, and soot and other impurities driven forwardly through the tubes and out through the chimney. The blower mechanism consists generally of a cylindrical, rotating body (mounted in a stationary covering) communicating with the steam supply and carrying at its discharge end a nozzle through which the steam is projected, the rotation of the nozzle enabling the operator to cause the steam jet to reach progressively all of the flues.

Rotary nozzle-carrying blowers for cleaning horizontal boiler tubes, and adapted to concentrate the steam blast upon a small number of flues at a time, were old at the time of Miggett's application. The prior patent art is illustrated by Hodge (1903), Hodge (1905), Taber (1906), Bradley (1907), Herman (1907), and Hodge (1908). Each of these patents, except Hodge (1908), disclosed a nozzle either with one slotted opening or with two or more steam-directing passages, all inclined at different angles to the axis of the nozzle, the angle at which the steam is directed changing with the rotation of the blower body. While these devices accomplished the result of reaching all the tubes, none of them disclosed any means for adjusting the angle of the nozzle independently of its rotation, and so for overcoming a tendency to throw steam upon the tube sheet or upon the brickwork, to their injury, as well as under the boiler, also to waste steam not only in the manner stated but through the use of a plurality of steam passages.[1] Miggett disclosed, by the patent in suit, a single movable nozzle within a horizontal spindle, and having a single steam passage therein; a bevel gear on the end of another shaft within this spindle meshes with a bevel gear on the rear of the nozzle piece. By rotating a crank arm on the other end of this shaft the angular relation of the discharge end of the nozzle may be changed at the will of the operator. When this crank arm is attached to the hub or dial on the crank-arm which revolves the body portion the nozzle revolves only therewith. Hodge however, had, on February 4, 1908, been granted patent No. 878,286, upon a rotary cleaner having a single movable nozzle with a single steam passage therein, the nozzle being shiftable to different angles relatively to the axis of revolution of its shaft, this shifting adjustment being, as in the later patent to Miggett, accomplished by the use of a bevel gear upon the outer end of the nozzle shaft meshing with another bevel gear upon the rear end of the nozzle piece. By the use of a double system of gears, operated by a crank, the hollow spindle and nozzle are revolved in the same direction but at different speeds. This Hodge patent is prior art as to Miggett, although the patent had not been issued when Miggett's application was filed. Hodge's application and issue dates respectively antedate those of Miggett. Lemley v. Dobson-Evans Co. (C. C. A. 6) 243 Fed. 391, 395, 156 C. C. A. 171. The only substantial respect in which Miggett differs from Hodge is that the former makes the rotary and lateral movements of the nozzle

[1] Smith (1895), who used water instead of steam, also disclosed a nozzle pointing in a direction inclined to its axis of rotation.

occur successively, while in the latter the two movements are made simultaneously.[2] While Miggett's advance over Hodge was not great, it had utility, and we are disposed to accord it some measure of invention. The decision below seems to have been based on a conclusion of noninfringement. The only claim involved is No. 27, which reads:

"A boiler tube cleaner, comprising a rotary body having means for delivering a steam-jet at different angles to the axis of said body, means for controlling the delivery-angle of the jet, means for rotating said body, a shaft operatively connected with said controlling means, extending lengthwise of said body and rotatable independently thereof, and means for coupling said shaft to said body-rotating means."

Defendant's device is manufactured by the Marion Foundry & Supply Company under the Barnhill patent, No. 913,675, February 23, 1909. Instead of having an adjustable nozzle with a single opening, it employs a nozzle-piece having four steam-directing passages, all inclined at different angles to the axis of the nozzle, and so arranged that jets from the four several passages successively are capable of reaching all the tubes. But one steam passage can be used at a time, all but the selected passage being closed by a valve, manually operable at the outer end of the blower, by means of a shaft which rotates independently of the blower-body. In a purely literal sense the claim may be made to read upon defendant's device; but it scarcely need be said that literal reading is not the sole test of infringement. It is only by a liberal construction of plaintiff's patent that defendant's device can be found to infringe the claim in question; and Miggett's advance is too narrow to permit a liberal construction, with an attendant broad range of equivalents, or to extend protection beyond the characteristic construction disclosed by him.

The fundamental principle of the Miggett patent, and which gives it such measure of invention as we are disposed to accord to it, is a single-passage movable nozzle, the entire of which is capable of a change of angle relatively to the axis of revolution by means independent of such rotation. Miggett evidently had no idea of using the

[2]Hodge's specification states: "The outlet end of the nozzle is arranged at an angle to the axis on which its inlet end turns on the front body section. Upon rotating the front body section while the outlet of the nozzle mounted thereon projects laterally at the greatest angle relatively to the axis of the front body section, as shown in Fig. 2, the steam issuing therefrom will be delivered in a circular path successively into the outermost flues of the flue area. Upon turning the nozzle in the front body section so that the outlet end of the same is parallel with and substantially in axial alinement with the front body section, as shown in Figs. 1 and 6, the steam issuing from the nozzle will be directed into the flues at the center of the flue area. By turning the nozzle on the front body section so that its outlet is at a greater or lesser angle to the axis of the front body section the circular path of the steam jet may be increased or decreased in diameter between the two extremes which it is possible to adjust the nozzle and thus enable each of the flues to be reached by the steam jet." It is obvious that with suitable mechanism Hodge's nozzle, with its bevel gears, could be made to revolve independently of the spindle, but we find no disclosure of either mechanism therefor or of desirability thereof.

plurality-of-passage piece of the earlier art which defendant uses. He clearly chose a distinctly different type. His specification characterizes the invention as of "a type having a nozzle-piece pivoted on a rotary carrier or section of the tubular body at an angle to the axis of the latter, and which is itself arranged at an angle to the axis of its own pivot"; and it is said that "by turning the nozzle with the body section, etc., the blast of steam issuing from the nozzle may be moved in circular paths of different diameters over the entire flue area," etc. Miggett controls the delivery angle of the jet by changing the inclination of the entire nozzle as respects its own axis, as did Hodge. Defendant does not change the angle of his nozzle as respects its own axis, nor does the nozzle turn except as it rotates when the body rotates. Defendant's nozzle does not, we think, in any sense which can properly be given to the patent, revolve at an angle to the shaft which operates it. Its revolution is only about the axis of the drive shaft. Defendant merely selects an opening whose angle of inclination is predetermined. The direction of movement of the steam through any one of the various passages of the nozzle is always the same. Miggett's means for changing the angle of the nozzle's inclination are not adapted or adaptable to defendant's selection of the particular steam passage desired. Defendant's device is not within the spirit or intent of Miggett's invention. As the angle of inclination of defendant's nozzle is not changed, defendant, of course, has no occasion to use Miggett's bevel-gear or any equivalent mechanism. The term "means for controlling the delivery angle of the jet," when read in connection with the specification, naturally suggests a control of the delivery angle of the nozzle.

It results from these views that the District Court rightly dismissed the bill of complaint. This conclusion makes it unnecessary to consider the asserted license or permission to use the device of the patent.

The decree of the District Court is affirmed.

HARRIS, CORTNER & CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. November 4, 1921.)

No. 3711.

Carriers ⇐113—Cotton, when destroyed by fire, held not in possession of railroad company as carrier.

Cotton owned by plaintiffs, which was destroyed by fire after it had been loaded by a compress company, at plaintiffs' request, in cars of defendant railroad company, where the loading certificate issued by the compress company was held by plaintiffs, who had given no shipping directions to defendant and had made no application for a bill of lading, *held* not in possession of defendant as carrier, and defendant held not liable as a carrier for the loss.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action at law by Harris, Cortner & Co. against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Edgar W. Godbey and A. J. Harris, both of Decatur, Ala., for plaintiffs in error.

John C. Eyster and Charles H. Eyster, both of Albany, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Harris, Cortner & Co. (hereinafter styled plaintiffs) brought suit in a state court in Alabama against the Louisville & Nashville Railroad Company (hereinafter styled defendant), to recover damages for the destruction by fire of 100 bales of cotton. Said case was removed to the United States District Court for the Northern District of Alabama.

The original complaint claimed damages for the failure to deliver said bales of cotton alleged to have been received by defendant as a common carrier for delivery to plaintiffs at Liverpool, England. By amendment counts A, B, C, and D were added.

Count A claimed damages for the destruction of said bales of cotton received by defendant as a common carrier.

Count B claimed said damages because the defendant negligently failed to move the cars placed by it at the platform of the compress company for the loading of said cotton with reasonable promptness and expedition after such loading and after the cars were sealed, whereby they were caused to be caught on fire and consumed by a fire that started and swept across the unprotected, uncovered, and cotton-laden platform of said compress company.

Count C alleged the placing and loading of said cars by plaintiffs at the compress platform under contract arrangements with the defendant as a common carrier for the export of such cotton, such cars being placed at a point where there were thousands of bales of cotton on the open, wooden, and inflammable platform, which platform was without adequate protection in case of fire, all of which was known to defendant, by which negligence the cars were caused to catch on fire and consumed by fire, which started and swept across the unprotected, uncovered, and cotton-laden platform of said compress company.

Count D claimed damages for that plaintiffs had arrangements with the defendant as a common carrier for the export of cotton over defendant's lines by way of Mobile, Ala., and Pensacola, Fla.; that it notified defendant of its desire to load said 100 bales of cotton for export, which it was understood by both parties would be moved through Mobile or Pensacola to foreign countries; that the defendant thereupon placed cars for the loading of said 100 bales of cotton at the compress platform, where there were thousands of bales of cotton on the open, uncovered, and inflammable platform of the compress company; on the floor of the platform of said compress plant were large amounts of loose cotton, cotton pickings, loose lint, etc.; that the compress company acted as defendant's agent in compressing

said cotton as a preliminary to and part of the transportation thereof, also loading it on the cars and sealing the cars, and while so acting as agent for defendant negligently allowed such inflammable conditions to continue, whereby fire was communicated, by the burning of the compress premises, to said cars, and plaintiffs' cotton so destroyed.

It appeared from the evidence in the case without dispute that the plaintiffs had said cotton at the compress and held the compress company's warehouse receipts therefor; that on the morning of April 25, 1916, plaintiffs notified the compress company to compress and load said 100 bales of cotton for export. The compress company notified the railroad company, who placed two cars at the compress for loading. The 100 bales were then run through the compress under the supervision of an agent of the plaintiffs, who again weighed the cotton, and it was loaded by employees of the compress company and the cars sealed. The plaintiffs then surrendered the warehouse receipts to the compress company, and the compress delivered to them what was known as a loading certificate addressed to the defendant. The loading of said cars was completed about 2:30 p. m., and the fire occurred about 4 p. m. In a few minutes the cars of cotton were consumed.

No directions had been or were given as to what port the cotton was to be sent for export. The loading certificate was never delivered to the railroad company. No bill of lading was applied for, nor was any communication held with the railroad company after the cotton was loaded. There was no representative of the railroad company present during the loading of the cotton or its handling. Before the cotton was received by the railroad company as carrier under the regulations then existing for export business, it was necessary to deliver to the railroad company the loading certificate issued by the compress company, to make out a bill of lading, showing a ship's contract number, evidencing a contract for space on a particular ship, and prepayment of both inland and ocean freight, and the filing of an export declaration were required. None of these things had been done at the time of the fire.

The court below held that no receipt of this cotton by the railroad company as a common carrier had been shown, and that no negligence had been shown on its part, unless the compress company, in the matter of handling and loading the cotton, was the agent of the railroad company, which had undertaken to do this work for the shipper, and unless it was also shown that the compress company was negligent in and about the character of compress premises maintained by it, and that such negligence prevented the saving of the cotton from the fire. It therefore directed a verdict for the defendant under the original complaint and counts A, B, and C. It submitted the issues to the jury arising on count D. The jury returned a verdict for defendant.

If the court was right in withdrawing from the jury the issues of the original complaint and counts A, B, and C, then the judgment must be affirmed, as whatever charges of negligence were raised under the theory that the compress company was the railroad company's agent, and the railroad company responsible for its negligence, if any, arose under count D, were fairly submitted to the jury, and there was suffi-

cient evidence to warrant the verdict for the defendant. Unless the defendant had received this cotton for shipment as a common carrier at the time it was destroyed by fire, and was therefore liable for its safe delivery (the act of God or the public enemy excepted), the court was right in directing a verdict under the original complaint and counts A, B, and C, as we do not find in the record any evidence of any negligence on the part of the railroad company in not removing the cotton, between the time of completion of its loading by the plaintiffs and the time of the fire.

We do not think the defendant was in possession of this cotton as a common carrier. No bill of lading had been applied for by the shipper. No shipping directions had been given. It could have been shipped by him either for export or not. Even if for export, whether it was to go through Pensacola or Mobile had not been made known to the railroad company. The undisputed evidence is that, if for export, prepayment of both inland and export freight was a prerequisite for the issuance of a bill of lading, or the movement of the cotton. Even the loading certificate was still in the hands of the shipper at the time of the fire. We therefore think the cotton was not in the possession of the railroad company as a common carrier, and that therefore it was not liable as complained of in the original complaint or counts A, B, or C. Kansas City M. & O. R. R. Co. v. Cox, 25 Okl. 774, 108 Pac. 380, 32 L. R. S. (N. S.) 313, 317; St. Louis, I. M. & S. R. Co. v. Commercial Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; Hutchinson on Carriers (3d Ed.) § 125.

The judgment of the District Court is affirmed.

COCHRAN et al. v. BECKER.

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

Nos. 5231, 5247.

1. **Courts ⟸405(18)—Bills of review not entertained in courts of appeal.**
   The practice of the federal courts in equity in entertaining bills of review is not properly applicable to Circuit Courts of Appeals, and such courts have no jurisdiction under such a bill to vacate a judgment dismissing an appeal and writ of error and enter judgment upon the merits.
2. **Appeal and error ⟸436—Jurisdiction of Circuit Court of Appeal after party has taken an appeal and sued out a writ of error to the Supreme Court.**
   The jurisdiction of a Circuit Court of Appeals, after an appeal has been taken and a writ of error sued out to the Supreme Court, is limited to only such orders as it can make in connection with the records for the appeal and writ of error to the Supreme Court.

In Error to and Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Actions by James K. Cochran and another against Coulton M. Becker. From a judgment and decree in favor of defendant, plaintiffs brought error, and appealed. The appeal and writ of error were

dismissed, and plaintiffs moved for leave to file bill of review. Motions to vacate and enter judgment on the merits in the so-called bill of review denied.

See, also, 257 Fed. 988, 168 C. C. A. 666.

Harris Kobey, in pro per.

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

STONE, Circuit Judge. Both of these cases arose in the Eastern District of Missouri. No. 5231 is a law action, and the other one in equity. The transcripts of record in both cases were filed in this court in August, 1918.

December 18, 1918, appellant-plaintiff in error acknowledged service of motions to dismiss the appeal and the writ of error with attached notices for January 6, 1919. January 2, 1919, these motions and notices were filed. January 6, 1919, these motions were called to the attention of the court by counsel for appellee-defendant in error; appellant-plaintiff in error not being represented. Upon suggestion of counsel, hearing on the motion was postponed until the date upon which the cases were set upon the calendar for hearing, to wit, January 20, 1919. On that date, appellant-plaintiff in error filed his motions for supplemental transcript and for continuance. On the last above date this court entered similar orders of submission of the motions as follows:

Order of Submission of Motion of Appellants for Supplemental Transcript of Record and for Continuance and of Motion of Appellee to Dismiss.

"This cause, having been called in its regular order, came on to be heard on the motion of appellants for a supplemental transcript of record and for a continuance to the succeeding term of this court, and on the motion of appellee to dismiss the appeal, and Mr. Oliver J. Miller, counsel for appellee, made argument in support of the motion to dismiss; counsel for appellants were not present. Thereupon said motions were by the court taken under advisement."

After consideration of the above motions by the court, later upon the same date, orders were entered denying the motions of appellant-plaintiff in error and sustaining the motions to dismiss the appeal and the writ of error. On March 15 and 21, 1919, respectively, plaintiff in error-appellant filed motions in the respective suits to set aside or vacate the order of dismissal and enter a final order or judgment on the merits. April 9, 1919, appellee-defendant in error filed an answer to the last above motions. These motions and answers presented briefly the points raised upon the motions for supplemental transcript, for continuance and for dismissal. Because appellant-plaintiff in error had not been represented at the hearing of the motions on January 20, 1919, and because he was conducting his cases in person without the assistance of competent counsel, the court treated the motions as petitions for rehearing, and carefully re-examined the matters involved in the motions upon which it had acted on January 20, 1919. The result was a dismissal June 4, 1919, of these last filed motions. May 26, 1920, about a year later, and long after the mandate had gone down and aft-

er two terms of this court had intervened, appellant-plaintiff in error filed motions "for leave to file bill of review." June 2, 1920, those motions were denied for want of jurisdiction. The substantial portions of these orders of denial were:

"And it appearing that during said December term, 1918, and on the 21st day of March, 1919, the appellants herein filed a motion to vacate the decree of this court and enter a final order on the merits, which said motion was by the court treated as a motion for rehearing, and after due consideration by the court said motion was denied at the May term, 1919, on June 4, 1919, the said May term, 1919, was finally adjourned on August 25, 1919, and subsequently there have transpired the September term and December term, 1919. And now at the present May term, 1920, there having been filed the aforesaid motion of appellants for leave to file in this court a bill of review to have reviewed the decree of this court entered at the December term, 1918, on the 20th day of January, 1919, it is by the court, after due consideration, now here ordered that said motion be, and the same is hereby, denied for the want of jurisdiction."

June 3, 1920, appellant-plaintiff in error filed in this court his appeal and writ of error, with assignments of error and citations, to the Supreme Court. Both the appeal and the writ of error were allowed and service of citations thereon made June 11, 1920. We are not advised as to the status of this appeal and writ of error in the Supreme Court, beyond the information, gained from the clerk, that no transcript for the Supreme Court has been ordered. July 31, 1920, appellant-plaintiff in error filed motions which he denominates as "motions to vacate orders filed herein, and enter judgment upon the merits in the bill of review filed as a matter of right." These motions were orally argued by appellant-plaintiff in error and submitted during the September term, 1920, and are the matters now before the court.

These cases were disposed of in this court by the orders of January 20, 1919, sustaining the motions to dismiss the appeal and the writ of error. The occurrences in open court and the correspondence of the clerk of this court with appellant-plaintiff in error reveal beyond question that he was amply notified of that hearing on that day. If he did not choose to be present, that was his own act, from which this court cannot relieve him. In a letter from appellant-plaintiff in error to the clerk, dated January 13, 1919, he requested "that the motions to dismiss and plaintiff's motions be submitted and acted upon at the same time." Not only the motions to dismiss but the motions for supplemental transcripts and for continuances, filed by appellant-plaintiff in error, were carefully considered by this court before the rulings thereon.

[1] Later this court reconsidered all of these matters under the motions filed, by appellant-plaintiff in error, on March 15 and 21, 1919, and reached the same conclusion. This appellant-plaintiff in error has had no lack of careful consideration of his claims in this court. Almost a year after the rulings on the last-mentioned motions and after more than two full terms of this court had intervened, the motions of May 26, 1920, were filed. It makes no difference whether those motions be regarded as applications for leave to file bills of review or as bills of review, the result would be the same. This court

would be without jurisdiction to entertain them, as no such procedure is recognized in this court. This was definitely decided in Omaha Electric Light & Power Co. v. City of Omaha, 216 Fed. 848, 133 C. C. A. 52. Following the above case, the motions were dismissed for want of jurisdiction. The present motions are of the same character, designed to accomplish the same results, and, of course, are subject to the same rule.

[2] The above reason for not entertaining these motions is sufficient, but there is an additional reason. Appellant-plaintiff in error has taken an appeal and sued out a writ of error to the Supreme Court from the decisions herein of this court. Thus the jurisdiction of this court to make any further orders in these cases has been limited to such as it can now legally make in connection with the records for this appeal and writ of error to the Supreme Court.

The motions to vacate and enter judgment upon the merits in the so-called bills of review are, for want of jurisdiction, denied.

BAKER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1921. Rehearing Denied December 5, 1921.)

No. 5530.

1. Conspiracy ⟸46—Evidence held competent to show overt act.

Under an indictment under Cr. Code, § 37 (Comp. St. § 10201), for conspiracy to defraud the United States in respect to its trust duties toward members of certain Indian tribes by inducing the Secretary of the Interior by means of fraud and deceit to believe that certain Indian heirs were competent, and to cause the issuance to them of unrestricted patents for allotments held in trust, and by thereafter procuring conveyances of the lands from the patentees to defendants or others, the procuring of such conveyances after issuance of the patents *held* to constitute overt acts within the conspiracy charged, proof of which was competent.

2. Conspiracy ⟸46—Evidence held competent to prove conspiracy.

Under an indictment for conspiracy, evidence of overt acts, though committed prior to the period of limitation, may be considered as bearing on the question of conspiracy.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Ed Baker and another. Judgment of conviction, and defendants bring error. Affirmed.

John Embry, of Oklahoma City, Okl. (Seymour Foose, of Watonga, Okl., and Embry, Johnson & Kidd, of Oklahoma City, Okl., on the brief), for plaintiffs in error.

Herman S. Davis, Asst. U. S. Atty., of Oklahoma City, Okl. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

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

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

HOOK, Circuit Judge. Ed Baker and Ernie Black were convicted and sentenced for conspiring to defraud the United States in respect of its trust duties to certain members of the Cheyenne and Arapahoe Tribes of Indians and their allotted lands in Blaine county, Okl. (Criminal Code, § 37 [Comp. St. § 10201]). They prosecute this writ of error.

According to its general policy with reference to tribal titles to Indian lands, the government adopted in the case of the Cheyennes and Arapahoes the familiar plan of individual allotments. As they were not regarded competent to be intrusted with complete title and control, it was provided as a protective but forward step towards ultimate, full emancipation that the government should hold the titles in trust for the allottees and their heirs for the period of 25 years. Afterwards the Secretary of the Interior was authorized by statute to issue patents in fee in individual cases in which he was satisfied that the Indians were competent and capable of managing their own affairs. Finally, the Secretary was generally given discretion to remove restrictions on the alienation of allotments of deceased Indians and to issue unrestricted patents to their heirs in fee. It was upon the above situation that the conspiracy charged was predicated.

In general outline the indictment alleged that the defrauding of the United States was to be accomplished by practicing deception upon the Commissioners of Indian Affairs and through him upon the Secretary of the Interior as to the competency and qualifications of certain incompetent Indian heirs and by procuring by those means the issue to them of patents in fee for the lands held in trust for them by the United States, and, that being done, by procuring from the patentees deeds of conveyance to the accused and other persons. The machinery of the deception was set forth in detail. It consisted of false claims, proofs, and reports as to the competency of the Indians and their ability to manage their own affairs and the submission of them to the government officials at Washington for their action. A local official at the Cantonment Agency, Okl., was indicted as a coconspirator, but was acquitted at the trial.

[1] The trial court excluded from the consideration of the jury all the overt acts that were not alleged to have been committed within the statutory period of limitation, that is, within three years prior to the indictment. Another was withdrawn for insufficiency of proof, and still another fell because it was alleged to have been committed by the local official who was acquitted. Upon this it is contended that no overt acts charged in the indictment were left except those of the procuring of deeds of conveyance from the Indians after the patents from the United States had been issued to them; that the object of the conspiracy, if there was one, was attained upon the issue of the patents by which the "absolute title" passed from the government and vested in the Indians; and that the procurement of a subsequent deed could not constitute an overt act, which was an element of the offense required by section 37 of the Criminal Code. See Lonabaugh v. United States, 179 Fed. 476, 103 C. C. A. 56. But the case at bar is distinguishable from that of Lonabaugh. The charge here is broader than that of a

conspiracy to defraud the United States by wrongfully obtaining patents of lands of the public domain. Here, it is that the defrauding was in impairing, obstructing, and defeating the lawful functions of the Department of the Interior in respect of the possession, control, supervision, and management of the Indian lands. Those lands were held by the United States in trust for the Indians. They were not subject to sale by them unless and until the Secretary of the Interior acting according to law had caused patents in fee to be issued to them. If the action of the Secretary was induced by fraud and deceit as is charged, the trust obligation survived the issue of the patents. It did not end. The government still had sufficient interest, and it was its duty to recover the title and restore the lands to the trust estate. United States v. Debell, 227 Fed. 760, 142 C. C. A. 284. This it could do if the title had not in the meantime passed into the hands of an innocent purchaser. The right of the government as trustee was not limited to an action for the value of the land or for damages. If it were otherwise, a conversion of the trust land into a cause of action for money could be accomplished by fraud and deception practiced upon the trustee. It is obvious therefore that the procuring of deeds of conveyance from the Indians named in the indictment after the patents had been issued to them constituted overt acts within the scope and purpose of the conspiracy charged.

[2] Complaint is also made that although the trial court excluded from the consideration of the jury a number of alleged overt acts because they were committed prior to the period of limitation, it yet submitted the evidence regarding them as bearing on the question of conspiracy. There was no error in this. Under the statute defining the offense of the accused there are two essential elements: First a conspiracy to defraud; and, second, the commission of an overt act. Proof of a conspiracy may and generally does consist of a multitude of facts and circumstances regardless of whether singly considered they would constitute overt acts or not, and regardless of the time of their occurrence, provided it is shown that the conspiracy continued and was still afoot within the period of limitation. That is the case here.

There are other less important contentions. We have examined them and are of opinion that they are without merit. There was substantial proof of the guilt of the accused. The fraud and deception practiced upon the government officials were amply shown. The Indians were clearly incapable of managing their own affairs, though the contrary was made to appear. Most of them were of very advanced age, lived in tents, and belonged to the class known as "blanket Indians." And there was also proof that the consideration paid them for their conveyances was in some instances grossly inadequate.

The sentences are affirmed.

The above disposition of this case was determined by the three judges sitting, and the above opinion concurred in by Judge STONE before the death of Judge HOOK. It is also concurred in by Judge JOHNSON.

MACOMBER & WHYTE ROPE CO. v. AMERICAN STEEL & WIRE CO.

AMERICAN STEEL & WIRE CO. v. MACOMBER & WHYTE ROPE CO.

(Circuit Court of Appeals, Third Circuit. September 19, 1921.)

Nos. 2646, 2647.

1. **Patents ⟸328—953,161, for nonrotating wire rope, held valid, but not infringed.**
   The Whyte patent, No. 953,161, for a nonrotating wire rope, *held* valid, but not infringed.
2. **Patents ⟸328—883,759, for nonrotating wire rope, held not infringed.**
   The Tangring patent, No. 883,759, for a nonrotating wire rope, *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Suit in equity by the Macomber & Whyte Rope Company against the American Steel & Wire Company. From the decree, both parties appeal. Affirmed.

Francis C. Lowthorp, of Trenton, N. J., and Pennie, Davis, Marvin & Edmonds, of New York City (Wm. B. Morton, of New York City, of counsel), for plaintiff.

D. Anthony Usina, of New York City, for defendant.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. The Macomber & Whyte Rope Company instituted proceedings against the American Steel & Wire Company for alleged infringement of its patent, No. 953,161, issued to George S. Whyte March 15, 1910. The American Steel & Wire Company filed the usual defense of anticipation and lack of novelty, and a counterclaim in which it charged that complainant infringed its patent, No. 883,759, applied for by Olaf Tangring on October 4, 1907, and assigned to American Steel & Wire Company April 7, 1908. The court decreed that the Whyte patent was valid, but not infringed by the respondent, and dismissed the bill. It further decreed that the Tangring patent was invalid, and dismissed the counterclaim. Both parties appealed, and both appeals will be disposed of in this one opinion.

[1] The invention in both patents relates to the construction of nonrotating wire ropes, used generally in mine and elevator shafts, where there are no guides to prevent rotation, which becomes serious in long lifts. Such a rope as usually made comprises a central strand or core of hemp, an inner layer of 6 strands of wire wound helically in one direction about the core, and an outer layer of 12 strands thus wound in the reverse direction about the inner layer as a core. When such a rope is hoisting, the layers tend to untwist in opposite directions, and thus neutralize each other, and the rope will not rotate if the ratio between the layers is such that they counterbalance each other. The lay of a strand is the distance within which the strand will make a complete turn around the axis of the rope, or, more exactly, the distance

from the crown of the strand at one turn to the crown of the strand at its next turn. In order that the tendency of the layers to untwist may neutralize each other, the inner must have a considerably shorter "lay" or twist than the outer.

"If the wires are all of the same size or diameter, and all of exactly the same length, it is geometrically certain that, when wound as above indicated, the 'lay' of the inner strands will be half the 'lay' of the outer strands, expressed 1 : 2." Macomber & Whyte Rope Co. v. Hazard Manufacturing Co., 211 Fed. 976, 128 C. C. A. 474.

After considerable experimentation, Whyte concluded that the correct ratio of the lays best suited to prevent rotation was 1 : 1.87, and so introduced this ratio into his patent. Whyte thought he was the pioneer in this art of ropemaking, and so did not include a ratio in his patent as first filed, but upon having his attention called to earlier patents, in which it was suggested that nonrotation could be produced by winding an inner and outer layer in opposite directions, it became necessary for him to fix a ratio. The real question upon which this case hinges is whether or not, having incorporated a definite ratio between the lays, the patent is limited to that precise ratio or a "trifling variation" therefrom.

While others had indicated that rotation in ropes might be reduced or eliminated by winding layers in reverse directions, Whyte was the first to suggest a definite ratio of the lays, and thus secured a patent, notwithstanding the disclosures of the prior art. By stating a definite ratio, and standing on that position, he avoided the difficulties whicl the disclosures of the prior art put in his way. That his patent is based upon the ratio fixed by him as indispensable is shown by the file wrapper. His application was filed November 1, 1906, but the patent was not issued until March 15, 1910, and after the "preferred ratio of lay" had been inserted in the specification on the suggestion of the "primary examiner" on January 4, 1910. Whyte doubtless thought that the ratio of 1 : 1.87, or a small variation therefrom, was the best, if not the only, one that would produce a workable nonrotating rope. In order to avoid the disclosures of the prior art and secure a patent, Whyte accepted this limitation of a definite ratio and now is bound by it. To hold the patent valid, and not anticipated, this is necessary. Macomber & Whyte Rope Co. v. Hazard Manufacturing Co., 211 Fed. 976, 128 C. C. A. 474, supra. We find ourselves in agreement with the learned trial judge and the Circuit Court of Appeals for the Second Circuit. The defendant's rope has a ratio of lay according to complainant's testimony of 1 : 1.72 and according to defendant's testimony of 1 : 1.71. This is more than a "trifling variation" from 1 : 1.87, and therefore the defendant does not infringe, and complainant's bill will be dismissed.

[2] In its counterclaim the respondent charged the complainant with infringing its Tangring patent. This patent, neither in the specification nor claims, discloses any ratio of lay whatever. It is evident that the rope of the complainant does not infringe the Tangring patent. The learned trial judge did not in his opinion discuss, except inferentially, the validity of this patent but in his decree he adjudged it to be invalid. Yet the logical conclusion of both his opinion and Judge Lacombe's,

of the Second Circuit, in the Hazard Case, supra, would seem to indicate the invalidity of that patent. It does, however, exhibit some differences of construction from the other prior art patents, and we do not find it necessary to pass upon its validity in deciding this appeal. It is only necessary to decide that the complainant does not infringe it.

We therefore affirm the dismissal of the counterclaim on the ground of noninfringement of the patent. Accordingly, the decree of the District Court, in dismissing the bill and counterclaim, is affirmed.

CONKLIN v. AUGUSTA CHRONICLE PUB. CO.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1921.)

No. 3629.

1. **Libel and slander ⟸19—Newspaper article held not to convey impression that plaintiff was obscure.**
   An item in a newspaper concerning a divorce action, which stated that plaintiff's home was in Winfield, Cowley county, Kan., could not be construed to mean or to convey the impression that plaintiff was an obscure person from an obscure place.

2. **Libel and slander ⟸42(1)—News item held not representation of collusion in divorce case.**
   A statement in a news item that plaintiff had agreed that her husband might obtain a divorce on the ground of desertion was not libelous, in that it represented her as being in collusion with her husband to procure a divorce contrary to law and public policy; such news item reporting the substance of the court's opinion wherein it was stated that plaintiff was "willing" that husband be granted a divorce upon the ground that she deserted him, although a false ground.

3. **Libel and slander ⟸51(1)—Lack of malice will prevent recovery in case of privileged communication.**
   Under Civ. Code Ga. 1910, § 4429, lack of malice in cases of privileged communications will prevent a recovery.

4. **Libel and slander ⟸42(1)—Honest report of court proceedings "privileged communication."**
   A fair and honest report of court proceedings is a "privileged communication," under Civ. Code Ga. 1910, § 4432.

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

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action by Mary L. Greer Conklin against the Augusta Chronicle Publishing Company and others, finally prosecuted against the named defendant alone. From an adverse judgment, plaintiff appeals. Affirmed.

Mary L. Greer Conklin, of Washington, D. C., in pro. per.

Wallace B. Pierce and Benjamin E. Pierce, both of Augusta, Ga. (Wm. H. Barrett, of Augusta, Ga., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Mary L. Greer Conklin, in her own proper person, filed a petition which she styled a bill in equity, but which in reality was an action at law to recover damages for alleged newspaper libels, against the Augusta Chronicle Publishing Company, the Constitution Publishing Company, and the Morning News, owners of three well-known daily newspapers, then and now published in the state of Georgia.

Mrs. Conklin, who will hereinafter be referred to as plaintiff, voluntarily dismissed out of the suit the Constitution Publishing Company and the Morning News, and thereafter prosecuted the action against the Augusta Chronicle Publishing Company alone. Defendant's demurrer was sustained and the petition dismissed.

At the time the suit was brought, all the alleged libels except one were barred by the statute of limitations, and may be left out of consideration. The publication not barred by the statute of limitations, of which complaint is made, purported to state the proceedings had in the Supreme Court of Georgia, in the case of Conklin v. Conklin, reported in 148 Ga. 640, 98 S. E. 221, which was a suit brought by the present plaintiff to set aside a decree of divorce theretofore obtained against her by her former husband. That publication is alleged to have contained in its caption the words, "Conklin divorce case decided against woman," and in the body thereof the following statement:

"It is shown in the record that Mary L. Greer, whose home was in Winfield, Cowley county, Kansas, was married to George H. Conklin, of Augusta, about 1900," and "Conklin brought suit for divorce and, according to Mrs. Conklin's petition, she was made to understand and believe by him that the ground to be alleged in the libel for divorce would be desertion, to which she agreed."

[1] Plaintiff alleges that the words above quoted from the caption, and the expression in the body of the article, namely, "Mary L. Greer, whose home was in Winfield, Cowley county, Kansas," were intended to mean and to convey the impression that plaintiff was an obscure person, from an obscure place. We content ourselves with the observation that the construction put upon this language is not the natural one, and that the newspaper statements complained of cannot be made to have the meaning attributed to them by innuendo.

[2] Plaintiff further alleged that the statement that she had agreed that her husband might obtain a divorce on the ground of desertion was false, and also libelous in that such statement represented her as being in collusion with her husband to procure a divorce contrary to law and public policy.

The opinion of the Supreme Court states:

"In no event, according to the allegations of the petition, can it be said that Mrs. Conklin deserted her husband. We do not hold that the divorce suit referred to in this case was a collusive one, because, so far as disclosed by the petition, she did not consent to the bringing of that suit, nor did she in any wise assist, encourage, or aid in its prosecution. She did, however, exercise the legal and moral right to keep silent when she was confronted with the knowledge that her husband had brought the suit for divorce against her upon a false ground. So far as she now discloses, she was willing that the husband be granted a divorce upon the ground that she had deserted him. Indeed, her

only complaint is that the husband sought and obtained a divorce upon the false ground of the mental incapacity of the wife at the time of the marriage."

[3, 4] The opinion of the court is to the effect that plaintiff was willing that her husband should obtain a divorce upon the ground of desertion, while the newspaper article stated that she had agreed that her husband might seek a divorce upon that ground. The only verbal difference between the opinion of the court and the newspaper article is that in the one plaintiff is represented by her acquiescence to have assented, and in the other to have agreed. There is no difference in meaning or effect. It appears to be beyond controversy that the newspaper article fairly and honestly reported the substance of the court's opinion. The publication was not libelous per se, and special damages are not alleged. Under the laws of Georgia, lack of malice in cases of privileged communications will prevent a recovery. A fair and honest report of court proceedings is a privileged communication. Georgia Code, §§ 4429 and 4432.

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

BASICH v. UNITED STATES.

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

No. 3678.

Criminal law ⇐369(6)—Evidence held admissible, though tending to prove different offense.

On trial of a defendant charged with operating an illegal still, evidence that he was found at another place in possession of liquor similar, and in containers similar, to that found on the premises where the still was operated, *held* admissible, though it tended also to prove a different offense.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against John Basich. Judgment of conviction, and defendant brings error. Affirmed.

The indictment in this case contains three counts, upon the first and second of which a verdict of guilty was returned. The first count charges that the defendant kept and maintained a common nuisance in the town of Newburg, Or., to wit, a building wherein intoxicating liquor was manufactured and kept in violation of the National Prohibition Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305). The second count charges that the defendant manufactured intoxicating liquor at the same time and place, in violation of the same act.

The testimony shows that the still was operated from about the middle of May, 1920, until the 4th day of August of the same year. An accomplice of the defendant testified at the trial that the defendant furnished all materials used in the manufacture of the liquor and assisted in such manufacture, that all liquor so manufactured was removed from the premises by the defendant, and that the witness was simply an employee of the defendant, working for a salary of $300 per month. Other testimony was offered tending to show that the defendant visited the premises where the liquor was manufactured on numerous occasions during the spring and summer of 1920; that he brought to the building a part of the materials used in its construction, and was seen delivering filled grain sacks there.

The government then offered testimony tending to show that on the 28th day of June, 1920, the defendant had in his possession at the Oak Hotel in the city of Portland 24 pints of moonshine whisky; that the bottles containing the whisky were of a peculiar shape and form, similar to a large quantity of bottles found at the premises where the liquor was manufactured; and that the liquor in the bottles so found was made by the same process and was similar to the liquor found at the still. The defendant objected to the introduction of this testimony, on the ground that it tended to show the commission of a separate and distinct crime for which the defendant was under indictment. The court ruled that the testimony was competent, if connected up as promised by the government, and, if not connected up, it would be stricken. The government then offered proof tending to show the similarity of the liquor contained therein. At the close of the trial the following instruction, among others, was given:

"Now, there was testimony introduced in this case that in June of 1920 the defendant was apprehended with a suit case containing liquor. He is not on trial for that offense. That evidence is to be considered by you only as bearing upon the issues tendered by the indictment in this case. It was admitted for no other purpose, and is not to be considered by the jury for any other purpose; that is, unless you believe, beyond a reasonable doubt, that the defendant kept and maintained a nuisance, as I have defined that term to you, or that he manufactured intoxicating liquor, or that he transported intoxicating liquor, as stated in the indictment, you would not be justified in finding him guilty, simply because you believe that he was in possession of intoxicating liquors at the time of his apprehension."

The defendant has sued out a writ of error to reverse the judgment upon the verdict, and the admission of the testimony tending to show the possession of intoxicating liquor in Portland on the 28th day of June, 1920, is the sole error relied upon.

Barnett H. Goldstein, of Portland, Or., for plaintiff in error.

Lester W. Humphreys, U. S. Atty., and Austin F. Flegel, Jr., Asst. U. S. Atty., both of Portland, Or.

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

RUDKIN, District Judge (after stating the facts as above). The rule is of course elementary that, when a defendant is on trial for one offense, irrelevant testimony tending to show the commission of a separate and distinct crime is not admissible. But the rule is equally well settled that relevant testimony, tending to establish or prove the crime charged, cannot be rejected simply because it may tend to prove the commission of some other crime. Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Williamson v. United States, 207 U. S. 425–451, 28 Sup. Ct. 163, 52 L. Ed. 278; Lueders v. United States (C. C. A.) 210 Fed. 419–423. It seems manifest to us that testimony tending to show the possession by the defendant of similar liquor in similar containers while the still was in operation was relevant to the issue before the jury, and its admission as limited by the court was not error.

The judgment is therefore affirmed.

In re SHUMAN.

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

No. 3542.

1. **Bankruptcy ⟸442—Findings of referee not reviewable on record in appellate court.**
   The question of the sufficiency of the evidence to support findings of a referee is not open for consideration by the appellate court, where it does not appear to have been raised in the District Court, and the record contains no findings by the District Judge, as required by the rules of the appellate court.

2. **Bankruptcy ⟸399(3)—Bankrupt, who has concealed property of greater value, not entitled to exemption.**
   A bankrupt is not entitled to exemptions under the law of Michigan, where it is found that he has fraudulently concealed from his creditors property of greater value.

Petition to Revise Order of the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of Edward Shuman, bankrupt. On petition by bankrupt to revise order of District Court. Affirmed.

Rowland W. Fixel, of Detroit, Mich. (Fixel & Fixel, of Detroit, Mich., on the brief), for petitioner.

Irwin I. Cohn, of Detroit, Mich. (George E. Brand, of Detroit, Mich., on the brief), for respondent.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. The bankrupt was engaged in operating a retail clothing store. Claiming that he had suffered the loss of a large share of his stock by burglary, he filed a voluntary petition in bankruptcy. Later he filed a petition for an assignment to him of that amount of his merchandise, or its proceeds, which would be exempt under the Michigan statute. A creditor opposed, and upon proofs taken the referee evidently did not believe the burglary story, but found that the bankrupt was concealing property of value greater than the amount exempted; accordingly, the referee denied the bankrupt's exemption petition. This was affirmed by the District Judge, upon petition to review, and the bankrupt now brings the matter here upon petition to revise.

[1] The bankrupt's first contention is that there was no evidence to support the referee's finding. We conclude that this contention is not now open. The record does not show that this objection was made, before the District Judge, in the petition to review the referee—such petition not being found in the present record—nor is it specified as one of the grounds of complaint in the petition to revise, filed in this court. Further, the record contains no finding of facts by the district judge, as required by our rule 34(2); nor does the record which is printed and presented persuade us that any injustice results from our stated conclusion.

[2] The bankrupt next contends that he is entitled to his exemptions as matter of law in spite of the referee's finding of fact. For this claim, we find no authority in principle or decision. Upon the subject of exemptions, the Bankruptcy Law (Comp. St. §§ 9585–9656) ascertains and applies the state rule, and there are states in which the statute of exemptions is so explicit that an award might be required, even under these circumstances, though no such decision is pointed out, and we find none; but there is no such extreme statute in Michigan. The rule of decision which protects the bankrupt (and his transferee) in the right to hold his exemption, out of property which he has fraudulently conveyed, and as against creditors who are setting aside the conveyance, and are thereby about to reach the exempt property, manifestly has no application to a case like the present. Under the facts here found, the bankrupt had selected and taken his own exemptions, and had them or their proceeds in his possession when he filed this petition. There is a clear estoppel; to grant his petition would be to give the exemptions twice. See Cowan v. Buschfield (D. C.) 180 Fed. 614, 618.

The order of the District Court, approving the order of the referee, is affirmed.

MORENKOW v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1921.)

No. 3557.

Indictment and information ⊂⊃62—Presumption that money paid railroad employés was property of United States and need not be alleged in conspiracy indictment.

In a prosecution for conspiracy to defraud the United States by adding fictitious names to the pay roll of a railroad which had been under federal control for more than a year, the conviction should not be reversed for absence of affirmative proof (a point not raised on the trial) that the money obtained by means of such fictitious entries was money derived from the operation of the road during federal control, within Federal Control Act, § 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾*l*), and therefore the property of the United States; there being a presumption that it was so derived.

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Criminal prosecution by the United States against Samuel Morenkow. Judgment of conviction, and defendant brings error. Affirmed.

Hackett & Lynch, of Toledo, Ohio, for plaintiff in error.

Warren P. Dillon, Asst. U. S. Atty., of Toledo, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was yard foreman of the track department of the Michigan Central Railroad yards at North Toledo, Ohio. He was convicted of conspiring with the man who kept the time of those employed in that department, to defraud the United

States (while the railroad was under federal control), by obtaining money to which respondents were not entitled, through the entry on the time roll of false and fictitious names of purported employés.

In our opinion the judgment should be affirmed. There is no merit in the contention that verdict should have been directed for defendant for lack of proof that the moneys which were the subject of the alleged conspiracy were (as the indictment charged) "the property of the United States" by virtue of section 12 of the Federal Control Act (March 21, 1918, 40 St. 451, 457 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾*l*]) which declares that "moneys and other property derived from the operation of the carriers during federal control" are "the property of the United States." The point urged is that it did not affirmatively appear that the moneys in question were derived from operation rather than from "unexpended balances remaining in the accounts of the railroad company." This proposition was not raised below. The only ground of the motion to direct was the absence of "testimony tending to prove the guilt of the defendant other than the uncorroborated testimony of * * * the accomplice," which was not a good ground. Holmgren v. U. S., 217 U. S. 509, 523, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Caminetti v. U. S., 242 U. S. 470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Ray v. U. S. (C. C. A. 6) 265 Fed. 257, 258. In fact, the jury was advised that it was "unsafe to convict a man under trial upon the uncorroborated testimony of an accomplice," and there was such corroboration. The charge by necessary implication treated the moneys in question as the property of the United States. No exception was taken to the charge with which defendant was apparently satisfied. Primá facie the moneys came from operation, for we must take judicial cognizance that the railroad had been under federal control as much as a year and a half before the alleged offense. Bloch v. U. S. (C. C. A. 5) 261 Fed. 321, 323. And the natural presumption of fact would be that any balance remaining from funds turned over by the railroad company had long before been exhausted. There was nothing opposed to that presumption, and the jury would have been justified in so finding. We find no reversible error in the admission of testimony. It is enough to say that unless where the testimony was plainly admissible it was either not objected to or the ground of objection not stated. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 624, 625, 116 C. C. A. 294. The record does not present a case justifying departure from the ordinary rules of practice. Tucker v. U. S. (C. C. A. 6), 224 Fed. 833, 841, 140 C. C. A. 279.

Judgment affirmed.

MARX v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1921.)

No. 5648.

Courts ⇐405(3)—Order denying application to be admitted to citizenship not appealable to Circuit Court of Appeals.

An order denying an application to be admitted to citizenship pursuant to Act June 29, 1906, as amended (Comp. St. § 4351 et seq.), is not a denial or adjudication of any right on the part of the applicant, and the Circuit Court of Appeals has no jurisdiction of an appeal therefrom, there being no case involved.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Fritz Marx applied to be admitted to citizenship. From an order denying the application, he appeals. Appeal dismissed.

M. N. Sale, of St. Louis, Mo. (A. B. Frey, of St. Louis, Mo., on the brief), for appellant.

Edward W. Tobin, Naturalization Examiner (James E. Carroll, U. S. Atty., and N. C. Whaley, Asst. U. S. Atty., both of St. Louis, Mo., on the brief), for the United States.

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

LEWIS, District Judge. This is an appeal from an order denying the application of Fritz Marx, an alien, to be admitted to citizenship pursuant to Act June 29, 1906, c. 3592, 34 Stat. 596, as amended (Comp. St. § 4351 et seq.).

Jurisdiction here is challenged by motion to dismiss the appeal, and we are of opinion that the objection is well taken. U. S. v. Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321; Appeal of Cook, 242 Fed. 932, 155 C. C. A. 520; U. S. v. Neugebauer, 221 Fed. 938, 137 C. C. A. 508; U. S. v. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665; State ex rel. v. Superior Court, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

The cases relied on by appellant (U. S. v. Ojala, 182 Fed. 51, 104 C. C. A. 491; U. S. v. Doyle, 179 Fed. 687, 103 C. C. A. 233; U. S. v. Poslusny, 179 Fed. 836, 103 C. C. A. 324; Bessho v. U. S., 178 Fed. 245, 101 C. C. A. 605; U. S. v. Rodiek, 162 Fed. 469, 89 C. C. A. 389), and others, were determined before the ruling in the Ness Case. Furthermore, in none of those cases was the question of jurisdiction raised.

The action of the District Court was not a denial or adjudication of any right on the part of appellant. His civil status and rights here, gained by residence, were not affected by the order. He petitioned for a change of his political status in accordance with the provisions of the act. He sought to obtain a privilege by favor, not of right; and had no case or controversy against or with appellee.

Johannessen v. U. S., 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066.

The late Judge HOOK presided at the argument, and concurred in these conclusions.

Appeal dismissed.

HANSSEN v. PUSEY & JONES CO.

(District Court, D. Delaware. July 21, 1921.)

No. 429.

1. **Receivers ⟸40—Decision on merits not necessary to appointment pendente lite.**
   To sustain a motion for the appointment of a receiver pendente lite, it is not necessary to decide in favor of complainant on the merits, nor is it necessary that such a case be presented as will, beyond doubt, entitle him to a decree on the final hearing, although the court will not disturb defendant's possession of property without a probability that plaintiff will prevail on final hearing.

2. **Bills and notes ⟸155—Extension agreement made with third person immaterial to negotiability of notes.**
   An extension agreement made by the payee of notes with a third person, recited in memorandum on back of each of the notes, did not affect their negotiability.

3. **Bills and notes ⟸351—Overdue paper negotiable.**
   Overdue paper is negotiable, and an indorsee takes the paper subject only to such equities as attach to the notes themselves, and in his hands the paper is not subject to claims against the payee, or an intermediate indorser, arising out of collateral matters or independent transactions.

4. **Bills and notes ⟸443(3)—Indorsement of note to agent transfers title.**
   As respects an agent's right to sue on a negotiable note, the indorsement of the note to the agent transfers to him title thereto as against all parties except his principal.

5. **Corporations ⟸556—Suit to have receivers appointed maintainable by general creditor.**
   Suit to procure appointment of receivers for a Delaware corporation under Rev. Code Del. 1915, par. 3883, is maintainable by one not a judgment creditor, but merely a general creditor.

6. **Corporations ⟸557(5)—Showing of insolvency held sufficient.**
   In suit to procure appointment of receivers for a Delaware corporation under Rev. Code Del. 1915, par. 3883, showing of the corporation's insolvency *held* sufficient.

7. **Corporations ⟸553(6)—Necessity for receivership shown by transfer of control of corporation.**
   In suit to procure appointment of receivers for a Delaware corporation under Rev. Code Del. 1915, par. 3883, the fact that all its shares of capital stock, both common and preferred, stood pledged for large sums of money, and that, by agreement between the corporation and the United States Shipping Board Emergency Fleet Corporation, a nominee of the Fleet Corporation was elected treasurer of the company, and that, through him, the Fleet Corporation had complete control of the corporation's funds and their disbursement, and that by another agreement the affairs of the corporation were to be managed and controlled for the preservation of its assets, for the benefit, not of all creditors and stockholders, but for the benefit of the parties to that agreement, *held* to warrant appointment of receivers pendente lite; the two agreements amounting to nullifying Rev.

Code Del. 1915, par. 1923, requiring a corporation to be managed by its board of directors.

8. Corporations ⇐665(3)—Courts have no jurisdiction over internal affairs of foreign corporation.

A court is without control of the internal affairs of a corporation not chartered in the state where the court sits.

In Equity. Suit by Hans Karluf Hanssen against the Pusey & Jones Company, for appointment of a receiver for defendant. Receivers were appointed ex parte. On rule to show cause why the receivership should not be continued during pendency of the cause. Rule made absolute.

William G. Mahaffy and John P. Nields, both of Wilmington, Del., for complainant.

George N. Davis and Robert Penington, both of Wilmington, Del., Chester N. Farr, Jr., of Philadelphia, Pa., and Selden Bacon, Henry A. Wise, and Hartwell Cabell, all of New York City, for defendant.

MORRIS, District Judge. The bill of complaint was filed by Hans Karluf Hanssen against the Pusey & Jones Company, a Delaware corporation, praying the appointment of a receiver for that corporation. The bill alleges, among other things, that the complainant is a subject of the king of Norway and a resident of Norway; that the jurisdictional amount is involved; that a statute of the state of Delaware authorizes the appointment of a receiver of a Delaware corporation on the application of any creditor or stockholder thereof, whenever the corporation is not one for public improvement and shall be insolvent. The bill further alleges that the complainant is a stockholder and a creditor of the respondent corporation, that the respondent is not a corporation for public improvement, and that it is insolvent, in that it is unable to pay its obligations as they fall due in the usual course of business.

Upon filing the bill the complainant moved for the appointment ex parte of one or more receivers. This motion was based upon the further allegation of the bill that a judgment entered in this court on the 22d day of March, 1921, at the suit of Baltimore Dry Docks & Shipbuilding Company against the Pusey & Jones Company for $800,125, was illegally, unlawfully, and in effect collusively obtained. As the judgment would pass beyond the control of the court at the end of the term at which it was entered, unless an application to vacate and set aside the judgment should be made before the rising of the court on the last day of the term, and as the bill of complaint was filed on the 9th day of June, and as the term of this court at which the judgment was entered would end on the 13th day of June, receivers were appointed ex parte and without delay, in order that they might have an opportunity before the end of the term to qualify, examine the matter, and take such action with respect to the judgment as they might deem proper or be advised.

The matters now before the court arise upon a rule, issued at the time of the filing of the bill, directed to the respondent, and made re-

turnable on June 18th, to show cause why the receivers appointed ex parte, to continue until the further order of the court, should not be continued during the pendency of the cause. The rule was heard upon bill, answer, affidavits, and exhibits filed by the respective parties. Paragraph 3883 of the Revised Code of Delaware of 1915, upon which complainant relies, provides that—

"Whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and may be necessary and proper; the powers of such receivers to be such and continued so long as the Chancellor shall think necessary; Provided, however, that the provisions of this section shall not apply to corporations for public improvement."

While the defendant admitted in open court that the allegations of the bill were sufficient to warrant the appointment ex parte of receivers, it contends that, in view of the facts disclosed by the affidavits filed in support of and in opposition to the rule, the plaintiff has failed to establish that he is either a stockholder or a creditor of the defendant corporation, or that the defendant is insolvent in the sense that it has not available funds to meet current liabilities as they mature, and further that, even if it appears that the complainant is a stockholder or a creditor, and that the defendant company is insolvent as alleged, that the facts shown do not warrant the exercise of judicial discretion in favor of the appointment of receivers.

[1] It is to be constantly borne in mind that, in order to sustain a motion for the appointment of a receiver pendente lite, it is not necessary to decide in favor of complainant upon the merits, nor is it necessary that such a case be presented as will, beyond all doubt, entitle him to a decree upon the final hearing. In granting temporary relief by the appointment of such receiver, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the judicial preservation of the rights or property in controversy, for the benefit of all parties in interest, until a hearing upon the merits shall have been had, without expressing, and, indeed, without having the means of forming, a final opinion as to such rights. The court will not, however, upon an application for temporary relief, ignore the probability of plaintiff's finally establishing his alleged right, nor will it, by the appointment of receivers pendente lite, disturb defendant in the possession of its property without a probability that plaintiff will prevail upon the final hearing.

The affidavits and exhibits filed herein disclose the facts hereinafter stated. In December, 1919, one Christoffer Hannevig, then the president of the respondent corporation, was indebted to nine Norwegian individuals and corporations in an amount exceeding $1,250,000. To secure the payment of that indebtedness the complainant came to

America as the authorized representative of the Norwegian creditors. After negotiations between Hannevig and the complainant, the former delivered to the latter on February 13, 1920, certain shares of stock and nine promissory notes, aggregating $650,000, made by the Pusey & Jones Company, of which eight were payable to the order of Christoffer Hannevig, Inc., and the remaining one to the order of Hannevig. One note was dated July 27, 1917, another October 1, 1917, and the remaining notes bore intervening dates, Some were payable in four months, others in three months, after their dates. All the notes were indorsed in blank by the respective payees. They have at all times since their delivery to the complainant remained in his possession. The delivery of the notes was accompanied by a memorandum, written in Norwegian, signed by Hannevig and the complainant, a translation of the pertinent portions of which is as follows:

"The undersigned, Christoffer Hannevig, hereby acknowledges this date that he has delivered to Mr. H. Karluf Hanssen, as representative of the nine contract holders at the Pusey & Jones Co. which have a certain amount owing to them for overpayments and differences on the installments. The shares, etc., given below as security correct payments for the obligations with interest which are now due. * * * I reserved the deposited values shall be delivered to me, and can be disposed of by me free of any incumbrances on condition, that I pay my obligations in Norwegian currency at an exchange taken at the respective installment dates with an interest of 6 per cent., and this shall not acknowledge that I am bound to pay anything else except $565,875, which I have already paid out in taking over the S. S. Fire Island in American dollars."

At the time of the delivery of the notes to the complainant, Hannevig was or thereafter became indebted to the defendant, by reason of matters wholly unconnected with the notes, in a sum exceeding the aggregate amount thereof. On September 18, 1917, Hannevig entered into an agreement with the United States Shipping Board Emergency Fleet Corporation that he would extend the terms of payment of the notes until the completion of the last of eight ships requisitioned by an order of the Shipping Board of August 3, 1917. Pursuant to that agreement with the Shipping Board, a memorandum was made on the back of each of the notes as follows:

"Extended according to letter dated September 18, 1917, to U. S. Shipping Board Emergency Fleet Corporation."

The ships referred to in the letter or agreement were all completed before the 1st day of August, 1919. The claim against the defendant, evidenced by the notes, has not been reduced to judgment.

Under this state of facts the defendant makes four contentions: First, that by the agreement of September 18, 1917, the negotiability of the notes was destroyed; second, the notes having been delivered to the complainant after their maturity, they were received by him subject to all equities against Hannevig, and Hannevig being indebted to the defendant in a sum in excess of the amount of the notes, nothing is due thereon; third, that the notes having been delivered to the complainant as the representative of the Norwegian creditors of Hannevig, the complainant has not title to the notes and is not a creditor of the defendant corporation; and, lastly, that even if complainant

is a creditor he is only a general creditor, and a suit of this character may be maintained in this court only by a judgment creditor.

[2-5] As to the first contention, it is unnecessary to decide whether an agreement for an indefinite extension of time for payment embodied in a note or entered into between the parties thereto destroys its negotiability, for the agreement here under consideration touching that matter was one made, not with the maker of the notes, but with a third person. Such an agreement did not and could not affect the notes, their tenor, or any quality thereof. The second contention overlooks the doctrine that overdue paper is negotiable, and that an indorsee takes the paper subject only to such equities as attach to the notes themselves, and that in his hands it is not subject to claims against the payee, or an intermediate indorser, arising out of collateral matters or independent transactions. 3 R. C. L. 1046; Daniel on Negotiable Instruments, § 725. The third contention ignores the negotiable character of the notes, and that an indorsement of a note to an agent transfers to him title thereto as against all parties except his principal. 3 R. C. L., Bills and Notes, §§ 190, 198–201. The notes are unpaid, and no equities have been set up by the defendant that would serve to defeat in whole or in part the claim of the complainant based thereon. That a suit of this nature may be maintained by a general creditor has long been settled, so far as this court is concerned, by Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506. The cases cited by the defendant herein in support of its contention that a suit of this character may be maintained only by a judgment creditor were all reviewed in that case. It appearing that the complainant is a creditor who may maintain this suit in this court, it is unnecessary now to determine whether he is also a stockholder as alleged.

[6] Little need be said with respect to the insolvency of the defendant, in that it is unable to meet its obligations as they fall due in the usual course of business. It has not for years been able so to meet its maturing obligations. For a long time the defendant has been financially dependent upon the Fleet Corporation. The accounts between the defendant and that corporation have not been adjusted and are in litigation. There is apparently no substantial reason to expect that further moneys will be immediately forthcoming from that source. In August, 1920, defendant's financial condition, as stated by it in its bill of complaint filed in the Supreme Court of the District of Columbia against the United States Shipping Board Emergency Fleet Corporation, had resulted in an inability "to obtain and give acceptable security for the completion and delivery of vessels which otherwise it would be able to contract to construct in one or other of its shipyards"; inability "to obtain contracts for present or future ship construction work"; an "ever-increasing impairment of credit, from which plaintiff has suffered for more than six months last past, and will continue to suffer until same is completely ruined or irretrievably lost"; and in a rapidly diminishing executive staff and labor force, which "soon, unless remedied, will be nonexistent." I find nothing in the record to overbalance those statements of the defendant. Apparently, as then foretold, its condition has gradually become worse. A

judgment for $800,125 was obtained against it on March 22d last by the Baltimore Dry Docks & Shipbuilding Company. The validity of that judgment is not questioned by the defendant, yet it remains unpaid. It appears that the plaintiff therein entered into an agreement that it would not require payment thereof until November, 1921; but the terms and conditions of that agreement were extraordinary, and were not those which obtain in the ordinary and usual course of trade and business.

[7] It appearing that the complainant will probably be able to establish at final hearing that he is a creditor of the respondent company, and that that company is insolvent, in that it is unable to pay its obligations as they mature in the ordinary and usual course of trade and business, should an order be now made continuing the receivers during the pendency of this cause? In Ellis v. Penn Beef Co. et al., 9 Del. Ch. 213, 217, 80 Atl. 666, 667, the Chancellor said:

"The appointment of a receiver pendente lite is a well-recognized branch of the general preventive jurisdiction to protect from injury the thing in controversy, and preserve it for all parties in interest until disposed of as the court may direct. This is an exceedingly delicate and responsible duty, to be discharged with the utmost caution and only under such special and peculiar circumstances as demand summary relief. It is, therefore, not to be exercised doubtingly, but the court must be convinced that the relief is needed, and that it is the appropriate means of securing a proper end. Serious injury to the complainant is an important element in deciding whether the relief should be granted. * * * The remedy is, of course, provisional, and not decisive of the ultimate rights, nor conclusive of the merits. With a prima facie case made by the complainant, and probable cause for sustaining the bill, the preliminary relief should be granted, without going into the merits."

Are receivers necessary to protect the assets of the defendant and to preserve the same for all parties in interest until the final determination of this cause? All the shares of the capital stock, both preferred and common, stand pledged for large sums of money. The equities therein, if any, have likewise been assigned to secure the payment of other large sums of money. The Revised Code of Delaware of 1915, par. 1923, provides:

"The business of every corporation organized under the provisions of this chapter shall be managed by a board of not less than three directors. * * *"

An agreement entered into by and between the defendant corporation and the United States Shipping Board Emergency Fleet Corporation on the 14th of May, 1918, contains the following provision:

"The company [the defendant herein] further agrees to amend its by-laws so that the directors may take all necessary steps to elect Henry G. Barstar as treasurer of the company, and to make provision that the said office of treasurer may be filled from time to time by a nominee of the Fleet Corporation and to provide by said changes in the by-laws that the treasurer so named by the Fleet Corporation shall have complete control of the disbursements of the corporate funds at all three yards of the company."

It further appears that the agreement so entered into by the company has been carried out, and that at the time of the appointment of receivers the Fleet Corporation, through its representative, acting as treasurer, had complete control of all the corporate funds of the de-

fendant and of their disbursement. It further appears that on March 18, 1921, an agreement was entered into (a copy of which is printed in the margin) [1] by which the affairs of the defendant corporation were to be managed and controlled, the purpose of that agreement being, as I understand it, not for the preservation of the assets of the defendant

[1] The several represented interests subscribing to this memorandum or plan of action with respect to the Pusey & Jones Corporation agree:

First. They will promote and approve the immediate election of a board of five directors of the Pusey & Jones Corporation to be constituted as follows: Henry A. Wise, receiver in bankruptcy of Hannevig, his nominee or successor in office; Hartwell Cabell, representing the insurance departments, or his successor appointed by them; Laurence Leonard or other representative of the United States shipping interests; George Weems Williams, or other nominee of the Baltimore Dry Docks & Shipbuilding Company, or a successor to be chosen as hereinafter provided; William G. Cox, of Delaware.

Second. The Baltimore Dry Docks & Shipbuilding Company, hereinafter called the Dry Docks Company, will proceed with the trial of the case in which it asserts a claim against the Pusey & Jones Corporation for $750,000 and accrued interest, which case is set for trial in the United States District Court for the District of Delaware, on March 22, 1921, and to the trial of said case on said date no request for postponement will be made; and the said Dry Docks Company does stipulate that no execution will be issued or levied on said judgment for the period of six months from the date of entry thereof. The Dry Docks Company does also agree that if, at any time prior to the 1st of November, 1921, the full amount of its judgment, including accrued interest and court costs, is received by it, it will enter said judgment released (or assign same without recourse), and will also waive any and all rights accruing out of and in respect to the deposit of preferred and common stock of the Pusey & Jones Corporation by Christoffer Hannevig, certificates of which are now in their possession or under their control. Upon receiving payment of said judgment, interest, and costs on or before the 1st day of November, 1921, the alleged purchase of the stock by the Dry Docks Company shall be considered as canceled, and the Dry Docks Company shall be released from any further liability to any one on account of said transaction, and said stock shall be delivered by the Dry Docks Company to the said Hartwell Cabell and Henry A. Wise (and/or their respective successors), to hold the same for account of whom it may concern, and the Dry Docks Company will thereupon cause its nominee to resign from the board of directors of the said Pusey & Jones Corporation, and the vacancy in said board and on the litigation and settlement committee hereinafter mentioned shall be filled by the selection by Henry A. Wise and Hartwell Cabell (or their respective successors) of a neutral and disinterested person acceptable to them both. If there is not paid to the Dry Docks Company on or before November 1, 1921, the full amount of the judgment, interest, and costs, then the rights of the Dry Docks Company to the stock of the Pusey & Jones Corporation now in its possession shall be the same as if this agreement had not been executed, but Henry A. Wise, one of the receivers in bankruptcy of Christoffer Hannevig, or his successor, and the superintendent of insurance of the state of New York and the superintendent of insurance of Pennsylvania shall be permitted to intervene in the suit now pending in the United States District Court for the District of Delaware, or in any other litigation now or then hereafter pending, involving the title to or ownership of said stock, for the purpose of protecting their respective rights in regard to said stock and contesting the title to the same now insisted upon by the Dry Docks Company, it being understood that the said suit now pending in the said District Court of the United States for the District of Delaware shall be adjourned until November 15, 1921. The making of this agreement is without prejudice to the rights of the Dry Docks Company, or the receivers or trustees of Hannevig, or the superintendents of insurance of New York and Pennsylvania, in regard to stock transfers made by Hannevig, or title or ownership of such stock, and is simply and solely an arrangement to

company for the benefit of all its creditors and stockholders, but primarily for the benefit of the parties to that agreement.

[8] True, that agreement was approved by a judge of the District Court of the United States for the Southern District of New York; but that approval merely authorized its receiver in bankruptcy of a

postpone any questions and the litigation of any questions in that regard until November 15, 1921: Provided, however, that if, before November 1, 1921, the Dry Docks Company shall have been fully paid as aforesaid, this litigation shall be disposed of in the spirit of this agreement.

Third. Messrs. Rounds, Schurman, and Dwight are now chief counsel for the Pusey & Jones Corporation in the litigations in connection with the prosecution of its claim against the United States Shipping Board and the United States. They shall be continued as such chief counsel, with the right to continue the employment of Messrs. McKinney & Flannery as local counsel in Washington, subject, however, to the joint advice, approval, and control of a litigation and settlement committee composed of Henry A. Wise, or his successor, and George Weems Williams, or his successor, to be selected as hereinbefore provided. No proposition or compromise, adjustment, or settlement shall be made or accepted on behalf of the Pusey & Jones Corporation, excepting with the consent and approval and under the general direction of Henry A. Wise (or his successor) and George Weems Williams (or his successor), Wise and Williams and their successors being hereby constituted a committee of two in full charge of all negotiations and settlements and all steps to be taken looking toward the settlement of the claims of the company against the government, or the United States Shipping Board, or the Emergency Fleet Corporation. Williams shall not withhold approval of any settlement which pays Dry Docks Company in full on or before November 1, 1921. Hartwell Cabell, or his successor, however, shall be kept fully informed of developments in connection with any such negotiations or settlements, it being intended that a full spirit of co-operation shall be preserved. It is further expressly understood and agreed that the board of directors and the stockholders of the Pusey & Jones Corporation shall take appropriate action to carry out the spirit and intent of this agreement, to which end the present board of directors shall elect the board hereinbefore set forth, and appropriate action shall also be taken for the purpose of holding a stockholders' meeting for the ratification of such action, and the board of directors shall spread this agreement in full upon the corporate minutes, approve the same, and by due resolution vote to carry out its intent and purpose in good faith, and to carry out this agreement in every possible way, and the United States government and its agencies and representatives, the United States Shipping Board and the Emergency Fleet Corporation, shall be duly advised of the action taken by the several interests, and be requested to cooperate in the carrying out of this agreement, and particularly in reaching a prompt and just settlement of all matters in controversy between the United States government and its agencies aforesaid and the Pusey & Jones Corporation.

The board of directors shall from time to time authorize the expenditure of such money as may in the judgment of the board be necessary and proper for the carrying out of the intent of this agreement, but no counsel shall be employed or retained by the company, or compensated, without the written consent and approval of said committee, composed of Henry A. Wise and George Weems Williams, or their respective successors.

This agreement has been entered into after conference participated in by the following: Jesse S. Phillips, superintendent of insurance of the state of New York; Hartwell Cabell, as counsel for said Jesse S. Phillips, as liquidator of certain insurance companies; Thomas B. Donaldson, superintendent of insurance of the state of Pennsylvania; James E. Finegan, counsel for Thomas B. Donaldson, as liquidator of certain insurance companies; William H. Hotchkiss, counsel for the Jefferson Insurance Company, North Atlantic Insurance Company, and Liberty Marine Insurance Company; Henry A. Wise and Thomas P. Hanagan, receivers of Christoffer Hannevig, by Saul S. Myers

stockholder of the Pusey & Jones Company to become a party thereto. Such approval had no other effect or purpose. That approval had no relevancy to the questions here involved. It is well settled that a court sitting in the state of New York is without control over the internal affairs of a corporation not chartered in that state. Fletcher on Corporations, 5786. These two agreements amount to a practical nullification of the Delaware statute requiring that a Delaware corporation shall be managed by a board of directors; the purpose of that statute being that the corporation shall be so managed for the benefit of all parties in interest and not merely for some of such parties.

In view of the financial condition of the company and the foregoing facts, I deem the continuance of the receivers during the pendency of this cause essential for the protection of the interests of the complainant and others in like position.

and James N. Rossenberg; Laurence Leonard; Charles Kimmich; Chester Farr; T. Langland Thompson; George Gordon Battle; Elon S. Hobbs; George Weems Williams; Sidney M. Henry, vice president Dry Docks Company.

These participants in the conference leading to this agreement all have an interest in securing a prompt and equitable determination of the claims of the Pusey & Jones Corporation against the government or its agencies. All recognize the importance and desirability of having the committee composed of Messrs. Wise and Williams have exclusive and complete supervision of the litigation and charge of the settlements and all negotiations in respect thereto, and all parties to this agreement therefore agree that they will not interfere with any such negotiations or take any independent action whatsoever without first getting written approval of Messrs. Wise and Williams or their successor.

It is agreed that none of the parties hereto will institute, or assist or acquiesce in the institution, of any proceedings looking to a receivership in bankruptcy of the Pusey & Jones Corporation, or other interference with the intentions of this instrument, for the period to be terminated on November 1, 1921, or for such other and additional period as may be agreed upon unanimously by George Weems Williams, Hartwell Cabell, and Henry A. Wise (or their respective successors). There being certain matters in issue between the receivers of Christoffer Hannevig and the insurance departments and the companies now being liquidated under their supervision, it is agreed that the insurance departments will furnish, upon the request of the receivers or trustees of Hannevig, such information, data, and testimony as may be relevant and competent and as might be required by court order.

The making of this agreement is no recognition by the said receivers or trustees of prior rights on the part of the insurance departments in certain shares of the stock of the Pusey & Jones Corporation. The United States District Court for the Southern District of New York is to be asked to postpone the election of a trustee in bankruptcy of Christoffer Hannevig pending the determination of the matter in controversy between the Pusey & Jones Corporation and the United States government and its respective agencies. New York City, March 18, 1921. Jesse S. Phillips, Supt. of Ins. of New York. Hartwell Cabell, Counsel for Above. Chas. Kimmich. Thomas B. Donaldson, Comm. of Insurance, State of Penn. James E. Finegan, Counsel for Above, Atty. Com. Donaldson. Elon S. Hobbs, Counsel for Jefferson Co. Ins. Companies, J. N. Rosenberg, for Receiver of Christoffer Hannevig, as Counsel for Wise & Hanagan. Chester V. Farr, Jr. Henry A. Wise, Thomas P. Hanagan, Receivers Christoffer Hannevig, Bankrupt, per Thomas Hanagan. Geo. Gordon Battle, Counsel for Pusey & Jones. T. Langland Thompson, Counsel for Ch. Hannevig. Baltimore Dry Docks & Shipbuilding Co., by Sidney Henry, Vice President. George Weems Williams, Its Attorney.

MARBLEHEAD LAND CO. v. LOS ANGELES COUNTY et al.

(District Court, S. D. California, S. D. October 31, 1921.)

No. F–58.

1. **Courts ⟸508(5)—Federal court may not enjoin proceedings to enforce state condemnation judgment.**
   Under Jud. Code, § 265 (Comp. St. § 1242), generally forbidding federal courts to enjoin proceedings in a state court, a federal court may not enjoin a county from taking possession of a highway condemned in a suit in the state court, where the county is proceeding under and in pursuance of a judgment of condemnation, and a writ to aid enforcement of the judgment properly issued out of the state court.

2. **Courts ⟸508(5)—Federal court will not determine propriety of state court's action in issuance of writ enforcing its judgment.**
   Where injunction is sought in a federal court to restrain a county from taking possession of land condemned by virtue of a judgment of the state court and a writ in aid thereof, the federal court need not decide the claim that the writ was improperly issued, the orderly procedure being to move the state court to have the writ recalled if improperly issued.

3. **Eminent domain ⟸249—Court may issue writ of assistance to place plaintiff in possession.**
   The superior court of California has power to issue a writ of assistance to place plaintiff in possession, in a suit to condemn land.

4. **Courts ⟸508(1)—Right to injunction pending appeal does not authorize federal court to enjoin proceedings in state court.**
   The doctrine that a court may stay proceedings pending an appeal from a judgment dissolving a temporary injunction, though the court may be of opinion that the parties securing the injunction may not eventually prevail, cannot be invoked as against Jud. Code, § 265 (Comp. St. § 1242), forbidding federal courts to enjoin proceedings in a state court.

5. **Injunction ⟸129(1)—Suit in federal court to enjoin proceedings in state court dismissed without prejudice**
   Where a suit in a federal court to enjoin a county from taking possession of land under judgment of condemnation in a state court must be refused as contrary to Jud. Code, § 265 (Comp. St. § 1242), as to enjoining proceedings in other courts, the bill may be dismissed without prejudice, as not to be regarded as an adjudication on the matters set forth in the bill.

In Equity. Suit by the Marblehead Land Company against the County of Los Angeles and others. Dismissed without prejudice.

Anderson & Anderson, Newby & Palmer, and Grant Jackson, all of Los Angeles, Cal., for complainant.

A. J. Hill, Co. Counsel, and Paul Vallee, Chief Deputy, both of Los Angeles, Cal., for defendants.

TRIPPET, District Judge. [1] This is a suit to enjoin the county of Los Angeles from taking possession and throwing open to public use a highway condemned in a suit in the superior court of California by the county of Los Angeles against the predecessors of the plaintiff in this case. The judgment of condemnation has been affirmed by the Supreme Court of the state, and is a final judgment. A temporary injunction was issued herein, restraining the defendants from taking

such possession on the ground that the county was proceeding, as claimed by the plaintiff, in violation of the terms and conditions of the judgment rendered in the condemnation suit, and not under and in pursuance thereof.

Since the commencement of the trial of this case the facts involved in the situation are entirely changed. The county of Los Angeles has secured a writ to issue out of the superior court of the state of California, in and for the county of Los Angeles, to place the county of Los Angeles in possession of the property condemned, and the county now claims to be proceeding under and in pursuance of the judgment of condemnation and the writ issued out of the said superior court.

Is this a suit to stay proceedings in a court of the state of California within the meaning of section 265 of the federal Judicial Code?

Section 265 of the federal Judicial Code (Comp. St. § 1242) is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In discussing the meaning of the word "proceedings" used in that section, Judge Day, in American Shipbuilding Co. v. Whitney et al. (C. C.) 190 Fed. 109, 110, used the following language:

"As to what constitutes a 'proceeding' in contemplation of this section, the courts have often given expression. Justice Marshall, in the case of Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, in considering and defining the term 'proceedings,' said: 'It is applicable to writs and executions and is applicable to every step taken in the cause; it indicates the progressive course of the business from its commencement to its termination.'

"In United States v. Collins, Fed. Cas. No. 14,834, it was held that 'proceedings,' within the meaning of the statute under consideration, include all steps taken in a suit from its inception to and including final process. The term 'proceedings' includes a sale and the judgment thereon. Ruggles v. Simonton, Fed. Cas. No. 12,120; Pickett v. Filer & Stowell (C. C.) 40 Fed. 313."

I have examined the authorities referred to by Judge Day and they support the above quotation from his opinion. The case of United States v. Collins, Fed. Cas. No. 14,834 supra, is a case directly in point. While it was not necessary for the court in that case to decide the point, nevertheless, it was appropriate for the court to remark, in construing the meaning of the word "proceedings," the following:

"This term 'proceedings' may properly, and, I think, must necessarily, include all steps taken by the court, or by its officers, under its process, from the institution of the suit until the close of the final process of execution which may issue therein. Cropper v. Coburn (Case No. 3,416)."

See, also, Yick Wo v. Crowley (C. C.) 26 Fed. 207; Peck v. Jenness, 7 How. 625, 12 L. Ed. 841; Haines v. Carpenter, 91 U. S. 257, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644.

Section 265 of the federal Judicial Code was applied in the case of Western Union Telegraph Co. of Illinois et al. v. Louisville & N. R. Co., 218 Fed. 628, 134 C. C. A. 386. This was a condemnation

suit, and the principle involved was very similar to the one before the court.

It is then appropriate for us to inquire, Is there any process that the superior court of the state of California, in and for the county of Los Angeles, can issue to execute the judgment of condemnation heretofore rendered?

The Supreme Court of the state of California had the principle involved here before it in the case of Montgomery v. Tutt, 11 Cal. 191. In that case Field, Justice, delivering the opinion, said:

"The power of the court to issue the judicial writ, or to make the order, and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject-matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. It is true that in the present case the decree does not contain a direction that the possession of the premises be delivered to the purchaser. It is usual to insert a clause to that effect, but it is not essential. It is necessarily implied in the direction for the sale and execution of a deed. The title held by the mortgagor passes under the decree to the purchaser upon the consummation of the sale by the master's or sheriff's deed. As against all the parties to the suit, the title is gone; and as the right to the possession, as against them, follows the title, it would be a useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a court of equity. When that court adjudges a title to either real or personal property, to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided."

The case of Montgomery v. Tutt was cited and approved by the Supreme Court of the United States in the case of Root v. Woolworth, 150 U. S. 401, 412, 14 Sup. Ct. 136, 37 L. Ed. 1123. In a more recent case, and probably a case more applicable than the case of Montgomery v. Tutt is the case of Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164. That was a case of divorce, and in the divorce proceeding the court adjudicated the rights of the parties relative to the community property. After the decree, application was made for a writ of assistance to place the plaintiff in possession, and the court said on page 63, of 113 Cal., at page 166 of 45 Pac.:

"There is left for consideration the question whether a writ of assistance is the proper process in such a case. Our statutory action of divorce in its nature pertains to equity. The court, in fixing the status of the litigants, has the unquestioned power to dispose of the property of the community, dividing it between the spouses in such proportions as seem just. It has also jurisdiction to determine whether or not a given piece of property is or is not community property. Having these ample powers to adjudge and to award, it would be anomalous indeed if, under our simplified procedure, it were obliged to send either of the parties into another forum to prosecute another action to obtain possession of that which it had the power to give.

"Discussing the powers of a court of equity, this court said in Montgomery v. Tutt, 11 Cal. 191: 'The power of the court to issue the judicial writ, or to make the order and enforce the same by writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject-matter.' Says Chancellor Kent in Kershaw v. Thompson, 4 Johns Ch. 609: 'When the court has obtained lawful jurisdiction of the case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice merely to declare the right, without affording the remedy.'"

[2] Objection is raised to the writ issued by the clerk of the superior court. It is claimed that the writ was improperly issued. It is not necessary for this court to decide that question. The writ was issued under the seal of the court, and is in the hands of the sheriff. The orderly procedure is to move the court to have the writ recalled, if it has not been properly issued, and thereupon the court may adjudicate any further troubles that the parties may have. If the writ has been improperly issued, application should be made to the court for writ of assistance, and the court will then determine whether or not the county is entitled to such writ.

[3] That the superior court of the state of California, in and for the county of Los Angeles, has the power to issue a writ of assistance to place the plaintiff in a condemnation suit in possession of the property condemned, this court has no doubt. That the power to issue writs of assistance for carrying into execution judgments, which the judicial department of the state of California has power to pronounce, carries with it the power to withhold such writ in a proper case seems to be one of those plain propositions which reasoning cannot render plainer. Therefore both parties here have a plain, simple, and complete remedy in the court where this judgment was pronounced. They should go there and not seek to take the law in their own hands, nor apply to some other court for relief. There is no evidence here that the county procured the judgment in the superior court by fraud, nor is the county seeking to make a fraudulent use of the judgment. The real complaint that the plaintiff makes is not that the county is not seeking an enforcement of the judgment, but that the county is seeking to avoid the judgment by not following its terms and conditions. Whether the county is seeking to take an inequitable advantage of the plaintiff here by reason of that judgment must be determined by the court that rendered the judgment, in determining whether or not the plaintiff there, the county, is entitled to enforce the judgment by writ of assistance. No court will permit its process to be abused.

The possession heretofore granted the county to construct the road was not a complete and full possession, and the county is not in possession of the property for the purposes for which the road was condemned. The superior court could have given them absolute possession of the property, but it did not do so. It is the duty of the superior court now to determine whether or not the county is entitled to possession, and out of respect for the authorities vested in the state of California this court will not interfere in that proceeding.

The doctrine of restraining proceedings pending an appeal.

[4] It is well-settled law that a court will often stay proceedings pending an appeal from a judgment dissolving a temporary injunction, though the court may be of the opinion that the parties securing the injunction may not eventually prevail. It is done to preserve the rights of the parties in the event that the court is wrong in refusing the injunction. But this doctrine cannot prevail here for the same reason hereinabove mentioned. The law prohibits this court from issuing an injunction to stay proceedings in a state court.

[5] It might be that an unqualified dismissal of this action would jeopardize the rights of the parties in future litigation, and be regarded as a final adjudication upon the matters set forth in the bill. This should not be, and therefore the decree will be that the bill be dismissed without prejudice.

FELLOWS v. NATIONAL CAN CO.

(District Court, E. D. Michigan, S. D. October 31, 1921.)

No. 5986.

1. **Courts ⟸375—Local laws govern limitations.**
Subject-matter of a suit in a federal court being a Michigan contract, it is governed by the statutes of limitation of that state.

2. **Limitation of actions ⟸39(2), 46(6)—Cause of action for balance of royalty due for each year held to accrue after end thereof; ten-year statute applicable.**
Where royalties were due under a Michigan contract under seal "within a reasonable time after defendant's monthly report showed that the aggregate of solder savings payments were less than the annual minimum," right of action to recover each year's balance of minimum royalty accrued after the 1st of January of the following year, and action would not be barred by limitations until ten years after such day under Comp. Laws Mich. 1897, § 9734, How. Ann. St. Mich. § 14141, notwithstanding Comp. Laws Mich. 1915, §§ 12323, 12350, in view of section 12319, providing that all actions shall be governed in respect to limitations according to the law under which the right accrued.

3. **Limitation of actions ⟸4(2)—Statute absolutely barring right to bring action invalid.**
A legislative enactment which, by shortening period of statute of limitations, would absolutely deprive a person having a right of action from bringing it, would be unconstitutional.

4. **Election of remedies ⟸12—Assumpsit for royalties barred by limitations as to items held not to right to sue in debt.**
The bringing of an action in assumpsit to recover royalties due in a number of consecutive years, subsequently determined to be unavailable as to royalties due for certain years by reason of statute of limitations, was not such an election of remedies so as to prevent the bringing of another action in debt on contract under seal to recover for such years, which was not barred by limitations.

5. **Judgment ⟸590(4)—Judgment in assumpsit held not res judicata in subsequent action to recover royalties for certain years.**
Judgment in an action in assumpsit for royalties due for a number of consecutive years, which action was unavailable as to certain years by reason of the statute of limitations, was not res judicata in a subsequent action in debt under the contract, which was under seal, to recover the royalty for such years; first action presenting no question nor issue concerning the nature or extent of the right of the plaintiff to recover for breach of a contract under seal.

6. **Judgment ⟸739—Judgment on one cause of action not res judicata upon different cause of action.**
A judgment on one cause of action is not res judicata upon a different cause of action in another suit between the same parties, where the questions involved and determined in the latter suit were not determined nor involved in the former.

At Law. Action by Olin S. Fellows against the National Can Company. On motion to dismiss. Motion denied.

William R. Moss, of Chicago, Ill., for plaintiff.
Bigelow & Rankin, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This action is now before the court upon a motion by the defendant to dismiss the action on various grounds hereinafter discussed. The jurisdiction of this court is properly invoked on the ground of diversity of citizenship, the matter in controversy exceeding the requisite jurisdictional amount.

The material facts, substantially as set forth in the undisputed statement of facts filed in the cause, are as follows:

An action in assumpsit was instituted in this court by Olin S. Fellows (plaintiff herein) against the National Can Company (defendant herein) on the 18th day of May, 1915, to recover for a balance alleged to be due as annual minimum royalty growing out of a lease under seal entered into between the parties during the year 1905, whereby the defendant, National Can Company, leased certain solder-saving devices from the plaintiff. The amount sought to be recovered in that action was for royalties that accrued during the years 1906 to 1912, both years inclusive. Action was commenced in assumpsit on the theory that the suit involved an entire contract, and that no cause of action arose until the last payment was made, in the early part of 1913, when the contract was terminated. During the pendency of that action, namely, on the 26th day of December, 1916, the present action in debt was instituted in this court growing out of the same subject-matter, primarily to save the running of the statute of limitations, for the annual minimum royalties that accrued during the years 1906, 1907, and 1908, in the event that the contract should be held, in the action in assumpsit, not to be entire but severable by years, the first action having been commenced more than six years after the royalties had accrued for said years 1906, 1907, and 1908. Upon the trial of the action in assumpsit, recently determined in this court, no evidence was admitted by the court with respect to the royalties claimed by plaintiff to be due for the years 1906, 1907, and 1908, or any of them, the court holding that the statute of limitations barred a recovery for all of those years, but the court permitted a recovery for the years 1909, 1910, 1911, and 1912, directing a verdict in favor of plaintiff therefor.

The first action in assumpsit having been terminated, the present action is, as already stated, now before the court upon what is treated by both parties as a motion to dismiss (although no formal written motion has yet been filed), demurrers having been abolished by the Michigan statute applicable, section 12456 of the Michigan Compiled Laws of 1915.

The grounds upon which the defendant relies may be conveniently grouped and considered under three heads, as follows: (1) That the cause of action upon which plaintiff here seeks to recover has been barred by the Michigan statutes of limitation; (2) that the institution of the first action by plaintiff constituted an election of remedies

depriving him of the right to maintain the present action; and (3) that the judgment in the former action operates as res judicata in the latter, concluding the matters involved in, and precluding plaintiff from maintaining, the cause at bar.

[1, 2] 1. Is the plaintiff barred from the right to bring the instant action by the statutes of limitation of the state of Michigan, the subject-matter herein being a Michigan contract, and being therefore governed by the statutes of limitation of that state? Fellows v. National Can Co., 257 Fed. 970, 169 C. C. A. 120. This action, having been brought to recover on a contract under seal, was required, by the applicable statute, in force at the time of the making of such contract, to be instituted within ten years after the date of the accrual of the cause of action on which it is based. Section 9734 of the Michigan Compiled Laws of 1897, being section 14141 of Howell's Michigan Statutes of 1913; Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673. As the cause of action for the recovery of the royalty due under such contract for each year accrued after the end of such year, and "within a reasonable time after defendant's monthly report showed that the aggregate of solder-savings payments were less than the annual minimum" (Fellows v. National Can Company, supra), the right to recover the royalty due for the year 1906 accrued after the 1st of January, 1907 (Fellows v. National Can Co., supra), and under the statute of limitations just cited, which was then in force, the right to sue on such cause of action, based, as it was, on a contract under seal, would not be barred until ten years thereafter, that is, until after the 1st of January, 1917, which was subsequent to the time of the commencement of the present action.

[3] It is urged, however, by the defendant, that the Michigan Judicature Act, which took effect on the 1st day of January, 1916, before the commencement of this action, not only abolished the action of debt (section 12350, Michigan Compiled Laws of 1915), but abrogated the ten-year statute of limitations for actions on contracts under seal and substituted therefor a six-year period within which such actions must be brought (section 12323, Michigan Compiled Laws of 1915); and that therefore plaintiff is precluded from maintaining the present action. It is true that section 12350, just cited, abolished the action of debt and provided that in all cases where that action would be otherwise maintainable the action of assumpsit should thereafter be brought, and that said section 12323 changed the period of the statute of limitations applicable to contracts under seal such as that herein involved from ten to six years. By another section, however, of the same Judicature Act, section 12319 of the Michigan Compiled Laws of 1915, it was, and is, provided that—

"All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions."

If the Michigan Legislature had attempted, by shortening the period of the statute of limitations, to deprive the plaintiff, and others similarly situated, of the right, which he had immediately prior to the taking effect of the Judicature Act on January 1, 1916, to bring this

action, as he did, within ten years from the date of the accrual of his earliest cause of action involved herein, the effect thereof would have been to absolutely bar his right to bring the present action, and such attempt would have been unconstitutional. Price v. Hopkin, 13 Mich. 318; Ludwig v. Stewart, 32 Mich. 27; Chapman v. Douglas County Commissioners, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378.

It is, however, clear, from the saving clause of the Michigan Judicature Act just quoted, that said Legislature made no such attempt, but expressly recognized the statutes of limitation existing at the time of the accrual of any previously acquired right of action as still in force and applicable to "all actions" brought to enforce any such "right." McBride v. Chippewa Circuit Judge, 202 Mich. 61, 167 N. W. 934; Black v. Spears, 209 Mich. 1, 176 N. W. 469; Id., 213 Mich. 29, 180 N. W. 593. As it is contended by defendant itself, in one of its briefs, that the present action is in reality an action in assumpsit, it will be so treated by this court, although, for the reason just pointed out, governed by the ten-year statute of limitations in force at the time of the accrual of the right of action on which recovery is sought.

[4] 2. I cannot agree with the contention of defendant that the act of the plaintiff in bringing his first action in assumpsit was such an election of remedies as prevents him from now maintaining the action at bar. Where a party selects one of several supposedly existent remedies not through a deliberate choice of alternative and inconsistent remedies, but in the belief that the remedy selected is available and it is subsequently determined that he was mistaken in such belief and that the remedy selected did not in reality exist, his mistake in making such selection does not constitute an election of remedies which will deprive him of the right to thereafter pursue the proper remedy. Northern Assurance Co. v. Grand View Building Association, 203 U. S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109; Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828; Southern Pacific Co. v. Bogert, 250 U. S. 483, 39 Sup. Ct. 533, 53 L. Ed. 1099; Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739 (C. C. A. 7); Brown v. Fletcher, 182 Fed. 963, 105 C. C. A. 425 (C. C. A. 6); Mintz v. Jacob, 163 Mich. 280, 128 N. W. 211; Tullos v. Mayfield (Tex. Civ. App.) 198 S. W. 1073; 20 Corpus Juris, 21–27. As, therefore, the right to bring an action in assumpsit to recover the royalties due for the years 1906, 1907, and 1908 had been lost, by reason of the statute of limitations, prior to the date of the institution of the previous action in assumpsit, and the act of the plaintiff in the commencement thereof was due to his mistake in selecting a remedy in substance and effect not available, such act did not constitute an election of remedies within the meaning of the law or affect his right to subsequently bring the proper remedy, this action to recover upon a contract under seal. The contention of the defendant to the contrary cannot be sustained.

[5, 6] 3. It is further urged by defendant that the judgment in the former suit is res adjudicata in the present action. As, however, the previous action was in assumpsit and presented no question nor is-

sue concerning the nature or extent of the right of the plaintiff to recover for the breach of a contract under seal or concerning the applicability or effect of the ten-year statute of limitations, and the grounds and reasons for the disallowance, in that action, of the claims on which the present action is based, are not presented in the case at bar, it is clear that there is nothing in the pleadings, proofs, or judgment entered there which can affect the right of the plaintiff to litigate the questions involved here; it being, of course, elementary law that a judgment on one cause of action in one suit is not res adjudicata upon a different cause of action in another suit between the same parties where the questions involved and determined in the latter suit were not determined nor involved in the former. Brown v. Fletcher, supra.

For the reasons stated, the motion to dismiss must be denied.

In re THOMPSON.

In re MARKELL.

(District Court, W. D. Pennsylvania. October 20, 1921.)

No. 8790.

1. **Bankruptcy ⊜339—Payment involved where claim is filed in bankruptcy court.**
   One presenting a claim in the bankruptcy court for payment necessarily asks the court to adjudicate it, which involves the question of validity and payment, and trustee in bankruptcy may set up payment, notwithstanding claimant claims to have in the records, offered in its support, conclusive evidence of its validity and amount.

2. **Pledges ⊜56(5)—Pledgee, selling property, must comply strictly with terms of contract.**
   A pledgee of securities, in selling the same, must comply strictly with the terms of notes which constitute the contract under which the pledge is sold, because the pledgee is a trustee of the property pledged, first for himself to the extent of his claim, and for the pledgor for the remainder, if any.

3. **Pledges ⊜2—Local laws govern.**
   The law governing sale of pledges is local, and the law of the state where a pledge is given and sold applies.

4. **Pledges ⊜56(6)—Authority of pledgee to become purchaser to be in plain terms.**
   Authority of pledgee to become the purchaser of the pledge at a sale thereof must be given in very plain terms in Pennsylvania.

5. **Pledges ⊜56(5)—Public sale contemplates competetive bidding.**
   A public sale of a pledge contemplates competitive bidding, and a sale of a pledge in the office of pledgee's attorney, where there was only present the attorney, pledgee, and a third person, who did not desire to bid, was not a public sale.

6. **Pledges ⊜56(1)—Pledgee cannot sacrifice property to injury of creditors of pledgor.**
   Pledgee, selling property, must exercise good faith, taking no undue advantage of his trusteeship, to his own benefit and the injury of creditors of the pledgor.

---

7. **Judgment ⊂⊃516—Against bankrupt could be attacked collaterally by creditors defrauded thereby.**
A collusive judgment, obtained against bankrupt before proceedings in bankruptcy were begun, may be attacked collaterally by judgment or execution creditors defrauded thereby.

8. **Bankruptcy ⊂⊃339—Judgment may be collaterally attacked by trustee in bankruptcy.**
Where judgment was obtained against bankrupt before bankruptcy proceedings on mortgage foreclosure, and the land was sold by trustee in bankruptcy, and mortgagee filed claim for unpaid portion of judgment, which he claimed constituted a lien on the proceeds in the hands of the trustee, the trustee, as a defense, could claim that such judgment had been paid, in that the mortgagee had sacrificed securities held by him, and had purchased them at an illegal sale for a nominal amount, and that to allow him a lien on the funds in the hands of the trustee would amount to payment twice of his debt.

In Bankruptcy. In the matter of Josiah Van Kirk Thompson, bankrupt. Order of referee awarding a sum to F. E. Markell, claimant, reversed.

Weil & Thorp, of Pittsburgh, Pa., for receivers.
E. C. Higbee, of Uniontown, Pa., for claimant.

THOMSON, District Judge. We have, on certificate for review, the question of the correctness of the referee's action in allowing the claim of F. E. Markell in the sum of $19,600.39. The facts in their chronological order, are these:

In 1907, three notes of Jasper Augustine were accepted by the Citizens' National Bank of Connellsville, two for $16,000 each, and one for $18,000, aggregating $50,000, for which the bank paid $42,500. Interest being paid on the notes to 1909, Thompson, the bankrupt, on the purchase of certain coal property, assumed the payment of these notes. In 1913, Thompson borrowed from the claimant, Markell, who was the president of the said Citizens' National Bank, $80,000 in two sums, $50,000 on January 2d and $30,000 on September 12th, giving his notes therefor, with collateral security, namely: On the first note, $50,000 worth of Isabella Coke Company bonds, and on the second note $27,000 worth of Poland Coal Company bonds and $13,000 of Pittsburgh & Westmoreland Coal Company bonds. As additional security, he gave to Markell a mortgage on certain coal property in the sum of $80,000. Thus, for the loan of $50,000, Markell held Thompson's notes for $80,000, bonds of the face value of $90,000, and a mortgage for $80,000.

On December 7, 1915, Markell obtained judgments by suit on his two notes of $50,000 and $30,000, respectively, in the court of common pleas of Fayette county. At that time, Thompson was in the hands of receivers appointed by the Fayette county court. The receivers were not made parties to the suit, and, no appearance being entered for the defendant, the judgments were taken by default.

On December 20, 1915, Markell sold the bonds above enumerated, which he held as collateral on said two notes, and bought them in for $5,000. In the first note of $30,000 there was authority given to sell

at public or private sale, without demand, advertisement, or notice. The second note gave power to Markell to sell and transfer at public or private sale. Notice by advertisement was given of the sale, which took place in the office of his attorney; no one but his attorneys and claimant being present, except a stranger from Uniontown, who said he did not want to bid. Mr. Markell, the claimant, being the only bidder, he obtained the securities for $5,000.

In May, 1917, a writ of sci. fa. was issued on the mortgage, and on August 2d, following, judgment entered thereon for $89,940, being a few days prior to the adjudication of the bankrupt. On September 5, 1918, the claimant went into the bankrupt court before Referee J. G. Carroll, claiming $80,000, with interest from October 10, 1914, less a credit of $5,000 as of December 20, 1915, being the date when the bonds were sold.

On August 2, 1919, Markell received on his mortgages $81,188.20, from the proceeds of the sale by the trustees of two of the tracts embraced in the mortgage. Afterwards the trustees, by proceedings in this court, sold the other tract embraced in the mortgage, free, clear, and discharged of all liens; the liens on the land being transferred to the fund, which is more than sufficient to pay the balance claimed on the mortgage, to wit, $19,600.39.

On July 15, 1920, the claimant, through his attorney, Mr. Higbee, appeared before William R. Blair, Esq., referee, and presented the balance claimed upon the mortgage. His position was that he was not claiming anything whatever out of the bankrupt's estate, but was sitting on his security; that, inasmuch as the land which constituted that security has been sold discharged of the lien, and the lien transferred to the fund, for the purpose of showing his lien on the fund, and its amount, he offered the mortgage, the proceedings on the sci. fa. resulting in judgment, and the petition of the trustees for confirmation of the sale which produced the fund in question, and the decree confirming the same.

To this offer the trustees made numerous objections, among others, that under the circumstances the sale of the securities was fraudulent, and the value of the same, which claimant thus received and holds, was much more than sufficient to pay the balance claimed. The referee overruled the objections and allowed the claim, basing his ruling on two grounds: First, that the bankruptcy court has no jurisdiction to hear the defense to the Markell claim; that by reason of the sale of the securities, Markell held them under an adverse claim of title, which, under the decisions of the Supreme Court in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and Mitchell v. McClure, 178 U. S. 539, 29 Sup. Ct. 1000, 44 L. Ed. 1182, must be tried in another forum; and, second, because all such matters, if proven, were matters of defense, and the judgments offered in evidence are conclusive against them.

The evidence shows that the securities sold were of the value of about $60,000. In addition, the testimony shows, whatever may be its bearing on the questions involved, that on the day the bonds were sold Markell wrote Thompson a letter, agreeing to "hold these bonds until

the 1st day of April, 1916, to be returned to you on payment of said notes, with interest"; that the notes were not paid within the time specified; that, after the adjudication in bankruptcy, Markell said he would deliver all the collateral he had purchased, if his claim and that of the bank were paid; that Mr. Scrugham, one of the trustees, stated to the attorney for the claimant that the trustees were in funds, and would pay the claim, if Markell would turn over the collateral in his possession.

The respective claims of the bank and that of Markell appear, from the records before us, to be separate and distinct. But, whatever may be the fact, the bank's claim having been withdrawn before the referee, the claim of Markell must be considered alone. The claimant having received on his loans $81,188 in money, and securities of the value of $60,000, or $40,000 more than the indebtedness, can he, under the facts stated, as against objecting creditors, get the decree of the court for the payment of $19,000 more? Some inexorable rule of law must be invoked, some insuperable barrier against the assertion of equities must be interposed, to sustain such a contention. Such barrier defendant's counsel finds in the alleged conclusiveness of the judgment obtained on the sci. fa. on the mortgage. The argument is: The claimant acquired a good title to the securities at the sale; that Thompson made no effort to impeach it, and thus in legal effect ratified it; that the judgment on the mortgage, entered before the proceedings in bankruptcy, adjudicated and forever barred all question which could have been raised as to the validity of the sale or the amount due, not only against Thompson, but against the trustees as well. He further asserts that Markell is not in the bankruptcy court, seeks nothing out of the fund to be distributed among unsecured creditors, but is merely asking payment of the lien on the fund which the trustees hold subject to its payment; that, title to the securities being held adversely to the estate, the bankruptcy court is without jurisdiction to try any question concerning it.

[1] On the question of jurisdiction, the cases of Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182, do not apply. The trustees are not making a claim to property adverse to the claimant. They are not asserting title to the collateral sold, attempting to recover it back, or to set aside the alleged illegal sale. They are simply setting up an equitable defense against the claim. They are asserting payment and asking a court of equity to refuse payment of a claim already paid in full.

The claimant is in the bankruptcy court when he presents his claim for payment. When he introduces his claim, he necessarily asks the court to adjudicate it, which involves the question of validity and payment. This is none the less true because he claims to have, in the records offered in its support, conclusive evidence of its validity and amount. Whether he has such conclusive evidence, either as to validity or amount, was a question for the referee to decide, and for this court on review. The referee held that, even assuming jurisdiction of the defense, the judgments conclusively barred all parties from defending.

Thus it is clear that the claimant was in the bankruptcy court, submitted his claim for adjudication, and succeeded in securing its allowance by the referee. Being in the bankruptcy court, a court of equity powers, which had jurisdiction of the parties and the subject-matter, it was his duty to hear any equitable defense offered to the claim, and to decree accordingly.

[2] The judgments on the notes, entered before the sale of the bonds, adjudicated nothing involved in this issue, and may be put aside. Whether the sale of the securities was legal depends on whether the pledgee complied strictly with the terms of the notes, which constituted the contract under which the pledge was sold; this because the pledgee is a trustee of the property pledged, first for himself to the extent of his claim, and for the pledgor for the remainder, if any. Cadwalader's Appeal, 64 Pa. 293; Sitgreaves v. Bank, 49 Pa. 359.

[3, 4] With the first note was $50,000 worth of bonds. There was authority in this note to sell publicly or privately, without demand or notice, and to purchase as any other bidder at any public sale. It also gave to the holder the "right to call for additional security from time to time in case there should be a decline in the market value thereof." While the second note, with $40,000 worth of collateral, gave the power to sell at private or public sale, it gave no power to the pledgee to become a bidder at his own sale. Without such power, he could not become a bidder at the sale. The law governing the pledge is local, and the law of Pennsylvania applies. Hiscock v. Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. "Authority to the pledgee to become the purchaser, must be given in very plain terms." Hamilton v. Schaack, 16 N. Y. Weekly Digest, 423.

[5] The bonds under both notes were sold in the office of the pledgee's attorney, there being present only his attorney, Mr. Mathews, the pledgee, and a third person, who did not desire to bid. Mr. Mathews was the auctioneer, and there was but one bid, that of the pledgee. In a private sale there is simply an agreement as to the price. In a public sale the price is supposed to be fixed, not by agreement, but as the result of competitive bidding. The principles governing a public sale are well set forth in Hibler v. Hoag, 1 Watts & S. 552, wherein the court says:

"In every sort of auction, there are either successive bids for the property, or successive offerings of it at different prices, in a way to promote competition. By the usual practice, the bidders successively bid more and more, until the highest point is attained. * * * In the instance under consideration, there was no bidding at all; the property being offered once and for all, to any one who would take it for the sum named. What else does the ordinary retailer, except that he does not proclaim his price aloud, or take the same measures to attract the public attention? * * * What, then, is understood by an auction, according to the usages of Pennsylvania? It is a sale by consecutive bidding, intended to reach the highest price of the article by competition for it; and such a sale the Legislature certainly had in its view."

If such standard were applied here, the sale would not meet the requirements of a public sale. If the sale was not in legal effect a public sale, then the pledgee had no right to bid. The sale would be illegal,

and pass no title, and the pledgee would be answerable for the securities illegally appropriated under it. But, assuming that the sale passed title, what then? Whether the price fixed by the bid is conclusive of the value of the property as against the pledgor is one thing, and whether it is conclusive of the value as against creditors is a very different thing.

[6] The trustee of the pledge must exercise good faith, taking no undue advantage of his trusteeship to his own benefit and the injury of others. In Re Mertens, 144 Fed. 818, 75 C. C. A. 548, Wallace, Circuit Judge, said:

"Doubtless the pledgee cannot avail himself of his authority, however unlimited, and sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose."

This was quoted with approval by the Supreme Court in Hiscock v. Bank, 206 U. S. at page 38, 27 Sup. Ct. 681, at page 684 (51 L. Ed. 945). In Pauly v. Trust Co., 165 U. S. 606, at page 620, 17 Sup. Ct. 465, at page 470 (41 L. Ed. 844), Mr. Justice Harlan said:

"That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor."

To the same effect is Dwight v. Singer, 27 Pa. Super. Ct. 119. In other words, the Golden Rule applies. If good faith is the test, how can it be found here in favor of the claimant, who acquired for $5,000, under the circumstances shown, pledged property of the value of $60,000, and seeks to assert his right against creditors injuriously affected thereby?

[7] But it is argued with great zeal that such defense existed when the judgment was taken on the sci. fa., and, not having been raised there, the door is forever closed; that the judgment adjudicated all questions that could be raised as to the validity or regularity of the sale, and is conclusive of the amount due the claimant, which necessarily involved the proper credit to be applied on the sale of the securities.

Here, again, is the failure to distinguish between parties and creditors. The creditors have had no day in court, no opportunity to be heard. As heretofore stated, the receivers were not made parties to the sci. fa., although the estate was in their hands, both when the sci. fa. was issued and when judgment by default was obtained. The trustees could not defend, as the proceedings in bankruptcy were not begun until after the judgment was entered. The trustees cannot be charged with laches when they defend at the first opportunity given them. What are the rights of creditors in a court of equity against another creditor, whose claim is tainted with fraud, actual or constructive, when judgment has been obtained thereon in a court of law? This was once a mooted question in England, but is so no longer, either there or here. In Cochran v. Eldridge, 49 Pa. 365, Chief Justice Woodward, in an able and scholarly opinion, traced the history of the growth in English jurisprudence of the power which a court of equity has to relieve against judgments at law, when fraudulently obtained, or where some strong natural equity can be alleged against them. He shows that from the time it first engaged the attention of English chancellors,

it met with violent opposition from common-law lawyers and judges, through the reigns of many kings, finally culminating in the famous controversy conducted by Lord Coke against, and by Lord Ellsmere in favor of, the chancery jurisdiction, the very point of which was whether a court of equity could give relief for or against a judgment at common law; that from the time that question was finally decided in the affirmative, such jurisdiction has been constantly exercised in England. He further shows, by extended citations, that the courts of this country have followed the principle, whether applied by courts of chancery as an independent jurisdiction, or by courts of law exercising equity powers.

[8] That a judgment may be attacked collaterally by a creditor represented by the trustee in bankruptcy is held in McNaughton's Appeal, 101 Pa. 550. The court there had refused the application of the defendant to open the judgment, but in distribution the court held that it was well settled that a collusive judgment may be attacked collaterally by judgment or execution creditors who would otherwise be defrauded thereby, citing many cases. In Re Phelps, 3 Am. Bankr. R. 434, it was held that this doctrine applies to all sides of the court, but with particular force to bankruptcy. To the same effect are In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74; Chandler v. Thompson, 120 Fed. 948, 57 C. C. A. 230; In re Davis, 174 Fed. 556, 98 C. C. A. 338. There a mortgage given by the bank was foreclosed and purchased by the mortgagee for costs, who later presented his claim for the full amount in a court of bankruptcy. The referee, finding that the real value of the security exceeded the debt and to allow it would be payment twice, refused the claim. This, on appeal, was affirmed by Judge McPherson, who in a clear opinion applied the well-established equitable principles above referred to.

As the record stands, it appears that the claimant here has been already much overpaid. The claimant makes his demand for further payment in a court of equity. This court will not sanction, much less lend its aid, in securing for him again that which he has already received. It follows that the order of the learned referee, allowing F. E. Markell the sum of $19,600.39, must be reversed; and it is so ordered.

ATLANTIC FRUIT CO. v. RED CROSS LINE.

(District Court, S. D. New York. September 24, 1921.)

1. **Admiralty ⇐=1—Not bound by strict rules of common law.**
   Admiralty is not bound by the strict rules of the common law, and not infrequently applies principles differing from those in other courts.
2. **Shipping ⇐=39—Performance of arbitration agreement is not condition precedent to libel.**
   Notwithstanding the more liberal rule adopted by the common law of England, and by several of the states, relating to agreements for arbitration, courts of admiralty in the Second Circuit are committed to the rule that the performance of an agreement to arbitrate contained in the charter is not a condition precedent to the right to maintain a libel for breach of the charter.

3. Admiralty ⇐1—May enforce rights created by state statutes.
In the absence of congressional action, a state law may, within certain limitations, give a substantial right of such a character that it may be enforced in a federal court of admiralty as well as in one of equity or of common law.

4. Admiralty ⇐26—State arbitration statute gives remedy not enforceable.
Laws N. Y. 1920, c. 275, making arbitration agreements valid and enforceable, and authorizing the staying of legal proceedings pending arbitration, does not confer substantive right, but merely a remedy for the enforcement of the right created by the agreement of the parties, and therefore it cannot regulate the procedure and practice of the federal court of admiralty.

In Admiralty. Libel by the Atlantic Fruit Company against the Red Cross Line. On exceptions to the defense that the charter required appellant first to resort to arbitration. Defense held insufficient.

Hunt, Hill & Betts, of New York City (John W. Crandall and E. S. Rapallo, both of New York City, of counsel), for libelant.

Loomis, Barrett & Jones, of New York City (Homer L. Loomis and Reginald B. Williams, both of New York City, of counsel), for respondent.

Julius Henry Cohen, of New York City, for Chamber of Commerce of State of New York, as amicus curiæ.

MACK, Circuit Judge. The libelant, as chartered owner, seeks to recover $4,500 alleged to be due under a time charter party of the steamship Runa. The respondent alleges by way of answer that, through ignorance of the lack of dispatch in the prosecution of the voyage upon the part of the master, it has already overpaid the libelant more than $35,000 for charter hire and expenses. The respondent sets up as a further defense the refusal of the libelant to submit to arbitration. The charter party has the following provision:

"That should any dispute arise between owners and charterers, the matter in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of two of them shall be final and for the purpose of enforcing any award, this agreement may be made a rule of court."

Libelant files exceptions to this defense, alleging it to be irrelevant, insufficient, frivolous, and evasive.[1]

[1] The proctors for the libelant explain in their brief that the libelant refused to submit the controversy to arbitration in the state court not because it wanted to escape from its agreement, but because it was desirous of having the suit brought in an admiralty court where the steamer Runa and her owners could be brought in on petition if the respondent should choose to file a cross-libel. The charter party between the libelant and the owners of the Runa is the same as the one between the libelant and respondent, and if there was any failure on the part of the master in proscuting the voyage with dispatch, and any negligence whereby the Runa was compelled to put into the Azores, the ultimate liability would be upon the owners of the Runa. The state laws, it is pointed out, do not and could not give any right of proceeding in rem against the Runa. It must not be overlooked, however, that in an action in personam in a state court, defendant's interest in a vessel is subject to attachment. Rounds v. Cloverport Foundry, 237 U. S. 303, 35 Sup. Ct. 596, 59 L. Ed. 966.

There was a tendency in the early common law to regard arbitration agreements with extreme disfavor as being contrary to public policy and as ousting the courts of their legitimate jurisdiction. But there has been a marked shift of judicial opinion in favor of arbitration, and, quite apart from statute, it is now settled, under the modern common law of England, that the parties to a contract can agree that all differences between them shall be submitted to arbitration and that arbitration of the question of liability, as well as of the amount of damage, may be made a condition precedent to the suit. Scott v. Avery, 5 H. L. Cas. 811, 8 Exch. 487; Trainor v. Fire Assurance Co., 65 L. T. R. 825; Collins v. Locke, 4 A. C. 74; Spurrier v. La Clocke, 1902 A. C. 446; Gaw v. British Law Fire Insurance Co., 1908, 1 Ir. R. 245; Woodall v. Pearl Assurance Co., 1919, 1 K. B. 593. Under the Common Law Procedure Act of 1854 and the Arbitration Act of 1889 (52 and 53 Vict. c. 49), power is given to the courts in their discretion to stay proceedings even where the agreement for arbitration does not make arbitration a condition precedent. Theretofore the courts had treated a mere agreement to arbitrate as a collateral undertaking giving rise to an action for nominal damages for breach but not barring a proceeding at law. Equity might refuse to grant relief to one who had failed to carry out his agreement to arbitrate (Waters v. Taylor, 15 Ves. Jr. 10; Harcourt v. Ramsbottom, 1 Jac. & Walk. 505), but because of inherent difficulties as to enforcement, as well as doubts as to the public policy, the Chancellor was not prepared to decree specific performance. Williston, Contracts, § 1421. After the decision in Scott v. Avery, supra, there was no need of resorting to equity to enforce the negative part of the covenant not to litigate before arbitration, because the remedy at law was adequate.

Viewing the question as one of principle rather than precedent, there is great weight in the following observation of Prof. Williston:

"Even the requirement of the form of a condition precedent as a requisite for denying relief by legal proceedings until arbitration has been had, savours of excessive technicality; for the nature of the provision necessarily indicates that the intention of the parties can be effectuated only by regarding the stipulation as a condition. A promise in a contract to give a bond for securing performance of other promises is held to create a condition precedent to liability on the other promises, because otherwise the stipulation would be ineffective. It is a condition implied in fact. Somewhat similar it may fairly be argued a provision for the arbitration of disputes under a contract can only be effective if the arbitration precedes litigation rather than follows it." Williston, Contracts, § 1724.

While there are American authorities that follow the British precedents apart from the statutes (see Williston, § 1721), there has been a tendency in some courts here, as there was even for a time in the lower courts in England, to follow the principles laid down, not by the House of Lords, but by the Exchequer Chamber in Scott v. Avery, supra, and to hold invalid and unenforceable agreements to arbitrate the question of liability itself as distinguished from the amount of the loss or damage. Meacham v. James. F. & C. R. R. Co., 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851; Hamilton v. Home Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708 (semble); Hamilton

v. Liverpool Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419 (semble); Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.) 222 Fed. 1006; Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935, 163 C. C. A. 185, Ann. Cas. 1918E, 491; (D. C.) 232 Fed. 403, affirmed on another point in 252 U. S. 313, 40 Sup. Ct. 332, 64 L. Ed. 586; The Eros, 251 Fed. 45, 163 C. C. A. 295; (D. C.) 241 Fed. 186. In the Atlanten Case, the Court of Appeals, while holding that agreements of this kind were unenforceable and would not be given effect as conditions precedent to legal proceedings, did not deny that an action for nominal damages might be sustained for their breach, as was done in Munson v. Straits of Dover S. S. Co., 102 Fed. 926, 43 C. C. A. 57; (D. C.) 99 Fed. 787. See, also, Matter of Berkowitz, 230 N. Y. 261, 271, 130 N. E. 288.

[1, 2] I recognize the growing sentiment in the commercial world, which is principally concerned in these matters, that the law ought not to intervene and render arbitration agreements ineffective (see Cohen, Commercial Arbitration and the Law), and the duty of courts, especially in matters essentially of procedure, to free themselves from anachronistic rules and precedents which are opposed to principles and standards of modern jurisprudence. It is true, too, that admiralty is not bound by the strict rules of the common law (Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501), and not infrequently applies principles differing from those in other courts (The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218; The China, 7 Wall. 53, 19 L. Ed. 67; The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954). Arbitration clauses are found in virtually all the standard forms of charter parties and are particularly favored by shipping men as a means of avoiding litigation in distant countries before foreign tribunals. It is, moreover, important that in these matters American maritime law should accord with that of the other great maritime countries. Nor should it be overlooked that an unfortunate situation is created if arbitration agreements can be repudiated in American courts while American citizens can insist upon their enforcement in their favor as a bar to litigation abroad. While for these reasons, it would seem most desirable that, at least in admiralty, a covenant to arbitrate should operate as in the nature of an equitable defense, nevertheless, sitting in this circuit, I am constrained to follow the decisions in The Atlanten and The Eros, supra, unless, because of the New York Arbitration Act (Laws of 1920, c. 275), making arbitration agreements valid and enforceable and authorizing the staying of legal proceedings, the law to be applied in this court in admiralty has been changed.

[3] It is undoubtedly true that within certain limitations, in the absence of congressional action, "a state law may give a substantial right of such a character that * * * the right may be enforced in the proper federal tribunal whether it be a court of equity, of admiralty, or of common law." Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624. It is on this principle that state pilotage laws have been sustained. Ex

parte McNeil, supra; Cooley v. Board of Port Wardens, 12 How. 299, 13 L. Ed. 996. It is on the same principle that the states have been permitted to create a lien on a vessel for repairs made and materials furnished in her home port, and such a lien may then be enforced in admiralty. The Planter (Peyroux v. Howard) 7 Pet. 324, 341, 8 L. Ed. 700, Fed. Cas. No. 11,207; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. Similarly, by state statute, damages may be made recoverable for death caused by a collision upon the high seas, either in the state court (Steamboat Co. v. Chase, 16 Wall. 522, 21 L. Ed. 369; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, 20 Sup. Ct. 824, 44 L. Ed. 921), or in admiralty (The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; The Bourgogne, 210 U. S. 95, 138, 28 Sup. Ct. 664, 52 L. Ed. 973). On the other hand, state workmen's compensation statutes and statutes of fraud have been held inapplicable in admiralty (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145; Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261; cf. Chelentis v. Luckenbach, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171), because these statutes were thought to impair the uniformity or to restrict the jurisdiction of the admiralty court.

[4] Arbitration statutes or judicial recognition of the enforceability of such provisions do not confer a substantive right, but a remedy for the enforcement of the right which is created by the agreement of the parties. The New York Court of Appeals has expressly so construed this statute. As Judge Cardozo states in the Berkowitz Case, 230 N. Y. 261, 270, 130 N. E. 288:

"The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies (Meacham v. Jamestown F. & C. R. R. Co., 211 N. Y. 346, 352; Aktieselskabet K. F. K. v. Rederiaktiebolaget Atlanten, 232 Fed. Rep. 403, 405; 250 Fed. Rep. 935; U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. Rep. 1006, 1011). The rule to be applied is the rule of the forum. Both in this court and elsewhere the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

It is thus evident that the New York Legislature sought to create no new substantive right, but only to provide in its own courts a new method of procedure for enforcing existing obligations. While it is true that, if substantive rights are created by a state statute, a federal court may enforce these even if it must depart in minor particulars from some of the rules of procedure outlined in the statute (Brine v. Ins. Co., 96 U. S. 627, 24 L. Ed. 858; Allis v. Ins. Co., 97 U. S. 144, 24 L. Ed. 1008; Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648), it is not within the power of the state to regulate the procedure and practice of a federal court of admiralty (The Lottawanna, 21 Wall. 558, 22 L. Ed. 654).

Moreover, the enforceability of the arbitration provision has not been made dependent upon its validity or its enforceability under the

laws of the state or country where the contract was made or where the arbitration was to be had; though valid and enforceable there, the federal courts in the Atlanten, Eros, and Trinidad, supra, have declined to effectuate it either by stay or dismissal of the libel. And this result was reached, not because it accorded with the public policy at that time prevailing in the state in which the admiralty court, a federal tribunal, sat, but because of what was assumed to be the public policy of the admiralty courts of the United States, the lex fori.

If now the admiralty courts sitting in the state of New York were for that reason to regard the New York Arbitration Statute as binding upon them, the result would be that a libel for breach of a maritime contract would be barred in those admiralty courts and not barred in the admiralty courts sitting in other states, a clear impairment of uniformity.

Whether it would be within the discretion of the federal court, sitting in New York or elsewhere, to stay its own proceedings, when, before the filing of the libel in admiralty, a proceeding is instituted under the New York statute to secure what is tantamount to specific performance of an agreement to arbitrate (see McClellan v. Carland, 217 U. S. 268, 281, 30 Sup. Ct. 501, 54 L. Ed. 762; In re Lasserot, 240 Fed. 325, 153 C. C. A. 251; Woren v. Witherbee Sherman & Co. [D. C.] 240 Fed. 1013), it is not necessary to decide on the present motion, which does not refer to any proceeding in the state court. Counsel, however, has handed me a copy of Judge Augustus N. Hand's opinion, remanding to the state court, whence it had been removed to this court, the matter of the petition of Red Cross Line for an order directing Atlantic Fruit Company to proceed to arbitration, decided June 20, 1921, and a copy of Judge Burr's opinion in the same case, after it had been remanded, directing the parties to proceed to arbitration (N. Y. Law Journal, August 2, 1921). Whether this petition in the state court was filed prior or subsequent to the filing of the libel in admiralty does not appear from the opinions.

It would not be proper for me on this motion to express any opinion on the validity of the proceedings in the state court or on the effect of an award by the arbitrators or a judgment thereon in the state court, if such award or judgment should antedate the decree in this court.

It suffices now that in my judgment, for the reasons heretofore stated, the state statute neither bars the libel nor justifies a stay of the proceedings thereunder.

MATTHEW SMITH TEA, COFFEE & GROCERY CO. v. LAMBORN & CO. PENNSYLVANIA MILK PRODUCTS CO. v. SAME. BRENNER & PERLHOFF CO. v. SAME.

(District Court, S. D. New York. July 18, 1921.)

Sales ⇐83—Seller held to have right to substitute vessel under contract for delivery of sugar.

Under a contract for sale of sugar by weight and quality, to be shipped from Java within a specified period by "steamer or steamers" to Philadelphia, "names of such steamers to be declared later," the seller *held* to have the right to substitute another steamer for one provisionally declared, where the substituted vessel sailed within the time specified.

At Law. Actions by the Matthew Smith Tea, Coffee & Grocery Company by the Pennsylvania Milk Products Company, and by the Brenner & Perlhoff Company against Lamborn & Co. On motions by plaintiffs to strike out defense. Denied.

These actions were brought to recover alleged damages for breach of contract, in that the defendant company, having declared the steamer Chifiku Maru, afterward declared the steamer West Cheswald as a substitute steamer, and tendered the sugar from the latter steamer. The defendants set up in their answers the reasons for the substitution, and showed that the earlier declared steamer had been obliged to put into Port Said for repairs, and that the shipment on the West Cheswald met the requirements and specifications of the contract. The plaintiffs moved to strike out the defense as insufficient in law.

Hunt, Hill & Betts, of New York City (Leavitt J. Hunt, of New York City, of counsel), for the motions.

Louis O. Van Doren, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). Under the state practice the motion would be denied, because none of the articles of the answer objected to could possibly embarrass the plaintiff on a trial. The state courts are always loath to undertake the reformation of pleadings, by paring and pruning, for the same reasons which would have deterred a lesser hero than the son of Alcmene from undertaking his twelve labors. However the plaintiff has presented the substance of the case upon this motion, and cannot complain if I decide it upon the merits against it.

None of the cases cited appear to me to touch the situation, except Thornton v. Simpson, 6 Taunt. 556, and two decisions in state courts upon this very contract. The whole case turns upon whether the defendant had the right to substitute the West Cheswald for the Chifiku Maru. I think that it had. The contract was for the sale of sugar by weight and quality, to be shipped from Java, August-September, 1920, by steamer or steamers to Philadelphia, "names of such steamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract." Now, it is clear that, without the clause just quoted, the seller would have been obliged generally to deliver. The sale was of fungibles, and not of a cargo, already loaded on a given ship. Moreover, the seller might withhold his

declaration of the steamers for as long as he chose. The case is not like Steinhardt v. Bingham, 182 N. Y. 326, 75 N. E. 403, where the declaration had to be within five days after bill of lading received. However, for as long as he did withhold, he remained generally liable. His declaration limited his obligation by excusing him in case the declared steamer should "fail to arrive." Hence the defendant is right in saying that the clause was for the seller's benefit only. Neill v. Whitword, 18 C. B. (N. S.), 435; Harrison v. Fortlage, 161 U. S. 57, 64, 16 Sup. Ct. 488, 40 L. Ed. 616. Clearly under this contract the buyer could have no interest in the particular ship on which the sugar arrived, so long as it was shipped "August-September."

I do not find it necessary to hold that, having once unconditionally declared a steamer, the seller could substitute another in every conceivable circumstance. For example, if the Chifiku Maru had been unconditionally declared, and then lost, it perhaps would be reasonable that the buyer should be excused, because otherwise the seller could hold him if the price fell, though he could not hold the seller if it rose. Yet, even then, it must be remembered that the contract does not read, "No arrival, no sale." It is specifically a release only of the seller. However that may be, the Chifiku Maru was not lost, and was in no danger of loss, and the case seems to be within Thornton v. Simpson, supra, as well as the decisions on this contract of Mr. Justice Sawyer and Mr. Justice Shoemaker. If these be right, the seller could substitute, unless because the West Cheswald being nearer port, was less likely to be lost. That appears to me a fanciful distinction, even assuming that the seller would not have had the right to put another cargo to the buyer, had the Chifiku Maru been actually lost. Hence I should think that, even if the seller had made an unconditional declaration, if Thornton v. Simpson, supra, be still law, he might substitute as he did, the buyer's position being in effect unchanged.

But the seller never made an unconditional declaration and the point does not arise. In his letter of August 30th, he expressly reserves the right to substitute another vessel. This he had the right to do, because he was only to declare "later." His letter amounted to saying that he then intended to ship by Chifiku Maru and Washington Maru, but might later decide to ship by another vessel. The buyer, having no right to a declaration at any given time, lost nothing by this. Nor did his letter of September 29th change this situation. The only "declaration" under the contract was on August 30th, "We hereby declare," etc. The second merely specified the time of sailing of the Chifiku Maru, already provisionally declared. It is to be read with the first letter, and is not to be taken as modifying its terms. The first alone was an act under the contract. On December 13th, when the substitution was made, I think the reservation contained in the original declaration was still in effect.

As to the custom pleaded in the twenty-ninth article of the answer, it seems to me so clear that it does not contradict the contract, that I need do no more than allude to it.

The defense is entirely good in law, and the motion is denied for that reason.

POTOMAC ELECTRIC POWER CO. et al. v. PUBLIC UTILITIES COMMISSION OF DISTRICT OF COLUMBIA et al.

(Court of Appeals of District of Columbia. Submitted May 2, 1921. Decided November 7, 1921.)

No. 3485.

1. **Public service commissions ⊂=25—Court exercises independent judgment as to law and facts.**
   Though Act Cong. March 4, 1913, creating the Public Utilities Commission of the District, paragraph 69, places the burden of proof upon the party seeking to set aside any determination of the Commission, the court, on bill to set aside the valuation of the Commission made under paragraph 7 of the act, must exercise its own independent judgment as to both law and facts so far as necessary to determine the question in issue, where the decision is challenged on the ground that it is based upon a mistake of law, is wholly unsupported by evidence, or is so clearly contrary to the weight of the evidence as to amount to an arbitrary exercise of power.
2. **Public service commissions ⊂=17—Increase in cost due to war should be considered in fixing value.**
   In fixing the value of property devoted to public use in 1916, the Commission should consider and give fair weight to the increase in values since 1914, resulting from the World War, and its decision fixing the value on July 1, 1914, adding thereto the actual cost of improvement subsequently made, must be set aside.
3. **Public service commissions ⊂=17—Utility entitled to fair return on value at time of use.**
   A public utility is entitled to a fair return upon the reasonable value of the property at the time it is being used for the public.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Bill by the Potomac Electric Power Company, and cross-bill by the Washington Railway & Electric Company, against the Public Utilities Commission of the District of Columbia and others, to review the findings of the Commission as to the value of the property of the plaintiff actually used for the convenience of the public. From a decree dismissing the bill and the cross-bill, the plaintiff and cross-complainant appealed. Reversed and remanded.

John S. Barbour, of Washington, D. C., Osborne I. Yellott, of Baltimore, Md., and S. Russell Bowen, of Washington, D. C., for appellants.

C. H. Syme and F. H. Stephens, both of Washington, D. C., for appellees.

ROBB, Associate Justice. This is an appeal from a decree in the Supreme Court of the District dismissing the bill of the Potomac Electric Power Company and the cross-bill of the Washington Railway & Electric Company, seeking a review of the findings of the Public Utilities Commission of the District of Columbia as to the value of the property of the Power Company "actually used and useful

for the convenience of the public." See act creating the Public Utilities Commission, 37 Stat. 974.

Paragraph 7 of the act provides that—

"The Commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation."

And paragraph 9 authorizes the Commission at any time, of its own initiative, to make a revaluation of any public utility.

Under paragraph 64:

Any public utility "being dissatisfied with any order or decision of the Commission fixing any valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme Court of the District of Columbia against the Commission as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of fixed in such order is unlawful, inadequate, or unreasonable."

It is further provided that all such proceedings "shall be tried and determined as are equity proceedings in said court."

Paragraph 69 places the burden of proof upon the party adverse to the Commission or seeking to set aside any determination, requirement, or order of the Commission, "to show by clear and satisfactory evidence" that the order or finding is "inadequate, unreasonable, or unlawful."

[1] Under our view of the case it is necessary to consider but two questions at this time, the first of which is as to the scope of the court's jurisdiction under the statute. Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908, involved a statute of Pennsylvania substantially similar to ours. There the Commission had found the fair value of the public utility and the trial court reviewed and reversed the finding and directed the Commissioner to fix the value at a substantially higher sum. The Supreme Court of the state reversed the decision of the trial court on the ground, as found by the Supreme Court of the United States, that the courts were without authority "to determine the question of confiscation according to their own independent judgment." In the Supreme Court of the United States it was said:

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. [Authorities.] In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The statute here under examination gives to the findings of the Commission prima facie effect, for it in terms places the burden upon the challenger or exceptant of showing by clear and satisfactory evidence that the findings are "inadequate, unreasonable, or unlawful." But where, as here, the decision is challenged on the ground that it is

based upon a mistake of law, or that it is wholly unsupported by evidence, or is so clearly contrary to the weight of the evidence as to amount to an arbitrary exercise of power, it is the duty of the court, under the rule announced by the Supreme Court, to exercise "its own independent judgment as to both law and facts," so far as it is necessary to determine the question in issue. The court's duty in such a situation is very carefully outlined in Int. Comm. v. Union Pac. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308.

[2] The second question relates to alleged errors in the rule adopted by the Commission in finding present value. The Commission found the fair value of the property, as of July 1, 1914, to be $10,250,000. The uncontradicted evidence showed that between that date and December 31, 1916, "the time of said valuation," there had been a sharp rise in values. On this point the Commission said:

"The European war did not commence until August, 1914. Its effect was first a depression of short duration, since which prices have advanced under this artificial stimulus with such rapidity and to such an extent as to prevent the formation of reliable opinion as to their permanency or future effect upon the industrial and economic situation in this country."

Appellants contend that the Commission as matter of law, in reaching a conclusion as to the fair value of their property on December 31, 1916, should have taken into consideration the increased value of that property, as shown by the evidence, between the earlier and later dates. This the Commission declined to do, but, taking for a basis the fair value of the property as of July 1, 1914, the Commission added the net additional expenditures on the property subsequent to that date, and entirely ignored the evidence as to the increase in the value of the property forming the basis of the valuation of July 1, 1914. In its decision the Commission said:

"Claims by the company for greater allowances in the reproduction estimate of the physical property were based largely upon the difference in prices created by extraordinary conditions which arose subsequent to July 1, 1914."

The trial court was of the view that the rule adopted by the Commission was correct. We are unable to concur in that view.

[3] The principal object of valuation, of course, is to provide a rate base, and the statute clearly contemplates that the commission shall ascertain the value as of "the time of said valuation," and not as of some anterior date. It has been ruled many times that there must be a fair return to a public utility "upon the reasonable value of the property at the time it is being used for the public." San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; Minnesota Rate Cases, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. In the present case the Commission, in effect, declined to find the present value of the property because not satisfied as to how long existing conditions would continue. In assuming this position the Commission must have overlooked paragraph 9 of the statute, authorizing it at any time, of its own initiative, to make a revaluation of the property

of any public utility. In our view, it was the duty of the Commission to have considered and given due weight to the evidence as to the then value of the property. As conditions changed and values were substantially affected, it would have been the further duty of the Commission to exercise its discretion and revalue the property. The conditions existing were world wide and, while their duration and future effect were problematical, there was no immediate prospect of a return to normal conditions. It may be suggested, although the point was not raised in the opinion of the Commission, that practical difficulties would have been encountered in an attempt to ascertain the increase in value of the property between July 1, 1914, and December 31, 1916. But there was substantial evidence before the Commission as to the rise in values, and a brief investigation would have enabled the Commission to determine, with substantial accuracy, how much in fairness should be added to the earlier valuation.

Much reliance was placed by the trial court upon the language of former Justice Hughes, as referee, in the case of Brooklyn Borough Gas Co. v. Public Service Commission (July 24, 1918); but we find nothing in the report, as we read it, justifying the action of the Commission here in entirely ignoring the evidence as to value at the time the finding actually was made. The contention there was that the rates should be based "upon a plant valuation simply representing a hypothetical cost of reproduction" at a time of abnormally high prices due to exceptional conditions. There is a very substantial difference between considering the present cost of reproduction as one of the essential and important elements in the determination of present value, and the acceptance, as conclusive evidence of such value, of mere expert estimates of present cost of reproduction.

We are of the view, therefore, that the present cost of reproduction is one of the necessary elements for consideration, along with other relevant facts, in fixing the fair and reasonable value of the property. The law deals with existing conditions and not with abstract theories.

It follows that the decree must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SMYTH, Chief Justice (dissenting). The court does not disapprove the findings of the Commission with respect to the value of the property on July 1, 1914, but holds in effect that since there was substantial testimony that the cost of reproduction had greatly increased between that date and December 31, 1916, the fair value of the property must also have increased, and therefore that the Commission erred in not giving effect to that increase. And it imposes on the Commission the duty of saying "how much in fairness should be added to the earlier [1914] valuation." But the Commission have already decided that nothing in fairness should be added—that the abnormal increase in the cost of reproduction caused by the World War was not an index of fair value. The Commission's notion of fairness upon the point is known now, for we cannot assume that it has changed, and

hence a direction to them to do what is fair in the premises is equivalent to saying that they should adhere to their former judgment. For this reason I think that there should be a definite instruction given as to whether the whole amount of this increase, or only a part, and if a part, what part, should be added. Suppose the Commission allow 10 per cent. of the increase, will the court approve their action or send the case back for retrial? To my mind the Commission are entitled to know just what the court's view is on the question.

But I do not think any part of the increase should be included, because, in my judgment, it has no tendency to indicate the fair value of the property. The increase is not due to any investment by the company, but results solely from the World War, which has demoralized market conditions and rendered property values unreliable. To accept such an increase as a standard of value would be to adopt an unstable measure, which would lead to injustice. "Prices advanced under the artificial stimulus of the European war," said the Commission, "with such rapidity and to such an extent as to prevent the formation of a reliable opinion as to their permanency or future effect upon the industrial and economic situation in this country." It was on prices thus advanced that the company based its reproduction cost, for its chief expert said:

"The prices adopted were those which, we believe, a competent contractor if asked to bid on the construction of such a property on July 1, 1916, would use in making his estimate of cost."

At that time the World War was at its height. Such a contractor would have to consider the great uncertainties attending the procurement of labor and material and the fluctuations in the cost of both, and to be safe would have to fix his prices enormously high. Could there be a more oscillating or unfair standard found? The Commission were right when they said:

"Under what principle of law or equity may purely speculative-cost increments be created and added under the very eyes of the Commission and during the very time of its investigations to find fair value?"

Mr. Justice Gould, who reviewed the case in the Supreme Court, said reproduction cost could be used where it "is determined as of a fairly normal period," but—

"It would lose all value if made as of an abnormal period when prices were abnormally low or high. To be of any assistance or real use it must be made as of a normal time and the unit cost applied thereto should extend over a sufficient number of years to show a normal trend of prices."

In harmony with this is the language of Judge Hughes as referee in the case of Brooklyn Borough Gas Company v. Public Service Commission, decided July 24, 1918. He wrote the opinion of the Supreme Court in the Minnesota Rate Cases, and may be regarded as an expert on the question. "To base," he said, "rates upon a plant valuation simply representing the hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public, and likewise to base rates upon an estimated

cost of reproduction far lower than the actual bona fide and prudent investment because of abnormally low prices, would be unfair to the company"; and condemned the contention that the cost of reproduction should be used as a standard, by saying:

"This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment, but upon a normal reproduction cost, in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law."

True, he was speaking there of the insistence that the cost of reproduction should be used as the sole test of value, but his argument would forbid the inclusion of any part of it. The point he was considering cannot be distinguished in principle from the one in the instant case.

The New York Public Service Commission, First District, No. 5, P. U. R. 930 denying the proposition that reproduction cost should be used, said:

"In the present juncture of universal upheaval, the application of such a postulate of evaluation to rate-making would lead to startling consequences."

"The cost of reproduction method," says the Supreme Court of the United States in the Minnesota Rate Cases, 230 U. S. 352, 452, 33 Sup. Ct. 729, 761 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), "is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

If, instead of the cost of reproduction being inflated, it was abnormally low as in the time of a panic, would it not be held unfair to value the company's property by such a standard? In the leading case of Smyth v. Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819, the value of the Union Pacific Railroad was under consideration for the purpose of fixing a rate base. The road was constructed a few years after the close of the Civil War when prices were abnormally high. The testimony in the case was taken in the wake of the panic of 1893 when the road could have been reproduced for about one-third of what it had cost. To take the cost of reproduction as the standard of value would be very unjust and the Supreme Court refused to do it, but it said that it should be considered with certain other factors named, without indicating what weight should be given to it or any of the others. The inference is that the triers of fact are to examine all these factors, allowing to each such effect, if any, as in fairness it should have in forming their appraisal of the value. The Commission here considered the reproduction cost and rejected it because of its abnormality.

The rate base to be fixed was not to be for a month or a year, but for a number of years, for it is not believed that it was the intention of Congress that, in view of the trouble and expense attending it, a valua-

tion should be made very often. If effect was given to the high reproduction cost prevailing in 1916, the patrons of the utility would be compelled to pay a rate which would afford a just return on the value fixed. This would be extremely unfair. It is said that if the cost of reproduction should drop, the Commission are empowered by the statute to revalue the property. True, but if the company issued stocks and bonds based on the value placed on its property by the Commission, we would have the same situation as existed in the Consolidated Gas Co. Case, 212 U. S. 19, 43, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. There a number of gas companies were authorized by the Legislature to consolidate, and the consolidated company was empowered to issue stock "not to be in amount more 'than the fair aggregate value of the property, franchises and rights of the several companies to be consolidated.'" The franchise was valued at seven millions of dollars. Stock was sold on the basis of the valuation. Many years afterwards it was sought to fix the value of the consolidated property as a rate base. It was urged that no allowance should be made for the franchise, but the court said that as it was valued by direction of the Legislature and stock purchased on the assumption that it was worth $7,000,000, the stockholders were entitled to receive a fair return upon it. Applying that doctrine to this case, would not the stockholders who purchased stock on the theory that the high value fixed by the Commission was the true value be in a strong position to say that they were entitled to a fair return on that value and that it could not be reduced if by doing so they were deprived of such a return?

The value placed on the property by the Commission finds strong support in the following facts: The Commission allowed $1,322,936.28 more than the amount found by their accountants as the historical cost of the property undepreciated; $1,037,486.91 more than their own finding of the same item of value; $1,137,157.09 more than the cost of reproduction in 1914, less accrued depreciation as found by their engineers; and $761,737.23 more than their own finding of the same element of value. They found the fair value of the property on July 1, 1914, to be $10,250,000, to which they added $761,737.23, the actual cost of additions made between July 1, 1914, and December 31, 1916, and fixed the value as of the later date at $11,231,178.43. The company claimed the fair value to be on December 31, 1916, $23,235,387. Compare this claim with what it said the property was worth in its reports to Congress before the investigation was entered upon. There is a report for each year running from 1906 to 1916. In the first the approximate value was placed at $8,500,000; in the one for 1912, at $13,000,000. These amounts improperly include the value of the Great Falls Power site, which is not being used for the benefit of the public, at $1,000,000, and $1,977,150.63, a book value, without any substantial basis, given to the property which the company acquired from the United States Electric Lighting Company. When these amounts are deducted from the figures of the 1912 report, a balance will be left of $10,022,850, which is $227,150 less than the July 1, 1914, value as fixed by the Commission.

After 1912 the reports did not contain a statement of the approximate value of the property, but did give its actual cost. The one for 1914 said it cost $11,655,070.30; the one for 1916, $12,510,344.10. Deduct from the last figures the two items which I have just said were improperly included in the 1912 statement, and which were included in these figures, and the balance would be $9,533,194 as the cost of the company's property according to its own statement made in 1916, the time when the decision of the Commission was rendered; or $1,697,984.00 less than the Commission allowed.

In view of the foregoing, I do not think the company has, in the language of the statute, clearly and satisfactorily shown that the finding of the Commission is inadequate, unreasonable, and unlawful, and hence I dissent.

WASHINGTON TERMINAL CO. v. CALLAHAN.

(Court of Appeals of District of Columbia. Submitted October 12, 1921. Decided November 7, 1921.)

No. 3481.

1. **Master and servant ⟸137(4)—Railroad liable for negligence of employees required to look out for safety of another.**
   A terminal company subject to Employers' Liability Act, § 1 (Comp. St. § 8657), whose rules required a signal foreman's helper to keep a lookout while the foreman was at work on a switch and to warn him, and also requiring the engineer and fireman to keep a lookout for men working on the tracks and to stop the train if they failed to get out of the way, is liable to the administratrix of a signal foreman who was killed because of the negligence of his helper and the engine crew.

2. **Master and servant ⟸278(18)—Evidence held to warrant inference of negligence of fellow employees.**
   In an action for the death of a signal foreman while he was working on a switch, evidence *held* to warrant the inference that his helper, who was killed at the same time, and the crew of the engine which struck him, were negligent in the performance of the duty imposed on them by the rules to look out for the foreman's safety.

3. **Master and servant ⟸216(6)—Railroad employee does not ordinarily assume risk of negligence of fellow employees.**
   Under the Employers' Liability Act (Comp. St. §§ 8657–8665), the hazard of negligence by fellow employees is not assumed unless a dangerous method of action or condition, not constituting a violation of the safety statute, has become established through such negligence, of which condition the injured employee had actual or constructive notice, but notwithstanding which he continued to work without complaining to the employer.

4. **Master and servant ⟸276(8)—Evidence held to sustain finding servant was killed by train while at work on switch.**
   In an action for the death of a signal foreman employed by a terminal company, evidence that the foreman was seen working on a switch just prior to the accident and was later found dead on the switch and under the train *held* sufficient to justify an inference that he was killed by the train while at work on the switch, though no witness saw the accident.

Appeal from the Supreme Court of the District of Columbia.

Action by Emma G. Callahan, as administratrix of the estate of Hugh R. Callahan, against the Washington Terminal Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

George E. Hamilton and John J. Hamilton, both of Washington, D. C., for appellant.

R. B. Dickey and Dan Thew Wright, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Plaintiff's decedent, Hugh R. Callahan, a foreman of signal helpers and maintainers, was killed while repairing a switch in the yards of defendant terminal company. From a judgment for damages defendant appeals.

It appears that, while Callahan with his helper was working on what is known as switch No. 137, they were run over and killed by engine No. 23, which was moving a train of empty cars from the union depot to the yards. There was testimony that the train was moving at from six to eight miles per hour, and that the bell was ringing. A train passing on a parallel track, the testimony showed, was making sufficient noise to confuse the workmen and to detract attention from the approaching train. Callahan, however, was there under rules established by the company for the operation of its tracks and switches within the yard limits. One rule required the signal foreman's helper to keep a lookout while the foreman was at work on the switch and to warn him of approaching trains. Another rule required both the engineer and fireman to keep a lookout ahead for men working on the tracks and switches and to stop the train if they failed to get out of the way. These rules were in the interest of the company. Trains were constantly moving backward and forward on these tracks and switches, and if a workman was compelled to keep a lookout for his own safety, he would get little accomplished.

[1] From the facts disclosed, the helper was undoubtedly confused by the noise of the passing train on the parallel track; but it appears that the engineer and fireman had a clear view of the track for a distance of 240 feet before reaching the switch where Callahan and his helper were killed. Callahan was relieved from keeping a lookout for approaching trains, since, under the rules, he could rely upon his helper and the trainmen to protect him. We deem it unnecessary, therefore, to analyze the testimony, since the accident could only have occurred through the negligence of the helper or the trainmen, or all. Their negligence is the negligence of defendant, for which it is liable. Employers' Liability Act, 35 Stats. L. 65, § 1 (Comp. St. § 8657).

[2] In the light of the rules under which Callahan was working, the jury was justified in finding that his death was occasioned by the negligence of his fellow employees. The engineer had a clear view of the track; and, if he failed to look for men working on the tracks, he was negligent, or, if he looked and failed to see Callahan and his helper, his observation was so careless as to constitute negligence. On the other hand, if the helper failed to see the approaching train, he was guilty of negligence in failing to perform the duty to which,

under the rules, he had been assigned. That he did not keep a lookout for the protection of Callahan is apparent from the fact that he, himself, was killed.

[3] No rule of assumed risk can be invoked for the relief of defendant company. In the light of the Employers' Liability Act (Comp. St. §§ 8657–8665), the hazard of negligence by fellow employees is not assumed, unless a dangerous method of action or condition, not constituting the violation of any statute enacted for the safety of employees, has become established through the negligence of a fellow employee or employees, of which the employee had constructive or actual notice, and, with such notice, he continued to work without calling the attention of the employer to the dangerous condition. Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. In the present case no dangerous condition or method of operating trains had been established, of which Callahan was required to take notice. Hence, assumed risk has no application.

[4] Contributory negligence and assumed risk being eliminated, but one question remains. Error is assigned upon the denial of defendant's motion for an instructed verdict. No witness was produced who actually saw the train strike the deceased. The record disclosed, however, that some time before the accident Callahan, in company with his helper, left the signal tower to inspect the switches. Just prior to the accident he and the helper were seen working on switch No. 137. He was later found dead on the switch and under the train pulled by engine No. 23. His tools were also on the switch where he was found. This was sufficient to justify the inference by the jury that while at work on the switch he was struck by engine No. 23 and killed.

The judgment is affirmed, with costs.

Affirmed.

NEWBERRY v. CENTRAL OF GEORGIA RY. CO.

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

No. 3726.

1. **Removal of causes ⟸118—That if made in state court it would have prevented removal not ground for refusing amendment.**
   It is not ground for disallowance of an amendment to the complaint in an action removed from a state court that, if made in the state court, it would have prevented removal, where by reason of diversity of citizenship, on which ground it was removed, the action might originally have been brought in the federal court.

2. **Limitation of actions ⟸127(5)—Amendment not barred by limitation as stating new cause of action.**
   Where the complaint in an action for personal injury by an employee against a railroad company stated a cause of action at common law, an amendment offered after introduction of evidence showing the fact alleging that at the time of the injury defendant was engaged and plaintiff was employed in interstate commerce, thus bringing the case within Employers' Liability Act (Comp. St. §§ 8657–8665), *held* not to state a new cause of action barred by limitation under section 6 of that act, but merely to amplify the cause of action originally stated and to relate back to the commencement of the action.

3. **Master and servant ⟸288(10)—Railroad telegraph operator's assumption of risk of unsanitary office held for jury.**
   Where the evidence showed that plaintiff, an employee of defendant railroad company as a station agent and telegraph operator, was sent to take charge of an isolated station with which he was unacquainted, where he arrived at night during a cold rain, that the office provided was a box car the roof of which leaked, and which was unprovided with fuel, and that as a result of his exposure during the night he suffered a serious impairment of his health, it cannot be held as matter of law that in taking up his duties as operator and assisting in the direction of trains he assumed the risk from such conditions.

In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Action at law by M. J. Newberry against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

For opinion below, see 271 Fed. 117.

Washington Moody of Tuskaloosa, Ala., for plaintiff in error.

R. B. Barnes and Jacob A. Walker, both of Opelika, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. The complaint of plaintiff in error alleges that on March 3, 1917, "defendant was engaged in operating a railroad in Tallapoosa county, Ala., and the plaintiff was on said date in the service or employment of the defendant as a station agent or telegraph operator at Slaughters," in the said county, and was required to work in a car, the roof of which was out of repair, in

consequence of which during a rain plaintiff in error became wet and was made sick, and his health permanently impaired. Negligence was also alleged for the failure to provide plaintiff in error with fuel. The case went to trial upon the plea of the general issue, with leave to give in evidence any special defense in accordance with the Alabama practice. The suit was brought in the state court, and removed to the federal District Court, because of diversity of citizenship. There was evidence to the effect that plaintiff in error had been employed as a telegraph operator by defendant in error for several years, and arrived at Slaughters after dark, and immediately took up his duties as telegraph operator; that the place provided for him to work was a box car; that it was raining when plaintiff in error arrived, the box car was leaking, the floor was wet, and the weather was cold; that, although there was a stove in the car, there was no fuel; that plaintiff in error was a total stranger; that he did not know whether there was any other house near by, and that he remained all night thus exposed to the rain and to the cold; that, as a result of his remaining in the box car under the conditions which existed there, he suffered very serious impairment of health. The chief train dispatcher of defendant in error testified that he had charge of the operation of trains running between Columbus, Ga., and Birmingham, Ala., known as the Columbus Division, and that the trains operated over this division were engaged in interstate commerce, and that plaintiff in error at the time he became sick from the alleged exposure was dispatching trains from Columbus to Birmingham. Thereupon plaintiff in error asked leave to file an amendment to the complaint, but did not withdraw the original complaint. The amendment set up no new facts, but only alleged that plaintiff in error and defendant in error were engaged in interstate commerce. Upon objection the court below refused to allow the amendment, and entered judgment for defendant in error upon a verdict rendered in response to a peremptory instruction.

The court based its action upon the grounds: (1) That under the complaint as amended the cause could not have been removed from the state court; (2) that the amendment set up a new cause of action, which was barred by the statute limitations of two years prescribed by the federal Employers' Liability Act (Comp. St. §§ 8657–8665); (3) and that plaintiff in error assumed the risk involved in using a leaking, wet, and cold box car as a telegraph office.

[1] 1. While it is true that, if the action had been brought in the state court, the case could not have been removed, yet plaintiff in error, because of diversity of citizenship, could have sued initially in the federal District Court. It is evident, therefore, that the court would not have lost jurisdiction of the case if the amendment had been allowed.

[2] 2. If the amendment stated a new cause of action, it was barred by section 6 of the federal Employers' Liability Act (section 8662), because the amendment was offered more than two years after the cause of action accrued. The same question was before the

Supreme Court in Seaboard Air Line Railway v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006, and it was there said:

"If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. * * * But, if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

In that case the complaint alleged:

That the defendant was operating "a line of railroad in Virginia, North Carolina, and elsewhere; that the plaintiff was in its employ; that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains; and that the injury was sustained at Cochran, Va., through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition."

It was held that the amendment did not allege a new cause of action, but merely expanded or amplified the original complaint. It was also pointed out in the cited case that the action was not based upon the laws of North Carolina, because the injury occurred in Virginia, and that the action was not based upon the laws of Virginia, because they were not pleaded; that the fact that it was alleged that the defendant operated its railroad in states other than Virginia was material only if the cause of action arose in interstate commerce, and therefore under the federal Employers' Liability Act. But these comments by the Supreme Court only go to show that it might be concluded that the railroad company was engaged in interstate commerce. However, under the terms of the act, it is inapplicable unless the employee is also "employed by such carrier in such commerce." The allegation of the complaint in the Renn Case was thus construed as stating that the railroad company was an interstate carrier, but there is no allegation that it was engaged in interstate commerce at the time of the injury. By a similar expansion or amplification of the original complaint in the instant case there is as much basis for holding that plaintiff in error, at the time of his injury, was engaged in interstate commerce, in view of the allegation that he was a telegraph operator. The testimony of the train dispatcher that plaintiff in error was engaged in assisting in directing the movement of interstate trains, was to be expected. It is doubtful if the train dispatcher of any railroad company and the operators under him are not constantly engaged in directing the movement of passengers or freight in interstate commerce. In one case at least it has been held that courts will take judicial notice that a particular railroad company is engaged in interstate commerce. Dingman v. Railroad Co., 164 Mich. 328, 130 N. W. 24, 32 L. R. A. (N. S.) 1181. It is also stated in 15 R. C. L. 1119:

"As courts take judicial notice of the leading geographical features of the country, and as the locality of important lines of railroad, once established, become as fixed and permanent and as well known as any other geographical feature, the courts will have cognizance of the directions, runs and locations of the important railroads within their jurisdictions," etc.

It is not necessary to go that far in this case, or to approve the views just stated. In Baltimore & Ohio Railroad Co. v. Smith, 246 U. S. 653, 38 Sup. Ct. 335, 62 L. Ed. 922, the Supreme Court affirmed a decision by the Court of Appeals of Kentucky. The petition in that case is set forth in Smith v. B. & O. Railroad Co., 157 Ky. 113, 162 S. W. 564. It alleged that the defendant, a corporation under the laws of Maryland and Virginia, operated lines of railroad in those states, in Pennsylvania and elsewhere, and at the time the plaintiff was injured operated trains between the cities of Lavenia and Layton; that plaintiff was a telegraph operator at Lavenia and was injured because of a defective handhold on a car. There were no other allegations that plaintiff and defendant at the time of the injury were engaged in interstate commerce. There, as here, an amendment was offered which pleaded the federal Employers' Liability Act after an action under that act was barred by the statute of limitations. On a second appeal, reported in 169 Ky. 593,[1] it was held that the original petition sufficiently stated a cause of action under the federal Employers' Liability Act, and that the amendment to the petition did not set up a new cause of action. In Railroad Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the plaintiff, in her individual capacity, sued to recover for the death of her son, which occurred while he was in the employ of the defendant railroad company as a locomotive fireman upon a train bound from a station in Kansas to a station in Oklahoma. The plaintiff pleaded the laws of Kansas. Upon plea that the cause of action arose under the federal Employers' Liability Act, plaintiff amended her petition by alleging that she had been appointed administratrix. It was held that the pleading of the Kansas statute was immaterial, inasmuch as the facts stated a case under the federal act; and it was further held that the amendment, setting up the right of the plaintiff to sue in her capacity as administratrix, did not constitute a new cause of action; and the case of Union Pacific Railway Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, relied upon by the court below and by defendant in error, is distinguished.

In Seaboard Airline Railway Co. v. Koennecke, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. Ed. 324, suit was brought by the widow and four children, and was based upon a South Carolina statute. The evidence having shown liability under the federal Employers' Liability Act, an amendment was asked and allowed. In that case this significant statement is made:

"The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect," etc.

Of course, a remedy provided by the federal Employers' Liability Act is exclusive, and it is clear that the act must be given effect whereever it comes into conflict with a right of action which would otherwise exist. But in this case plaintiff in error alleged a cause of action which exists under the common law, and in the absence of any

[1] 184 S. W. 1108, L. R. A. 1918F, 1205.

statute, state or federal. If the state of Alabama had never enacted its Employers' Liability Act, and if Congress had never enacted the federal Employers' Liability Act, plaintiff in error would nevertheless have been entitled to recover. If the facts pleaded did not fall within the purview of either statute, it was a matter of no concern to him. Cases are constantly arising out of the relation between railroad employees and the railroad companies which employ them, which are not remediable under either the express statutory provisions of a state or under the act of Congress, but only at common law or under the general principles of law universally recognized and enforced. Indeed, it was suggested in the argument of this case that the box car in which plaintiff in error was at work at the time he claims to have suffered injury did not fall within section 1 of the federal Employers' Liability Act, which creates liability for any defect or insufficiency in the "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." If that be true, it follows that it was error to hold the act of Congress applicable. We are of opinion, however, that the box car was a part of the "equipment," but that the amendment does not constitute a departure as defined in Railway Co. v. Wyler, supra, and as applied in the later cases in the Supreme Court above cited.

A plaintiff is not required to state under what law he brings his action, but is only required to plead facts which under the law—that is, any law applicable to the case—entitle him to recover. It so happens that in the case at bar the facts pleaded entitle plaintiff to recover at common law if they fail to come within the provisions of either the Alabama statute or the act of Congress. If in proof of such a case it develops that a statute authorizes a recovery upon the facts pleaded, in reason and in justice the utmost the wrongdoer is entitled to is to have the law made applicable by the statute given in charge to the jury. It would be manifestly absurd, and a contradiction in terms, to hold that a plaintiff cannot recover, because, forsooth, he has pleaded and proved a case for which the law provides he shall recover.

It is contended that it was within the discretion of the trial court either to permit or refuse the filing of an amendment to the complaint, which discretion is not reviewable unless abused. But the District Court, as shown by the judgment roll, refused to allow the amendment because in its opinion it was without jurisdiction or authority to do so. It is apparent that the court would not have disallowed the amendment if it had been of opinion that its discretion could be exercised.

[3] 3. We are of opinion that it was error to hold, as a matter of law, that plaintiff in error assumed the risk of injury to his health either by going to Slaughters or by remaining at work there in the leaky, wet, and cold box car which he used as a telegraph office. There was evidence that he went without any knowledge whatever of the condition of the box car. He had the right to assume that he would be furnished a safe place to work. Immediately upon his arrival, he proceeded to the work assigned him, as he was in duty

bound to do. The duties of a telegraph operator in directing or assisting in the direction of trains are important, and the failure to perform them may, and frequently does, result in collisions of trains and the consequent destruction of property, and injury and death. In the situation which confronted plaintiff in error it cannot be said, as a matter of law, that he should have neglected his important duties and have concerned himself instead about his own personal comfort, nor that a reasonable man would not have done as he did. Therefore the question of assumption of risk was for the jury to decide.

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

COMBS v. HALEY COAL CO.

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

No. 3455.

1. **Life estates ⟸8—Possession under dower right inures to benefit of remainderman.**

Where a son in the right of his mother went into possession of land which had been assigned to her as dower from the estate of a former husband, his occupancy inured to the benefit of the remainderman, and where continued for more than 15 years was sufficient under Carroll's Ky. St. § 2505, to cure by adverse possession, subject to the dower right, any defect in the title of the remainderman.

2. **Adverse possession ⟸62(3)—Possession adverse to landlord cannot be initiated without open renunciation of his title.**

One who entered into possession of land claiming under a dower right of his mother cannot change his possession to one adverse to the title of the remainderman without open and public renunciation of that title, and recording of a deed from another to himself while so in possession is not alone sufficient.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by the Haley Coal Company against H. H. Combs and others. Decree for complainant, and defendant Combs appeals. Affirmed.

A. F. Byrd, of Lexington, Ky. (C. W. Napier, of Hazard, Ky., on the brief), for appellant.

Wm. L. Wallace, of Frankfort, Ky. (Ed. C. O'Rear and Wm. L. Wallace, both of Frankfort, Ky., and P. T. Wheeler, of Hazard, Ky., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Joab Allen, shortly after coming of age, executed a contract to convey, to the Kentucky Coal Land Company, a tract of land situated in the mountain region of Eastern Kentucky. The Haley Coal Company, as grantee of the contract vendee, filed, in the court below, a bill for specific performance, and

it made additional defendants thereto H. H. Combs and his wife, alleging that they claimed some adverse interests, and asking that the plaintiff's rights be established as against them. The court below held that plaintiff's rights were superior to defendants', and granted the relief sought by the bill, which was subject to Mrs. Combs' conceded life estate.

Plaintiff's paper title is not clear. It is said to begin in a grant from the state to Stephen Napier, in 1844, but, as this grant is located by the surveyors, it covers only a portion of the land now in controversy. As located and as platted, it seems quite obvious that the description departed vitally from what Napier intended; but the present record affords no sufficient data for the correction of the error—if, indeed, it is at all capable of correction. The title is, also, as to a portion of the land, said to come through a survey by Nicholas Combs, in 1830, but its location is very uncertain. Whatever rights Nicholas Combs had came to Stephen Napier, in 1844. When Stephen Napier came to convey, in 1848, to Thomas Griggsby, he conveyed the property as described in his grant of 1844, and, also, some adjacent parcels, but did not, in terms, describe the tract he had received from Combs. It is the natural inference that he thought the Combs survey was included within his own patent. In 1854, Griggsby conveyed to Zachariah Campbell. He departed from the maze of courses and distances found in other conveyances, and described mainly by reference to water courses and ridges, in a way that is quite intelligible and that includes all the land in controversy—though we do not say that the boundaries are a "well-defined line," under the Kentucky adverse possession rule. This, however, is the end of the recorded paper title. True, the plaintiff in this case later obtained a deed from the heirs of Zachariah Campbell; but in order to overcome what otherwise might be the ripened possessory rights of Combs, plaintiff is obliged to derive its claim through long possession under Joab Allen; hence, the later deed from the Campbell heirs is not now important.

We say that the paper title stops with the deed to Campbell. There is, in the record, a title bond made by Griggsby to Owens, February 3, 1862, which probably covers, and by rather a vague description, the same land conveyed by Griggsby to Campbell in 1854, and an assignment of this bond from Owens to Campbell, October 8, 1863. There also appears thereon an assignment of "the benefit of the within two hundred acres" (the bond called for 600 acres) from Campbell to Emery Allen, dated February 11, 1862, before Campbell seemingly had any interest to assign. Nothing indicates that Griggsby had any title to convey to Owens, or that Emery Allen took anything by this assignment. However, so far as is important in this case, all parties claim under this Emery Allen. There is some rather persuasive evidence, also, of a title bond by Campbell to Allen, dated February 11, 1862, covering the entire of the same land conveyed by Griggsby to Campbell in 1854, and being, apparently, a different paper from the bond to Owens; but this evidence is not a wholly satisfactory basis

for establishing a paper title, and we do not determine its sufficiency. Emery Allen undoubtedly lived, about 1862, upon the larger description covered by the Griggsby-Campbell deed (not upon the portion now in controversy), and claiming to have a title bond from Campbell. Emery Allen died about 1862, leaving a widow, Margaret Allen, and one son, Sam Allen. Sam Allen died, about 1885, leaving a widow and one son, Joab Allen, then one year old. After the death of Emery Allen, and until about 1880, Sam and his mother lived upon parts of the larger tract and claimed ownership in the whole in the right of the Emery Allen estate. This seems to have been the neighborhood understanding, although the proof of actual possession and of the extent of the claim is somewhat vague. There is distinct evidence, however, that during this period there was some actual possession of the part now in controversy, by tenants under the Allen estate or Sam Allen, and there was no proof of any possession adverse to this claim. About 1870, the widow, Margaret Allen, married H. H. Combs, and he joined with his wife and stepson in this character of occupation and claim. About 1880, Combs and his wife moved entirely from the vicinity and lived upon other property belonging to him. Apparently, Sam Allen remained, and before and after his marriage in 1884 continued, until his death, the same character of occupation and claim to the entire Emery estate.

In 1891, Sam Allen's widow, then Mrs. Childers, and her husband and her minor son, Joab Allen, joined in a petition in equity to the Perry county circuit court, making Margaret Combs and her husband defendants. This petition alleged that Emery Allen died seized of several tracts of land, one of which seems to be the land conveyed by the Griggsby-Campbell deed. The petition further stated that this land remained the property of the estate and heirs of Emery Allen, and prayed that the dower of Margaret Allen Combs be set off and that subject thereto the dower of Mrs. Childers, as Sam Allen's widow, be set off, and that the remainder of the property be placed in the hands of a guardian to be appointed for the infant, Joab Allen. The records indicate that summons was served upon both defendants, and the judgment of the court recites that, "by agreement of the parties, it is adjudged" that the assignment of dower be made by commissioners to be appointed and that a guardian of Joab Allen take the remainder. The report of the commissioners shows that a tract which is generally identifiable as the land now in controversy was set off to Margaret Allen Combs for her dower. The description in the commissioners' report of the part so set off and called lot No. 1 is, in the main, simple and easily applied. If it were considered by itself, it is not certain that the lines would close; but the petition for assignment of dower and decree therefor and the commissioners' report constitute one record, and the tract intended to be lot 1 is easily identified all through, though with some variation in each place. Taking these together and giving reasonable interpretation to the words used, lot No. 1 is to be considered as extending from the named starting point up Lost creek, including all the

land to the top of the ridges on both sides to the field of an adjacent owner identified and described, and extending up both sides of Sixteen Mile fork, including all the land to the top of the ridges on both sides and from its mouth at Lost creek to the line of the specified owner next above on Sixteen Mile fork. This parcel, therefore, became a T, the part on Lost creek being the head and the part on Sixteen Mile fork the stem. We consider the boundaries thus established and described to be sufficiently well defined to meet the requirements of the Kentucky rule as to the constructive limits of an adverse possession. Mosley v. Kentucky Co. (C. C. A. 6) 259 Fed. 106, 112, 170 C. C. A. 174; Kentucky Co. v. Mineral Co. (C. C. A. 6) 219 Fed. 45, 133 C. C. A. 151. Further, although the commissioners' report is not shown to have been confirmed, and, if not, the proceedings were not sufficient to perfect a title, yet we think this partition record, remaining in the local courts, is sufficient to constitute, or be the equivalent of, the written instrument which will serve, under the Kentucky rule, to fix the extent of an efficient constructive possession based upon actual possession of parts thereof. See Mosley v. Kentucky Co., supra, 259 Fed. 109, 170 C. C. A. 174. The partition and assignment were matters of notoriety in the neighborhood at the time.

About 1895, Wade Combs, who was the son of Margaret Combs and her second husband, and who had been living for 15 years with his father and mother, on his father's place, was sent by them to take possession of, and occupy, in his mother's right, this lot No. 1. He established his residence there and lived there continuously until after this suit was commenced in 1913. There is nothing to indicate that, after the assignment of dower, Mrs. Combs made any claim to any interest in any of the other parts of the original estate, but she did claim, and her husband, for her, claimed, the possessory title to this portion as her dower. She at one time claimed to have completed the payments to Campbell after Emery Allen's death, which would have made her a creditor of the estate; but she seems never to have pressed this claim in any way, and it is not improbable that it was taken into account in assigning dower. Considering the acquiescence —if not the participation—of herself and her husband in the assignment of dower, the fact that she had been out of any actual possession for fifteen years, that she and her husband sent their son in from outside to occupy this lot No. 1 for her, and the absence thereafter of any claim by her to any other tract in the Emery Allen estate, we think it a proper conclusion of fact, as the district judge found, that Mrs. Combs, in 1895, entered into actual possession of parts of lot 1 and the constructive possession of all of it (except for interferences not now material), under the assignment of dower to her; that she thereby became, as to this tract, a tenant for life of the Allen estate, or, rather, of Joab Allen, the remainderman; and that Wade Combs entered and held only in his mother's right, and was therefore a subtenant under the remainderman. This conclusion is sufficient to require that the relief asked by the bill should be granted as against

Margaret Combs; indeed, she does not seem to be asserting any adverse right or claim.

[1, 2] Under statutes of limitation which bar entry upon real estate, or a suit to recover the same after a prescribed period of adverse possession, and where it appears that this adverse possession has been completed for the statutory period, it is the general rule that the one who has maintained this possession not only has a defensive right under the letter of the statute, but that this right has ripened into an affirmative title which either presupposes a grant, or, without such presumption, enables him to maintain ejectment or a bill to quiet title. Sharon v. Tucker, 144 U. S. 533, 544, 12 Sup. Ct. 720, 36 L. Ed. 532. The Kentucky statute upon the subject (section 2505, Carroll's Ky. Stat.) is of the general character of the statutes to which this rule has been applied, and fixes the period at fifteen years. Counsel upon both sides assume that this rule prevails in Kentucky, and we observe no reason why it does not. It follows that possession of lot No. 1 by Wade Combs, in his mother's right, and therefore in the underlying right of Joab Allen, for the period of 15 years ending in 1910, would fix in Joab Allen, and his grantees, a title sufficient to justify all the relief granted. It is not denied that the possession of Wade Combs during this period was sufficient in every respect, save one, to mature a title by adverse possession. It is said that in 1898 he ceased to hold under his mother and nephew, and began to hold adversely. In 1898 he and his father and mother became dissatisfied with their title. Since the cause was the making of surveys which indicated that the Napier and Nicholas Combs grants might not cover the Sixteen Mile fork property, this dissatisfaction does not indicate that they were claiming anything more than dower. Thereupon, with their consent, their son, Wade Combs, took a conveyance from one Miller, covering part of the land in dispute and said to be based upon an early Miller grant. This deed he recorded in 1904. He and his father now claim that possession thereafter was maintained under the Miller title and in hostility to the Allen title. They cannot be heard to make this claim. It is the familiar rule that a tenant may not dispute his landlord's title while he holds the possession which he received as tenant, and the Kentucky courts have repeatedly applied the corollary that in order that a tenant may initiate any possession adverse to the landlord's title, there must be an open and public renunciation of that title. Morton v. Lawson, 1 B. Mon. (Ky.) 45, 47; Farrow v. Edmundson, 4 B. Mon. (Ky.) 605; Chambers v. Pleak, 6 Dana (Ky.) 426, 428, 32 Am. Dec. 78; South's Heirs v. Marcum (Ky.) 58 S. W. 527. There was no such renunciation; on the contrary, the neighbors, many of whom were kin, testify that they never heard of any claim of title by Wade or his father, except that under the mother's dower, until about the time this suit was commenced. The recording of the deed in 1904 would be some evidence to support a claim of renouncement and public adverse holding, but it is not enough of itself to establish the necessary notoriety (Mosley v. Kentucky Co., supra, 259 Fed. at page 110, 170 C. C. A. 174), and

there is nothing else. The conveyance of the Miller title by Wade to his father, the moving onto the property by the latter, and making some measure of public claim, did not occur until 1914. It follows that what was done under the Miller title did not serve to interrupt the continuous possession being held for Joab Allen and which ripened into an unassailable title at least in 1910, and that it becomes unnecessary to consider the validity of the Miller title.

The same considerations dispose of the claims made by H. H. Combs under several patents issued to him at late dates and covering, respectively, several parcels within lot No. 1. He made no motion toward taking possession under these patents until 1914; it was then too late. It might be suggested that if these parcels were in fact vacant and had never been granted, as Combs claims, they belonged to the state, and the statute would not have run in favor of the Allen interests as against the state; but it is held in Kentucky that a grant by the state is not an assertion of the state's title, and that the statute of limitations continues to run in favor of the claiming occupant and becomes perfect against the new grantee, unless he moves before the statutory period expires. Beeler v. Coy, 9 B. Mon. (Ky.) 312, 315.

It is not easy to identify, in all respects, the property in dispute, as specifically described in the bill of complaint and in the decree, with lot No. 1 as we have interpreted its description; but the surveyors and the counsel familiar with the local topography have all assumed that substantial identity exists. No error has been assigned which would reach such a question; and it must therefore be treated as foreclosed, if it ever existed. We need not say that the fixing of the boundaries thus made by adopting plaintiff's precise description would not be effective as against an interfering claimant not a party hereto.

Upon the argument in this court, it was pointed out that, while the suit was pending in the court below, the plaintiff conveyed all its interest to another corporation in which it was merged, and therefore was not, at the time of the decree, the real party in interest. No such objection was made in the court below nor in the assignments of error or in appellant's brief, and it cannot now be considered. It seems apparent enough that the suit was in fact continued for the use and benefit of the grantee, and, if the parties desire, the court below will be at liberty to entertain a supplemental petition to put this fact upon the record and so to demonstrate that the grantee is entitled to the benefit of the decree.

The decree below is affirmed.

TROPE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1921.)

No. 5767.

1. **Indictment and information ⟸110(2)—Need not follow very words of statute.**
   An indictment alleging that defendant knowingly purchased military property of the United States from a soldier *held* sufficient to charge an offense under Criminal Code, § 35, as amended by Act Oct. 23, 1918 (Comp. St. Ann. Supp. 1919, § 10199), though it did not allege in terms that the property was furnished by the United States to the soldier.
2. **Army and navy ⟸40—Description of property in indictment for purchasing from soldier sufficient.**
   Description in an indictment of property of the United States alleged to have been unlawfully purchased as "three head of horses" *held* sufficient.
3. **Criminal law ⟸1036(8)—Question of sufficiency of evidence not reviewable unless raised in trial court.**
   The question of sufficiency of the evidence to support the judgment is not reviewable by the appellate court unless presented to the trial court at the conclusion of the trial.
4. **Army and navy ⟸40—Property in possession of soldier held "furnished" within meaning of statute.**
   Military property of the United States placed in the custody of a soldier is "furnished" to such soldier within the meaning of Criminal Code, § 35, as amended by Act Oct. 23, 1918 (Comp. St. Ann. Supp. 1919, § 10199), making it an offense to knowingly purchase property so furnished.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Furnish.]
5. **Criminal law ⟸1186(4)—Instructions not substantially erroneous not ground of reversal.**
   Where the instructions stated the substantial elements of the offense charged under Criminal Code, § 35, as amended (Comp. St. Ann. Supp. 1919, § 10199), it is not ground for reversal that they were based on the statute before amendment; Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), putting the burden on plaintiff in error to show that same substantial right has been denied.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Isaac Trope. Judgment of conviction, and defendant brings error. Affirmed.

John F. Thomas, B. M. Parmenter, and Stevens & Richardson, all of Lawton, Okl., for plaintiff in error.

Herbert M. Peck, U. S. Atty., and Benjamin L. Tisinger, Asst. U. S. Atty., both of Oklahoma City, Okl.

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

MUNGER, District Judge. The plaintiff in error, hereafter called defendant, was convicted on three counts of an indictment which charged that he purchased from a soldier military property of the United States. It is conceded by the district attorney that the indict-

ment was drawn on the supposition that the statute which applied to the facts was section 35 of the Penal Code as it existed prior to the amendment thereto by the Act of Congress of October 23, 1918, 40 Stat. 1015 (volume 2, Supp. U. S. Comp. Stats. 1919, § 10199). If any offense was committed it occurred subsequently to the taking effect of the amended section of the Code. Before the amendment the applicable portion of this section read as follows:

"And whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property whether furnished to the soldier, sailor, officer, or person under a clothing allowance or otherwise such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned not more than two years." Comp. St. § 10199.

The amendment changed this statute so as to read:

"And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both." Comp. St. Ann. Supp. 1919, § 10199.

[1] The defendant alleges that the court erred in overruling his motion to quash and his demurrer to the indictment and his motion in arrest of judgment, because the indictment stated no offense against the laws of the United States. The specific objections made are that no count of the indictment alleged that the property purchased had been furnished by the United States to any soldier or other person named in the statute for any purpose, and that the description of the property was too indefinite.

The statute as amended confines the offense to purchasers and pledgees of property furnished by the United States under a clothing allowance or otherwise. The indictment does not allege in exact words that the animals purchased were furnished by the United States to the seller, but it did allege that they were knowingly purchased from a soldier then enlisted and employed in the military forces of the United States and were military property and the property of the United States and were then in the possession of the seller for the use and benefit of the United States army. and this is equivalent to a charge that the United States furnished them to the soldier. Section 1025 of the Revised Statutes (Comp. St. § 1691) provides that no indictment shall be deemed insufficient by reason of any defect of form only which does not tend to prejudice the defendant, and section 269 of the Judicial Code (Comp. St. § 1246) provides that on the hearing of a writ of error in a criminal case, the court shall give judgment after an examination of the entire record without regard to technical errors, de-

fects, or exceptions which do not affect the substantial rights of the parties. It is not necessary that an indictment in describing a statutory offense shall use the very words of the statute, as any other form of expression is sufficient which fully describes the offense. Dunbar v. United States, 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. Ed. 390; Lemon v. United States, 164 Fed. 953, 957, 90 C. C. A. 617.

[2] The complaint of the description of the property purchased is that it is stated in the several counts as "three head of horses," "one horse," and "one mule," without setting forth the organization for which the animals were provided, or the branch of the army to which the seller belonged. The indictment need not plead the evidence, and, if the ultimate facts alleged do not sufficiently inform the defendant to enable him to prepare his defense, he may ask for a bill of particulars. The ownership of these animals was averred, and they were described as military property and in the possession of a named soldier on a named date, and the value was stated. It has long been settled under analogous statutes that a more particular description of the character of the animal cannot be required. Dunbar v. United States, supra; United States v. Claflin, 13 Blatchf. 178, 25 Fed. Cas. No. 14798; 2 Bish. Cr. Proc. § 700(1); Fleck v. United States (C. C. A.) 265 Fed. 617, 618. No claim is made that the defendant was not sufficiently informed of the charge against him to enable him to prepare his defense, and the indictment was definite enough to enable the defendant to use a judgment under it in bar of a second prosecution, and hence was not void for indefiniteness.

[3] Error is assigned because of the overruling of the motion for a new trial, and because the judgment was not sustained by sufficient evidence. These assignments present no questions for review, as has been many times stated by the decisions of this court, and no question of the sufficiency of the evidence was presented to the court at the conclusion of the trial, which was the proper step to require a review of its sufficiency by this court. Gillette v. United States, 236 Fed. 215, 218, 149 C. C. A. 405; Joplin & P. Ry. Co. v. Payne, 194 Fed. 387, 389, 114 C. C. A. 305; Prosser v. United States (C. C. A.) 265 Fed. 252, 253.

[4] The point urged is that the evidence did not show that any of these animals had been furnished to the soldiers. An examination of the evidence has been made, and it appears to have been shown that these animals were a part of the property of the United States, kept at the remount station at Ft. Sill, Okl., for the use of the army and were confined in corrals with other horses and mules which had been inspected and condemned as not suitable for army purposes. The regular procedure was for the proper army officers to hold a public sale of these animals, and pending such a sale they were kept and cared for by the soldiers in charge. The men who sold these horses were quartermaster sergeants on whom was placed the duty of caring for them. Under these circumstances the United States furnished the animals to the soldiers as the custodians and helpers in charge of them. The word "furnished" as used in this statute means provided

or supplied by the United States to any soldier or other person of the classes named for any purpose.

[5] A further complaint is made that the court's instructions were based upon the provisions of section 35 of the Criminal Code as it existed before it was amended. No exception was taken to the instructions which in any way raised the question, and no assignment of error presents it. It is not pointed out in what particular the jury was misled, and an examination of the instructions shows that the court stated the essential elements of the offense as charged in the indictment and as described in the amended statute as the facts that the jury must find before returning a verdict of guilty. The jury was instructed that the animals purchased must have been furnished to the army, and that the buyer must have guilty knowledge that the soldier had no right to sell them, and that these soldiers had no right to make the sales charged. Since the amendment of section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, § 1246) the burden is on the plaintiff in error to show from the whole record that some substantial right has been denied to him. Rich v. United States (C. C. A.) 271 Fed. 566, 570.

There appears to be no substantial error and the judgment will be affirmed.

ROYAL CO. v. TWEEDIE.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1921.)

No. 5782.

1. **Patents ⇐165—Claims are measure of right to relief.**
The claim of a patent is the measure of the patentee's right to relief.

2. **Patents ⇐167(2)—Claims to be construed in light of specification.**
The claims of a patent are to be construed in the light of the specification, and general language in a claim which points to an element or device more fully described in the specification is limited to such an element or device as is there described.

3. **Patents ⇐165—Patent is disclaimer as to anything shown and not claimed.**
A patent is a complete and legal notice to every one that he may freely use any combinations or improvements therein shown which are not clearly pointed out and distinctly claimed as the patentee's discovery or invention.

4. **Patents ⇐168(2)—Claims narrowed in Patent Office cannot be expanded to cover what was rejected.**
Where claims in an application have been narrowed by amendment to meet requirements of the patent office, the patentee cannot insist on a construction of the claims allowed which would cover what was rejected.

5. **Patents ⇐328—1,153,977, for boot-top, held not infringed.**
The Tweedie patent, No. 1,153,977, for a boot-top, as limited by the prior art and amendment of claims in the Patent Office, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit in equity by Charles Tweedie against the Royal Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 267 Fed. 224.

Amasa C. Paul, of Minneapolis, Minn. (Albert E. Hausman and Delos G. Haynes, both of St. Louis, Mo., and Fritz v. Briesen, of New York City, on the brief), for appellant.

James A. Carr, of St. Louis, Mo., for appellee.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from a decree holding valid and infringed United States letters patent No. 1,153,977, issued to the plaintiff on September 21, 1915, for a boot-top. 267 Fed. 224. The bill of complaint also charged infringement of patent No. 1,265,280, but this was abandoned at the hearing, so that we are only concerned with the validity of patent No. 1,153,977. The complaint contains the usual allegations and prayers for relief.

The answer denies all the material allegations of invention, and pleads failure of the plaintiff to comply with the provisions of sections 4900 and 4901, Rev. St. (Comp. St. §§ 9446, 9447), in failing to give sufficient notice to the public, by not having placed thereon or upon a large number thereof the legend "Patented," together with the date of the letters patent. It also pleads want of invention in view of the state of the art of manufacturing the article, and that it does not disclose any new or patentable invention, but merely involves ordinary skill and judgment.

The validity of the patent is also attacked for the reason that the thing patented by the letters patent had been described prior to plaintiff's alleged invention for more than two years prior to the filing of the application for said letters patent in a large number of patents set out in the answer; but in view of the conclusions reached it is only necessary to refer to Ludlow patent, No. 38,235, dated April 21, 1863; Ludlow reissue, No. 1567, November 10, 1863; McQuiston patent, No. 801,899, October 17, 1905; and Whitcomb & Dagget patent, No. 197,002, dated November 13, 1877.

The file wrapper shows that there were seven claims in the original application of the plaintiff. In claims 1, 2, and 3, it was claimed, a boot-top having the general lines of a high boot, the front and back seams being sprung in, whereby said boot-top is attachable to low shoes to simulate a high boot. In claim 4 he described his invention as:

"A boot-top for low shoes, said boot-top having its lower edges even with the sole of the shoe on each side, a strap connecting the lower edge of each side of the boot-top, and means for detachably securing the top front edges together."

Claim 5 described the boot-top "having its lower edges even with the sole of the shoe on each side, a strap connecting the lower edge of each side of the boot-top, said strap being shaped to fit the shank of the shoe, and means for detachably securing the top front edges together." Claim 6 describes:

"A boot-top for low shoes, said boot-top comprising full length quarters of unequal length from top to bottom, whereby their lower edges are even with the sole of the shoe on each side, a strap connecting the front portions of the lower edges of said quarters, said strap being shaped to fit the shank of the shoe, and means for detachably securing the top front edges of said quarters together."

In claim 7 he added to what is set out in claims 5 and 6, "a foxing of distinctive material from said top surrounding the heel portion thereof." This application was rejected, the examiner suggesting as a form for claims 1, 2, and 3:

"A boot-top to be worn over low shoes having full length quarters following the general lines of the upper portion of a high boot, the lower edges of said boot-top being arranged to coincide with the edges of the sole of the shoe around the heel and along the sides of the shank, and the front and back lower portions of said boot-top being sprung in a sufficient amount to make the lower edges of the boot-top closely hug the shoe, and a strap connecting the lower side edges of the boot-top, said strap being arranged to lie beneath and fit the shank of the shoe from the breast of the heel to the points where the lower edges of the boot-top intersect the edges of the sole."

Claims 4 to 7 were rejected upon Blumenthal (German), No. 19,971, Johnson (British), No. 308, Ludlow, April 21, 1863, No. 38,235, and Ludlow, November 10, 1863, No. 1,567, as not involving invention in view of the Ludlow patents.

Thereupon the application was amended by canceling all the claims and inserting as claim 1 the form suggested by the examiner. He added three other claims, which are practically the same, except that instead of "a low shoe" he uses the word "shoe." The examiner, upon the amended application, suggested that the word "boot-top" in claim 1, line 9, be changed to "such portions," upon the ground that the "springing in of the front and back lower portions do not cause the lower edges along the sides of the shank to closely hug the shoe, but only the lower edges of the portions sprung in." He also suggested some slight changes in claims 2 and 3.

Thereupon the application was again amended to conform to the suggestions of the examiner and the patent granted.

Ludlow patent, No. 38,235, shows a top-boot or "gaiterette or anklet, fitting over the shoe and ankle, similar to the one shown in the drawing, and inserting in the back seam a steel strip or spring, for the purpose of bracing or supporting the ankle; and, furthermore, for the production of a symmetrically fitting gaiterette similar to those now worn." Ludlow patent, No. 1,567, shows a gaiterette, shank strap cut in form of a trapezoid, two flaps, one on each side of the boot-top to which the strap is attached, so that "the lower edge of the gaiterette is drawn up tight to the surface of the shoe and held in close contact throughout * * * and the strap itself as well as the lower edge of said gaiterette are drawn up tight to the surface with which they are in contact * * * and the direction of the strain exerted by the shank strap on the edge of the gaiter, being at an obtuse angle with said edge, is capable of keeping the same close to the surface of the shoe, thus preserving the elegant appearance of the foot."

In these two patents may be found all that Tweedie has, except the extension of the boot-tops to a level with the sole of the shoe and the "spring" or scantiness of material at the lower part of the front and back seams.

Whitcomb & Daggett patent, No. 197,002, shows that the scantiness of material at the lower edges of boot-tops to make them fit closely was not new. There the patentees first placed their boot-top wet on a last or former. The last or former is described:

"This last or former is also so shaped, by curving inward at the bottom, as to give the gaiter, when fitted and dried to it, a similar inward curve or spring, which causes it to hug snugly to the foot of the wearer, especially over and around the instep and the heel. * * * The edges are then trimmed and stitched or bound, buttons attached to one end of the lap or fold, and button holes made in the other end of the lap, a strap affixed to go under the bottom of the wearer's boot or shoe, and it is ready for use. * * * Overgaiters made as described may reach above the ankle to the knee, or above, forming what is termed a 'legging.'"

Here is where Mr. Tweedie found his "spring" idea and its illustration.

McQuiston patent, No. 801,899, shows, what she calls, "a shoe-dress," which consists of cloth to fit over the shoe. In the application she says:

"The heel portion of the shoe-dress being left open to permit the heel of the shoe to protrude and the edge portion bordering upon said heel-opening being drawn in, to insure a close fit of the dress about the heel of the shoe and prevent its creeping."

Here we find a covering which extends down to the level of the sole at the heel and has the scantiness about it, and has the shank-strap in the shoe-dress, which Mr. Tweedie claims. This shoe-dress has a sole under and covers the front part of the shoe.

The examiner upon the first application said of claims 1, 2, and 3, "The only feature of novelty in these claims appears to reside in the 'sprung in' front and back portions of the boot-top," and that "these claims should include the strap passing under the shank, for without such strap the utility of springing in the front and rear portions of the boot-top would be lost." Therefore he held in effect that without the strap the invention would not be patentable.

An examination of Mr. Tweedie's patent discloses but one method of distinguishing his patented device from those described in the art before. The claims do not distinguish it, for they read "the front and back lower portions of said boot-top being sprung in a sufficient amount to make the lower edges of such portions closely hug the shoe," and this is no more than Whitcomb & Daggett did. Turning to the specifications to ascertain what the new principle was that Mr. Tweedie insisted distinguished his invention from other devices for the same purpose, we find therein that the "front and back seams are cut scant at their lower ends to throw the top in toward the last, and thereby the top does not fit the last exactly and cannot be pulled on to the last quite to its proper position. It will pull onto a shoe made on the same last, and will grip it in such a snug fit as to appear to be sewed thereto,

because it squeezes in the fore part of the shoe slightly where it would bind the last, and as it has the same lines as those of the shoe it appears to be a continuation thereof."

[1] It is well settled that the specifications and claims must be read to mean what they say, and the device which they specify must be shown to be the one which produces the effect which they specify. The object of the patent law is to secure to the inventor all to which he is entitled, and it is also intended to apprise the public of what is still left open to them. The claim must be the measure of the patentee's right to relief. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; McClain v. Ortmayer, 141 U. S. 419, 424, 12 Sup. Ct. 76, 35 L. Ed. 800; United States L. & H. Corporation v. Safety Car H. & L. Co. (C. C. A.) 261 Fed. 915, 918.

[2] The claim in the patent is the measure of the invention. The specification, however, may be referred to in construing the patent, and it is well understood that the claims are to be construed in the light of the specifications; while the specification is never available for the purpose of expanding a claim, although it may be referred to for the purpose of limiting it. Fowler & Wolfe Mfg. Co. v. McCrum-Howell Co., 215 Fed. 905, 909, 132 C. C. A. 143; Miller Rubber Co. v. Behrend, 242 Fed. 515, 521, 155 C. C. A. 291. To the same effect are Seymour v. Osborne, 78 U. S. (11 Wall.) 516, 20 L. Ed. 33; Mitchell v. Tilghman, 86 U. S. (19 Wall.) 287, 391, 22 L. Ed. 125; Bickford Co. v. Merrill (C. C. A.) 268 Fed. 540.

"General language in a claim which points to an element or device more fully described in the specification is limited to such an element or device as is there described." Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 449, 23 C. C. A. 223; Outlook Envelope Co. v. General Paper Goods Mfg. Co., 239 Fed. 877, 153 C. C. A. 5; Bird v. Elaborating Roofing Co., 256 Fed. 366, 167 C. C. A. 536.

[3] Section 4888, Rev. St. (Comp. St. § 9432), requires the inventor to particularly point out and to claim distinctly the part, improvement or combination which is claimed as a discovery. When, under this statute, an inventor has made his claims, he has thereby disclaimed and dedicated to the public all other combinations and improvements apparent from his specification or improvement which he claims as his own. While the patent is notice of the claims which it contains and allows, it constitutes an estoppel of the patentee from claiming under that or any subsequent patent any combination or improvement there shown which he has not clearly pointed out and distinctly claimed as his discovery or invention when he received the patent. It is a complete and legal notice to every one, notice on which every one has a right to rely, that he may freely use such improvements and combinations without claim or molestation from the patentee. McBride v. Kingman, 97 Fed. 217, 223, 38 C. C. A. 123; Valvona-Marchiony Co. v. Perella, 212 Fed. 168, 129 C. C. A. 24.

"The specification of a patent, which forms a part of the same application as its claims, must be read and construed with them, not for the purpose of expanding nor for the purpose of limiting or contracting the latter, but for

the purpose of ascertaining their true meaning and the actual intention of the parties when they were made and allowed." O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 344, 72 C. C. A. 304; Century Electric Co. v. Westinghouse Elec. & Mfg. Co., 191 Fed. 350, 354, 112 C. C. A. 8; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 853, 128 C. C. A. 53; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 406, 133 C. C. A. 310.

As the springing in by the scantiness of the material of the lower part of the seams at the front and back of the boot-top, to such an extent that the boot-top cannot be drawn on to the last on which the shoe is made, but can be drawn on and worn over the shoe made on the last, is the only characteristic of the defendant's patented device by which others can distinguish Mr. Tweedie's device from the springing in of such seams, and the lower edge of boot-tops not claimed in Tweedie's, it was indispensable to prove infringement that there should be proof that defendant's boot-tops had this characteristic.

The evidence fails to establish this characteristic in the boot-tops made or sold by the defendant. While the witnesses for plaintiff testify that his device is embodied in the defendant's boot-top, those for the defendant testify that it is not. No one testifies that defendant's boot-tops are so made that they cannot be drawn on over the last on which the shoes are made which they fit, and yet can be and are usable on the respective shoes made on such lasts. The evidence convinces that the boot-tops sold by the plaintiff and defendant alike are so large that they can be drawn on over such lasts. The testimony of Mr. Mahler, a witness for the plaintiff, on cross-examination, on that point, is that a "4C will fit a 3½D, a 4 and 4½C, a 4½ and a 5D and a 5A and a 5½A. The demonstration I gave just now is a 4C boot-top on a 5A shoe." He further testified that "under his instructions he advised his customers that such use could be made of the Tweedie boot-tops," and that "instructions to that effect were contained in a chart, furnished to all customers." This chart was also identified by the plaintiff as being furnished by his direction to customers buying his boot-tops.

If these boot-tops were made so small, scant, or light that they could be drawn on only over the lasts on which those shoes were made, how would it be possible that a 4C boot-top would fit a number of larger sizes of shoes?

[4, 5] In order to obtain the patent, plaintiff was required by the Patent Office to make it much narrower than in his first application he intended, which was done by filing an amended application narrowing it. He cannot, therefore, insist on a construction of the claims allowed, which would cover that which has been rejected. Hubbell v. United States, 179 U. S. 80, 21 Sup. Ct. 24, 45 L. Ed. 95; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; American Laundry Mach. Co. v. U. S. Hoffman Co. (C. C. A.) 271 Fed. 856. As narrowed defendant's device does not infringe it, as the evidence does not establish a scantiness or springing in the lower ends of the front or back parts of the defendant's boot-tops that would prevent their being drawn on to a last on which the respective shoes were made that they were designed to fit. As this

"springing in" described in the specification and claims, is a characteristic of each of the claims of Mr. Tweedie, none of them was infringed by the defendant.

The decree is reversed, with directions to dismiss the complaint.

PISTON RING CO. v. BURD HIGH COMPRESSION RING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2883.

Patents ⟸328—1,050,102, and reissue 14,644, for processes of manufacturing piston rings, held not infringed.

The Campbell patent, No. 1,050,102, and Lanchester reissue patent, No. 14,644 (original No. 1,118,784), each for a method of manufacturing piston rings, *held* not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Piston Ring Company against the Burd High Compression Ring Company and the Liberty Foundries Company. Decree for defendants, and complainant appeals. Affirmed.

The following is the opinion of Geiger, District Judge:

This case arises out of the Campbell patent, No. 1,050,102, issued January 14, 1913, upon an application filed March 7, 1912, and the Lanchester reissue patent, No. 14,644, dated May 6, 1919, the original being No. 1,118,784, dated November 24, 1914, upon an application filed February 7, 1910. Such patents deal with the art or method of manufacturing piston rings, though the Lanchester reissue aims to cover the product as well. Campbell states the subject-matter and object of his disclosure as follows:

"My invention relates to improvements in the art of manufacturing piston rings and like devices.

"The object of my invention is to provide means for producing a perfectly circular ring when finished and to provide an improved method of producing piston rings hereinafter more fully described and particularly pointed out in the claims.

"Heretofore it has been customary to produce a ring of somewhat greater diameter than the bore of the cylinder in which it is to be operated, then remove a portion of the ring at one side whereby the ring can be compressed into a less circumference or diameter and inserted in the cylinder, and by its resilience to yieldably engage the inner surface of the cylinder.

"This compressing of a normally circular ring distorts the same from a true circle and results in an imperfect fit in the cylinder. In attempting to obviate this difficulty, it has also been tried to make the ring with its inner surface excentric to its outer surface, the removed portion being taken from the thinnest part of the ring, whereby the ring when compressed remains more nearly circular. This, however, is not entirely successful and is also objectionable for the reason that the plane opposite surfaces of the ring are greater at one side than at the other, whereby it wears uneven, and also leaves a clearance between the thin side of the ring and the bottom of the channel of the piston in which the ring is held.

"My invention consists essentially of a novel method of manufacturing rings consisting of making a ring pattern of substantially the dimensions of the ring to be produced with the usual allowance for shrinkage and finishing and preferable concentric within and without; inserting in one side of this

pattern a segment of substantially the extent of the portion of the ring to be removed to provide for resilience and compression of the same; casting from this modified pattern; removing a portion of the casting substantially corresponding with the segment inserted in the pattern; compressing the casting to close the opening formed therein, and while so compressed, finishing the ring as preferred, as will more fully appear by reference to the accompanying drawings. * * *"

The patentee then elaborated with six figures as follows: and says that figure 1 represented the original pattern; 2 the opening, after being cut and expanded; 3 the segment or gap piece; 4 the casting made from a pattern; 5 the opening formed in the pattern by removal of a segment corresponding to 3; whereas 6 shows the compressed casting. The patentee further calls attention to these figures by noting that when the pattern is originally severed and expanded to receive the segment, it is thrown out of true "round," the degree depending upon the length of the expansion and the introduced segment, and that the casting made from such pattern will, after removal of a segment or gap, in like manner remain out of round. (See figures 2, 3, 4 and 5.) And he adds that "the casting will obviously be restored in a true circle when compressed to the same extent that the pattern was expanded, and thus be a perfect fit within the cylinder."

Upon this disclosure two claims were allowed, namely:

"1. The art of making piston rings and the like, comprising inserting a segment in a circular pattern, whereby the pattern is distorted from a true circular form, casting from said pattern, removing from said casting a portion substantially corresponding to the inserted segment in the pattern, compressing the casting to close the opening therein, and finishing the casting to the working size while in the said compressed condition.

"2. The art of making piston rings and the like, comprising forming a pattern to the working size and shape of the proposed ring with only shrinkage and finishing material added; inserting a segment in said pattern to expand and distort the pattern out of a true circular form, casting from said pattern a ring distorted to expand in the distortion of the pattern; removing from the casting a portion substantially corresponding to the segment inserted in the pattern, compressing the ring to close the opening formed by said removal and to remove the distortion therefrom, and finishing the ring to the working size and shape while thus compressed.

The Lanchester reissue patent, concededly covering the same subject-matter, is discussed by the patentee in the following language:

"The usual method of manufacturing such spring piston rings is broadly to take rings of metal of suitable width, cut out a portion of the circumference of the ring, compress the ring until the ends of the gap abut and turn or scrape the outside of the noncircular ring to circular form. It will be seen that this method involves at least three steps, thus: Initial turning of the ring, cutting the gap, and final turning or fitting. Now, it is found in practice that rings manufactured as above suffer from the defect that the pressure exerted by the ring against the cylinder in which it works is not uniform all around its circumference, and further that it requires much skill on the part of the mechanic and the expenditure of considerable time, to obtain a satisfactory fit of such rings in their working cylinders.

"The object of the present invention is to reduce the number of processes required in the production of spring piston rings and to obtain a high degree of accuracy without the employment of hand-fitting.

"The present invention consists in a method of manufacturing spring piston rings which includes the use of a former of such a noncircular figure, that a ring blank shaped from it, when reduced in circumferential extent by the removal of a portion of the circumference, becomes on compression a circular ring of the required finished size.

"The present invention also consists in a method of manufacturing spring piston rings which includes the use of a former having the noncircular figure obtained by cutting radially a circular ring, inserting a spacing piece in the cut to expand the ring.

"The present invention also consists in the method of manufacturing spring piston rings which includes the use of a former composed of a circular ring, this ring being cut radially, at one place and spring (sprung) open by a spacing inserted in the cut."

The method claims patented by Lanchester, two in number, are:

"1. A method of manufacturing spring piston rings consisting in making a former of circular form of the finished size of the piston ring, cutting such former in one place, holding such former open to a noncircular form by means of a gap piece, reproducing said noncircular form in metal and cutting a piece out of said metal ring of equal length to said gap piece as set forth."

Notwithstanding all testimony taken in the case, it is conceded that the alleged infringing method or process employed by the defendant is accurately set forth in the following answer to an interrogatory, a part of the record of the case:

"A brass drum is cast and turned of such diameter that its exterior circumferential length equals the length of the inner circumference of the cylinder plus the length of the metal excised when the piston ring formed from the pattern is split, plus such allowances as have to be made for shrinkage and finishing. It is then bored and a ring of the required width cut off to form the pattern. The pattern ring is then bent by hand to a generally slight elliptical shape. A test casting is then made from this pattern of the metal of which the rings are to be made. It is split at the point relative to the eccentricity of the ring where the piston rings to be manufactured from the pattern are to be split, and it is compressed by even pressure throughout its periphery to the diameter of the cylinder with which the rings are to be used, allowance being made for the stock to be removed in finishing. The outside periphery and sides are then ground to finished dimensions. A circular template is then used to determine how far out of round the test casting is when so finished and compressed. The amount of error in the casting and its location is noted and the pattern bent to correct the error. New test castings are made and this process of testing and correcting followed until castings of sufficiently correct shape are obtained."

In determining the question of infringement, the foregoing résumé of the specifications and claims of the two patents and of the method employed by the defendant suggests—and this suggestion is conclusively supported by reference to the other matters of record in this case—that certain steps in the making of piston rings are of quite ancient recognition of the art. Lanchester observes that broadly the usual method of making "spring piston rings" is to cut out a portion of the circumference, compress the ring until the ends abut, and "turn or scrape the outside of the noncircular ring to the circular form." This, so he says, involves at least three steps, initial turning of the ring, cutting the gap and final turning or fitting. The defect arising out of this method is unequal pressure in the circumference and a disadvantage in the requirement of "much skill on the part of the mechanic and the expenditure of considerable time to obtain a satisfactory fit of such rings in their working cylinders." His invention aims "to reduce the number of processes and by the use of a former of such a noncircular figure" that by removal of a gap piece it becomes on compression a true ring.

Campbell apparently sought to build upon an art wherein "it has been customary to produce a ring of somewhat greater diameter than the bore of the cylinder, * * * then remove a portion of the ring at one side, whereby the ring can be compressed into less circumference or diameter. * * *"

He observes that this process results in reducing a normally circular ring from its true circule resulting in imperfect fit, uneven pressure, and uneven wearing.

Now, if a comparison be made between the methods suggested by either Lanchester or Campbell and the method pursued by the defendant, the outstanding and initial distinction arises from the recourse by the defendant to the recognized initial step of the prior art, namely, the taking of a ring larger than the cylinder bore; and unless Campbell and Lanchester obtained a monopoly upon their introduction of the "out of round step," unless the defend-

ant is precluded from resorting to every method of taking an out of round step simply because Campbell and Lanchester disclosed the particular method of spreading the ring and inserting the gap piece, it cannot be said to infringe because they resort to a distinctive means of taking or producing such "out of round result." Therefore what breadth must attach to the particular method or step disclosed by Lanchester and Campbell, or either of them, to bring about either the "out of round" pattern or the "out of round" finished ring? It is my judgment that this question is clearly answered upon the record before us in such a way as at least to relieve the defendant from a charge of infringement.

The patents in suit as well as the literature, in evidence, dealing with methods of manufacturing spring piston rings, clearly show that the fundamental difficulty in the art arose out of dealing with the necessity of having a ring which on compression was circular, but which should, when in use, exert substantially equal pressure at every point of the circumference. In other words, the springing should, theoretically, be equal. Now, whatever may be said about this method or the appliances for practicing it, Ramsbottom, in the English patent issued in 1855, pointed out these matters just as clearly as they are found in the patents in suit or in any other literature of the art. The significance of his disclosure resides, not in the particular mechanical appliances used in practicing his method—those may be conceded to be crude and out of date—but he does show the "out of round" step and in language very much like that found in the patents in suit and in subsequent literature discusses the reasons for taking it. He not only perceived the necessity of taking the step, but disclosed a method. And it is interesting to note that in literature introduced into the record, e. g., the extract from "The Steam Engine" by Holmes, published in 1893 (see printed record in this case, page 141), the commentator quotes Ramsbottom and apparently aims to reproduce Ramsbottom's disclosure in respect to the "out of round" step. In this connection it is interesting to observe the identity in the figure (see pages 140, 141) and figure 5 of Campbell's patent, both of them disclosing the finished ring uncompressed and "out of round." When, therefore, these features of the art which appear so clearly and without contradiction are pressed, it follows necessarily that whatever credit be given to Lanchester and Campbell they were not in a position of claiming broad novelty because of conception of the "out of round" idea, and its introduction at some point or other as a step in making a spring piston ring. On the contrary, they must be limited to a disclosure of a method involving a step patentably novel over the other methods in the art disclosing application of the identical "out of round" conception. That this was the view taken by the Patent Office upon the original Lanchester application seems quite clear upon consulting the file, wherein appears the insistence upon the part of the examiner that clearance and particularity be required in description and definition of the spreading of the ring and the insertion of the gap piece—the examiner apparently being unwilling that any equivocal term—in short, any term except "gap piece" be used for the purpose of description. In that connection, and after repeated rejections because of the insertion of new matter by the applicant, the examiner, on October 21, 1912, dealt with the whole matter—arising upon the claims 1 and 2—in the following language:

"Claim 1 is objectionable in that it defines the result of the expression 'a noncircular annular figure.' The true invention as attempted to be set forth in this claim would appear to be the *method* of making the particular figure, i. e., the noncircular annular figure.

"Claim 2 is rejected on Bussey of record. This claim is no more than the recitation of an old method of producing a shape from a specifically shaped former. The invention would appear to be in the *method of making the former*." (Italics ours.)

What has been just noted is further strikingly supported by the file history upon Lanchester's reissue application, when the examiner having observed that the specifications provided as a step in the method of ascertaining the size of the gap, "calculation" as well as experiment, wherefore, the "product

claims" necessarily enabled making the product by a method not involved in the "method claims," and directed the cancellation which was acceded to. This recognition by the examiner is in coincidence with the suggestion contained in the Ramsbottom patent, namely, that although the method described proceeded upon an experimental basis and is sufficiently correct for "practical" purposes, "it may also be determined mathematically so as to be theoretically correct." This brings us to a comparison of what is claimed in the patents in suit as the novel method, and as such the subject-matter of the patent, with the defendant's processes.

Undeniably, the "out of round" idea was old and the question is therefore squarely presented: Did Lanchester or Campbell by obtaining a monopoly upon the method of cutting a gap, inserting a gap piece, thereby producing the "out of round" condition, preclude the defendant from manually pressing a circular ring into slight generally elliptical form. If so, what effect is to be given to the recognized conception of producing an "out of round" shape disclosed by Ramsbottom? Certainly, the step followed by the defendant, when compared with Ramsbottom, is just as distinctive, as a method, as is that pursued by Lanchester or Campbell. If it be true, as the latter seemed to indicate, that their method insures with greater certainty the perfect circular form or compression and greater equality of expansion, it is apparent that the Patent Office conceived its novelty to reside in this, that they took, initially, a ring of the precise diameter of the cylinder, or of the finished ring, spread it by means of a gap piece, for pattern purposes, with the intention of removing from the cast "out of round" ring an equal segment, so that, upon compression, the ring resumes the original perfect circular shape. No matter what confidence the defendant may have in the efficacy of its method, it certainly is sufficiently variant from the particular steps or method described by the patents to suggest that it cannot have the merit of the patent method if the latter has what is claimed for it. That is to say, taking a larger ring, manually pressing it into elliptical form (slight or general) cannot be as certain as the method of inserting a gap piece of predetermined length (either upon experiment or by calculation); and further prosecution by the defendant of its method in cutting out a segment, testing out successive patterns, cutting and trying, is certainly not only at variance with what is claimed by the patentees in respect of their particular method practically insuring certainty of result, but is a recurrence to old art practice. The patents in substance claim that by taking a ring of the exact size, and spreading it, the later removal of the segment from the cast furnishes the condition for return, on compression to the perfect circle; and that, as I understand, embodies the claim of novelty. Therefore the whole matter comes back to a consideration of the possibilities of any breadth of disclosure or claim on the part of Lanchester or Campbell, especially in view of the inherent quality of "out of roundness" in spring piston rings—and that implies the necessity at some stage of manufacture of introducing the conception either in a pattern or in the ring itself—and in further view of the recognition by the patentees themselves of diversity of method. Putting it in another way: If Lanchester and Campbell embody the defendant's process upon the theory of the equivalency, why should not the disclosure of Ramsbottom be entitled to even greater range of equivalency, and therefore dominate and destroy the patents in suit? It is to be noted, of course, that the patents in suit cannot be sustained, indeed it is not attempted, as disclosing novel methods of casting from patterns. Any consideration leads to the peculiar step introduced to accomplish the "out of round" conception or idea in making either the ring or the patern, viz., by the basic splitting of a ring and inserting a gap piece to spread. No consideration can deal with this other than as a different way of accomplishing the same result as was disclosed in 1855. Indeed, it is difficult to avoid the conclusion that in splitting the ring and inserting a gap piece, the "out of round" step is taken in a manner quite equivalent with that of putting weights or subjecting the sides of the ring to a stress which will bring them into a permanent noncircular form—and, apparently, Ramsbottom disclosed this as a method of making either the ring itself or a pattern or former.

The general conclusion seems inescapable that Campbell and Lanchester, jointly or severally, are entitled to no credit save such as may arise upon the effort in disclosure of a new method, which, on the face of their patents and in view of the art, if novel, is limited to a means of accomplishing the "out of round" purpose through a pattern formed by splitting a ring and inserting a gap piece; that defendants' method is entirely distinctive and, in so far as it involves the "out of round" conception at some stage, does not infringe plaintiff's patents.

This interpretation which must be brought to the patents in suit furnishes a sufficient basis for disposing of the case upon the issue of noninfringement. But upon such interpretation, when taken in connection with evidence about to be referred to, the case presents so clearly the question of validity of the patent that it is deemed proper to determine such issue also. There are in evidence copies of what has been referred to as the "German" article, stipulated to have been published in a periodical whose translated title is "Chronicles of the Association of German Engineers," published February 16, 1901, and March 16, 1901, two issues, "Printed publications published in Germany and a printed copy of each of which issues was received and catalogued in the John Crerar Library, Chicago, during the year 1901," and presumably since such time remaining in the files of said library open at all times to the public.

This article is relied upon by the defendant as a foreign publication adequate to defeat the patents in suit. The publication gives it a status as a publication of its subject-matter, and the only question is that respecting effectiveness of the disclosure therein contained. A translation by a skilled engineer was brought into the case, and, after somewhat exhaustive cross-examination of the translator, the correctness of such translation is not open to question.

In my judgment, the significance of the article is twofold:

First. The comprehensiveness of its recognition and discussion of the art, notwithstanding its publication more than nine years before the Lanchester patent was originally applied for, thirteen years before its issue, seventeen years before reissue, eleven years before the Campbell patent was applied for, twelve years before its issue.

Second. Its disclosure of the identical methods claimed in each of the patents in suit.

For the purpose of considering the article, in comparison with the statements contained in the patents in suit with the art as exhibited in the testimony of this case, extended excerpts may be made:

"Very exceptional demands are placed upon the tightness of pistons by the high pressures in the modern gas and steam engines. But although all sorts of varieties of rings have been invented, they were unable to replace the old well-known spring rings made of steel or cast iron. The simple and cheap manufacture, combined with the good behavior in service, assigns to these rings also in the future a most important part among the piston rings, and there exists therefore a well-founded reason to busy ones self more intimately with their calculation, construction and the method of machining them.

"Ordinarily spring rings for a diameter D of a cylinder are produced by first finishing a cylindrical ring for an outside diameter of for inst. D–D/30 3 mm, then cutting a piece out of the circumference of the ring amounting to about D/10 then bending it together and then finishing it in its bent condition on the inside and outside. Similar at least sound the instructions, which the designer gives to the shop and the exact procedure is generally left to the latter.

"However, this manufacture is by no means as simple as it might appear from such a short instruction; because it cannot simply be expected that a ring manufactured in such a way, and brought into a corresponding cylinder, would really be perfectly round, i. e., that it would at every point be in contact with the cylindrical surface and still less that it would be so with a uniform surface pressure.

"To attain the latter end, some shops have the custom to give the crude ring castings an oval form, composed approximately of two half circles,

which are removed from each other for a small distance a, thus forming approximately an ellipse with a as the distance between the foci. This elliptical ring is cut open at a terminal point of its smallest diameter and is then treated in a way similar to that above referred to. It approaches already more the condition of equal surface pressure.

"The purpose of the subsequent considerations is now before all to establish the conditions for the original form and for the machining of the piston rings in such a way that the rings, when executed accordingly, will subsequently in the cylinder touch everywhere and with the same predetermined pressure and will therefore justify the expectation of the best possible tightness and an uniform radial wear of themselves and the cylinder. The uniform radial wear of the cylinder is of greatest importance because it permits without difficulty to again obtain a good tightness, if the used rings are exchanged in time against new round ones. One should not rely upon the gradual improvement of tightness of imperfect piston rings by means of the wearing down of such points which in the beginning are along in contact with the cylinder wall. Experience shows that such rings are radially compressed by the rapid increase in pressure in the neighborhood of the dead center positions of the piston, and that they therefore soon lose their elasticity and become unserviceable in all cases where they are not built extraordinarily strong or where the pressure which prevails behind the pistons is not also admitted to underneath the rings, whereby a strong friction and wear would be caused.

"Incidentally in the course of the consideration a method will be found by which the exact form of the rings can be found in a very simple way without any figuring. * * *

"Constructing and Machining Piston Rings of Uniform Thickness. * * *

"For the purpose of machining about 2 to 6 mm. have to be added on the inside and outside to the thickness of the crude ring casting depending on the diameter.

"Theoretically now the machining would best be done by producing the exact inside and outside form of the finished uncompressed ring from the crude piston ring body by means of a lathe built for copying or still better by means of a copying, milling machine because the latter makes better copies on account of the slow advance of the cutter. The ring body is thereby equipped with cast-iron lugs to make it easier secured in place, and it should not be used to the full extent of its height in order to have the best possible homogeneity of material. This method would require before all a very accurate template and for the proper machining of rings of various size a copying milling machine, which would allow with a single template to produce geometrically similar bodies of different size. The individual rings would afterwards be cut off from the ready finished oval cylinder and the correct piece cut out at point 1 of Fig. 5.

"However in case that such a special machine is not available for the finishing of the piston rings, they should be cut off in correct width from the ring body which is cast with the smallest possible additional thickness. When doing this the one front surface of the rings can be correctly machined before cutting a ring off while the second is secured subsequently exactly vertical to the cylindrical surface, if needs be by turning the ring around and reattaching it to the lathe. Thereupon the necessary cuts have to be made at point 1 of Fig. 5, which can be done in the simplest way according to Fig. 7, or according to Fig. 8, in case the rings shall overlap. The rings are now to be pressed together (usually by means of a steel band) and to be machined in the compressed state first inside and then outside. * * *

"From the same line of thought, which has led to equation (62), results also a very simple method by which a sufficiently correct form of the piston ring in the uncompressed state can be obtained in a practical way, without much figuring.

"Namely, if one imagines a closed ring of a thickness h, figured acc. to equation (15) and finished in circular form with the diameter 2 ra of the corresponding cylinder, and cut open at a point 1 1, (the cut having the width of the saw blade) and tangential forces Q (Fig. 9) so attached at the

point of cut, that the ring is bent open, then the originally circular ring will with great approximation now assume the form, which is evolved, when designing the ring by way of marking down the changes of the coordinates of the center line. These forces Q would bend the ends of the ring apart for 2 A/11 T+S. The forces Q can therefore as regards their effect be replaced by bending the ring open and wedging a piece of the length 2 Ay/11+S=/12 to 0/8 between its ends.

"In this way it would be very easy to find the form of the ring for the drawing for the pattern. If it is intended to use the thus bent open ring itself as a pattern, it is at the time of machining the closed ring to its circular form necessary to make and in view of shrinkage appropriate, addition to the inside and outside for the later machining. The piece which is to be inserted is given the same length 2 Ay/11+S and it is perhaps formed so as to overlap for the purpose of riveting it on."

"Rings of smaller diameter must for this machining receive an addition, which is important in proportion to their thickness, and they suffer therefore a considerable strain, when bent together in the crude state. With small diameters therefore attention has to be paid to the correct construction of the ring and the careful manufacture of the pattern and the casting, in order to have the ring assume already an almost perfectly round form, when it is bent together in its crude state.

"Neither would it be recommendable, to finish such a smaller ring completely on the inside and only then to begin the machining of its outer circumference; it is rather more correct, to take off small cuts alternately on the inside and outside. Thus of course the cost of manufacture is increased. * * *

"Cast-iron piston rings of 30mm thickness for a cylinder diameter Da=1000 mm are manufactured by the method formerly described from a pattern, which has been obtained by finishing a cylindrical cast iron ring having proper inside and outside additions (of about 5mm each) cutting it open and inserting a piece of D/9=1000/9—110 length."

Among the striking features of the article, to which particular reference may be made, are recognition of the demands occasioned by modern high pressure gas and steam engines, the necessity for consideration of the "calculation, construction and method of machining them" (piston rings); the known practice in the art, adverted to in language quite similar to that contained in Lanchester, Campbell, and other evidence in the case; his specific consideration of the matter with a view of meeting disadvantags growing out of eccentricities and consequent inequalities of pressure in piston rings; the custom of giving crude ring castings an oval or elliptical form; and, finally, the close appreciation of a problem of accomplishing uniform radial wear of the cylinder, etc.

The importance, and the significance of the author's observations, bear not merely upon their concurrence with what appears in the specifications of the patents in suit and in the art, but because of their coincidence with matters strenuously urged in the hearing of this case as supporting the claim of patentable subject-matter rightfully recognized in the patents in suit.

When, therefore, we find not only concurrence or coincidence of the article with the observations made in this case upon the general art, but also find an exact duplication, as it seems to me, of the conception of the patents in suit, the conclusion that defendants have sustained their contention and have satisfied the terms of the statute is unavoidable. Except for suggestions about to be noted, the plaintiffs, upon the trial, were unable to bring forth anything in the way of criticism of the substantially identical character of the disclosure contained in the article. Reference was made to adjudicated cases wherein the disclosure was characterized as "hidden," or as containing merely "the germ of the idea" found in the later patent, on the strength of which it was ignored. Such observations, however, cannot be applied where, as here, the status of the publication is conceded, and the identity of its subject-matter cannot be denied. As already indicated, the disclosure in this article is just as plain as (though in some respects much more elaborate and highly refinded

than) the patents in suit. In such a case, and where both earlier and later patents go no farther than merely to suggest a method to be worked out "by calculation," is another earlier disclosure to be disparaged because it in fact does work out a method in that way? Are the patents in suit to be given credit because they did not do what Ramsbottom and Lanchester suggested might be done and yet never did; and is the article in question to be disparaged for disclosing a carefully worked out method of calculation? Likewise, when the article discloses in simple and plain terms, the method of spreading a ring, using a gap piece, machining it by copying lathe (compare this part of the article with Lanchester) and, generally, appropriately describing practice, is it to be ignored because in addition thereto it contains much that is addressed to most highly skilled engineers, giving formulæ based upon principles of the calculus, higher mathematics, or analytical mechanics? It may be that shopmen or other lay workers in the art, counsel, and court, might not readly or otherwise, or ever, understand these formulæ, but their presence, in conjunction with a disclosure as simple and as understandable and, therefore, as good, as that contained in the patents in suit, should not operate to the disadvantage of the article under the statute. By way of testing out this suggestion, can it be said, if the German article constituted the specification of a patent issued in 1901, Lanchester or Campbell could have successfully met it as an anticipation or as an insufficient disclosure to defeat their own application; or if, as such, it has been copending with them in the patent office, any distinction upon interference could have been drawn?

Now, if it be urged upon the testimony in this case that speculation may be indulged because the method of spreading a ring and inserting the gap piece took no hold in the art prior to the advent of Lanchester and Campbell, the force of the German article and its clarity as an identical disclosure is not thereby impugned. The fact none the less appears that although Lanchester, Campbell and other workers in the art, either did not see nor act upon the publication, the disclosure was none the less old. And I assume that under the statute there is not reserved to the court the right to inquire into the degree to which the publication—conceded to be a publication under the statute —in truth circulated or was read; nor may the court arbitrarily, and because of the mere lapse of time, ignore it. It is not for the court to say that under the statute the value of a printed publication as a disclosure varies either directly or inversely with its age.

The testimony tending to show the plaintiff's great commercial success in manufacturing and selling piston rings, made according to the patent methods, is not supportive of any issue in the case, when once identity of the disclosure contained in the German article with the patent disclosure must be found. Such finding, being clearly demanded, and not open to doubt, the testimony alluded to can serve no purpose except, possibly, to create a doubt or to offer a basis for conjecture respecting the failure of the art to act upon the earlier disclosure. Such latter course, however, is not permissible, unless, in the absence of such proof, the court can say that a doubt arises and exists with respect to identities. I think the defense of invalidity is sustained; and a decree for defendant may be entered.

Charles K. Gillson and Frank E. Liverance, for appellant.

John B. Macauley, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVAN A. EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The bill alleged infringement by appellee of United States patents, No. 1,050,102, January 14, 1913, to Campbell, and reissue No. 14,644, May 6, 1919, to Lanchester, both for manufacture of cast-metal piston ring packings for steam and internal combustion engine cylinders. Among the defenses interposed were noninfringement and invalidity of patents. The Campbell patent is for

a process of making piston rings or patterns for piston rings by radially splitting the round pattern, spreading apart the severed ends, and inserting a segment in the space, whereby the expanded ring becomes more or less distorted from the true round, and using such expanded and distorted ring as a pattern for casting the rings, which when cast have cut from them a piece corresponding with the inserted segment in the pattern. The casting is then compressed, bringing the ends in contact, and while so held is ground or cut smooth on its outer surface.

Upon being compressed so that the ends practically contact, the ring presumably takes the substantially round form of the original ring of the pattern before it was cut and spread. The ring is sprung into the grooves cut in the piston to receive it, and is then compressed for insertion into the cylinder. The tendency of the ring when within the cylinder being to resume its normal expanded form, it presses against the smooth inner wall of the cylinder, producing, to the extent of the perfect roundness of both cylinder wall and the compressed ring, a substantially tight fit between the two, and thus prevents loss of power through leakage of steam, gas, or oil between cylinder wall and ring.

The fit of the opposite side of the ring against the inner surface of the piston groove need not and cannot be so exact, and this side of the ring may be left without cutting or grinding, which conduces to the desired greater resiliency of the cast ring, as well as to simplicity and cheapness of fabrication.

The Lanchester patent devices sued on are one of its two process claims, and its two product claims, which seem to be for a ring produced through and by means of the process set out in the other claims. But in effect the two patents are so similar as quite irresistibly to invite the conclusion that their coverage is substantially identical.

It is apparent that the nearer true round the compressed metal ring is as it presses against the round inner wall of the cylinder, the better will be the contact and more perfect the fit. Cast iron, which both employ, has long been found to be a desirable metal for such rings. The uncontradicted evidence is that appellee makes its pattern rings by first producing a soft brass round drum of a circumference substantially equal to that of the cylinder wall, making proper allowance for shrinkage and finishing, plus a compression space to be left between the ends of the ring when finished and in normal expansion. This brass drum is bored so that the shell remaining is of the thickness of the rings to be made from it. From this hollow drum there are then cut rings of the width of the finished piston ring, and the round brass ring is then distorted by the skillful operative into somewhat elliptical shape. From this a casting is made, and from the casting there is excised a piece, so that what remains will be substantially the length of the inner circumference of the cylinder. The compressed casting is ground on its outer surface, and a round template of desired size applied to find where it is out of round, and the ring bent accordingly, and further test castings made, until one is cast which on finishing as aforesaid will be sufficiently round for practical purposes, and this is thereupon the pattern for casting the commercial rings.

Leaving the inner surface of the ring unground or uncut (which appellee also does), and thus contributing to the resiliency of the ring, is no part of the claimed novelty. This is but an incident in the manufacture of such rings. There is manifestly no need for close contact between the inner surface of the ring and the adjacent surface of the groove in the piston. There is no frictional contact which would require smoothness of this surface of the ring or the adjacent surface of the groove, and, indeed, the very purpose in having the ring spring-like and expansible forbids its close fit with the inner surface of the groove; for in the original expansion, and surely in its further expansion to take up space caused by wear in cylinder wall, there is necessarily some space between inner surface of the ring and the inner surface of the groove. This quality of increased resilience through leaving the inner surface as it was cast, though much lauded in briefs and arguments of counsel, and mentioned in the descriptive part of the Campbell patent, is not referred to in the claims of either.

Expansible metal piston rings are very old in the steam and gas engine art. They were produced and employed in vast numbers long before the patents in suit, and in great variety have been produced and sold ever since. The art has been long so crowded as scarcely to admit of any advance which is basically broad.

Appellant's large commercial success is urgently pressed in furtherance of the claim for broad interpretation of the patents, as well as in support of their validity. From the record it appears that since their start of about twelve years ago, appellant's business in metal piston rings has grown to be larger than that of any one of its ninety or more competitors in this country, who make metal piston rings. While in cases of doubt commercial success of a patented article may tend strongly to influence conclusions favorable to the patent, we know too well of those many notable instances where rapid and signal commercial success has been achieved through improved business methods, appearance, uniformity, and dependability of product, favorable business connections, or a variety of other causes, all wholly apart from monopolistic grants or advantages, to admit of any general rule that because of the coincidental fact of holding a monoply, this alone must account for the achievement.

Conceding the claims to the extent of their purport, we are convinced that appellee did not employ the process of the patents, and that its product is not the result of their teachings.

In an opinion by Judge Geiger filed in the District Court about five months prior to the entry therein of the decree, the question of infringement was fully considered, and the conclusion of noninfringement reached. With that conclusion and the cogent reasons therefor, as in such opinion stated, we are in entire accord. This of itself, without regard to the question of validity of the patents, which in the same opinion is exhaustively considered, requires us to affirm the general decree of the District Court dismissing appellant's bill with costs.

Decree affirmed.

BENTON et al. v. AMERICAN NAT. BANK OF MACON.

(Circuit Court of Appeals, Fifth Circuit. November 5, 1921.)

No. 3706.

1. **Equity ⇐150(1)—Bill joining all bank stockholders held not multifarious.**
In a suit under Comp. St. §§ 9689, 9806, 9807, to enforce the individual liability of the shareholders of a national bank which has gone into liquidation, the joining of all the shareholders does not render the bill multifarious.

2. **Banks and banking ⇐250(4)—Shareholders of a corporation held proper parties in a suit to enforce stockholders' liability on the stock held.**
In a suit by one national bank against another to enforce shareholders' liability, in which a finance company was made defendant as a shareholder of the defendant bank, it appearing that such finance company had been dissolved, a petition that certain shareholders of such dissolved company to whom assets of such company had been distributed be made parties defendant was properly granted, their liability being limited to the amount of assets received by them, against the objection that joining them made the bill multifarious and was a misjoinder of parties defendant and that, if they were joined, other stockholders of the dissolved corporation should have been joined.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action by the American National Bank of Macon against the Commercial National Bank of Macon and others. From a decree granting a petition to make certain shareholders of a third corporation parties, L. O. Benton and others, as shareholders, appeal. Affirmed.

Charles L. Bartlett and Robert L. Berner, both of Macon, Ga. (Green F. Johnson, of Monticello, Ga., on the brief), for appellants.

George S. Jones and Orville A. Park, both of Macon, Ga. (Jones, Park & Johnston, of Macon, Ga., on the brief), for appellee.

Before WALKER and BRYAN, Circuit Judges, and SIBLEY, District Judge.

WALKER, Circuit Judge. The Southern Securities & Financing Company, a Georgia corporation (herein referred to as the Financing Company), was named as a party defendant in a bill in equity in the nature of a creditor's bill filed against the Commercial National Bank of Macon and its shareholders after that bank had, in 1914, gone into voluntary liquidation as authorized by statute; the relief sought being the enforcement of the individual liability of such shareholders, and it being alleged that the Financing Company was the holder and owner of 103 shares of the capital stock of said bank. Service of subpœna was made in January, 1917, upon one of the appellants, L. O. Benton, as the president of the Financing Company. A traverse to the marshal's return showing such service was filed, upon the ground that at the time of the attempted service there was no such corporation as the Financing Company; the corporation previously existing under the above-stated name having surrendered its charter and been dissolved as a

corporation in August, 1915. After that traverse was sustained, the plaintiff in the bill, the appellee here, filed its petition praying that certain stockholders of the dissolved corporation, the appellants here, be made parties defendant to the bill in lieu of the Financing Company. That petition alleged that upon the dissolution of the Financing Company its assets were distributed to the appellants and its other stockholders, and asserted the claim that the liability of the Financing Company as a stockholder in said bank is enforceable against the appellants to the extent of the assets of the Financing Company distributed to and taken by them respectively. Over objections interposed by the appellants, the court ordered that they be made parties defendant in said cause, and that the cause proceed against them in lieu and instead of the Financing Company; the liability of the appellants being limited to the amount of assets of the Financing Company received by them respectively. The just-mentioned action of the trial court is complained of upon the grounds: (1) That the effect of it was to make the bill multifarious and to bring about a misjoinder of parties defendant; and (2) that other stockholders of the Financing Company should have been joined with the appellant as defendants.

[1] If the Financing Company had remained in existence it would have been a proper party defendant. The suit was such a one as is provided for by statute for the enforcement of the individual liability of the shareholders of a national bank which has gone into liquidation. U. S. Compiled Statutes Anno. §§ 9689, 9806, 9807. The joining of all the shareholders of the bank as defendants does not render such a bill multifarious. Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Williamson v. American Bank, 115 Fed. 793, 52 C. C. A. 1. The effect of the court's action which is complained of was to substitute the appellants in the place of the dissolved Financing Company, for the enforcement against them of the Financing Company's liability as a shareholder, but to the extent only of the Financing Company's assets received by them respectively. In the case of Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571, it was decided that the liability of a deceased owner of stock in a national bank was enforceable, to the extent of the distributive shares received, against the widow and one only of six children of the deceased, to all of whom such stock was allotted in indivision, in proportion to their interests in the estate, in pursuance of a statute which made property so allotted subject to the payment of debts of the deceased.

The following was said in the opinion:

"The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. * * * This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

The following Georgia statute evidences an intention to make the stockholders of a dissolved corporation liable for its debts, to the extent of its money or funds received by them, and to make such liability enforceable against all or any one or more of such stockholders:

"In all suits against the members of a private association, joint-stock company, or the members of existing or dissolved corporations, to recover a debt due by the association, company, or corporation, of which they are or have been members, or for the appropriation of money or funds in their hands to the payment of such debt, the plaintiff or complainant in such suit may institute the same, and proceed to judgment therein against all or any one or more of the members of such association, company, or corporation, or any other person liable, and recover of the member or members sued the amount of unpaid stock in his hands, or other indebtedness of each member or members; provided, the same does not exceed the amount of the plaintiff's debt against such association, company, or corporation; and if it exceeds such debt, then so much only as will be sufficient to satisfy such debt." Civ. Code 1895, § 1892.

The just-quoted statute was in existence long prior to the enactment in 1910 of the Georgia statute under which the Financing Company was dissolved. Park's Anno. Code of Georgia, § 2823 et seq. The last-cited statute does not purport to repeal or modify the one above set out. A Georgia corporation's contract obligations survive its dissolution and remain enforceable against its assets, and against its stockholders to the extent of its assets distributed to and received by them respectively.

[2] What has been said sufficiently indicates the grounds of the conclusion that the appellants were properly made parties defendant, in place of the dissolved corporation of which they were stockholders, for the purpose of enforcing against them that corporation's liability as a shareholder in the liquidating bank, but to the extent only of the amount of the dissolved corporation's assets received by them respectively upon its dissolution. The appellants were liable because they were the recipients of assets of the Financing Company which remained subject to be applied to the payment of its debts. It was not incumbent on the appellee to proceed against all the Financing Company's stockholders who shared in the distribution of its assets. Whatever right the appellants have to require other stockholders of the Financing Company to contribute to the amount required to discharge that company's liability as a shareholder in the bank is an equity existing in their favor against such other stockholders, in which the creditor, the appellee, has no concern. Some affirmative proceeding against such other stockholders was required for the enforcement of that equity. The record does not show that in the trial court its enforcement was sought by the appellants. The fact that there were other stockholders, and their names and places of residence, were mentioned in that part of the answer of the appellants to the order to show cause why they should not be made parties defendant, which raised the objection that the appellants could not be proceeded against unless the other stockholders of the dissolved corporation were joined with them. The appellants did not ask that other stockholders of the Financing Company be made defendants, to the end that they be required to contribute to the amount needed to satisfy the demand asserted by the bill. The question whether the equity of contribution could or could not have been enforced in this suit is not decided, because it was not raised in the trial court. The court did not err in the ruling complained of.

The decree is affirmed.

HIGHTOWER et al. v. AMERICAN NAT. BANK OF MACON.

(Circuit Court of Appeals, Fifth Circuit. November 5, 1921.)

No. 3722.

1. **Banks and banking ⇐250(5)—Evidence held to show bank a creditor of another bank entitled to enforce stockholders' liability.**
   Evidence *held* to show that an agreement by which one national bank took over the assets of another for purpose of liquidation constituted a loan and not a purchase of the assets by the bank receiving them, and that consequently it was a creditor entitled to enforce the liability of the shareholders of the liquidating bank.
2. **Appeal and error ⇐323(2)—Shareholders' liability being several, any may appeal without joining others.**
   In a suit against a bank and shareholders to enforce a debt and shareholders' liability, defendants' liability being several and not joint, decree against them may be appealed from by one or more without joining others.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action by the American National Bank of Macon against the Commercial National Bank of Macon and others as shareholders. From a decree adjudging plaintiff a creditor with consequent right of enforcing shareholders' liability, W. H. Hightower and others appeal. Affirmed.

Charles L. Bartlett, Robert L. Berner, Charles Akerman, Robert L. Anderson, John E. Hall, and Warren Grice, all of Macon, Ga. (Richard D. Feagin, Thomas E. Ryals, and Augustus O. B. Sparks, all of Macon, Ga., on the brief), for appellants.

Orville A. Park and George S. Jones, both of Macon, Ga. (Jones, Park & Johnston, of Macon, Ga., on the brief), for appellee.

Before WALKER and BRYAN, Circuit Judges, and SIBLEY, District Judge.

BRYAN, Circuit Judge. This is an appeal from a final decree establishing in favor of the American Bank of Macon, Ga., the statutory liability of appellants as shareholders of the Commercial National Bank of Macon, Ga.

Reference is made to the opinion of this court on a former appeal, reported in 254 Fed. 249, 165 C. C. A. 537, in which a decree of the District Court dismissing the bill was reversed, for a statement of the averments of the bill filed by appellee, and for the full text of the contract and resolutions pleaded and attached as exhibits.

[1] It was decided on the former appeal that the bill states a case. Whether the evidence supports the averments of the bill, as it is held to do by the decree now appealed from, is the only question presented by this appeal. If the evidence shows that the American Bank was a creditor of the Commercial Bank, it is admitted by appellants that the decree of the District Court is correct and should be affirmed. On the other hand, if the evidence shows that the American Bank was a purchaser of the assets of the Commercial Bank, it is admitted by appellee that the decree is erroneous and should be reversed.

In June, 1914, the Comptroller of the Currency complained of the condition of the Commercial Bank as disclosed by the report of a national bank examiner, and required the material reduction of large lines of credit extended to certain customers, and particularly to directors and corporations in which directors were interested. In July it was stated in a report by its finance committee that the bank was in need of $100,000 to make it above criticism; that money borrowed in excess of the amount permitted by law was about $60,000; and that its cash on hand was too low to be allowed to stand. Rumors as to the solvency of the bank became current, exchanges were held up, and remittances were not promptly made. Finally, on July 31, 1914, an appeal was made to the president of the American Bank for assistance. The officers of the two banks met, and after an all night session spent in considering the condition of the Commercial Bank, the two resolutions of August 1, 1914, were adopted. Thereafter, in pursuance of these resolutions, the contract of August 11, 1914, was entered into by authority of the boards of directors of the two banks, and the resolutions of August 12, 1914, and September 30, 1914, were adopted by the shareholders of the Commercial Bank. After August 1, 1914, the Commercial Bank transacted whatever business it did in the banking offices of the American Bank, but by its own officers, for more than two weeks at least, during which time the Commercial Bank paid its depositors largely with money furnished by the American Bank, but maintained and kept separate books and accounts. When it was necessary to secure funds from the American Bank, appropriate entries of debit and credit were made by the bookkeepers of the two banks.

Immediately after the adoption of the resolutions of August 1, 1914, the directors of the two banks caused advertisements to be inserted in the daily papers. That of the American Bank announced that a consolidation of the business of the two banks had been effected, that the assets of the Commercial Bank had been taken over by the American Bank, and that the latter would take care of all the business theretofore handled by the former; that the money on deposit with the Commercial Bank had been transferred to the American Bank, and that the latter would pay checks against the former; and that checks should be written on the blanks of the Commercial Bank until the depositors made other arrangements. The advertisement of the Commercial Bank announced that a merger of the two banks had been perfected; that all the assets of the Commercial Bank had been transferred to the American bank; that checks of customers upon the Commercial Bank would be honored by the American Bank; that depositors of the Commercial Bank should use the blank checks of that bank until they transferred their accounts to the American Bank, or made other arrangements; and that arrangements had been made to protect the interests of the stockholders of the Commercial Bank.

At the shareholders' meeting held August 12, 1914, objection was made to that provision in the contract executed the day before by the directors to the effect that shareholders of the Commercial Bank should not be relieved of their liability as such, for any deficit that

might remain after exhausting the other assets of the bank; but upon the statement being made that the American Bank insisted upon the provision remaining in the contract, the resolution containing it was unanimously adopted. According to the minutes of that meeting, one of the directors stated that the American Bank relied upon the statutory liability of the shareholders. The director shown by the minutes to have made this statement testified that he did not do so. The shareholders also appointed a committee to represent them in liquidating the assets of the Commercial Bank. At the meeting of the shareholders on September 30, 1914, a resolution was adopted in which it was recited that the transfer of the assets by the Commercial Bank to the American Bank was made as security. At this meeting the shareholders also formally placed the Commercial Bank in voluntary liquidation, and appointed the American Bank liquidating agent. The shareholders' committee represented the interests of the Commercial Bank and its shareholders in various ways. It corresponded with the Comptroller of the Currency and represented that the assets of the Commercial Bank were held as security by the American Bank; it authorized the sale of bonds to the amount of $300,000, which it claimed were owned by the Commercial Bank; it collected rents from the Commercial Bank building, made efforts to sell it, and failing to get a satisfactory price from others, finally sold it to the American Bank; it brought suits to enforce collections due to the bank, presented claims in favor of the bank in several bankruptcy proceedings. It also defended suits against the bank, in one of which, brought by shareholders for the appointment of a receiver, it set up the transactions between the Commercial Bank and the American Bank, but made no allegation or claim that the Commercial Bank had sold its assets. As late as April, 1915, it was considering the sale of unpaid notes to the American Bank.

It is averred in the fourth paragraph of the amendment to the bill that it was found to be impracticable to take notes "as had been contemplated by the resolutions," and it is then averred that it was agreed that the indebtedness of the Commercial Bank to the American Bank should be carried by the latter as an overdraft. The master found that the agreement alleged had not been proven, but also found that the indebtedness was in fact carried as an overdraft.

It is averred in the fifth paragraph of the amendment to the bill that for "some two weeks" after August 1, 1914, the Commercial Bank continued in active operation. The evidence showed and the master found that it cashed checks drawn on it, received deposits, cleared checks through the clearing house, checked on its deposits in other banks, collected notes, and renewed notes for its customers, for a longer period than two weeks.

It is averred in the sixth paragraph of the amendment to the bill that the board of directors of the Commercial Bank adopted a resolution, a copy of which was attached as an exhibit, accepting an offer from the American Bank to purchase the Commercial Bank building for the sum of $40,000, to be credited on the indebtedness of the Commercial Bank to the American Bank. The resolution did not ap-

pear in the minutes of the directors, and hence was not proven; but the testimony showed that the directors did in fact authorize the sale.

The master found that the transactions between the two banks did not constitute a sale of the assets of the Commercial Bank, but did constitute the American Bank the sole creditor of the Commercial Bank. The report of the master was confirmed by the District Court.

[2] Appellee moves to dismiss the appeal upon the ground that several defendants, as to whom a severance has not been had, have not joined in it.

The liability is several and not joint and may be appealed from by one or more defendants without joining others. Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340.

The motion to dismiss the appeal is therefore denied.

Appellants insist that this court held on the former appeal that the contract between the two banks, construed in the light of the resolutions, was ambiguous, and that appellee's right to recover was altogether dependent upon the conduct of the parties and the construction placed by them upon the contract and the resolutions upon which it was based. Proceeding upon that theory, it is argued that the evidence fails to prove the conduct of the parties alleged in the fourth, fifth, and sixth paragraphs of the amendment to the bill. But the contention is untenable that the opinion on the former appeal held that the contract was ambiguous. Both the contract and the conduct alleged in pursuance of it were discussed and the opinion was based upon both.

The averment of the fourth paragraph of the amendment that the indebtedness of the Commercial Bank was agreed to be represented by overdrafts instead of by notes is susceptible of proof by the undisputed fact that it was represented by that method. Of course, appellee loses the benefit that would have been derived from an agreement to give and accept notes.

The averment of the fifth paragraph that "for some two weeks" after August 1, the Commercial Bank continued in active operation, cashing checks, receiving deposits, and otherwise conducting a banking business, it appears to us, is sustained by the evidence. The fact that the business of the Commercial Bank was conducted in the banking house of the American Bank did not deprive the former bank of its character as a banking institution.

The averment of the sixth paragraph to the effect that a resolution was adopted by the directors of the Commercial Bank authorizing a sale of the bank building to the American Bank, the proceeds to be credited on the former's indebtedness to the latter, was not proven; and although it is true that the things were done which it is claimed the resolution authorized, yet the record evidence, in the form of a minute entry, of an acknowledgment of the indebtedness, became lost to appellee upon its failure to prove the resolution. The contract and various resolutions and the conduct of the parties throughout are all consistent with the theory of a loan. Although the resolution adopted by the American Bank on August 1, 1914, contemplated the purchase of

assets, it actually provided for advances upon collateral security. At the shareholders' meeting on September 30, 1914, only the pledge of assets was provided for, and a sale of assets was not. Likewise the provision for repaying advances with accrued interest to the American Bank is the most positive kind of evidence of a loan. The contention by appellants that the assets of the Commercial Bank were only intended to be pledged in the event the shareholders failed to ratify the resolutions and contract adopted and entered into by the directors on behalf of the two banks, or in the event the transaction should be attacked by suits, is not a reasonable or satisfactory one, in view of the general character of the provision which contains no such limitation. The correspondence with the Comptroller, the collection of rents on the Commercial Bank building, the bringing and defending of suits by the Commercial Bank and by the shareholders' committee, all show that the assets of the Commercial Bank were held as security by the American Bank.

It is argued that the activities of the shareholders' committee is explained by the expectation that the stock would yield a return to the shareholders; but long before the committee of the shareholders ceased to exercise acts of ownership over the assets of the Commercial Bank, it had become apparent that there could not by any possibility be any value in the shares of stock held in the Commercial Bank. Indeed, it had become apparent that an assessment of shareholders for the full amount of their statutory liability woud be insufficient to provide for the payment of the debts of the Commercial Bank. The transactions are inconsistent throughout with the theory of a sale. If the American Bank had purchased the assets of the Commercial Bank, there would have been no occasion for the insertion in the contract of a provision that the Commercial Bank should pay interest. It would have been most unusual, in that event, for the American Bank to have agreed to account to the Commercial Bank for an excess realized by it upon assets which it had purchased outright. Why would the shareholders' committee have passed a resolution in 1915 looking to the sale of the unpaid notes of the Commercial Bank to the American Bank, if the sale had taken place in 1914? If the assets of the Commercial Bank had been sold in 1914, why would the committee of the shareholders in 1915 be asserting or concerning themselves about the liability of debtors to the Commercial Bank who had become bankrupt? It is almost inconceivable that the share holders and their committee would repeatedly and continuously over a long period of time declare by resolution and show by their conduct that assets had only been pledged to secure a loan if it had been the fact that the entire assets had long since been sold.

The newspaper advertisements are not important. They were undoubtedly intended to bridge over a crisis and to allay any feeling of uneasiness on the part of depositors in the Commercial Bank. Neither party was estopped by anything stated in them from asserting any contractual right or obligation it possessed.

The excess of liabilities over assets of the Commercial Bank, amounting to more than the shareholders' liability of $300,000, has

been paid by the American Bank. There is no claim that credit was not given for the full value of these assets.

We are of opinion that the decree of the court is well sustained by the evidence, and it is therefore affirmed.

NYE TOOL & MACHINE WORKS v. CROWN DIE & TOOL CO.*

(Circuit Court of Appeals, Seventh Circuit. June 24, 1921. Rehearing Denied October 27, 1921.)

No. 2942.

1. **Patents ⟹182—Natural and statutory right of inventor are separate and independent.**

The common-law right of an inventor to the exclusive benefit of his invention so long as he can keep it secret from competitors, and his statutory right under the patent laws to exclude others from its use for a limited term in return for the full disclosure of his invention to the public, are separate and independent rights.

2. **Patents ⟹193—Right of action against single infringer assignable.**

Under Rev. St. § 4898 (Comp. St. § 9444), the owner of a patent may assign its right of action against a single infringer with the right to restrain future infringement and to recover damages for past infringement.

3. **Patents ⟹280—Damages for infringement recoverable in suit in equity for injunction.**

Under an assignment by the owner of a patent of all rights of action against an infringer, at law or in equity, a court of equity in a suit by the assignee to restrain future infringement may award damages for past infringement since the assignment; but damages which accrued in favor of the assignor prior to the assignment are recoverable only in an action at law.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Nye Tool & Machine Works against the Crown Die & Tool Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 270 Fed. 587.

This is an appeal from a decree dismissing on appellee's motion appellant's bill for alleged infringement of patent No. 1,033,142, July 23, 1912, to Reed Manufacturing Company, assignee of the inventors Wright and Howard, for a machine for forming screw thread-cutting devices.

In the bill, commendable for its brevity and directness, appellant alleged: (1) That Wright and Howard made the invention and filed their application, on which the patent was issued to Reed Manufacturing Company; (2) that Reed Manufacturing Company, owner of the patent, "prior to the beginning of this suit," by a duly executed assignment in writing (attached to the bill as "Exhibit A"), transferred to appellant the right to exclude appellee from practicing the invention and the right to recover all claims in law or in equity arising out of appellee's infringement of the patent; (3) that the devices of the patent, made by Reed Manufacturing Company and by appellant, have been duly marked "Patented, July 23, 1912"; (4) that appellee has infringed the patent within the six years last past by making, using, and selling devices containing the inventions claimed therein,

---

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

*Certiorari granted 256 U. S. —, 42 Sup. Ct. 185, 66 L. Ed. —.

that appellee had been notified of the infringement, and that the infringement has damaged appellant and profited appellee; and prayed for an injunction and an accounting of appellee's profits and appellant's damages.

Exhibit A is as follows:

"Whereas, Reed Manufacturing Company, a corporation of Pennsylvania, is the owner of letters patent of the United States, No. 1,033,142, for a machine for forming screw thread-cutting devices granted July 23, 1912, on an application of Wright and Howard; and

"Whereas, under said patent said Reed Manufacturing Company has the right to exclude others from manufacturing, using and selling the devices of said patent; and

"Whereas, it is believed by the parties that Crown Die & Tool Company, a corporation of Illinois, has been manufacturing and using devices an infringement of said patent; and

"Whereas, Nye Tool & Machine Works is engaged in the manufacture of dies with which the dies made by said Crown Die & Tool Company, by the use of said infringing machine, are in competition; and

"Whereas, Nye Tool & Machine Works is desirous of acquiring from Reed Manufacturing Company all of its rights of exclusion under said patent, so far as the same may be exercised against the Crown Die & Tool Company together with all rights of the Reed Manufacturing Company against the Crown Die & Tool Company arising out of the infringement aforesaid:

"Now, therefore, in consideration of one thousand dollars ($1,000.00), and other good and valuable considerations, the receipt of which is hereby acknowledged, the Reed Manufacturing Company hereby assigns and sets over to the Nye Tool & Machine Works all claims recoverable in law or in equity, whether for damages, profits, savings, or any other kind or description, which the Reed Manufacturing Company has against the Crown Die & Tool Company arising out of the infringement by the Crown Die & Tool Company of the Wright & Hubbard patent No. 1,033,142; and, for the same consideration, assigns and sets over all the rights which it now has arising from said patent of excluding the Crown Die & Tool Company from the practice of the invention of said patent, the intention being that, in so far as concerns the exclusion of the Crown Die & Tool Company under said patent, the Nye Tool & Machine Works shall be vested with as full rights in the premises as the Reed Manufacturing Company would have had had this assignment not been made; and that the Nye Tool & Machine Works shall have the full right to bring suit on said patent, either at law or in equity against said Crown Die & Tool Company, and for own benefit, to exclude the Crown Die & Tool Company from practicing the invention of said patent, and for its own use and benefit to collect damages which may arise by reason of the future infringement of said patent by the Crown Die & Tool Company, but nothing herein contained shall in any way affect or alter the rights of the Reed Manufactur ing Company against other than the Crown Die & Tool Company; and, for the same consideration, all rights as are herein given against the Crown Die & Tool Company are given as against any successor or assignee of the business thereof."

Appellee's motion to dismiss the bill for want of equity apparent on its face, in addition to challenging appellant's title and right to sue, suggests laches, conspiracy, and pendency of a prior suit, and also denies jurisdiction in equity over damages "recoverable at law."

Russel Wiles, of Chicago, Ill., for appellant.

Florence King, of Chicago, Ill., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Nothing of laches, conspiracy, or pendency of a prior suit is stated in the bill. If such matters exist, they must be brought into the record by appellee's answer. In the statement of the case we have synopsized the bill

in order to show that a good cause of action in equity is pleaded unless there is a lack in appellant's right to sue or in the trial court's equitable jurisdiction.

[1] An inventor is not compelled by law to apply for and take out a patent. If he has produced a new composition of matter of such a nature that the ingredients and the process are safe from discovery by others either by observing his use of his invention or by independent investigation and experiment, he would have a much more enduring monopoly by refusing to make the "full disclosure" that our patent statute invites. Such is his natural or common-law right. It is only when he fears discovery and resultant injury from the exercise by others of their natural or common-law right to copy his unpatented invention that he seeks the patent solicitor. So it is clear to a demonstration that the natural or common-law right and the statutory right are separate and independent. Neither impinges upon the other. Whether an inventor exercises or refuses to exercise his natural or common-law right has nothing to do with his assertion of his statutory right, which consists exclusively of his power, through the courts, to restrain others from practicing his invention and to call them to account for having done so in defiance of his monopoly. This view of our patent system is not a present invention, for long ago it was fully disclosed and distinctly claimed in open letters to the public. Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Fuller v. Berger, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Appellee's argument that a monopoly of this character is contrary to public policy is somewhat belated in view of the Constitution and acts of Congress.

[2] Congress, having full constitutional power over the subject, could have provided that a patent should be nonassignable, or, if assignable, that it should be assigned only as an entirety. But section 4898, R. S. (Comp. St. § 9444), says that "any patent, or any interest therein, shall be assignable in law by an instrument in writing." It would be hard to find broader or clearer words than "any interest therein" with which to clothe the owner of a patent with the right to subdivide and deed or lease his property as he pleased.

As "the right to exclude" is the only property involved, and as that property is made divisible and assignable at the will of the owner, and as the owner had duly assigned to appellant the whole of the right to exclude appellee, it is difficult to understand why appellee should feel concerned about appellant's lack of right to exclude strangers to this suit. If appellant had the right to exclude all the strangers in the world, appellee might as well contend that appellant, having good and complete title to the patentee's right to exclude appellee, should not be permitted to enforce the right because appellant was ignoring all other trespassers and was picking out appellee alone.

[3] Jurisdiction in equity to enjoin trespasses upon property is unquestionable. When that equitable jurisdiction is invoked, the chancellor will hear and determine in the same suit the matter of damages

that accrued from the trespasses during the plaintiff's ownership of the property and within the period of limitations. If such damages alone were sought, the action would be at law; but because such damages grew out of the ownership that is to be vindicated by the injunction, the demand therefor, although legal in its nature, is treated as a proper appendage of the bill in equity. Appellant's bill alleges that it acquired ownership of the right to exclude appellee "prior to the beginning of this suit," but without stating the date either in the body of the bill or in the exhibit. Appellee's alleged infringement covered six years prior to the filing of the bill. Some of that period may antedate appellant's ownership. Reed Manufacturing Company included in its assignment of an interest in the patent to appellant an assignment of its claims for damages during its exclusive ownership. Damages that are incidental to appellant's ownership are properly included in the bill. But if appellant desires to recover on the assignment of Reed Manufacturing Company's right of action at law for the damages suffered by that company, it should proceed at law upon that separate legal cause of action.

The decree is reversed for further proceedings in consonance with this opinion.

MILLER et al. v. ELECTRO BLEACHING GAS CO.*

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

No. 5800.

Patents ⟸259—Sale of single part for use in unpatented apparatus for carrying out patented process not contributory infringement.

The sale by defendant of pressure regulating valves to take the place of regulator valves furnished by complainant as a part of an unpatented apparatus for purifying water in accordance with complainant's patented process, such valves being made and sold by defendant for general use, *held* not to constitute contributory infringement of the process patent.

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

Suit in equity by the Electro Bleaching Gas Company against William G. Miller and others. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 264 Fed. 429.

Arthur C. Brown, of Kansas City, Mo., for appellants.

Loren N. Wood, of New York City (David M. Proctor, of Kansas City, Mo., and Drury W. Cooper, of New York City, on the brief), for appellee.

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

PER CURIAM. This is an appeal from a decree adjudging letters patent No. 1,142,361 valid and that the appellants, defendants in the

---

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 187, 66 L. Ed. —.

court below, were guilty of contributory infringement. The complaint is in the usual form and charges the defendants with contributing to the use and practice of the process of antisepticizing water, which constitutes the invention set forth in the claims of said letters patent.

The answer admits the issuing of the letters patent to the appellee, the plaintiff assignee of George Ornstein, but denies infringement of any of the 12 claims on which the patent was issued and also attacks the validity of the letters patent, upon the ground that none of the claims of said letters patent can be lawfully construed so as to cover and embrace any device or apparatus made, used, or sold by these defendants; and the further ground that the alleged improvements set forth in said letters patent, particularly pointed out in the 12 claims thereof, were not novel and patentable when produced by the patentee, but that the process described in the claims had been previously patented and described in sundry patents and printed publications, notice of which was given by the defendants to the plaintiff.

In view of the conclusions reached it is unnecessary to pass upon the validity of the letters patent in this opinion.

In the original application Mr. Ornstein asked for letters patent on the process as well as the apparatus, but the request for the apparatus, after having been rejected by the examiner of the Patent Office, was withdrawn and only the application for a process patent was asked and finally, after several rejections and amendments, granted. In the original applications for both letters patents, the apparatus was fully described in the specifications as well as claims; but the application upon which the letters patent were finally granted does not describe the apparatus in any of the claims, but only the process of antisepticizing waters, although in the specifications the apparatus to be used is described, and also illustrations of three kinds of apparatus which may be used are filed. In the specifications it is also stated that "several apparatus are susceptible of use in the process." Among other contrivances in the apparatus there is a shut-off valve and a regulating valve, but no mention of either of these valves or any other parts of the apparatus is set out in any one of the twelve claims.

The apparatus by which the patented process is made operative, as shown by the figures accompanying the application, comprises an absorption tower, through which the minor flow of water passes downward to absorb an upwardly moving current of chlorine gas. The chlorine is supplied from a tank of compressed and liquified chlorine gas from which a pipe leads into the lower part of the tower. The tank is provided with a shut-off valve and the supply pipe with a pressure reducing valve and a regulating valve. Water is supplied to the tower from any suitable source.

The infringement charged is a chlorine gas-pressure regulator, performing the same office and producing the same result as the pressure reducing and regulating valves of plaintiff's apparatus.

The plaintiff had sold to the city of Chicago, for use in its municipal water plants, a number of complete sets of its apparatus; later the city purchased from defendants a Miller chlorine gas-pressure regulator to replace the corresponding part in plaintiff's apparatus. The

reason the city of Chicago made the change, as testified by its assistant city engineer, was that defendants' valves enabled the city to obtain better regulation of gas flow from defendants' valves and a great saving in maintenance costs.

Plaintiff also sold a set of apparatus to the city of Kansas City, Mo., which thereafter purchased from defendants one of their chlorine gas-pressure regulator valves. The reason this last purchase was made, as testified by the city's chemist in charge of water purification of Kansas City, was that plaintiff's valve mechanism was insufficient in capacity to get the required quantity of gas into the coke filled tower.

Do the sales of these valves constitute contributory infringement of plaintiff's process patent? The learned District Judge held they did.

It is neither charged nor claimed that defendants had employed the process of the patent in suit, nor that they had made or sold apparatus for employing that process. All the defendants did was the sales of pressure regulating valves to take the place of regulator valves furnished as a part of the apparatus sold by the plaintiff. Defendants' valves were not made for the purpose of being sold especially to owners or licensees of plaintiff's apparatus, but were manufactured and sold by them for general use and were used in some flour mills.

The real question in issue is whether upon this state of facts a person selling a single part for use in an apparatus employed in manufacturing an article protected by a process patent is guilty of contributory infringement.

What is a process patent? A leading case, uniformly followed, is Cochrane v. Deener, 94 U. S. 780, 788, 24 L. Ed. 139. It was there defined as:

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. * * * The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

In the instant case the application for letters patent for the apparatus was denied by the Patent Office and abandoned by the patentee. In Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, it was said:

"A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed."

In Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 301, 318, 29 Sup. Ct. 495, 500 (53 L. Ed. 805), it was held:

"A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents."

The valves sold by defendants in no wise affected the process, but at most the apparatus which was not protected by the letters patent of plaintiff. In any event the most that can be claimed on behalf of the

plaintiff is that the defendants sold one of the elements of plaintiff's unpatented apparatus, because the parties who had purchased the apparatus from plaintiff found defendants' valves to improve the apparatus purchased from plaintiff, and enabled them to use it more economically. Even in apparatus patents it is at best doubtful whether such sales as defendants are chargeable with would constitute contributory infringement. In Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co., 75 Fed. 1005, 1010, 22 C. C. A. 1, 5, where a similar question was before the court, it was held:

"If a purchaser from the complainant chooses, the day after his purchase, to substitute a stand which is better made, and better adapted to his peculiar needs, he has the right to do so."

The same conclusion was reached in National Malleable Castings Co. v. T. H. Symington Co., 230 Fed. 821, 826, 145 C. C. A. 131, affirmed 250 U. S. 383, 39 Sup. Ct. 542, 63 L. Ed. 1045; Edison Electric Light Co. v. Peninsular Light & Power Co. (C. C.) 95 Fed. 669, 673, affirmed 101 Fed. 831, 43 C. C. A. 479; Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 863, 866, affirmed 154 Fed. 65, 80 C. C. A. 177, and 215 U. S. 156, 30 Sup. Ct. 45, 54 L. Ed. 137. In Cortelyou v. Charles E. Johnson & Co., 145 Fed. 933, 76 C. C. A. 455, affirmed 207 U. S. 198, 28 Sup. Ct. 105, 52 L. Ed. 167, it was said:

"We incline to the opinion that the line should be drawn to include those articles which are either parts of a patented combination or device or which are produced for the sole purpose of being so used and to exclude the staple articles of commerce."

Without passing on the validity of plaintiff's process patent, we are of the opinion that the defendants were not guilty of contributory infringement and that the decree of the court below holding that it did must be and is reversed.

HOOK, Circuit Judge, participated in the hearing of this cause, concurred in the result and reasons therefor, and was to write the opinion of the court, but died before preparing it.

THE FRANK D. STOUT.

JOHANSON v. BROOKINGS COMMERCIAL CO.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1921.)

No. 3638.

1. **Seamen ⇐29(5)—No recovery on ground of negligence not pleaded.**
   In an action by a seaman against the owner of a schooner to recover for injuries suffered, no recovery could be had on account of defect in hook used, where such defect was not pleaded.
2. **Seamen ⇐29(5)—Finding that owners were not negligent in using wire sling sustained.**
   In an action by a seaman against the owner of a schooner to recover for personal injuries suffered while unloading lumber, evidence *held* to sus-

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

tain finding that it was not the duty of the ship to furnish a chain sling with a trip line, rather than wire.

3. Seamen ⟸29(3)—Failure to use trip line not attributable to ship.
If it was negligence not to use a trip line on a sling while unloading lumber from a schooner, such carelessness was attributable to the officers of the schooner, and not to the owners, who had supplied sufficient ropes that could be used for such purpose.

4. Seamen ⟸29(3)—Ship not liable for negligence of mate or winchman.
Neither a vessel nor her owner is liable for injuries received by a seaman, unless they are caused by the unseaworthiness of the vessel, or a failure to supply and keep in order the proper appliances appurtenant, and they are not liable for injury to a seaman whose place of work was dangerous only by reason of negligence of a mate or winchman.

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

Libel in admiralty by Adolph Johanson against the Brookings Commercial Company, claimant of the American steam schooner, Frank D. Stout. Decree for claimant, and libelant appeals. Affirmed.

S. T. Hogevoll, of San Francisco, Cal., for appellant.

Farnham P. Griffiths and McCutchen, Willard, Mannon & Greene, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from a judgment dismissing a libel for injuries received while unloading lumber from the steamer Frank D. Stout, at San Pedro, Cal. Libelant sets forth that while the ship was in the act of unloading, and while it was the duty of the owners to furnish the ship with proper appliances and to keep them in repair, the owners neglected their duty, in that they used an unsafe sling, made of wire, instead of a chain; that libelant was 14 feet below the deck, unfastening the wire sling; that the ship was lowering a heavy piece of lumber, held by the wire sling; that the lumber had been placed on the water, and before libelant had time to unfasten the sling holding the load the winch driver, who did not know that the sling had not been unfastened, started to raise the winch, but a signal was not obeyed, and a heavy piece of lumber was lifted from the water against the side of the ship, and libelant's foot was crushed between the lumber and the side of the ship; that there should have been a tripping or releasing line.

Respondent denied negligence, and admitted the use of a wire sling as the only proper appliance for work such as was being done, and pleaded that libelant, together with other seamen, was engaged in discharging timber, and that in the performance of his work, and while standing on timbers alongside of the ship, engaged in the work of unfastening the hook attached to the sling, libelant's foot was crushed, and that his injury was one of the risks and dangers incident to his employment. Further defense is that, while the ship was unloading, the mate, who was standing on top of the deck load of the ship, gave

an improvident order to the winch driver to draw a timber in a sling closer to the vessel, and in obedience to such order the winch driver improvidently swung a timber toward the ship, and in that manner libelant was hurt; that all of the officers and members of the crew were at the time fellow servants of libelant, for whose negligence, if any, claimant is not responsible.

After hearing evidence, the District Court held that the injuries were not caused by the use of improper or unsafe appliances, but by the negligence of a member of the crew; that the slings complained of were perfectly safe, if the signalman and winch driver had been careful; and that there was no evidence that the winch itself was not in good condition.

The libelant's testimony was that he was standing on the deck load while they were swinging lumber; that in discharging it over the side, by direction of the mate in charge, one man had to go down to unhook the lumber, because there was no chain sling or tripping line, and it could not be unhooked from the deck; that he went down and was on the lumber for a time, when a timber came over the side into the water; that by order of the mate he went to unhook it with his hand, and was about 6 feet away from the sling, but that before he could catch hold of it the winchman started the winch, and libelant was caught between the ship and the timber; that he hollowed, but the winchman did not stop; that the pole used by the man on deck to unhook was about 18 feet long, but it was not long enough to reach the lumber; that in discharging lumber over the side of the ship it is usual to have a chain sling with a tripping line, so that one can stand on the deck and pull the tripping line, and the chain will unhook, so that it is unnecessary to go down to the lumber; that the winchman could not see him at the place where he was hurt; that when wire slings are used, and "you let go the falls, the wire sling coils up and jumps up toward the hook, and you cannot unhook it without using your hand"; that while he was reaching out to unhook the load the second mate must have given the signal to the operator of the winch to "come in"; that if the log had been left resting where it was, it could have been unhooked, and the accident would not have happened.

Libelant explained that "at the point of the hook is where you make the slipping line fast; when you pull that, it takes the hook over, and the chain slips out of the hook"; that he saw ropes on the ship which could have been used for tripping lines. There was some evidence tending to show that the customary way of unloading lumber from a schooner is by a chain sling; that a chain sling unhooks readily, when you have a tripping line on it; that a tripping line is fastened to the hook part on the chain sling; and that it can be reached from the rail of the ship.

To counteract this evidence respondent introduced witnesses of long experience, who testified that they preferred to use wire slings, because they thought it was safer, and that they did not use tripping lines, but would let a man go down and stand to one side. Several marine engineers also testified that there was greater safety in the use of the

wire sling, because it was easier to notice a defect in the wire than to discover a crack or defect in the link of a chain.

[1, 2] No basis for recovery can be made on account of the length of the hook, because there was no claim of that kind pleaded; moreover, the handle of the hook furnished was 18 feet long, and was used for several timbers before the accident. That evidence is not contradicted. Nor can we hold that the District Court erred in concluding that it was not the duty of the ship to furnish a chain sling with a trip line, rather than wire. The weight of the evidence of men of long experience in unloading ships is that a wire is safer than a chain sling, and witnesses explained that a rope or trip line could be tied to the hook of the sling of wire as well as to a chain.

[3] If it was careless not to use a trip line, such carelessness is attributable to the officers of the ship, but not to the owners, who supplied ropes.

[4] The place where libelant was injured became dangerous only by reason of the negligence of the mate or winchman, for which the shipowner is not liable. From the entire record it seems quite clear that the cause of the accident was the manner in which the work of unloading was prosecuted, and that, had it not been for the carelessness of the mate or the winchman, the accident would not have happened. Some of the witnesses for libelant said that the signalman must have been careless in not giving the signal to the winchman, as it was the duty of the signalman to watch and see that the load is not drawn in so as to hurt the man below. But under the doctrine of Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, except for failure to render proper medical treatment, neither a vessel nor her owner is liable to an indemnity for injuries received by a seaman, unless they were caused by the unseaworthiness of a ship or a failure to supply and keep in order the proper appliances appurtenant.

The case of The Hoquiam, 253 Fed. 627, 165 C. C. A. 253, is not pertinent, for the decision there was that section 20 of the Seamen's Act (Comp. St. § 8337a) does not apply as between a seaman in command and a stevedore who was not a seaman, under his command.

The decree must be affirmed. Appellee asks no costs, and none will be allowed in its favor.

Affirmed.

TUCKER v. CANFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1921.)

No. 5752.

1. Mines and minerals ⇐77—Cessation of operation, lapse of time, and notice of nonproduction may show abandonment.

Because of the peculiar nature of leases for the exploration and production of oil and gas, it is the lessee's duty to use reasonable diligence to obtain production, and a cessation of operation, lapse of time, and notice of nonproduction may show an abandonment.

---

2. Mines and minerals ⇐77—Evidence held to sustain finding assignee had abandoned lease, when assignors acquired new lease.

Evidence that the assignee of an oil lease had sold to the assignors the gas being produced, that he had refused to explore further, though he knew that the supply was exhausted, and that the lease would terminate when production ceased, *held* to sustain the court's finding that he had abandoned the lease when the assignors, after the gas had ceased to flow, took a new lease covering the same land, under which they deepened the well and struck oil, so that the assignors did not hold the new lease as trustees for the assignee.

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

Suit by W. B. Tucker against G. W. Canfield and others, to have defendants held to be trustees for the benefit of plaintiff of an oil and gas lease. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The plaintiff below brought this suit seeking to have the defendants Canfield held to be trustees for his benefit of an oil and gas lease, which had been executed to the Canfields as lessees. Upon a final hearing a decree was entered dismissing his bill, and the plaintiff appeals. The Canfields were lessees from the owners of 80 acres of land in Payne county, Okl., by a written lease conveying the oil and gas under the surface, with the right to operate for its extraction. The lease was executed on September 6, 1912, and was for the term of five years, and as much longer as oil and gas were found in paying quantities, and provided for a royalty of one-eighth of the oil produced and for a payment to the lessors of $150 per year for each well so long as gas was sold therefrom, and for a supply of gas for domestic use in one dwelling on the land. In case no well was completed within 12 months, the lease was to be void, unless the lessees should pay a rental of $1 per acre until a well was completed. The lessees held the lease without completing a well until January 6, 1917. At that date they assigned the lease to plaintiff, who agreed to perform all the lessees' covenants in the original lease, so as to keep the lease in force and to pay to the assignors one-eighth of any oil and one-fourth of any gas produced and sold from the land. The assignee agreed to pay the cost of all operations and developments under the lease. At the same time the assignors agreed to purchase all the oil produced from the land by the assignee under the lease. The plaintiff drilled a well on the land which produced a small flow of gas in May, 1917. On June 8, 1917, the parties entered into a written agreement by which the plaintiff sold to the Canfields for $10,000 all the gas produced from this well, and the equipment he had used, including the rig, casing in the well, tank, and a pipe line. The agreement provided that the lease should be kept in force and that the lease contracts or agreements held by them should not be affected. The Canfields agreed to pay any royalties due from the gas well, and that plaintiff should have the right at any time to re-enter the premises to deepen this well, provided that he preserved the gas produced without material reduction of its amount.

In a few days the plaintiff left for Beaumont, Tex., where he resided. The Canfields used the gas produced from the well and made the payments required. The following September the five-year term of the lease expired, but the gas well continued to produce. The next January the plaintiff received a letter from the Canfields, inquiring if he would sell his interest in the lease. The plaintiff did not answer this letter, but early in April went to visit the Canfields, and inspected the well, and made inquiries as to its production and prospects. Plaintiff was informed that the well was not producing much then, and that it would not produce much longer. The plaintiff soon returned to his home in Beaumont, and in the latter part of April the well quit producing gas. A few days later the Canfields mailed a letter properly addressed to him,

notifying him that the well had quit flowing. Nothing was heard from him, and in January, 1918, the Canfields made a verbal lease from the owners of the greater portion of this land, for the purpose of exploring for and producing oil and gas, the term to continue as long as either was produced from the land and upon stipulated payments of rent and royalty. This lease was later reduced to writing and signed. In the latter part of April, 1918, the Canfields began to deepen the well on the land, and expended several thousand dollars in the operation. A small flow of oil was struck the last of June. The plaintiff saw a newspaper report of oil being found, and in July telegraphed an inquiry to the Canfields whether they were drilling the gas well deeper, and an answer informed him that it had been drilled deeper and oil had been found. The plaintiff then came to the scene of operations and after unsuccessful negotiations for settlement began this suit.

Preston C. West, of Tulsa, Okl. (Roger S. Sherman and A. A. Davidson, both of Tulsa, Okl., on the brief), for appellant.

Bird McGuire, of Tulsa, Okl. (John Devereux, of Tulsa, Okl., on the brief), for appellees.

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

MUNGER, District Judge (after stating the facts as above). [1] Appellant's claim is that, because of the relationship between the Canfields and plaintiff, the Canfields were in a fiduciary position toward him, and that the benefit of the new lease taken by the Canfields inured to plaintiff. Whatever relationship there was between these parties had grown out of the dealings which have been set forth relating to this land and to the gas well thereon. It is plaintiff's theory that this relationship continued to the time when the Canfields became lessees in the new lease from the owners of the land. The trial court, after hearing the evidence, made a finding of the facts, and found that the plaintiff had abandoned the lease which had been assigned to him and that the lessors had accepted the surrender. Because of the peculiar nature of such leases for the exploration and production of oil and gas, it is the duty of the lessee to use reasonable diligence to obtain production, so that the income contemplated by both parties will be obtained, and a cessation of operations, lapse of time, and notice of nonproduction may show an abandonment of the lease on the part of the lessee. Brewster v. Lanyon Zinc Co., 140 Fed. 801, 811, 813, 72 C. C. A. 213; Logan Natural G. & F. Co. v. Great Southern G. & O. Co., 126 Fed. 623, 625, 626, 61 C. C. A. 359; People's Gas Co. v. Dean, 193 Fed. 938, 942, 113 C. C. A. 566; Pursel v. Reading Iron Co., 232 Fed. 801, 808, 146 C. C. A. 657; Barnsdall v. Boley (C. C.) 119 Fed. 191, 199; Roach v. Junction Oil & Gas Co. (Okl.) 179 Pac. 934.

[2] At the trial the following facts were either established or supported by competent evidence: After the well began its flow of gas, the plaintiff claimed the flow was too light to use, and threatened to pull out the casing and to plug the well, unless he could make a sale of it. The Canfields then purchased it, and all of the plaintiff's property on the land connected with it, leaving to plaintiff the lease and the right to explore further for oil and gas. The plaintiff then returned to his home in Texas, but returned the 1st of April, 1918, in reply to

the inquiry from the Canfields, made in January, as to a possible sale of his interest. He inspected the well, learned that the supply of gas was very low, refused to deepen it or to drill another, but suggested that he might deepen this well, if some further concessions as to royalty were made, and told one of the owners of the land that, if a well then being drilled by other parties about three-fourths of a mile away was successful, he might drill deeper. This well was unsuccessful, as no oil or gas was found. The plaintiff knew that a large number of wells were producing or being drilled near this property and in the same section of land. The plaintiff then again returned to his home, and within a month the well ceased to flow, and the Canfields mailed the letter to plaintiff, notifying him that the well had ceased to produce. No reply was received, nor was there any communication between plaintiff and the Canfields, or the owners of the land, for about 15 months, nor until the Canfields had taken a new lease, and had deepened the well and found oil. There was some conflict of testimony as to some of these circumstances, and some testimony by the plaintiff seeking to excuse his delay; but it is not considered to be sufficient to overcome the legal presumption that the findings of the court are correct. The facts sufficiently show that the plaintiff had surrendered his lease, and that there was no relationship toward him by the Canfields at the time they took the new lease which requires them to be held to be trustees for his benefit. It was the plaintiff's duty to deepen the well, or to drill another and by some means to maintain production of oil or gas in paying quantities, if he desired that his lease should continue in force.

The decree will be affirmed.

BANCO MERCANTIL AMERICANO DE CUBA v. TAGGART COAL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 1, 1921.)

No. 3760.

1. Appeal and error ⇐71(3)—Order transferring cause to law side, which in effect denies an injunction, appealable.

An order dismissing a bill from the equity side and transferring the cause to the law side of the court under Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), which in effect denies an interlocutory injunction prayed for in the bill, is appealable under Judicial Code, § 129 (Comp. St. § 1121).

2. Equity ⇐20—Bill alleging lien held to state cause of action for equitable relief.

A bill alleging an indebtedness from defendant to complainant, and that under a contract between them certain coal or its proceeds and notes and trade acceptances for coal sold are held by defendant in trust for complainant, and praying for an injunction to restrain transfer of the same, for enforcement of the lien created by the trust agreement, and for an accounting, *held* to state a cause of action in equity, regardless of the solvency of defendant.

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

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Suit in equity by the Banco Mercantil Americano de Cuba against the Taggart Coal Company and others. From an order dismissing the bill and transferring the cause to the law side of the court, complainant appeals. Reversed.

Robert M. Hitch and A. B. Lovett, both of Savannah, Ga. (Curtis, Mallett-Prevost & Colt, of New York City, and Hitch, Denmark & Lovett, of Savannah, Ga., on the brief), for appellant.

L. Z. Rosser, of Atlanta, Ga., and Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is an appeal from an order dismissing appellant's bill from the equity side of the court and transferring it to the law side.

The bill averred: That appellant, a banking corporation of Havana, Cuba, issued a letter of credit to the Taggart Coal Company, appellee, and advanced to it a total of $1,100,612 for the financing of shipments of coal from the United States to Cuban ports; that there was a balance due appellant of approximately $300,000; that in pursuance of agreement between the parties, appellant paid drafts in favor of the coal company through a correspondent bank in New York, when and as the same were presented at a bank in Savannah, Ga.; that to secure the repayment to appellant of the sums so advanced, bills of lading were forwarded from Savannah to appellant at Havana, and were delivered by appellant to the coal company in trust, evidenced by trust certificates executed by the coal company in favor of appellant, covering the shipments of coal or the proceeds thereof, and notes or trade acceptances taken in payment therefor; that the individual appellees were, respectively, the president and vice president of the coal company, and were in charge of the management of its affairs; that the coal company was not registered in Cuba, and that as a result, under the laws of Cuba, the individual appellees were jointly and severally liable for all the debts of the corporation; that certain shipments of coal had not been accounted for as required by the trust certificates; that some of the coal had not been sold, and some of the notes and trade acceptances for coal sold had not been delivered by appellees to appellant, but had been wrongfully withheld by them, and were in their possession; that appellees denied the existence of the indebtedness claimed by appellant, refused to account for the coal on hand, or for the proceeds of the coal sold, refused to deliver up to appellant the notes and trade acceptances received in payment for coal, and claimed the right to dispose of the coal, or its proceeds, and to collect for their own benefit the notes and trade acceptances then outstanding, and further refused to give an account or statement of the notes and acceptances held by them. Many other matters of detail are set out, but the foregoing statement comprises the essential averments of the bill.

The bill prayed for an accounting, that a trust in favor of appellant be decreed and impressed upon the coal that remained unsold, and that appellees be required to deliver to appellant the notes and trade acceptances, and the proceeds derived from the sales which still remained in their hands, and that they be enjoined from disposing of any coal in their possession, and from negotiating or incumbering the notes and trade acceptances remaining in their custody or control, and for general relief.

[1] Appellees move to dismiss the appeal on the ground that the decree of the District Court was not final within the meaning of section 128 of the Judicial Code (Comp. St. § 1120).

It need not be decided whether an order that dismisses a bill from the equity side of the court and transfers it to the law side under Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) is final or interlocutory, for the reason that in this suit an injunction is prayed for and in effect denied, and the order entered, though not final, may be appealed from under section 129 of the Judicial Code (Comp. St. § 1121). The motion to dismiss the appeal is denied.

[2] Under section 267 of the Judicial Code (Comp. St. § 1244), brought forward from the Judiciary Act of 1789, a suit in equity will not be sustained where there exists a plain, adequate, and complete remedy at law, and appellees contend that such a remedy exists in this suit. It is true the bill does not aver the insolvency of appellees, or either of them, and the lack of that averment seems to have had weight with the District Court; but in our view the solvency or insolvency of appellees is immaterial. Whether the bill could be maintained if it went no further than to disclose the right of an accounting between the parties need not be decided, because it contains averments which set up a lien in favor of appellant upon the coal, or its proceeds, and upon the notes and trade acceptances. These averments being admitted by the motion to dismiss, appellant has a right to assert its lien, notwithstanding that appellees may be solvent. The existence of a lien is sufficient to confer jurisdiction upon a court of equity. Wylie v. Coxe, 15 How. 416, 14 L. Ed. 753. Furthermore, under the averments of the bill, appellees hold the coal undisposed of, and the notes and trade acceptances in trust for appellant, and a court of equity has jurisdiction to compel the performance of duties and obligations growing out of the trust relationship. Oelrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43; Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 306; Townsend v. Venderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

Appellant is not deprived of the right to enforce its lien or to impress its trust upon the coal, or its proceeds, merely because the final relief prayed is for the recovery of money. Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; 1 Pomeroy's Equity Jurisprudence (4th Ed.) 158.

We are of opinion that the bill presents a cause of equity jurisdiction. The decree of the District Court is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SIMON v. MASSACHUSETTS TRUST CO.

(Circuit Court of Appeals, First Circuit. November 29, 1921.)

No. 1509.

Bankruptcy ⟸409(2)—Refusal of discharge proper where books of corporation controlled by bankrupt not produced.

In a bankruptcy proceeding, where the evidence disclosed that the bankrupt previously had been practically the sole owner of a corporation which had transferred to its successor all its property, and that the operations of such former corporation were of such magnitude that they must have been entered on the books and evidenced by various papers which the debtor had destroyed or failed to produce, *held*, that a discharge was properly refused, the statute not being confined to the books of the bankrupt, but including destruction or concealment of books of account or records of the company, from which the debtor's financial condition might be ascertained.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Proceeding in bankruptcy by the Massachusetts Trust Company against Isaac Simon. From a decree denying a discharge (268 Fed. 1006), the bankrupt appeals. Affirmed.

William H. Garland, of Boston, Mass., for appellant.

William Hirsh, of Boston, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of Massachusetts denying a discharge in bankruptcy to the appellant. A statement of the facts material to the case is as follows:

The appellant was engaged in the business of manufacturing sheepskin coats in Boston several years before 1909, in which year he caused a corporation to be formed under the laws of the state of Maine under the name of the Simon Manufacturing Company, with a capital stock of $50,000, and transferred to it all the assets of his business, receiving himself 449 shares of its capital stock. Of the remaining shares 50 were issued to a brother-in-law and 1 share to his wife. The appellant was elected president and treasurer of the corporation and later acquired the stock which had been issued to his brother-in-law, thus becoming the owner of all the capital stock of the corporation except the share held by his wife. In addition to the business conducted through this corporation, he was engaged in the real estate business and become the owner, with one Goldstein, of different interests in real estate in Boston and vicinity. He also loaned money on real estate, and the District Court has found that he—

"was taking on the average about one mortgage a month, some of them for very substantial sums. His bank deposits and withdrawals amounted to about six thousand dollars per month."

The Simon Manufacturing Company had two bank accounts, one with the Commonwealth Trust Company and one with the Manufacturers' National Bank of Lynn; but these were discontinued, and in 1915 all the deposits of the Simon Manufacturing Company were made in the name of Moses Goldman, who testified that there had been many attachments and keepers in the place of business of the Simon Manufacturing Company and so much trouble that he took the receipts of the company and deposited them in his own name and paid the bills of the company with his own personal check.

The bankrupt and two brothers-in-law organized on October 4, 1915, a new corporation, the Simon Coat Company, under the laws of Massachusetts, with $10,000 capital stock, one share of which was issued to each of the incorporators. The entire assets of the Simon Manufacturing Company were transferred to the new corporation, which continued to carry on the same business at the same location.

The certificate of condition of the Simon Manufacturing Company, filed as required by the laws of Massachusetts with the Commissioner of Corporations upon December 31, 1914, stated the assets of the corporation to be $69,264.18; liabilities, $10,264.18. The appellant testified that the assets transferred by the Simon Manufacturing Company to the Simon Coat Company consisted of merchandise on hand from $2,000 to $2,500; bills receivable, $6,000 to $7,000; fixtures and machinery, $900 to $1,000.

In actions commenced by creditors the Supreme Court of Massachusetts has found that the transfer of the assets of the old corporation to the new was fraudulent and made for the purpose of hindering and delaying creditors. 233 Mass. 85, 123 N. E. 340.

Although there were six specifications of objections to the debtor's discharge, we find it necessary to consider but one, which is in substance that the bankrupt willfully concealed certain books, including books of the Simon Manufacturing Company, with intent to conceal his financial condition.

The evidence discloses that the books of the Simon Manufacturing Company, through which agency the debtor carried on his business activities from 1909 until October, 1914, and of whose stock he was the sole owner except one share held by his wife, were disposed by him in a manner which warranted the finding of the District Court that—"he concealed or destroyed the company's books of account in order to hinder successful investigation of its affairs," and also that the real estate transactions carried on by him were of such kind and magnitude that they must have been entered on books and evidenced by various papers which the debtor had destroyed or did not produce.

It is claimed that the destruction of the books of the corporation would not bar a discharge, but that the books destroyed or concealed must have been the books of the bankrupt. The language of the statute, however, is not confined to the books of the bankrupt, but provides that the bankrupt shall be discharged—

"unless he has with intent to conceal his financial condition destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained."

As the bankrupt owned all the stock of the corporation, it was only the instrumentality chosen by him for conducting his business, and the destruction or concealment of its books could only have been for the purpose of concealing his financial condition. In re Berger (D. C.) 200 Fed. 325. He testified that he owed the corporation $25,000 at the time the transfer was made to the new corporation and had withdrawn this amount for his personal use. The books of the corporation would have enabled his trustees to determine the truthfulness of this claim and whether he had not withdrawn other and even larger amounts, and we think that the inference drawn by the District Court from the destruction or concealment of the books of the corporation that the bankrupt intended to conceal his financial condition is sustained by the evidence.

The order of the District Court is affirmed, with costs to the appellee in this court.

TENNESSEE, A. & G. R. CO. v. DRAKE.

(Circuit Court of Appeals, Fifth Circuit. October 26, 1921.)

No. 3718.

1. **Master and servant ⊜129(6)—Defective automatic couplers held "proximate cause" of injury to brakman coupling by hand.**

Where a brakeman was injured while between cars making a coupling because the automatic coupler after three trials failed to work, the defective coupler *held* the "proximate cause" of the injury within the Safety Appliance Act (Comp. St. §§ 8605–8612).

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

2. **Master and servant ⊜111(1½)—Safety Appliance Act applicable to cars on curve.**

The fact that cars were on a slight curve when a brakeman was injured in making a hand coupling because the automatic coupler failed to work *held* not to render Safety Appliance Act (Comp. St. §§ 8605–8612) inapplicable.

3. **Appeal and error ⊜216(1), 263(1)—Failure to except to charge or to request an instruction waiver of error.**

A party cannot assign error on the charge given where he did not except to it nor request an instruction on the issue.

In Error to the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Action at law by W. M. Drake against the Tennessee, Alabama & Georgia Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 268 Fed. 248.

Samuel B. Smith, of Chattanooga, Tenn., and G. E. Maddox, of Rome, Ga., for plaintiff in error.

George Westmoreland, Sidney Smith, and John L. Westmoreland, all of Atlanta, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Defendant in error, herein called plaintiff, sued plaintiff in error, herein called defendant, to recover damages for personal injury to himself. Plaintiff was an employee of defendant and at the time of his injury was engaged in making a coupling of two cars on a side track.

The petition is based upon the Safety Appliance Act, 27 Statutes at Large, 531 (Comp. St. §§ 8605–8612), in that the cars failed to couple automatically by impact, and also upon the Employers' Liability Act, 35 Statutes at Large, 65 (Comp. St. §§ 8657–8665), in that the engineer, knowing the plaintiff was between the cars, negligently and violently backed his train without signal, and without notice or warning to him. Three unsuccessful attempts were made to couple the train with the automatic couplers, and thereupon plaintiff went in between the cars to attach the safety chains, and was injured while doing so by the backing of the train. There was conflict in the evidence as to whether the curve upon which the coupling was attempted was a slight one or a sharp one. It is also disputed whether plaintiff gave the signal for the engineer to take slack, plaintiff denying that he did so, while, on the other hand, a witness for defendant, regularly employed as a brakeman on another train, testified that he gave the signal to take slack at plaintiff's request. There was also evidence that the backing of the train was violent and went beyond the taking up of slack. According to plaintiff's testimony, the engineer knew plaintiff went between the cars to attach the safety chains, after the automatic couplers had failed to work.

The court charged the jury upon the two statutes above mentioned, and there was judgment for plaintiff.

[1] It is contended that the Safety Appliance Act is inapplicable to the facts of the case, because it is said that at the time of his injury plaintiff was not attempting to make use of the automatic couplers, and that therefore any defect in them was not the proximate cause.

We are of opinion that the failure of the couplers to couple was the proximate cause of the injury, because it was the dominating cause. If the couplers had worked, there would have been no occasion for plaintiff to go between the cars for the purpose of making use of the safety chains. It is true he was injured after the automatic couplers required by the act of Congress had failed to work, but that is when such accidents usually occur.

[2] It is further contended in this connection that the Safety Appliance Act does not apply when cars intended to be coupled up are on a curve, but only when they are on a straight track.

It may be that the Supreme Court has not definitely held that couplers must work on sharp curves, although it was assumed in Railway Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, that the act applies even then.

The jury was entitled to find from the evidence that the curve was a slight one, because there was evidence to that effect. In such a

case we are of opinion that the Safety Appliance Act is involved, and that it has been so held in Atlantic City Railroad Co. v. Parker, 242 U. S. 56, 37 Sup. Ct. 69, 61 L. Ed. 150. In that case the coupler would not work on a slight curve, and the court gave the Safety Appliance Act in charge to the jury, as is apparent from the opinion of the Court of Errors and Appeals of New Jersey, reported in Parker v. Atlantic City R. Co., 87 N. J. Law, 148, 93 Atl. 574, and the Supreme Court of the United States held it was proper to do so.

By reason of the fact that a signal was given to the engineer, although not by plaintiff, but by a brakeman who claimed to act for him, it is contended that the negligence, if any, was that of the brakeman and not of the engineer. But there was testimony that the brakeman was a member of another train crew, and it is in dispute whether he had anything to do with the switching operation then in progress. Besides, as already pointed out, there was conflict in the evidence upon the point whether the engineer obeyed the signal merely to take slack, or backed his train more violently than was necessary.

[3] Error is assigned also for failure to give a proper charge upon the law of assumption of risk. The court charged the jury that under the common law one who "willingly chooses a dangerous thing or position or a way of doing a thing assumes the risk of it." Defendant did not except to this charge at the time it was given, and did not submit a request of its own. Under these circumstances, defendant is not in a position to assign error upon the charge given, or upon a refusal to charge upon that question.

On the whole, the issues were fairly submitted to the jury, and the judgment is affirmed.

GRAY v. UNITED STATES.

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

No. 3556.

1. **Internal revenue ⇐2—Statutory provisions held repealed by Prohibition Act.**

   Rev. St. §§ 3258, 3281 (Comp. St. §§ 5994, 6021), making it an offense to have an unregistered still or to carry on the business of distiller without giving bond or with intent to defraud the United States of the tax, so far as relates to stills for the manufacture of liquor for beverage purposes, *held* repealed by the National Prohibition Act Oct. 28, 1919.

2. **Criminal law ⇐1188—Appellate court may remand for appropriate sentence.**

   A trial court which did not impose specific sentence under certain counts of an indictment, but based its sentence on other counts as to which conviction is reversed, may be directed on remand by the appellate court to impose appropriate sentence on the good counts.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Criminal prosecution by the United States against William J. Gray. Judgment of conviction, and defendant brings error. Affirmed in part, and reversed in part.

Edwin J. Lynch, of Toledo, Ohio, for plaintiff in error.
Berkeley W. Henderson, Asst. U. S. Atty., of Toledo, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted on each of five counts of an indictment. By the first (under section 6, title 2, of the National Prohibition Act [Act Cong. Oct. 28, 1919, c. 85, 41 Stat. 305]) he was charged with manufacturing intoxicating liquor without permit therefor; by the second (under section 21, title 2, of that act), with maintaining a common nuisance, viz., a building where intoxicating liquors were manufactured contrary to the National Prohibition Act; by the third (under section 3258, Rev. Stat. [Comp. St. § 5994]), with having in his possession and custody and under his control a distilling apparatus without having registered the same; by the fourth (under section 3281, Rev. Stat. [Comp. St. § 6021]), with carrying on the business of a distiller without having given bond therefor; and by the fifth count, likewise under section 3281, with engaging in and carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled. The offense under each count is charged to have been committed on April 21, 1920.

[1] Since the case came into this court, section 3281 has been held repealed by the National Prohibition Act (United States v. Yuginovich, June 1, 1921, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —), at least in so far as applied to the distilling of spirits for beverage purposes. Under the proofs in the instant case, the distilling apparatus in question was necessarily treated as maintained for the manufacture of intoxicating liquor for beverage purposes. The same distillery was the subject of each of the five counts. In fact, the government concedes that the conviction as to the fourth and fifth counts must be set aside. Section 3258 was not involved in the Yuginovich Case. We are unable, however, satisfactorily to distinguish that section (which makes it an offense for any person to have in his possession or under his control any still or distilling apparatus set up which is not registered as required by that section) from those held in the Yuginovich Case to have been repealed, at least as applied to the distilling of spirits for beverage purposes, viz., section 3257 (section 5993), which makes it an offense to defraud or attempt to defraud the United States of a tax upon spirits distilled by one carrying on the business of a distillery; section 3279 (section 6019), which requires distillers to exhibit on the outside of their place of business a sign with the words "registered distillery"; section 3281, which makes it an offense to carry on the business of a distiller without having given bond, or to engage in such business with intent to defraud the United States of the tax on the spirits distilled; and section 3282 (section 6022), which forbids making a mash fit for distillation in any building not a distillery authorized by law.

In view of what has been said, the fact that section 9, title 3, of the National Prohibition Act, exempts industrial alcohol plants and bonded warehouses established under the provision of that title from the provisions of a large number of the old revenue sections (including 3258 and 3279) is not important.

In our opinion the conviction under section 3258 must likewise be set aside.

[2] Counts 1 and 2 present a different situation. The National Prohibition Act had taken effect prior to the commission of the alleged offense. Dillon v. Gloss, decided by the Supreme Court May 16, 1921, 256 U. S. —, 41 Sup. Ct. 510, 65 L. Ed. —. The sufficiency of these counts is not questioned. No exceptions were taken to the charge of the court. As to these counts, the only assignments of error open to consideration relate to the refusal to direct verdict and to the admission of certain testimony. We think there was sufficient evidence to sustain conviction under those counts, and no prejudicial error in the admission of evidence relating thereto is apparent. The denial of motion for new trial is not open to review. The conviction under the first and second counts is therefore sustained. The court below, however, after imposing separate sentences under the third, fourth and fifth counts respectively, did not impose specific sentences upon the conviction under the first and second counts, the judgment declaring that any sentence as to either of those counts "should be regarded as merged in the judgments already pronounced."

The conviction as to the third, fourth, and fifth counts is set aside, and the conviction under the first and second counts is affirmed, and the record remanded to the District Court with directions to enter appropriate judgment upon conviction under the first and second counts. Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; Wechsler v. United States (C. C. A. 2) 158 Fed. 579, 583, 86 C. C. A. 37; Johnson v. United States (C. C. A. 7) 215 Fed. 679, 687, 131 C. C. A. 613, L. R. A. 1915A, 862; Ulmer v. United States (C. C. A. 6) 219 Fed. 641, 647, 134 C. C. A. 127.

UNITED STATES v. SCHWARTZ.

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

No. 2735.

1. **Intoxicating liquors ⇐238(1)—Whether defendant manufactured intoxicating beverage after prohibition went into effect held for jury.**
   In a prosecution for manufacturing intoxicating liquors, consisting of a mixture of alcohol, coloring and flavoring extracts, whether such liquor was manufactured before or after the 16th of January 1920, when the Volstead Act became effective, *held* for the jury.

2. **Criminal law ⇐1056(1)—No reversal for defect in instruction in absence of exception.**
   In a prosecution for manufacturing intoxicating liquor, error of the court in stating as a fact that defendant had the component parts of the

manufactured liquor in his cellar was not prejudicial so as to require a reversal, where no exception was taken before the jury retired, as the objection must be considered as waived.

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

Joseph Schwartz was convicted of manufacturing intoxicating liquor in violation of the National Prohibition Act, and brings error. Affirmed.

J. Vincent Barnitt and Wm. V. Rosenkrans, both of Paterson, N. J., for plaintiff in error.

Isaac Gross, of Jersey City, N. J., and Elmer H. Geran, of Asbury Park, N. J., for defendant in error.

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

THOMPSON, District Judge. The plaintiff in error was convicted upon an information charging that on or about May 24, 1920, in violation of the National Prohibition Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305), he manufactured a quantity of intoxicating liquor, to wit, alcoholic liquor containing more than one-half of 1 per cent. of alcohol, and fit for use for beverage purposes.

At the trial there was evidence on behalf of the government that on May 20, 1920, the defendant was seen arriving in front of his house in an automobile, and that two burlap bags each containing a square can were taken from the car into the house; that on May 24, he was arrested when seen coming out of his house carrying two burlap bags each containing a square five-gallon can; that each of the cans was found to contain colored alcohol which the defendant, upon being interrogated, said was whisky; that in the defendant's house were found a wash boiler, two quart measures, ten five-gallon cans containing alcohol uncolored and unflavored, bottles containing flavoring extracts of whisky, cognac, and gin, and one bottle of burnt sugar or caramel in liquid form; that the liquor in the cans the defendant was carrying when arrested consisted of 88 proof alcohol, colored with caramel and fit for use for beverage purposes.

[1] The jury, therefore, had before it evidence that showed the presence in the house of materials which added to the alcohol would make a compound fit for use as an intoxicating beverage and that the contents of the cans the defendant was carrying when arrested could be made from the component parts found in his house. The jury could draw the inference from the evidence that the empty cans carried into the house on May 20 were carried out on May 24 containing the result of a mixture of ingredients similar to those contained in receptacles found in the house.

The defendant offered no evidence, and his attorney moved for the direction of a verdict of acquittal upon the ground that the government had failed to establish that the defendant manufactured at any date subsequent to the 16th of January, 1920, when the Volstead Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305) became effective.

The trial judge upon request of the attorney for the defendant charged the jury that, to convict, they must find the manufacture occurred subsequent to January 16, 1920, and, if they found that the defendant did manufacture the liquor prior to January 16, 1920, he would not be guilty of the offense charged. The defendant's motion for a directed verdict was denied.

We find no error in submitting the case to the jury.

[2] An assignment of error is based upon the statement of the trial judge in his charge to the jury that the component parts of manufactured liquor were found in the cellar of the defendant's house, when, in fact, there was no evidence that they were found in the cellar. If the attention of the trial judge had been called to the statement before the jury retired, it would no doubt have been corrected, but no exception was taken. The purpose of taking exception to parts of the charge before the jury retires is so well known as to require no discussion. If the statement was not considered sufficiently important or prejudicial at the time to be made the subject of an exception, objection to it must be considered as waived, and it is held no ground for reversal after verdict.

We discover no substantial error in the other assignments, and the judgment is affirmed.

THE HAMPDEN. THE ANVERSOISE. SOCIÉTÉ ANONYME ANVERSOISE DE NAVIGATION et al. v. COASTWISE TRANSP. CO.

(Circuit Court of Appeals, Fifth Circuit. October 25, 1921.)

Nos. 3730, 3731.

Collision ⟸105—Overtaking vessel held in fault.

Findings of the District Court, on conflicting evidence, that one of two vessels in collision was the overtaking vessel, and in fault for failing to keep out of the way as required by article 24 of the Inland Rules (Comp. St. § 7898), *held* sustained by the evidence.

Appeals from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Suit in admiralty for collision by the Coastwise Transportation Company, owner of the steamship Hampden, against the steamship Anversoise, the Société Anonyme Anversoise, claimant, with cross suit. Decree in each case in favor of the Hampden, and claimant of the Anversoise appeals. Affirmed.

For opinion below, see 267 Fed. 464.

George T. Cann, of Savannah, Ga., and Earle Farwell, of New York City (Barry, Wainwright, Thacher & Symmers, of New York City, Anderson, Cann & Cann and George T. Cann, all of Savannah, Ga., and Earle Farwell, of New York City, on the brief), for appellants.

Edward E. Blodgett, of Boston, Mass., and Anton P. Wright, of Savannah, Ga. (Blodgett, Jones, Burnham & Bingham, of Boston,

Mass., O'Byrne, Hartridge & Wright, of Savannah, Ga., Edward E. Blodgett, of Boston, Mass., Anton P. Wright, of Savannah, Ga., and Albert T. Gould, of Boston, Mass., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The owner of the steamship Hampden libeled the steamship Anversoise for damages alleged to have been caused by a collision of the two ships in the Savannah river, while they were proceeding up that stream, each of them on its way to Savannah, with a pilot aboard. The master and the owner of the Anversoise libeled the Hampden for damages sustained by the former as a result of the same collision. The court dismissed the libel against the Hampden, and awarded to its owner the agreed amount of the damages sustained by such owner in consequence of the collision. The evidence was conflicting on the question as to which of the two vessels was ahead as they were proceeding up the river prior to the time of the collision. The court found from the evidence that the Anversoise was the overtaking vessel, and that the Hampden was the overtaken one.

It is not fairly open to dispute that if the just mentioned findings are sustained, the evidence warranted the decree rendered, on the grounds that the Anversoise, being the overtaking vessel within the definition of inland rule 24 (U. S. Comp. St. 1918, § 7898), was liable for the damages caused by a collision which would not have occurred but for its violation of the provision of that rule requiring the overtaking vessel to keep out of the way of the overtaken vessel, and that the Anversoise did not sustain the burden of proving that the collision was due to the fault of the Hampden. Our examination of the evidence has led us to the conclusion that it warranted the court's findings to the effect that the Hampden was ahead of the Anversoise prior to the time of the collision, that the Anversoise came up with the Hampden from a direction more than two points abaft the latter's beam, that the Anversoise was proceeding to pass the Hampden until the former's bow was about abreast of the latter's beam, when the former was slowed down shortly before the collision occurred, and that the collision was not due to the fault of the Hampden. We are of opinion that the record does not show that the court erred in rendering either of the decrees which are presented for review.

Those decrees are affirmed.

LEIGH ELLIS & CO. v. DAVIS, Agent. *

(Circuit Court of Appeals, Fifth Circuit. October 25, 1921.)

No. 3755.

Carriers ⇐160—Action for short delivery held barred by limitation in bills of lading.

An action by the holder of bills of lading for cotton, issued by the Director General of Railroads, for short delivery, *held* barred by the provision in the bills requiring suits for loss, damage, or delay to be

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 187, 66 L. Ed. —.

brought within two years and one day after delivery, or, in case of failure to make delivery, within two years and one day after a reasonable time for delivery has elapsed.

In Error to the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Action at law by Leigh Ellis & Co. against James C. Davis, Federal Agent. Judgment for defendant, and plaintiffs bring error. Affirmed.

For opinion below, see 274 Fed. 443.

Edgar Watkins, of Atlanta, Ga., for plaintiffs in error.

Walter T. Colquitt and John A. Hynds, both of Atlanta, Ga. (Colquitt & Conyers and Brandon & Hynds, all of Atlanta, Ga., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. This was a suit, brought January 28, 1921, by the holder of two bills of lading issued by the Director General of Railroads on, respectively, March 25, 1918, and March 26, 1918, for cotton shipped, against the Agent designated by the President under the provision of section 206 of the Transportation Act of 1920. The claim asserted was based on the alleged fact that the cotton delivered weighed greatly less than the weights stated in the bills of lading. For reasons sufficiently stated in the opinion rendered by the District Judge (Leigh Ellis & Co. v. Payne, 274 Fed. 443), we are of opinion that the suit was barred by the provision, in the bills of lading sued on, that—

"Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed."

It follows that the judgment should be affirmed; and it is so ordered.

Affirmed.

DUGAN et al. v. MILES, Collector of Internal Revenue.

(District Court, D. Maryland. December 1, 1921.)

No. 963.

1. **Internal revenue ⇐8—Transfer taxes levied on an estate held excessive.**
Where devisee under a will took an annuity of $25,000 and a power of disposition by will over $250,000, a transfer tax, based on the value of the annuity plus the $250,000, is excessive; and the tax should be levied on $250,000 plus the value of an annuity of $15,000, basing the income from the fund over which the devisee had disposition at the rate of 4 per cent.

2. **Internal revenue ⇐38—Count held sufficient to state cause of action for recovery of excess taxes.**
A count of a declaration setting out the provisions of a will requiring trustees to accumulate the income of an estate during the widow's life,

that all such accumulations after her death go to exempt corporations. that the widow was to have a power of disposition by will over $250,000, and that transfer taxes had been paid on the $250,000, states a cause of action to recover the transfer tax levied upon the difference between $250,000 presently demandable and that sum payable without interest after the death of the widow.

3. **Pleading ⟸193(8)—Declaration not bad because asking more than that to which pleader was entitled.**
In a suit to recover excess transfer taxes, the fact that a count of the declaration asked more than that to which the pleader was entitled does not make it bad, if it discloses on its face a legal right to a judgment for something.

4. **Internal revenue ⟸38—Declaration in action to recover excess transfer taxes held demurrable for failure to allege duress.**
In an action to recover excess taxes on the transfer of an estate, the failure to allege in the first count that the payment was made under duress makes the first count subject to demurrer.

5. **Internal revenue ⟸8—Count for refund of taxes held based on wrong theory.**
In an action to recover excess taxes paid on the transfer of an annuity of $25,000 per year and a power of disposition by will over $250,000, a count based on the theory that the most the government was entitled to levy upon was $250,000 and, having assessed the annuity at $165,325.25, all that remained to be taxed was $84,674.75, was based on a mistaken theory.

At Law. Action by Hammond J. Dugan and another, executors, against Joshua W. Miles, Collector of Internal Revenue for the District of Maryland. On demurrer to the declaration. Sustained in part.

Venable, Baetjer & Howard and Ferdinand C. Dugan, all of Baltimore, Md., for plaintiffs.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for defendant.

ROSE, District Judge. The late Thomas O'Neill bequeathed some taxable legacies to persons other than his widow; but as there is no dispute about the tax on them, they may be ignored in this discussion. All the rest of his large property was left to trustees, during the life of his widow. They were to accumulate the income thereon, were to pay her an annuity of $25,000 during her life, and at her death, after applying $250,000 to such uses as she might by will appoint, they were to turn all the rest of the estate over to three corporations, legacies and devises to every one of which are exempt from the estate tax. All therefore that can be taxable is what the widow is either to receive or dispose of.

[1] The defendant has insisted on collecting the estate duty on the value of the annuity, commuted at $165,325.25, and upon the full quarter of a million over which the widow is given power of testamentary appointment. That is to say, the estate has been required to pay upon $415,325.25. It is clear that this sum largely exceeds the present value of everything which will in any sense ever go to the widow, and that therefore something has been taxed which Congress intended to exempt.

Apparently in calculating the present value of the annuity, the treasury assumed money to be worth 4 per cent. and that rate will be used for illustrative purposes. Any other will do as well. At it, the $250,000, over which the widow has the power of testamentary appointment, will, while the trustees hold it, produce $10,000 per annum and to make up her full annuity $15,000 will have to be supplied by other portions of the estate, and that is all that will come from other sources. The present worth of an annuity of $15,000 is, of course, just three-fifths of one of $25,000, or, at the rate assumed, $99,195.15. It is therefore demonstrable that using the assumed rate of interest, everything the widow gets is $250,000 plus $99,195.15, or $349,195.15, and that is all that should be taxable, if full effect is to be given the will of Congress. It may be that the ordinary mortality tables used for determining the present value of an annuity and the present cost of a lump sum payable at the termination of an annuitant's life may be made up on slightly different theories. If so, the figures stated will not be those used in practical operation, but the difference cannot be great. In other words, the government has collected a tax upon something like $66,130.10, which, as it did not go to the widow, will go to the exempt residuary legatees, and is, in consequence, not taxable.

Of course, the circumstance that the same person who is to receive the annuity of $25,000 a year is also to have the power of appointment after the termination of the annuity over $250,000 more is a mere accident, which, while it makes simpler the demonstration of the untenableness of the government's claim, really does not affect the problem at all. Reduced to its simplest terms, it is merely this: If a testator leaves the income, that is to say, the use of a sum of money, to an exempt legatee, for the life of some survivor of the testator, and after the death of such survivor directs that such sum shall go to some nonexempt purpose, is the government entitled to tax the whole value of that sum? If that question shall be answered in the affirmative, it means that there will be taxed that which the law says shall be exempt.

If the testator had directed that from a thousand dollar bond all the coupons maturing in the next eight years should go to an exempt institution, and the bond, shorn of them, to a taxable legatee, no one could suppose that the latter had received at the time of the testator's death the present market value of the bond with all coupons attached.

[2] The declaration contains four counts to each of which the defendant has demurred. The first recites such of the provisions of the will as require the trustees to accumulate the income of the estate during the widow's life, and the fact that all such accumulations after her death go to the exempt corporations. From what has been said, it is apparent that this count discloses a cause of action not indeed to recover the tax on all the $250,000, but on so much of it as is levied upon the difference between $250,000 presently demandable, and the same sum, payable without interest after the death of the widow. It is true that in this count nothing is said about the annuity of $25,000 and the payment of the tax upon its calculated present value, but as has been already pointed out, there were no legal reasons why anything should have been said as to those circumstances.

[3] It is further true that the plaintiffs claim recovery of all the tax paid upon $250,000. That they ask for more than that to which they are entitled does not make the count bad if it discloses on its face a legal right to a judgment for something. As for other reasons it will have to be amended, it will be well for the plaintiffs to avail themselves of the opportunity to make clear in it the precise issue which they wish to raise.

The government further objects that the appeal to the commissioner made no reference to the annuity, and did ask him to refund the entire tax on the $250,000. Even so, all the facts necessary to bring to his attention plaintiffs' right to a part of it were disclosed, and if the time in which a new appeal could be taken had expired, I should have little difficulty in holding that in this respect the count was good. Still, as the very learned and experienced counsel for the government seem to be convinced that they are right in this matter, the plaintiffs may think it best to get rid of the possibility of other minds taking that view.

[4] The government contends that the declaration does not, in any of its counts, sufficiently allege that the payment was made under duress. Of course, everybody knows that the only reason the money was paid was because the collector insisted that it should be. The government apparently, however, feels that a bad precedent would be established if it did not require the plaintiffs to say, in so many words, that they paid only under compulsion. As that request can be so easily complied with, there is no reason why the government's wishes should not be met; but as that has not as yet been done, the demurrer to the first count will be sustained.

[5] The theory of the second count appears to be that the utmost that the government was entitled to levy upon was $250,000, and that having assessed the annuity at $165,325.25, all that remained to be taxed was the difference between it and $250,000, or $84,674.75. I do not think this is true, or even partly true, and the demurrer to this count will be sustained.

The third and fourth counts state alternate ways of figuring the amount which the plaintiffs think they were entitled to recover. They contain considerable surplusage, and may, as defendant suggests, be somewhat argumentative. If the first count be properly amended, they are unnecessary, so that the demurrer to each of them will be sustained.

In re ABBRUZZO.

(District Court, W. D. Pennsylvania. June 20, 1921.)

No. 9134.

Bankruptcy ⇐191(1)—Distraint by landlord not dissolved by bankruptcy "obtained through legal proceeding."

A landlord's lien is not one "obtained through legal proceedings" within the meaning of Bankr. Act, § 67f (Comp. St. § 9651), but is recognized by the common law and the law of Pennsylvania as arising out of the

relation of landlord and tenant, and the lien acquired by a distraint for rent is not affected by bankruptcy of the tenant within four months.

In Bankruptcy. In the matter of Louis A. Abbruzzo, bankrupt. On review of order of referee. Reversed.

M. B. Lesher, of Pittsburgh, Pa., for creditors.
Linus P. McGuiness, of Pittsburgh, Pa., for bankrupt.

THOMSON, District Judge. This case comes before us on a certificate from the referee. Louis Abbruzzo, being a tenant of an office in the Park Building, Pittsburgh, and being indebted for six months' rent under his lease, amounting to $308, the landlord issued a warrant on December 21, 1918, under which the office furnishment was levied on and advertised for sale. Six days later, a creditors' petition was filed against the tenant, a receiver was appointed by the court, on the application of the receiver a restraining order issued against the landlord, and on February 19th the tenant was adjudged a bankrupt. On April 8, 1919, on petition of the receiver, the goods levied on under the landlord's warrant were sold at private sale for $300, the court confirmed the same, and ordered:

"That the said fund be substituted for the furniture and fixtures until the court shall have determined the validity of the lien, without prejudice to the rights of the said landlord therein."

The receiver, who was subsequently appointed trustee, filed his account, claiming $57.20 as expenses of administration, including his commissions and attorney's fees, and claimed in his trustee's account $16.50 expenses. The landlord objected to the allowance of any expenses, commissions, or attorney's fees, on the ground that he is entitled to have his rent paid in full. The learned referee overruled the objection, except as to an item of $5 attorney's fee in the trustee's account, and ascertained the amount due to the landlord to be $231.30. The correctness of this ruling is the matter certified.

The question involved is of much greater importance than the amount in controversy, and requires a discriminating application of certain established legal principles. The learned referee considered as controlling section 64b of the Bankruptcy Act (Comp. St. § 9648), which specifies the debts which have priority, and the order of payment. In this section, costs of administration and attorney's fees are placed third; wages due workmen, and so forth, fourth; and "debts owing to any person who by the laws of the states or the United States is entitled to priority" are fifth in the order of priority. Under this fixed statutory rule of distribution, the referee concluded that the costs of administration must be first paid. This section must be read in connection with other sections of the act, in order to correctly apply it.

Section 67f provides as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by

the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." Comp. St. § 9651.

This section strikes down preferences of all levies, judgments, attachments, or other liens, obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him. On the other hand, the Bankrupt Act preserves and gives effect to all the priorities which are not preferential or in fraud of the act, and which are recognized by the several states.

The question then arises, what is the nature of a landlord's claim, and on what is it based? Distress for rent is a most ancient and efficient remedy to the landlord for the collection of rent. It belonged to him at common law, and in most states its exercise is regulated by statute. In this state, as at common law, a warrant is issued directly by the landlord, and he to whom it is directed, whether officer or private citizen, is bailiff or agent of the landlord. The right of distraint arises when the relation of landlord and tenant is created, and is in the nature of a lien. For the assertion of this right no suit is necessary. It is independent of legal proceedings, as no return is made, no judicial hearing had, or judgment obtained, in order to authorize the landlord to sell. While there is no specific lien except on the goods actually distrained, all the goods on the premises are treated as a quasi pledge, which gives superiority to the specific lien established by the distraint. It is in no sense "obtained through legal proceedings." The priority given under the levy of the distress warrant arises under the law from the relation of landlord and tenant, the warrant being in the nature of an execution or process for the enforcement of the existing right. Such lien is not discharged under the provisions of section 67f of the Bankrupt Act, and therefore the priorities in distribution provided for in section 64b do not apply. These principles which I have summarized are most clearly set forth in the able opinion of Judge Gray, of the Circuit Court of Appeals for this circuit, in Re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384. They are also elaborated by the Supreme Court of the United States in Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, in which the opinion of Judge Gray in Re West Side Paper Co. is more than once referred to with approval.

The foregoing principles are so plainly enunciated and so clearly and convincingly stated in these cases as to leave no room for doubt as to their correctness. The learned referee in his opinion draws a distinction between the case at bar and that in Re West Side Paper Co., but I am of opinion that no such distinction is justified. The goods which were sold in that case were the goods of the bankrupt, who was a subtenant of the lessee, although not recognized by the landlord as his tenant. But the goods were on the leased premises, and therefore subject to the landlord's distress, by virtue of his right arising under the tenancy created by his lease. Under those circumstances, the goods having sold for less than the amount of the landlord's rent, the Circuit Court of Appeals held, reversing the District Court, that the landlord was entitled to payment in full of his rent,

undiminished by the costs of administration. This is absolutely controlling of the case at bar. The goods, being on the premises and liable for distress, under the Pennsylvania statute are preferred to the extent of one year's rent, as against an execution or other process by which they may be seized and sold.

It follows that the report and order of the learned referee must be reversed, and the whole fund is awarded to the landlord, except the actual costs of making the sale.

UNITED STATES v. ONE BUICK ROADSTER.

(District Court, E. D. Michigan, S. D. December 2, 1921.)

No. 6512.

Intoxicating liquors ⇐247—Conviction in federal court prerequisite to forfeiture of vehicle used in illegal transportation.

The conviction in a court having competent jurisdiction, which, under National Prohibition Act, § 26, is a prerequisite for forfeiture of a vehicle used in illegal transportation of liquor, is a conviction in a federal court of violation of such act, federal courts having, under Judicial Code, § 256 (Comp. St. § 1233), exclusive jurisdiction of offenses cognizable under authority of the United States; so conviction in a state court of violation of state prohibition is not enough.

Libel by the United States of America against one Buick roadster. Dismissed.

John E. Kinnane, U. S. Dist. Atty., and Frederick L. Eaton, Asst. U. S. Dist. Atty., both of Detroit, Mich.

McClear, Stein & Sarbaugh, of Detroit, Mich., for respondent.

TUTTLE, District Judge. This is a libel filed by the government, through the United States attorney for this district, alleging that the respondent automobile was seized within the jurisdiction of this court by the proper officers of the United States, and that it is subject to forfeiture to the United States under the National Prohibition Act (41 Stat. 305) and by reason of the violation thereof, in that before its seizure it had been unlawfully used in transporting certain intoxicating liquor therein described without the necessary permit, and praying that said automobile be declared forfeited to the United States and sold or disposed of by the court under said National Prohibition Act. An order to show cause why such forfeiture should not be declared was issued to the claimant of said automobile, and on the hearing thereof it appeared that the driver of the automobile in question had been arrested by officers of the state of Michigan, and tried and convicted of violation of the state prohibition statute in one of the courts of said state, and that this automobile had been seized by federal officials at the request of state officers. It further appeared that no one had been convicted or tried in this or any other federal court for the illegal transportation or possession of intoxicating liquor in this automobile,

or on any charge in connection with the use of such automobile; nor is it claimed otherwise by the government.

Under these circumstances, it is clear that no basis has been shown for the forfeiture of the automobile in question. The jurisdictional requirements and procedure for any such forfeiture on the ground alleged in the libel herein, or under any provision of the National Prohibition Act, are set forth in section 26 of said act, which was considered by this court in the recent case of United States v. One Cadillac Touring Car, 274 Fed. 470. That section provides that—

"Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the * * * automobile * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction. * * * The court upon conviction of the person so arrested, * * * unless good cause to the contrary is shown by the owner, shall order a sale * * * and shall pay the balance of the proceeds into the Treasury of the United States."

It is, of course, elementary that federal courts have exclusive jurisdiction of federal offenses. Section 256 of the Judicial Code (Comp. St. § 1233) expressly provides that—

"The jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several states * * * of all crimes and offenses cognizable under the authority of the United States."

It is therefore plain that the "conviction" in the "court having competent jurisdiction," referred to in the language of the National Prohibition Act just quoted, has reference to a conviction in a federal court. As, therefore, it has already been held by this court in the case just cited that the procedure prescribed by section 26 must be followed as a jurisdictional basis for the forfeiture of the automobile in question, and as such procedure requires a "conviction" under this federal statute before such automobile can be forfeited and sold, it follows that the libel and the proceedings based thereon in the present case are fatally defective in the respect pointed out, and such libel must therefore be dismissed, and an order entered directing the return of the automobile here involved to the claimant, in accordance with his petition filed herein.

In re DYNAMIC MFG. CO.

(District Court, E. D. Michigan, S. D. January 19, 1921.)

No. 4475.

Bankruptcy ⇐413(3)—Objections to discharge must conform to rules of court.

Specifications of objection to discharge of a bankrupt, not verified as required by a local rule of the court, nor filed within the time prescribed by such rule, will not be considered.

In Bankruptcy. In the matter of the Dynamic Manufacturing Company, bankrupt. On motion by bankrupt to strike out specifications of objection to discharge. Motion granted.

Henry P. Seaborg, of Detroit, Mich., for bankrupt.
N. Alvin Patterson, of Detroit, Mich., for creditor, Jennie Coon.

TUTTLE, District Judge. This is a motion by the bankrupt to strike out certain specifications in opposition to the discharge of the bankrupt, filed on behalf of Jennie Coon, a creditor of said bankrupt, by an attorney who does not now represent her. After the filing of such specifications, a motion was filed by the present attorney for said creditor to dismiss the application of the bankrupt for its discharge.

The specifications referred to are too vague and indefinite to satisfy the requirements of law. They are also insufficient because not verified as required by Rule 12 of the local Bankruptcy Rules. This rule includes the following provision:

"In case a creditor or other party in interest desires to oppose the granting of the discharge, he shall cause to be filed with the clerk on or before the return day of the order to show cause, his appearance in opposition thereto and shall file verified specifications of the grounds of his opposition within ten days thereafter, as provided in General Order No. 32, and serve a copy thereof upon the bankrupt, or his attorney if he appears by attorney." 37 Sup. Ct. v.

It further appears that no copy thereof was served upon the attorney for the bankrupt, as provided by said rule.

The motion to dismiss the application for a discharge, if treated as the equivalent of specifications in opposition to such discharge, must be held insufficient because not filed within 10 days after the return day of the order to show cause, as required by said rule, although the delay was in no degree due to the fault of Mrs. Coon's present attorney, who was not retained until too late.

Furthermore, it would seem that the grounds on which such last-mentioned so-called specifications are based would not, on the merits, warrant a denial of the discharge sought. These grounds involve and depend upon the contention that the bankrupt, which was formerly known as the Federal Carburetor Company, never legally acquired the name "Dynamic Manufacturing Company," in the manner provided by the statutes prescribing a method for the change of a corporate name, and that therefore this court has not acquired jurisdiction to entertain the petition in bankruptcy filed by the bankrupt as the Dynamic Manufacturing Company. However, a corporation may be known by the name adopted and used by it to designate itself, even if it has not formally and in the statutory manner changed its previous name, just as an individual may so adopt a new name and by user thereof become known by such new name, or even by several different names, without following the statutory procedure available for a formal change of name by the order of a court.

The reasons, therefore, assigned in the last aforesaid so-called specifications appear to be without merit, although it is unnecessary to pass upon this question as the motion of the bankrupt to dismiss the specifications, as improperly filed, must be, and hereby is, granted.

THE MANCHESTER BRIGADE. THE DAVIDSON COUNTY. MANCHESTER LINERS, Limited, v. UNITED STATES.

(District Court, E. D. Virginia. October 20, 1921.)

1. **Salvage ⟸7, 27—Service rendered to disabled vessel held salvage service.**
Libelant's steamship Manchester Brigade while on a transatlantic voyage and during a severe storm, in response to a wireless call went to the assistance of the steamship Davidson County, which was wholly disabled. She was requested to stand by and tow the Davidson County to the Azores when the weather permitted. After waiting two days, during which attempts at towing were defeated by the storm and when the weather had moderated and she was about to start towing, she was dismissed by the Davidson County on instructions from her owner, which had sent another vessel to her relief. The Manchester Brigade was delayed in her voyage two days, and if she had completed the towage she would have been delayed eight days. *Held*, that her service was one of salvage, and that she should receive one-fourth the salvage award to which she would have been entitled if she had completed the service, in addition to payment for the time lost and the expense incurred.

2. **Salvage ⟸15—Dismissal before completion of service does not defeat right to salvage award.**
Where the services of a salvor vessel have been accepted and she is able and willing to do everything that is necessary to complete the salvage, but is dismissed or superseded for reasons of convenience or economy on the part of the vessel in distress, the services rendered are salvage services and should be rewarded to the same extent and in the same degree as though the service were completed, having regard to the risks actually encountered and to the time and expense incurred.

3. **Salvage ⟸26—Lessening of danger of loss of ship by reason of wireless should be considered in awarding salvage.**
The use of the wireless makes it improbable that, under ordinary conditions of distress or damage to ship machinery, help may not be had before serious danger is encountered, and this fact should be taken into consideration in fixing salvage awards.

In Admiralty. Suit for salvage by the Manchester Liners, Limited, owner of steamship Manchester Brigade, against the United States, owner of steamship Davidson County. Decree for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, and Baird, White & Lanning, of Norfolk, Va., for libelant.

J. Frank Staley, Sp. Asst. Atty. Gen., and H. H. Rumble, Admiralty Counsel, and Paul W. Kear, U. S. Atty., both of Norfolk, Va., for respondent.

GRONER, District Judge. This is a libel for salvage.

[1] The Manchester Brigade, a British steamer, then valued at slightly over a million dollars, left Halifax for Liverpool December 8, 1919. at 11:30 a. m. About midnight of the same date she picked up a wireless message from the steamer Davidson County, then valued at a little over $600,000, stating that the latter was in distress, giving her position, and that she was drifting north. Between the last-mentioned date and December 12th a severe storm prevailed, and little, if any, progress was possible in going to the rescue of the drifting

vessel; but on December 12th the Manchester Brigade received another message from the Davidson County advising of her great danger, and requesting that some one should stand by her during the storm in case the necessity arose for abandoning ship. At a later hour of the same day the Davidson County advised the Manchester Brigade of her position, and the Manchester Brigade changed her course so as to bring her to the given position. Sharp lookout was kept, and both steamers from time to time displayed lights and employed other means to indicate their positions, and about 1:30 p. m. of December 14th the Davidson County was sighted about eight miles away. At 2:30 p. m. the same day the Manchester Brigade came up close, but the wind and sea were too heavy to make salvage operations possible. The wind was blowing a strong gale, and both steamers constantly shipped heavy seas over decks. The Davidson County, with all her propeller blades gone, was then drifting with the wind at an average speed of four or five miles an hour. The two steamers continued in constant wireless communication, the Davidson County repeatedly asking the Manchester Brigade to stand by and to prepare at the first opportunity to tow her to the Azores. At 8:35 p. m. on December 14th the Manchester Brigade advised the Davidson County that she had a towing line 90 fathoms long, of 5½-inch wire cable, which she would endeavor to put aboard, and at daylight of the 15th she maneuvered close up to the Davidson County, and at about 8 o'clock of that morning succeeded in getting a towline aboard. A few minutes later, however, owing to the heavy sea which was still running and the danger of parting the cable, it was slipped to avoid this result. Throughout the day numerous other attempts were made to take the Davidson County in tow, but without success. After daybreak of December 16th several more attempts were made, but these likewise failed owing to the heavy weather. Around noon of the 16th, when the wind and sea had moderated considerably, the Manchester Brigade again maneuvered to make fast to the Davidson County, and when she had prepared and was about to put aboard another line she received a wireless from the Davidson County informing her that the steamer West Lashaway was in close proximity and had been directed by the Shipping Board to take the distressed vessel in tow. The wireless from the master of the Davidson County concluded:

"I regret the time you have lost, and hope the Shipping Board will reward you as your heroic endeavors warrant. All members of my crew unite with me in thanks to you and wishing you bon voyage."

To this wireless the Manchester Brigade replied, offering to stand by until the West Lashaway arrived, but at about 2:30 p. m. that day received a report from the Davidson County saying that the Lashaway was within 40 miles, and that it was unnecessary for the Manchester Brigade to delay her voyage longer. Thereupon the Manchester Brigade proceeded upon her voyage. The Davidson County was picked up by the West Lashaway the following day and towed to the Azores, where she arrived December 20th; the towage service requiring exactly three days. The Manchester Brigade arrived at Liverpool, her des-

tination, at 11 a. m. December 21st, 13 days after her departure from Halifax. The average time consumed between Halifax and Liverpool by the Manchester Brigade was about 11 days, so that allowing for an average voyage it will be seen the lost time by reason of her efforts to salve the Davidson County was two days; and the time that she actually was standing by the Davidson County was also two days. For although she had left her course two days prior to the time she came within sight of the Davidson County, the time lost in finding the ship was made up by the drifting movement of the two ships in the direction of Liverpool. So that, allowing for the additional day required by the Lashaway in getting a line aboard the Davidson County and in actually starting the towing operation, it is fair to assume that had the Manchester Brigade been permitted to carry out her original purpose, the time consumed in the salvage operation would have been six days; and the additional lost time to the Manchester Brigade in steaming from the Azores to Liverpool, allowing one day for communication with her owners, and instructions, would have been, perhaps, two days; which would have made the actual time lost had the whole rescue been accomplished by her about eight days. As against this, her actual delay in her voyage was, as shown above, approximately two days.

It is insisted on behalf of the Davidson County that since the services performed by the Manchester Brigade accomplished nothing that contributed, physically speaking, to the ultimate safety of the vessel, no salvage, as such, is allowable under the doctrine prevailing in the American courts. It is not asserted that the Manchester Brigade should go wholly unpaid for her services, but that the amount allowed should be based upon a quantum meruit, rather than upon a reward for salvage services. Counsel, therefore, protest against an allowance of salvage measured by the total award which would have been made had the Manchester Brigade succeeded in passing a line and successfully towing the Davidson County into the Azores. It is true it has been held by some of the American courts that an indispensable element of salvage compensation is that the service shall be to some degree beneficial; that the effort of the salvor must at least have contributed to the rescue; but in no case called to my attention has there been a refusal to award salvage as such in a case in which the salvage service has been requested by the distressed vessel, and the failure on the part of the salvor to render the substantial service contemplated by the rule is due to the act of the former in discharging the latter just at the moment when success would otherwise attend the efforts being made.

In the case at bar, the services of the Manchester Brigade had been solicited, first, by a general call for help, and, later, by the frequent interchange of radiograms between herself and the Davidson County, in which the one asked and the other agreed to do the needful. The latter vessel represented herself as being in a helpless condition, with some prospect of having to abandon ship. The Manchester Brigade, responding to this appeal, changed her course, and through the greater part of two days and two nights sought to locate the helpless vessel, and when finally this was accomplished stood by her making

effort after effort to render services, and doing everything that seamanship could do under the circumstances. The condition of the weather made it impossible at the moment to accomplish the object of her endeavors, but two days later, when the weather had moderated and it was possible to get a line aboard and begin the towage service, she was dismissed without fault on her part in favor of another vessel which had been instructed to do the work. There is, of course, no ground for criticism of the Shipping Board for preferring one of its own vessels for the salvage service rather than the vessel of a stranger, and there was actually, of course, no option on the part of the master of the Davidson County in the action he took in superseding the original salvor; but to say that because of this combination of circumstances, operating at the moment when the Manchester Brigade would otherwise have succeeded in performing the service which for two days or more she had been making vain efforts to perform, the latter vessel is entitled to no salvage, would be going further than either fairness or good conscience requires. If, instead of the facts as they exist here, the Manchester Brigade, after the first day's futile efforts, had abandoned the Davidson County, I think it might, and could with propriety, be urged that she would be entitled to no salvage; and this principle might properly be extended even to a condition where if she had actually begun the towage service, and for reasons of her own, not amounting to an emergency, had discontinued and abandoned the work.

[2] But where the services of the salvor vessel have been accepted, and she is able and willing to do everything that is necessary to complete the salvage, but is dismissed or superseded for reasons of convenience or economy on the part of the vessel in distress, the services rendered are salvage services and should be rewarded to the same extent and in the same degree as though the service were completed, having regard, of course, as in all salvage cases, to the risks actually encountered in the service and to the time and expenses incurred. That this rule should obtain is in the interest, not alone of commerce, but to encourage assistance to life and property when either are in danger, and requires no citation of authority to sustain it; for otherwise, having regard to the frailties of human nature, there would be little inducement to the masters of vessels to engage in such undertakings and to imperil their own vessels and endanger their own lives if the reward were contingent, not only upon success, but also upon the whim of the owner or master of the vessel in distress.

Applying these principles to the instant case, my opinion is that the amount to be allowed as salvage to the Manchester Brigade should be one-fourth of the amount which she would have received had she completed the entire service, and this is based upon the time consumed as against the time which she would have consumed except for the severance of relations occurring as above stated, and to this amount should be added the expenses and damages sustained by her in the efforts she made.

[3] In fixing the total amount of salvage for services of this character, regard should be had, of course, to the established rules; but in

applying these rules the older salvage cases afford but little help. The amounts allowed were fixed at a time when conditions of rescue of distressed vessels at sea were materially different than at present; for instance, before the use of wireless telegraphy. Consideration was, of course, given to the fact that at such a time the service was frequently rendered on occasions when otherwise the vessel probably would have been lost, for in the then trackless paths of the ocean it was not infrequent for vessels of large size to disappear without trace or sign of their going. When distress overtook them, it was a matter of chance whether another vessel would pass their way and render the necessary service. They might in such circumstances drift entirely out of the steamer paths of the ocean with the attendant risk of damage or total destruction. But all of this is changed under conditions as they exist to-day. In 1901–02 radio communication was in its infancy, and for several years thereafter 50 miles was the distance limit of communication between vessels, but to-day radio communication has been perfected to such an extent that it is possible with the most improved methods to communicate nearly 4,000 miles, and even with the equipment carried by merchant vessels to cover an area reaching several hundred miles in every direction. There is scarcely a part of the broad ocean now to which one vessel may not call another at any moment and secure assistance between suns. The use of the wireless makes it improbable, indeed almost impossible, that under ordinary conditions of distress or damage to ship machinery help may not be had before serious danger is encountered. These facts should be taken into consideration in fixing salvage awards, and instead of the amount being based upon the theory of prize money or bonus, it should be more nearly based upon the principle of compensatory service, plus, of course, a reasonable reward to insure willing service.

The charter value of the Manchester Brigade was approximately $1,750 a day. Damages sustained by her, plus the value of the amount of coal consumed, may be reasonably estimated at $1,500. Her actual out-of-pocket loss, therefore, on account of her efforts to be of service to the Davidson County, was $5,000. Had the service been completed, my judgment of the amount of salvage, in addition to the allowance to the vessel for the time lost and expenses, would have been $16,000. One-fourth of this would be $4,000, and this amount, added to the $5,000 computed and stated above, would make $9,000, which is the amount for which a decree may be entered in favor of the Manchester Brigade.

THE NYANZA.

Petition of MOORE & McCORMACK CO., Inc.

(District Court, E. D. New York. July 29, 1921.)

War ⇐29—Sale of seized vessel under Merchant Marine Act held to cut off prior lien; Merchant Marine Act held valid.

Where a German vessel, interned in the Philippine Islands, was taken over by the United States Shipping Board, under authority of joint resolution of Congress of May 12, 1917, and a proclamation of the President of June 30, 1917, and thereafter, under Merchant Marine Act June 5, 1921, was sold free and clear of all claims or liens, a prior admiralty lien of a national of an allied country was cut off by the sale, and the national was obliged to look to the United States for consideration of its claim; this being the intention of the law, and the law being valid as against the objection that the United States had no power, under international law, to seize the property or claim of a national of a friendly nation, without substituting some physical fund to which the claim might be transferred.

In Admiralty. Libel by the Compagnie Franco Indochinoise against the steamship Nyanza, her engines, etc., opposed by the Moore & McCormack Company, Inc., owner, with petition by the latter interpleading the United States. Libel dismissed without prejudice.

Barker, Donahue, Anderson & Wylie and Harry M. Zuckert, all of New York City (Richard K. McGonigal, of New York City, of counsel), for libelant.

Wood, Molloy & France, of New York City (Melville J. France, of New York City, of counsel), for claimant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., and James W. Ryan, Asst. U. S. Atty., of New York City.

CHATFIELD, District Judge. The libelant seeks to dismiss exceptions filed by the claimant to the libel. The claimant by its exceptions, and the United States through a suggestion, filed in answer to a petition interpleading the United States under the rule, urges lack of jurisdiction in this court to entertain the cause of action or to issue process therein.

The steamship Nyanza, which was purchased from the United States Shipping Board through the agency of the Emergency Fleet Corporation, has been delivered to the claimant, who has paid in whole or in part therefor. Under the libel filed in this action, the vessel was seized by the marshal, and after some correspondence the United States Shipping Board filed a stipulation to obtain her release from custody, pending the proceedings herein and subsequent to the presentation of the suggestion that the court was without jurisdiction.

The claimant appeared specially, when it filed the exceptions now under consideration, and at the same time, and subject to determination of the question as to jurisdiction, presented an answer denying any knowledge or information as to the allegations of the complaint, except those as to the transfer of the vessel by the Shipping Board, etc., and in the answer expressly denied admiralty jurisdiction.

The issue is sharply and clearly defined. The Nyanza was a German merchant vessel, known as the Esslingen, which, on or about August 4, 1914, received a cargo of rice meal belonging to a French national at a port in Indo-China. The vessel arrived on the 9th of August, 1914, at Manilla, where the master and officers refused to deliver or to transfer this cargo on the demand of the libelant's agent, and subsequently allowed or caused the vessel to be interned by the United States government during the period of the war in which Germany was then engaged. After the entry of the United States into the war, the vessel with its contents was seized, when the officers of the interned vessel were discovered doing damage to its machinery.

In the meantime the libelant had recovered in the courts of the Philippine Islands a judgment against the owners for $43,888.50, with interest, for loss of cargo and damages, and the vessel was attached therefor. The cargo had been turned over to receivers and sold, but was spoiled, and brought little or nothing. The complaint does not show, but the inference is plain, that the libelant had no other security for collecting this judgment, and the judgment has not been paid.

After the seizure of the Esslingen by the United States, under authority of the joint resolution of Congress of May 12, 1917, the Esslingen was taken over by the United States Shipping Board, under a proclamation of the President dated June 30, 1917. Under this joint resolution and by the proclamation, the Secretary of the Navy was to appoint a board of survey to ascertain the actual value of the vessel, etc., "and all property contained therein at the time of its taking." This report was to be filed with the Secretary of the Navy for preservation, and—

"these findings shall be considered as competent evidence in all proceedings on any claim for compensation."

The Esslingen was brought to Jacksonville, Fla., by the United States Shipping Board, and its name changed to the Nyanza, and subsequently, under authority of the Act of Congress of June 5, 1921 (sections 4 and 5, Merchant Marine Act, 41 Stat. 988, c. 250), sold free and clear of all claims or liens to the claimant. The libelant seeks in this action to enforce the admiralty lien which was reduced to judgment in the action in the Philippine Islands, and also the lien obtained by attachment of the boat under the judgment.

Apparently the libelant considers that the admiralty lien, upon which the personam action at Manilla was based, was not merged in the judgment or affected thereby, and that, as the libelant is a national of a friendly or allied country, its property right has never been taken away or severed from the vessel which was liable therefor, as well as under levy upon the judgment, when the United States entered the war. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969.

The libelant admits that Congress and the United States Shipping Board have seized and disposed of the right of the German owners in the vessel and her cargo. They dispute, however, the jurisdiction of the United States under international law to seize the property of a national of a friendly nation, or to dispose of the same, and therefore

contend that the sale of the vessel by the United States was subject to such admiralty liens or claims as were not affected by the seizure of the rights vested in Germany or German subjects at the time. McKnight v. United States, 98 U. S. 179, 25 L. Ed. 115; The Elexea (D. C.) 53 Fed. 359; The St. Jago de Cuba, 22 U. S. (9 Wheat.) 408, 6 L. Ed. 122; North American Commercial Co. v. United States, 81 Fed. 748, 26 C. C. A. 591.

It is apparent, from a consideration of the documents, that in terms and intention all claims to the vessel were transferred from the vessel to the United States, or to the fund obtained by the United States when the vessel was sold. Payment of all such claims must necessarily be provided for by an act of Congress, as a claim against the United States government. The libelant cites such cases as The Buena Ventura, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. Ed. 206, The Nereide, 13 U. S. (9 Cranch) 388, 3 L. Ed. 769, Brown v. United States, 12 U. S. (8 Cranch) 109, 3 L. Ed. 504, and The Paquette Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320, in support of its contention that the United States cannot by seizures of prize, or directly through Act of Congress, taken unto itself the property of aliens of a country with which it is not at war.

If this be so, then the United States could sell no more than it could seize, and the claimant has purchased from the United States only such rights as accrued to the United States, and has taken the vessel subject to such admiralty liens as can be urged against it. But the government has not seized the lien or the property of a friendly neutral; it has seized the ship—a res—to which the lien will attach, but which like ownership of an interest, cannot be separated into parts.

If the government's contention be correct, there is no need of determining the extent of the so-called claim of lien, nor whether the obtaining of the judgment has affected the validity of the lien, nor whether the claim has been diminished by collection. Also, if the government's contention is correct, the libelant must look to the United States under the laws of Congress, for consideration of such claim as it may have, and the present action must be dismissed. The Hampton, 72 U. S. (5 Wall.) 372, 18 L. Ed. 659; The Battle, 73 U. S. (6 Wall.) 498, 18 L. Ed. 933; The Sally, 12 U. S. (8 Cranch) 382, 3 L. Ed. 597.

It is difficult to see why the Congress has not jurisdiction, in the absence of treaty provisions or of international agreements ratified by the United States, to take private property and to make compensation therefor, in such a way as the Congress may see fit. The Congress would have jurisdiction to terminate a treaty by the passage of any law within its constitutional power, whether or not diplomatic relations would be affected thereby. In what way the United States would be called upon to defend the claims against it is not of moment in determining whether Congress has transferred the property in question free from the claims of private, friendly aliens. In other words, the present question depends upon whether Congress has the constitutional power to take the claim of a friendly alien, as well as an enemy alien, in time of war, and in connection with the seizure of the physical prop-

erty of an enemy, without substituting therefor some physical fund to which the claim may be transferred.

In accordance with the principles of international law, the United States, and many other nations, respect the property of neutral or friendly aliens; but does this show that, when necessary for the prosecution of war, the rights of neutrals may not be interfered with? Has not Congress the power to take all property in the possession of, or apparently in the control of, the enemy, and to substitute such demands for compensation as may be legally enforced, whether in tribunals of justice or by treaty? This may be a tort, and not actionable (Juragua Iron Co. v. United States, 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520); but that does not contradict the fact.

The claim of the libelant could certainly be urged against Germany, as a part of the damage caused by the war, if such claims were included in the terms of the treaty of peace. If the United States agrees to take care of such claims, and to pay the same out of property taken by it from Germany, and for which, under the treaty, the United States will account to Germany, and which will be used by the United States to satisfy such claims as the United States shall pay or extinguish, it is difficult to see why the sale of this property by the United States should be destroyed, and its value made dubious, by the preservation of all sorts of unknown claims thereto as liens upon the vessel.

If the libelant's contention is correct, then the ships in the hands of the United States Shipping Board could not be disposed of at their market value, but only for such price as a speculator might wish to bid, with the chance of defending all sorts of admiralty claims thereto. It does not seem that the powers of Congress were thus limited, or that such was the intent of the law in question.

The exceptions to the libel should be sustained, and the suggestion of the United States respected and followed, to the extent of dismissing the present libel for lack of jurisdiction, without prejudice to the presentation of the libelant's claim in any way or in any place where it can be considered.

THE POZNAN.

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

1. **Shipping ⟸115—Matters which will excuse performance of contract of carrier.**

To excuse performance under a contract of affreightment altogether, and leave the promisee without remedy for his loss, the intervening event which prevents performance must be so unexpected as to be outside any contingency which, had the parties been faced with it, they would have agreed that the promisor should undertake.

2. **Shipping ⟸115—No excuse for failure to unload cargo.**

Where congestion at destination was perfectly well known when cargo was accepted, there was no such excuse for failing to deliver and unload the cargo and for returning to port of shipment, by reason of such congestion, as would relieve the ship from its obligation to unload at the port of discharge.

3. **Shipping ⇐113—Authority in bill of lading, permitting discharge at port other than that of discharge, scrutinized with care.**
An article in a contract of carriage, giving the master of a vessel the broadest discretion to terminate the venture and discharge the ship at that port which most nearly will fulfill the contract, should be scrutinized with care.

4. **Shipping ⇐141(1)—"Civil commotion" and "disturbance" in contract of carriage did not mean economic disturbance.**
The words "civil commotion" and "disturbance" in an article in a contract of carriage giving master right to discharge cargo at some other port than that of discharge in case of civil commotion, disturbance, etc., at the port of discharge, referred to political disorders which prevent a ship from safely approaching a port or from getting assistance in discharging the cargo, and did not relate to congestion or crowding due to an economic disturbance that resulted in merchants being unable to pay for goods and remove them from berths and warehouses.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disturbance; Words and Phrases, Civil Commotion.]

5. **Shipping ⇐141(1)—Contract of carriage held not to excuse nondelivery due to congestion at port of discharge.**
An article in a contract of carriage, excusing failure to discharge cargo in case of civil commotion, disturbance, blockade, or interdict of the port of discharge, warlike or naval operations or demonstrations, or ice or closure by ice, "or other circumstances (whether existing or anticipated)," did not excuse a failure to discharge occasioned by congestion, due to deficiency of wharves, warehouses, or lighters.

6. **Shipping ⇐125—Ship responsible for deviation.**
Where a ship without excuse deviates under contracts of carriage, she is responsible for any results arising therefrom.

7. **Shipping ⇐115, 125—Return to port of shipment a deviation.**
Where a ship without excuse returned to port of shipment, there was a total abandonment and deviation, even if the owner of the ship intended to transport the goods to port of discharge by another bottom.

8. **Shipping ⇐140—Ship's liability for loss limited by exceptions in contract before deviation.**
Until a deviation, liability of ship for loss or injury to cargo is limited by the conditions in its contract of carriage, but after such deviation she becomes an insurer.

9. **Shipping ⇐132(3)—Burden on ship to prove losses fall within exceptions in contract of carriage.**
Where cargo is lost or injured, the burden is on the ship to prove that the losses fall within exceptions limiting its liability found in the contract of carriage.

10. **Shipping ⇐141(1)—Liability limited by exceptions as to theft and breakage.**
Under exceptions in a contract of carriage against loss by theft and by breakage, ship is not liable for thieving by stevedores employed by contractors engaged by the ship, where due diligence was used.

11. **Shipping ⇐132(3)—Ship has burden of proving loss occurred before deviation.**
Where contract excepted ship from losses by thieving and breakage, and there was a deviation by the ship and a return to port of shipment without discharge of cargo, the ship will stand charged with whole loss occasioned by thieving and breakage during the whole voyage, unless it can prove that the thieving or breakage occurred before the deviation.

12. **Shipping ⇐106—Charterer's bill of lading bound ship for right delivery.**
Where charter party did not provide that master should sign bills of lading, and provided that charterer should issue no bill of lading until

freight had been paid to the owner, but clearly contemplated bills of lading running in the name of the charterer, and they all so read, the ship, once laden, was bound for right delivery.

13. **Shipping ⟸53, 62—Charterer liable for bills of lading signed by it.**
A charterer was liable for all bills of lading signed by it, and those signed by the master of the vessel with its consent and in its name, having no right to compel the master to sign for the owner under the charter party; and, the venture being primarily the charterer's, he would be liable, even though master signed bills of lading for the owner.

14. **Shipping ⟸53—Owner not liable under bills of lading signed by charterer.**
Owner of a vessel is not liable under bills of lading, not purporting to bind it, issued in the name of the charterer, which under the charter party was the only party bound to sign, even as to bills of lading actually signed by the master in the charterer's name while acting as charterer's servant.

15. **Shipping ⟸53—Owner of vessel held not liable under bills of lading.**
Owner of vessel was not liable under bills of lading signed by charterer, though it kept a representative at the office of the charterer, carefully supervising the issuance of all bills of lading and taking all the checks, where this was done in pursuance of its agreement by the charter, by which it was to have all the freight as security for the hire of the ship in question and others.

16. **Shipping ⟸53—Owner liable for results of causing chartered ship to return without discharging.**
The owner of a chartered ship was liable in tort to shippers, where it ordered the master to return with the ship to port of shipment without discharging cargo, as required by bills of lading issued by charterer.

17. **Admiralty ⟸22—Tort causing deviation within jurisdiction of admiralty court.**
Where tort of owner of chartered vessel consisted of an order to master on land resulting in deviation by ship, the injury being a breach of the contract of carriage between shippers and charterer, the admiralty court has jurisdiction of a libel against such owner.

18. **Shipping ⟸131—Owner not liable for pilfering after deviation occasioned by its tort.**
Where owner of chartered vessel was guilty of tort in occasioning the deviation of the ship and its return to port of shipment, subsequent pilfering from cargo at port of shipment, though in fact a consequence of the deviation, was too remote to be its legal result, and owner was not liable therefor to shippers under bills of lading signed by charterer.

19. **Shipping ⟸120—Ship liable for pilfering from cargo while in charge of marshal.**
Ship and charterer were liable to shippers for pilfering from cargo while the ship was in the charge of the marshal, where he was only in technical possession thereof.

20. **Shipping ⟸132(3)—Burden of proof concerning pilfering from cargo.**
Where owner of chartered ship caused its deviation and its return to port of shipment, shippers under contracts with charterer have the burden, as against the owner, of showing that pilfering occurred while such owner had charge of the cargo.

21. **Shipping ⟸131—Owner, causing deviation of chartered ship, only liable for proximate consequences.**
Owner of chartered ship, which tortiously causes its deviation and breach of contract of carriage between charterer and shippers is liable only for the proximate consequences of its tort, and if the ship at the time could not have made right delivery at port of discharge or some other proper port under the contract, the tort did not injure shippers,

and their relief can then rest only in contract, but if the ship could have delivered, the consequence of the order is the shippers' loss in getting delivery at port of shipment as against delivery at port of discharge when delivery could have been made after the tortious deviation.

22. **Shipping ⇐53—Immaterial as to liability of owner for tort that charterer would have committed same wrongful act.**
Where owner of chartered vessel tortiously ordered its return from port of discharge to port of shipment without discharge of cargo, such owner cannot argue as against shippers that the charterer would have returned independently of any order by the owner, and would have caused equal loss to shippers.

23. **Shipping ⇐131—Measure of damages for tortious deviation.**
Where ship breaches its contract to discharge cargo at port of discharge and returns to port of shipment, the measure of damages to shippers is the difference in value of the goods at port of discharge, delivered at a reasonable time after the ship arrived there, and their value in port of shipment when delivered, and this may or may not correspond with the cost of carriage from port of shipment to port of discharge, and the amount of the prepaid freight has nothing to do with it, and what was a reasonable time for delivery depends upon when, with reasonable efforts, the ship could have discharged.

24. **Shipping ⇐131—Measure of damages for deviation of ship occasioned by tort of third person.**
Where owner of chartered vessel tortiously ordered master to return the ship to the port of shipment after it reached the port of discharge, such owner is not responsible upon the basis of any possible discharge before it intervened and ordered the return of the ship, that is, the owner is not charged in personam in favor of shippers, under bills of lading signed by charterer with any affirmative obligation, the consequences of its tort being only the possible discharge which it actually prevented, the measure of damages being otherwise the same as that for breach of contract by charterer.

In Admiralty. Libel by the John B. Harris Company and others against the steamship Poznan and others. Cause referred to special commissioner.

This case comes up upon a great number of libels filed by shippers of cargo upon the S. S. Poznan against the ship in rem and the owner and charterer in personam. The ship was owned by the Polish-American Navigation Company, which chartered her to the Acme Operating Company on September 6, 1920, for a round trip, New York to Havana, Cuba, on a time charter, government form, at a hire of $67,500 a month, payable in advance. The charter was executed concurrently with another agreement of the same date, which arose from the following circumstances: The Polish-American Company had earlier chartered to the Acme Company two steamers, the Krakow, on July 3, 1920, and the Ida, on July 17th. On the 6th of September about $34,000 hire was due on the Krakow, and about $40,000 on the Ida. By the collateral agreement the Acme Company assigned to the Polish-American Company all freights received on the Poznan up to the sum of $275,000 as security for the hire already due and any further hire which should become due on any of the three vessels. Any excess of freights received over $275,000 and up to $350,000 were to be deposited by the Acme Company in a special account in its own name and that of the Polish-American Company as further security. The charter likewise provided that the charterers should issue no line bill of lading for cargo loaded until cash had been paid to the Polish Company, except bills of lading not exceeding $10,000.

The ship received about 13,000 tons of freight, and issued bills of lading, in the charterer's name, most of which were signed by the charterer except

a few by the master. The charges were calculated by weight or measurement, with an addition of 90 cents per hundred pounds, the significance of which the parties dispute, the libelants asserting that it was to insure delivery at Havana, while the Polish and Acme Companies declare that it was against possible demurrage in Havana. During all the time of loading the Polish Company had a representative, a clerk, in the Acme office, who checked the bills of lading and saw that all checks received—the freight being paid in advance—were at once indorsed over to the owners. In this way some $307,000 of moneys was received, including, however, in that sum, $50,000 of obligations, not cash, from one shipper.

The bills of lading were in usual form, and contained the following provisions relevant in the suit:

"The carrier shall not be liable for loss or damage occasioned * * * by robbers and/or thieves."

Again:

"8. * * * In case of war, hostilities, civil commotion, disturbance, blockade, or interdict of the port of discharge, warlike or naval operations or demonstrations or ice or closure by ice, or other circumstances (whether existing or anticipated) which in the opinion of the master give rise or are likely to give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the master is to be at liberty in his absolute discretion to proceed to and discharge the cargo at such other port or ports as he thinks advisable under the circumstances; and thereupon the cargo shall be at the sole risk and expense of the receivers, and the ship and the ship owner shall be free from all responsibility in respect thereof."

Finally:

"18. * * * Owing to conditions of war or hostilities existing or threatened, this shipment is accepted at the sole risk of the owners thereof of arrest, restraint, capture, seizure, detention or interference of any sort by any power; and the carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or of any carrier or to avoid loss, damage, expense, delay or other disadvantage, either with or without proceeding to or toward the port of discharge or entering or attempting to enter or discharge the goods there, whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk or expense of the owner thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges shall be paid by the shipper, consignee and/or assigns and shall be a lien on the goods."

The ship loaded in the North River at 131st and 133d streets and eventually cleared on October 3d, arriving at Havana on the evening of October 8th. Application for entry at the Custom House was made on the next day, but she could not be entered, because she presented but one sheet of her manifest, which consisted of 70 sheets. The other 69, having been left behind in the hurry of her departure, though at once sent by mail, were not received until November 11th, through some delay in the Cuban Post Office.

When the Poznan arrived in the harbor it was found to be extremely crowded with vessels, and she lay at anchor until November 25th, when by order of the owners she returned with her cargo unbroken to New York. Meanwhile, the master and Mr. Nevelson for the owners, who had arrived at Havana towards the end of October, made various efforts to obtain a berth, the sufficiency of which was a subject of most of the dispute at the hearing. The libelants insist, and the respondents deny, that there were at least four wharves at which she could have berthed, and which for convenience may be called Castellanos, Altares, United States and Cuba, and Paula. It is impossible to set out the evidence upon this issue in any reasonable compass. Nevelson while at Havana also made some inquiry as to the possibility of discharging the ship at other Cuban ports, but concluded that this also was impossible, a conclusion also contested by the libelants. It was at the end of

these inquiries, and after he had got back to New York and made some efforts there, that he directed the ship to return.

The crowded condition of the harbor of Havana had existed throughout the summer of 1920, was well known to the Acme Company and the Polish Company, on September 6th, was reflected in the unusually high charge of 90 cents per hundred pounds either for landing or demurrage. The Krakow had left New York in July, and was burned at Havana on October 18th before finishing her discharge. The Ida left later and arrived in August, but could not secure a berth until October 22d. The difficulties of discharge in Havana were, moreover, known. not only to those companies, but generally among shipping people. During the month of September there was some indication that the situation was better, but probably it grew worse in October, though that question is in some dispute. Acting upon his knowledge of this situation in the harbor, Stafford, president of the Acme Company, had entered into a more or less definite agreement with one Guidera for the use of a wharf before the Poznan sailed, which came to nothing. Stafford in addition bought some barges of the Shipping Board which were never delivered, and swore that he had two other barges under charter from another. The Acme agent in Havana was one La Villa, who had for one reason or another allowed the charterers' credit to become bad in Havana by his failure to pay past charges, a failure which undoubtedly increased the ship's difficulties.

On October 10th, the day after the Poznan arrived, the Cuban Republic declared a moratorium on all obligations, including those of the banks, which could thereafter be required to pay but 10 per cent. of their deposits. Its effect upon the discharge of vessels in the harbor is in dispute, the libelants arguing that it had little or no effect, while the respondents insist that they become decidedly worse, owing to the fact that merchants were unwilling or unable to meet their commitments. The official documents show that the discharges became relatively less in October and November than they had been in September, and for the moment anyway it undoubtedly tended to prevent the removal of freight from the bonded warehouses. How long this operated, or how important an influence it was, it is impossible to ascertain.

The Poznan docked in New York on her return on December 2d, and the shippers at once began to file possessory libels for the cargo, as well as the libels in suits for damages. The ship was arrested at once, and under order of court the cargo was taken away by the shippers upon giving stipulations for any damages to the ship. Though the Poznan was therefore in custody of the court, the Acme Company was not by order relieved of the duty to deliver, and proceeded to do so until February 3d, the delay being due to the extreme confusion with which unloading was made. Upon broaching the hatches the cargo was found to have been much more extensively damaged than is usual in such cases, but the details are too complicated to be set forth. Because of this damage and of the stowage as actually observed during discharge the libelants allege negligence and claim damages. The testimony is in dispute. Both on loading and discharge the stevedores pilfered largely, and there was in consequence a substantial shortage in the cargo. This the libelants assert to be due to negligent watching, and make the basis of a claim for damages.

The claims for damages are therefore made up first of the damages for delivery in New York, including: (1) In the case of goods reshipped, (a) the cost of carriage to Havana, (b) the difference in the value of the goods when they finally were discharged at Havana and their value at that port in November, 1920; (2) in the case of goods sold in New York, the difference in value between the value delivered in Havana in November, 1920, and the price realized here. Besides these, in all cases the libels claim loss from negligent stowage, and the shortage due to pilfering. All these claims are asserted against the Acme and Polish companies personally, as well as against the Poznan in rem.

The libelants consolidated all their libels into one, upon which the evidence was taken. This libel was then amended to include allegations that the Polish Company had persuaded the Acme Company to break its contract,

which was laid as an independent maritime tort. Much evidence was taken in Havana, and the case came on for hearing in court.

Walter C. Noyes, Ralph J. M. Bullowa, and Lawrence E. Brown, all of New York City, for claimant.

Frank E. Walsh, Harold Lee, of New York City, and Joseph A. McCaffrey, for charterer.

Hunt, Hill & Betts, of New York City (Geo. Whitefield Betts, Jr., and George C. Sprague, both of New York City, of counsel), for libelants John B. Harris Co. and others.

Burlingham, Veeder, Masten & Fearey, of New York City (Ray Rood Allen and Arthur Mayer, both of New York City, of counsel), for Davis and other libelants.

Harrington, Bigham & Englar, of New York City (Horace M. Gray, of New York City, of counsel), for libelants Quaker City Corporation and others.

Kirlin, Woolsey, Campbell, Hickok & Keating, of New York City (James H. Herbert and Robert S. Erskine, both of New York City, of counsel), for various libelants.

Duncan & Mount, of New York City (Russell T. Mount and Henry W. Dieck, Jr., both of New York City, of counsel), for Havana Central R. R. Co. and various libelants.

Haight, Sandford, Smith & Griffin, of New York City (James C. Webster, of New York City, of counsel), for Construction Supplies Corporation and others.

Samuel Frank, of New York City, for various libelants.

Joseph G. Cohen, of New York City, for various libelants.

Pratt, McAlpin & Page, of New York City (Ira C. Ramsburg, of New York City; of counsel), for various libelants.

Alexander & Ash, of New York City (Edward Ash, of New York City, of counsel), for various libelants.

Rumsey & Morgan, of New York City (Mark W. Maclay, Jr., of New York City, of counsel), for various libelants.

LEARNED HAND, District Judge (after stating the facts as above). The first question is whether there was a breach of contract in failing to deliver the cargo at Havana, a question quite distinct from whether the prepaid freight must be returned. Every one agrees that the understanding to deliver as evidenced by the bills of lading was absolute except in so far as it was excused, and there are only two excuses offered: First, that the venture was frustrated by impossibility of performance; second, that performance was excused under the terms of the bills of lading themselves. For the sake of argument I shall assume for the moment that the respondents are right in saying that between October 9 and November 25, 1920, they had no opportunity of berthing the "Poznan" anywhere in the harbor of Havana, that they could not have discharged in lighters, and that there were no other Cuban ports which offered better advantages. If the bill of lading or the law excused them from delivery, they were right in returning to New York, but if it did not, they were still in duty bound to make right delivery at Havana, and they should have waited till a berth was avail-

able. This feature of the case arises later; it has nothing to do with the question whether there was excuse for breach, which I am now considering.

[1] The case is clearly not one of frustration within the rule of The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960, The Claveresk (C. C. A.) 264 Fed. 276, and Bank Line v. Capel & Co., L. R. (1919) A. C. 435, and Tamplin S. S. Co. v. Anglo-Mex. Pet. Co. (1919) 2 A. C. 397. It is perhaps needless to repeat that these are but instances of the general rule that subsequent events, making the performance of a contract impossible, may be so unforeseen and so completely disappoint the expectation of the parties as to absolve the promisor from performance. The rule is, it is true, generally put as though the question were one of intent, but this is, strictly speaking, untrue. The parties have no intent whatever on the subject, because they assume that performance will take place, and are ordinarily not thinking of the promisor's failure. Yet any promisor recognizes that his performance is subject to some risks, which may prevent fulfillment, and such risks he must be understood as accepting when he makes the promise. Day v. U. S., 245 U. S. 159, 161, 38 Sup. Ct. 57, 62 L. Ed. 219. To excuse performance altogether and leave the promisee without remedy for his loss, courts have always found it necessary, though with various degrees of strictness, that the intervening event which prevents performance shall be so improbable as to be outside any contingency, which, had the parties been faced with it, they would have agreed that the promisor should undertake. Chic., M. & St. Paul v. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543, 23 Sup. Ct. 754, 47 L. Ed. 1171; Carnegie Steel Co. v. U. S., 240 U. S. 156, 165, 36 Sup. Ct. 342, 60 L. Ed. 576; Sun Printing & Pub. Assoc. v. Moore, 183 U. S. 642, 655, 22 Sup. Ct. 240, 46 L. Ed. 366; Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648 (C. C. A. 8th). Prima facie he is bound, however impossible it may be for him to perform, and as Prof. Williston (Williston on Contracts, § 1937), says, the exceptions which have grown up since the middle of the nineteenth century, whether phrased as "implied conditions," or as "the intent of the parties," are in truth no more than equitable modifications of the agreement. They depend, not upon a better understanding of what the parties said, but upon declining to enforce the undertaking in cases which lead to extravagantly unfair results.

[2] In the case at bar there is no reason whatever to excuse the ship. All the conditions in the harbor of Havana were perfectly well known in September, 1920, when the cargo was accepted. Indeed the Acme Company, just because of those conditions, tried to get a special wharf from Guidera and to have lighters and hulks on hand in which to discharge. No one will be hardy enough to suggest that the failure of those negotiations would excuse, especially as an unusual rate was charged against them, nor would there be the slightest ground to entertain the defense at all, except for the promulgation of the moratorium on October 10th. If this were the cause of the ship's default, it might well be that the case was one of frustration, because that might possibly

be so unexpected an event as to be fairly beyond the range of any putative "intent" of the parties. At least I shall assume as much, and take up the question of the actual effect of the moratorium upon the situation. Unfortunately, though perhaps necessarily, the evidence is vague, and it is also conflicting.

The only way in which the moratorium could have played a part, and this I understand to be conceded, is by preventing merchants from withdrawing their goods from the "habilitated" warehouses or the lighters, thus keeping these full of goods. A fair test of its effect should therefore be the daily withdrawals of goods through the Custom House before and after October 10th. Importations into the port of Havana we should also expect to fall off after the moratorium, though apparently that was exactly what did not happen, but that consideration is irrelevant, because any crowding which was due to importations after the Poznan arrived makes no difference. She was chargeable with getting the benefit of the date of her arrival, and in so far as the delay in receiving the manifest prevented her from doing so, she is to blame. The question really becomes this: What was the mass of accumulated merchandise of which she must await the withdrawal, and how far was that withdrawal delayed by the moratorium?

The figures given by Yero in his general list show September packages withdrawn at 1,421,000, October, 1,155,000, November, 1,207,000. In his detailed statement given later the footings for September and November are about the same, but those for October are 1,550,000, of which 474,000 were before October 10th, and 1,076,000 for the balance of the month. The discrepancy is not accounted for. If the later list be taken, the daily average of withdrawals from September 1st to the date of the moratorium was about 56,000 and from the moratorium to December 1st about 50,000. The daily withdrawals in October after the moratorium were nearly 60,000. On these figures it would appear that the moratorium did not stop withdrawals from the warehouses and lighters at all. If the first figure for October be taken and divided by 3, the daily figure for September and the first third of October is 53,000, for the last two-thirds of October and November is a little less than 44,000 and for the last two-thirds of October alone about 43,000.

Accepting the earlier figures as most favorable to the ship, there is still no reason to attribute to the moratorium any such effect as could possibly be deemed a frustration of the enterprise. There was some slackening in the withdrawals, say an average of 10,000 packages a day, i. e., 260,000 in a month, which would have delayed her about a week to work off at the rate of withdrawal during the last two-thirds of October. It would be absurd to treat this increased difficulty and delay as terminating the whole contract.

My conclusion, therefore, is that the conditions in October after the moratorium were not substantially different from what they had been during the summer. In October very large quantities did come in, and no doubt served still further to increase the congestion, but as I have said, this cannot fairly be taken in the ship's favor unless the neglect to furnish the manifest be ignored, which it should not be.

[3] The next question is whether articles 8 or 18 make an excuse.

Article 18 may be dismissed at once; it clearly refers only to circumstances arising out of war, and is not applicable to the situation at Havana last autumn. Article 8 is not subject to this limitation, being general in its application. It gives the master the broadest discretion to terminate the venture and discharge the ship at that port which most nearly will fulfill the contract. Obviously such an exception should be scrutinized with care, unless the charterer is to be free at pleasure to disregard the whole purpose of the voyage. The rule that exceptions must be strictly construed (Compania La Flecha' v. Brauer, 168 U. S. 104, 118, 18 Sup. Ct. 12, 42 L. Ed. 398) applies with exceptional force.

[4] No one can with much plausibility urge that the situation at Havana, even when the evidence is taken most favorably to the respondents, comes within any of the express exceptions in article 8. It was not the direct consequence of war, hostilities, blockade, warlike or naval operations or demonstrations, ice or closure by ice. There remain three conceivable exceptions; civil commotion, disturbance, or interdict of the port of the discharge. Yet it cannot be seriously argued that the crowded warehouses, berths and lighters at Havana were due to any of these. I can see little or no distinction between "civil commotion" and "disturbance," and if there be any, each refers to political disorders which prevent the ship from safely approaching the port or from getting assistance in loading or discharging from those on shore. "Disturbance" is no doubt the broader word, but it will not serve. In so far as the people of Cuba had ordered more goods than they had berths and warehouses to accommodate without delay, by no stretch can it apply. In so far as the crowding was due to the fact that merchants did not remove their goods because they could not pay for them, as eventually evidenced by the moratorium, it is indeed possible by a metaphor to speak of a "disturbance" as the cause. There was an economic disturbance, but that is certainly not what article 8 has in mind. Moreover, it is open to some doubt whether even so the cause would be proximate. The supposed sequence is that the merchants, being hard-pressed, refused to clear the warehouses; hence later ships could not discharge. Aside from the great doubt as to how far this circumstance operated in fact to prevent discharge, there is not a very direct relation between the economic stringency which put the merchants in this frame of mind and the actual clogging of the harbor. "Interdict" is of course in a political category.

There remains, therefore, only the general phrase, "other circumstances * * * which * * * are likely to give rise to delay or difficulty in * * * discharging." If these words are to be used in their bare grammatical meaning, then all that precedes was redundant, and the article as a whole gave the master the right to terminate the voyage for any reason as soon as he in good faith thought the discharge would be difficult or delayed. But nobody has ever thought that such a clause went so far as that. Yet the words must add something to the preceding specifications, and the question, of course, is how much. Lord Justice Farwell in Tillmanns v. Knutsford, [1908] 2 K. B. 385, 403–405, thought that it must be possible to find a single cate-

gory for all the preceding words, and that the general concluding language was to be taken as including all those instances not specified which that category would comprise. If so, then, as I understand the suggestion, you must find the genus determined by the greatest number of attributes common to all the specified instances, the greatest common divisor so to speak, and the general words comprise all instances not expressly enumerated. I am not at all satisfied that this, though a logical rule, is what the law will impute to the language. Lord Loreburn was more nearly correct perhaps when in Larsen v. Sylvester, [1908] A. C. 295, 296, he declined to attempt any final definition of what is after all only a canon of interpretation. I should suppose that the clause merely added a penumbra of meaning to each of the specified terms, so as to include similar things not literally covered by the terms themselves. Aktieselskabet Frank v. Namaqua Copper Co., Ltd., 25 Com. Cas. 212.

[5] Yet if Farwell, L. J., be right, still I think that this exception will not serve the respondents. Without the addition of the words, "ice or closure by ice," the article included only violent human interference, as was found in Tillmanns v. Knutsford, supra. The putative genus would as little include deficiency of wharves, berths, and lighters, or the failure to clear them with customary speed, as it included ice in the case cited. It is quite probable that "ice or closure by ice" was inserted just because of that decision. I am by hypothesis now to find a genus which shall include "ice" along with what went before. The items become, it is true, incongruous enough, but if logic is to be pressed to a conclusion, I think that all the items fall within the definition of an obstacle interposed between the ship and the port by the active agency of man or nature. Within such a genus the deficiency of wharves, warehouses, or lighters does not fall, any more than the deficiency of labor to discharge, usually covered by an exception against strikes and the like. Nothing here prevented the Poznan's unlivery except the absence of empty receptacles. True, it may be argued that the ships at the berths and the goods in the warehouses and lighters were physical obstacles, but the contract did not specify any particular berths, and the actual obstacles would not have prevented performance except for the scarcity of other means. This is quite another matter from blocking off the port by violence or by an obstacle like ice. Therefore, even accepting the rule of Farwell, L. J., the exception does not cover.

I have found no authorities in this country directly in point. The nearest is Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126 (C. C. A. 1st), a case involving delays caused by crowded berths. The exception read "strikes, lockouts, civil commotions or any other causes or accidents beyond the control of consignees," but the decision went off on another point, and there is little to indicate the court's opinion from what is said on pages 412, 413, of 142 Fed., 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

There are general expressions of the doctrine as in Hickman v. Cabot, 183 Fed. 747, 106 C. C. A. 183 (C. C. A. 4th), Board of Commerce v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486 (C. C. A.

6th), Bers v. Erie R. R., 225 N. Y. 543, 122 N. E. 456, and Krulewitch v. National Importing Co., 195 App. Div. 544, 186 N. Y. Supp. 838 (1st Dept.), but in no case are the facts near enough to be of much assistance here.

The English cases are more directly in point. In Re Richardson & Samuel, L. R., [1898] 1 Q. B. 261, the steamer was delayed in loading due to the fact that workmen, who had been paid off, when the railway service was interrupted, could not be reassembled in time to discharge the ships in season. Thus the berths remained crowded and the steamer had to wait her turn. The charter party contained the following:

"The act of God, the Queen's enemies, war, riots, floods, strikes, lockouts, accidents to railway factories or machinery loss or damage from fire on board in hulk or craft or on shore, arrests and/or restraint of princes rulers and people or other causes beyond charterer's control."

The Court of Appeal held that the delay due to dismissing the hands did not fall within these exceptions, being for the charterer's own purposes. Neither was it a lockout, nor ejusdem generis with a lockout. A. L. Smith, L. J., further added that the delay arising from loading in the order of arrival was not within the general clause. Insofar as the case may be disposed of on the first ground, possibly it is not pertinent, but the judges clearly intended it to rest in part anyway on the second and third, and in so far as it does, it is closely in point.

In Thorman v. Dowgate S. S. Co., L. R., [1910] 1 K. B. 410, the ship lost time through being obliged to wait her turn through a block in the harbor, precisely as in the case at bar. The charter party contained by reference the words:

"Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, loading, or shipping of the cargo, also restrictions or suspensions of labour lockouts delay on the part of railway either in supplying wagons loading the coals, or any other cause beyond my control."

Lord Sumner (then Hamilton, J.) held, relying partly on In re Richardson & Samuel, supra, that the concluding clause must be construed ejusdem generis with what went before and that the defendant, the charterer, was not excused for the delays, and must pay demurrage. The case appears to me on all fours with that at bar.

In Northfield S. S. Co. v. Compagnie l'Union des Gaz, L. R., [1912] 1 K. B. 434, the steamer was prevented from discharging because the berths were all taken and the port rule of the shore laborers forbade their working except upon berthed ships. The charter party had an exception as follows:

"In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging," etc.

The delay was held by the Court of Appeal to be on charterer's account under the rule ejusdem generis. Aktieselskabet Frank v. Namaqua Copper Co., Ltd., 25 Com. Cas. 212.

The last three cases dispose of the suggestion that Larsen v. Sylvester, L. R., [1908] A. C. 295, in which the words were "accidents or

hindrance of what kind soever," changed the rule of ejusdem generis as applied to this class of cases. Indeed, the House of Lords, shortly after Larsen v. Sylvester, applied it in S. S. Knutsford Ld. v. Tillmanns & Co., L. R. (1908) A. C. 406, supra, to a similar exception in a charter party, as already alluded to. Larsen v. Sylvester, supra, must be interpreted as depending upon the form of the phrase, "of what kind soever," which is taken to mean any kind of cause at all, even at the expense of making nugatory the preceding language. While it must be owned that the distinction is somewhat verbal, it is hard to escape the result.

My conclusion is that both on principle and authority, so far as can be gathered from the books both here and in England, the delay of a ship caused by the insufficiency of berthing facilities is not comprised in such a clause as article 8. It is especially to be noted that this applies even when the charter party contains an exception against strikes and lockouts, which clearly contemplate economic disorders. Thorman v. Dowgate, supra, and Northfield S. S. Co. v. Compagnie, supra, were therefore much stronger cases for the charterer than the case at bar is for the owners here.

[6, 7] Being without excuse the ship's return was a deviation, and she is responsible for any results arising from that fact. The law regarding deviation does not seem to me very clear. On the one hand it is said in Thorley v. Orchis S. S. Co., [1907] 1 K. B. 660, that deviation is an abandonment of the enterprise, i. e., the agreed voyage, and the substitution of another, to which the bill of lading does not apply. Hence the ship cannot take advantage of any exceptions and is liable at least as common carrier, and perhaps as absolute insurer.

Judge Brown in Calderon v. Atlas S. S. Co. (D. C.) 64 Fed. 874, 877, 878, expressly distinguished between land and water carriage in this respect, holding that as to water carriage the loss need not be directly caused by the deviation, and that the carrier was an insurer. He did not, however, decide that the contract had been abandoned, because he enforced one term of it. He was reversed as to this in the Supreme Court, but not on the ground stated in Thorley v. Orchis, supra. He again declared obiter the same rule in The Bordentown (D. C.) 40 Fed. 682, 689.

Justice Story, in Trott v. Wood, Fed. Cas. No. 14190, held the ship liable for a loss by capture which was not the direct result of forwarding by another vessel, and Justice Grier did the same in the case of a shipwreck in Bazin v. S. S. Co., Fed. Cas. No. 1152. The ship was held to be an insurer, but the ratio decidendi was not given. Judge Betts, in Thatcher v. McCulloh, Fed. Cas. No. 13862, appears obiter to have thought that the loss must appear to be due to the deviation.

In The Citta di Messina (D. C.) 169 Fed. 472, 475, Judge Hough, obiter, went still further, saying that the shipper has an option to treat the deviation as a conversion, or to hold the ship for any loss subsequent to deviation regardless of its causal relation. It must be conceded that at least in the case of delays the same rule does not apply to land carriage. Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; St. Louis, etc., Ry. v. Com. Ins. Co., 139 U. S. 223, 237, 11 Sup. Ct.

554, 35 L. Ed. 154, and the general applicability of the land rule has the high support of Williston (Williston on Contracts, § 1096).

I must own that it seems to me open to question whether any deviation of however slight account, must be regarded as a total abandonment of the enterprise and the substitution of a new voyage, under the rule in Thorley v. Orchis, supra, followed in The Citta di Messina, supra, and I am much strengthened in this doubt by the opinion of Mr. Williston. That there may be such a deviation is of course, very clear, as, for example, if a ship bound from New York to London should proceed by way of Rio and Buenos Ayres. I see no reason in such a case for refusing to treat the voyage as totally abandoned, and the contract of carriage as no longer applicable. In the case at bar it is too clear for words that the return to New York was a total abandonment, even if the Acme Company intended to transport the goods again to Havana by another bottom, which indeed is far from true. Therefore, here it is not necessary to rule on the general question suggested.

[8] Even so, I do not understand that the exceptions do not protect the carrier for any breaches of the contract which occurred before deviation. In Thorley v. Orchis, supra, the damage was done at discharge. In Calderon v. Atlas S. S. Co., supra, it occurred after deviation. In the Citta di Messina, supra, the time of deviation was said to be the critical period. The ship's liability for any loss or injury to the cargo before November 25th was therefore limited by the exceptions, and it was only thereafter that she became an insurer.

[9, 10] The bill of lading contains exceptions against loss by thieves and by breakage. These exceptions are not in the words of the Harter Act (Comp. St. §§ 8029–8035), but no point is made that they are void for that reason, if construed with an implied limitation that due diligence was in fact used to stow, handle, load, and deliver. I shall therefore assume that they are valid, but that such limitations are implied. The burden is on the ship to prove that the losses fall within the exceptions so construed. As to thieving, the stevedores were employed by contractors engaged by the ship, and were not employees of the ship directly, and the exception is good if there was due diligence used to load. The exception of course does not apply to the discharge. As to breakage, the exception is good for all breakage before November 25th, if there was due diligence used to stow.

Upon these issues a great deal of testimony was taken and if I could make any useful decisions upon it now, perhaps I should do so, so as to guide the Commissioner, but I cannot. I am satisfied that the stowage was in large part negligent, but such a general finding is useless at this stage, because the stowage of each parcel of this mixed cargo may present a separate question, which cannot properly arise until the nature of the damage to that part is proved. Then only can the question of stowage become practically important.

[11] But there is another reason why at the present time I need not discuss the stowage, and this applies also to the loss either by thieving or by breakage. I have already held the ship absolutely after November 25th for both these losses. The libelants will make out a prima

facie case by showing their loss by shortage and breakage. In so far as in fact this happened after November 25th it will be a conclusive case; in so far as it happened before, the ship may be able to answer it. but has the burden of proof. To carry that burden, however, it must show that the loss or breakage is within some exception in the bill of lading. But no exceptions are good after November 25, 1920, and to bring the loss within the exceptions, the ship must therefore show that the thieving occurred at New York before the vessel sailed on October 3d, and that the breakage occurred before November 25th. It may well be that this will be impossible; if so, the ship will stand charged with the whole loss. For these reasons, I think it best to leave all these questions for the Commissioner, when the libelants begin to prove their losses, and to suggest to him that he need not make findings upon the issues of good stowage or care in watching unless the ship succeeds in showing what part of the loss happened before November 25th.

[12] The last question is of the parties liable. First, of the ship. The charter party did not provide that the master should sign the bills of lading; that clause in the printed form being struck out. By an addendum it provided that the Acme Company should issue no bill of lading until the freight had been paid to the Polish Company. Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company, and they all so read. Most of them were in fact signed by the company, but a few by the master. So far as concerns the ship, it makes no difference. Being once laden she was bound for right delivery though the charterers sign. The Euripides (D. C.) 52 Fed. 161; The Centurion (D. C.) 57 Fed. 412; The Freda (D. C.) 266 Fed. 551. In The Esrom (No. 2) 272 Fed. 266 (C. C. A. 2d), February 24, 1921, it was agreed by all the judges that the charterer's bill of lading bound the ship for right delivery. Indeed, the cargo would have a "privilege" against the ship for right delivery, even without any bill of lading. The Saturnus, 250 Fed. 407, 162 C. C. A. 477, 3 A. L. R. 1187.

[13] Second, of the charterer. Clearly the Acme Company is liable for all bills of lading signed by it. It is liable besides on those signed by the master, since these were signed with its consent and in its name, and since it had no right to compel him to sign for the owners. Moreover, the venture was primarily theirs, and they were liable though the master signed bills of lading for the owners. Pendleton v. Benner Line, 246 U. S. 353, 355, 38 Sup. Ct. 330, 62 L. Ed. 770.

[14] Third, of the Polish Company. It was not liable under the bills of lading because these did not purport to bind it; they issued in the name of the charterer, which under the charter party was the only party bound to sign. The case is therefore not like Knutsford v. Tillmanns, supra, or The Themis (C. C. A. 2d), 275 Fed. 254, July, 1921, in which the charterer signed for the master under a charter party by the terms of which he could have compelled the master to sign. Even those bills of lading actually signed by the master were in the charterer's name, in doing which he acted as the charterer's, not the owner's servant. Ordinary principles of contract apply, and if the Polish Company is to be held it can only be as an undisclosed principal.

[15] The charter party, for reasons already given, prima facie precludes that possibility, and nothing in pais contradicts the conclusion. It is true that the Polish Company kept Jensen at the Acme offices carefully supervising the issuance of all bills of lading and taking all the checks. This, however, was in pursuance of its agreement with the Acme Company by which it was to have all the freight as security for the hire, not only of the Poznan, but of the Ida and the Krakow. It was natural not to trust to the credit of the Acme, and to take the freight direct by indorsement. Yet the venture remained that of the Acme Company, as is proved by the fact that all profits were in the end to come to it. The Polish Company is not liable in contract.

[16] However, the libelants insist that the Polish Company is liable in tort, which is said to rest upon compelling the Acme Company to break its contracts with the libelants at the time the ship was ordered home. The final order to the master to return came from Nevelson in New York, after he had exhausted all the efforts he thought desirable to find berths in Havana. No inducement or persuasion was directed to the Acme at all; the order ignored the charterer, though given with its assent, or at least without its dissent. Now it is well settled law in federal courts that where a third party procures an obligor to break a contract, he commits a tort against the obligee. Angle v. Chic., etc., Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Bitterman v. Louisville, etc., R. R., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693. In short, the rule first laid down in Lumley v. Gye, 2 E. & B. 216, has been fully accepted, and is even extended beyond cases where the injured party has a contract. Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. Under the facts at bar the Polish Company did commit a tort in directing the master to deviate and return to New York. Indeed it was they who primarily broke the contract, the Acme Company was nearly, if not quite, a silent and helpless dummy. I cannot see how the rule could be more aptly illustrated than in such a case.

[17] Was it, then, a maritime tort over which the admiralty will take jurisdiction? Confessedly, that question depends rather on historical than a priori considerations. Ordinarily it is the locus of the tort which governs, and where the injury is on the water though the defendant's act was on the land, that locus is determined by the water. Hermann v. Port Blakely Mill Co. (D. C.) 69 Fed. 646; Atlee v. Packet Co., 21 Wall. 389, 22 L. Ed. 619; The Normannia (D. C.) 62 Fed. 469, 472; Greenwood v. Westport (D. C.) 60 Fed. 560. Perhaps, not every tort committed at sea is within the jurisdiction of an admiralty court. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 60, 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. At least for the purposes of this case I may assume that the injury must be maritime in its character as much as though the case sounded in contract. The injury here was the breach of the contract of carriage itself, the effective cause of which was the act of the Polish Company. Obviously if that contract was maritime enough in its character to base a

libel upon it in contract, the injury resulting from the wrongful act on shore was as maritime, because it was the same thing. The case is a far less stretch of jurisdiction than The Normannia, supra. I conclude therefore that the Polish Company is liable in tort for turning back the Poznan, and that this court has jurisdiction.

[18-20] The remaining question is the extent of this liability in tort. It is apparent that the damage for bad stowage is not attributable to the order to return. Similarly of the pilfering on the North River. The pilfering at Brooklyn was in fact a consequence of the order to return, but too remote to be its legal result. No one would reasonably have apprehended it. Perhaps the Polish Company had assumed charge of the cargo at Brooklyn; the situation is not very clear, for the Acme Company had certainly not abandoned the cargo. The respondents insist that the marshal was in charge, but, although he was in technical possession, this was not the case. However, it will probably be impossible in fact to decide which part of the loss by pilferage occurred at Brooklyn and which at the North River. As against the Polish Company the libelants will have the burden on this issue and probably cannot carry it. It appears better, therefore, not now to pass on the question whether the Polish Company is responsible for that loss owing to any relation it assumed to the cargo on its arrival. The Commissioner may pass on that if it becomes relevant.

[21] The responsibility in tort for the other damages requires some analysis into the situation on November 25, 1920. The Acme Company was bound to make right delivery at Havana; it had no excuse in the bills of lading. Similarly, the ship was bound to the cargo. But the Polish Company is liable only for the proximate consequences of its order to return. If the ship at that time could not have made right delivery at Havana or some other Cuban port, the order did not injure the shippers. Their relief can then rest only in contract. If on the other hand, the ship could have delivered, the consequence of the order is the shippers' loss in getting delivery at New York in December and January as against delivery at Havana when delivery could have been made after November 25, 1920. Now it is perfectly clear that the Poznan could have discharged at some time at Havana, though just when may be open to doubt. After January 1, 1921, when Col. Despaigne was appointed by the President to relieve the harbor, the wharves began to clear. Before January 20th he had "habilitated" many more warehouses, and by March 9, 1921, when Yero's testimony was taken, there were only two or more steamers still discharging, of which one was the Acme's ship (under charter), the Whitney. It follows that the Poznan could have been discharged some time during January or February at the latest, had she stayed in the harbor, as was her duty.

[22] It may be urged that no one could know on November 25th that any such relief would come, and that the loss resulting from the Polish Company's order was not therefore proximate. I agree that no one at that date could tell how long it might take to discharge the ship, but I do not agree that it was apparent that she could not be discharged at all. On the contrary, it was reasonably certain that she could be discharged, though that might take time. There was no con-

ceivable economy in returning to New York and reshipping. Such a course was sure to lose time. In directing the return the Polish Company became chargeable with the possibility of a berth's being offered in January or February or earlier. In the loss incurred by the ship's failure to wait they associated themselves. Now it may be argued that the Acme Company might and probably would have returned independently of any direction of the Polish Company. Perhaps that is so, but the objection does not lie in the respondent's mouth. They gave the order which turned back the ship, and they were therefore the authors of the wrong from which loss resulted. It is no answer that the Acme Company might later have committed an independent wrong which would have caused an equal loss.

[23] The proper rule of damages is a little different under the tort and under the contract. Under the contract, it is the difference in value of the goods at Havana delivered at a reasonable time after the Poznan arrived, and their value in New York when delivered. This may or may not correspond with the cost of carriage to Havana; there is no necessary relation between the two, and, as I said at the outset, the amount of the prepaid freight has nothing to do with it. This rule is established in the books. The Caledonia, 157 U. S. 124, 139, 15 Sup. Ct. 537, 39 L. Ed. 644; The Success, Fed. Cas. No. 13,586, 7 Blatchf. 551; The Giulio (D. C.) 34 Fed. 909; The City of Para (D. C.) 44 Fed. 689; The Coventina (D. C.) 52 Fed. 156; The Arctic Bird (D. C.) 109 Fed. 167, 175. What was a reasonable time for delivery depends upon when with reasonable efforts the Poznan could have discharged. In deciding it the commissioner may find it necessary to consider the various negotiations for wharves in Havana, which are immaterial to the controversy in chief. In any case this date cannot be later than March 1st. Perhaps the difference in value between November 1st and March 1st is not enough to require this investigation; it is to be greatly hoped that the parties may agree upon some date.

[24] Upon the tort the rule is different only to this extent, that the Polish Company is not responsible upon the basis of any possible discharge before it intervened on November 25th. The date depends upon when the Poznan could have first discharged after that day. That date must be fixed upon the assumption that the Acme Company was unaided in the unlivery. The Polish Company is not charged in personam with any affirmative obligation; the consequences of its tort are only the possible discharge which it actually prevented. This may seem inconsistent with my ruling that its liability does not depend upon whether the Acme would have discharged at all, but it is not. The inquiry as to damages is based, not upon what the Acme would have done, but upon what it could have done, had it performed as it was bound to do. Again, it is to be hoped that the parties can avoid a long investigation of a necessarily hypothetical character, on which it may well be that only small differences, in view of the amounts at stake, will depend. They may agree upon an average date of discharge.

The cause will be referred to Judge Lacombe as Special Commissioner, if he cares to take it up, as soon as the parties wish; otherwise to such other commissioner as the parties may agree upon.

IMPERIAL MACHINE & FOUNDRY CORPORATION v. AMERICAN MACHINERY CO. et al.

(District Court, S. D. New York. May 2, 1921.)

1. **Patents ⊂=328—809,582, for vegetable peeling machine, claims 1, 2, 3, and 4, held infringed.**
   The Robinson patent, No. 809,582, for a vegetable peeling machine, *held* for a pioneer invention, and the claims entitled to a broad construction. Claims 1, 2, 3, and 4 *held* infringed by a machine having a bowl-shaped disc with raised portions.

2. **Patents ⊂=157(1)—"Flat" used in patent claims broadly construed.**
   The word "flat," as used in patent claims, *held* not to be construed as a limitation to a literally plane surface, where not required for any functional purpose and where a variance would not affect the operation of the machine.

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

3. **Judgment ⊂=527—When opinion may be read to ascertain issues determined.**
   Where a decree dismisses a bill in general terms, without setting forth the ground of such dismissal, the opinion of the court may be referred to in order to determine what issues were decided.

4. **Patents ⊂=327—Prior decree held not to render construction of patent claims res judicata.**
   The question of a limitation of patent claims *held* not res judicata because of an opinion expressed by the court as to such limitation in a prior suit between the parties, where the issues and the alleged infringing device were not the same as in a later suit, and where such opinion was not determinative of the suit.

5. **Patents ⊂=289—Patentee held not estopped from maintaining suit for infringement.**
   Defendant for ten years made and openly advertised and sold machines which infringed complainant's patent, but complainant delayed bringing suit for several years after it had knowledge of such facts, presumably because of a construction of its patent by one Circuit Court of Appeals under which defendant did not infringe. *Held*, that complainant, owning a pioneer patent, and which was the pioneer in the manufacture of practical machines in the art, was not estopped to maintain a suit to enjoin further infringement by defendant, but that it was not entitled to recover damages or profits for past infringement.

In Equity. Suit by the Imperial Machine & Foundry Corporation against the American Machinery Company and Harvey Brett. Decree for complainant.

A. Alexander Thomas, of New York City, for plaintiff.
William A. Redding, of New York City, for defendants.

MAYER, District Judge. This suit for infringement of two patents is the culmination of many years of controversy between plaintiff or its predecessors and American Machinery Company (formerly American Fruit Machinery Company).

At the conclusion of the argument, after the trial, the court stated that it would hold that the claims of United States letters patent No. 942,932 were not infringed. Patent No. 1,031,735 having been with-

drawn from the suit, there remain only for consideration claims 1, 2, 3, and 4 of United States letters patent to Henry Robinson, No. 809,582, issued January 9, 1906.

The principal defenses are noninfringement, res adjudicata, and equitable estoppel.

The validity of the patent and of the claims here in issue is not challenged.

The patent has been the subject-matter of much litigation. Many of the cases involving the patent are referred to in Imperial Machinery & Foundry Corporation v. G. S. Blakeslee & Co. (C. C. A.) 262 Fed. 419.

Of the various infringing devices considered in the cases referred to in Imperial Machinery & Foundry Corp. v. G. S. Blakeslee & Co., supra, the only one which dealt with the device alleged in this suit to infringe was Imperial Machine Company v. Whyte's, Inc., and two companion suits in which Judge Learned Hand rendered an opinion upon a motion for a preliminary injunction. His opinion is not reported; but he held claims 1, 2, 3, and 4 valid and infringed in the three suits just referred to.

There are two other cases, namely, Imperial Machinery Company v. Riley, in the United States District Court for the Southern District of New York, in which Judge Learned Hand granted, without opinion, a motion for a preliminary injunction, and Imperial Machinery Co. v. Beau-Site, in which a motion for preliminary injunction was granted by Judge Learned Hand, without opinion, on claim 1 and a final decree was entered holding claim 1 valid and infringed.

It will be noted that reference is made in 262 Fed. 420 to the opinion of Judge McPherson in Robinson Machine Company v. American Fruit Machinery Company, reported as a note in 212 Fed. 959. The decree, entered by Judge McPherson, was reversed, as will appear infra. The claims here under consideration are set forth in 262 Fed. at page 420, and to conserve brevity need not here be repeated.

[1] 1. *Infringement.*—In American Fruit Machinery Co. v. Robinson Machinery Co., 191 Fed. 723, 112 C. C. A. 313, the Circuit Court of Appeals for the Third Circuit reversed the decree entered by Judge McPherson and placed upon the claims there under consideration a different construction from that which had been accorded to them by Judge McPherson. Judge Learned Hand's opinion in the case of Whyte's, supra, indicates clearly a different view from that announced by the Circuit Court of Appeals for the Third District. It is true that Judge Hand rendered his opinion upon a motion for preliminary injunction, but nevertheless he construed the meaning of the claims as written.

In Imperial Machine & Foundry Corp. v. G. S. Blakeslee & Co., supra, it will be noted that the Circuit Court of Appeals for this circuit held the patent to be a pioneer, saying at page 420 of 262 Fed., "Indeed, we think it is a pioneer patent," and again, "It is in this it may be said to be a pioneer invention."

[2] Thus, in construing the scope of the claims it must be remembered that the Circuit Court of Appeals for this circuit has charac-

terized the patent as pioneer. This has also been the characterization in some of the opinions of the District Judges who have had occasion to construe the patent. The bowl-shaped disc which is here alleged to infringe was not the subject-matter of controversy in any of the courts prior to the Whyte's Case. In that case a disc similar to the alleged infringing device in this case was before the court. In American Fruit Machinery Company v. Robinson Machine Company, 191 Fed. 723, 112 C. C. A. 313, the Circuit Court of Appeals for the Third Circuit construed the word "flat" used in the phrase "horizontal flat striated portion." The "horizontal flat striated portion" is unquestionably an essential element in each of the claims. It is plain that Judge Lanning writing for the court in 191 Fed. 723, regarded "flat" as literally flat in the ordinary acceptation of the word. If this view of the Circuit Court of Appeals for the Third Circuit is accepted, then the bowl-shaped disc, here involved, does not infringe. In support of the same construction given to the word "flat" which was accorded by the court just referred to, plaintiff's expert, Mr. Dow, called attention to various definitions which sustain defendants' contention, if the word "flat" is to be literally construed. One of these definitions is sufficient for illustration, namely, "Having an even and horizontal surface, or nearly so, without marked prominences or depressions; level without inclination; plane." Webster's International Dictionary of the English Language, published by G. & C. Merriam & Co., Springfield, Mass.

In respect of prior patents defendants place particular emphasis on British patent No. 5,435 of April 19, 1896, granted to Friedrick Schulte for apparatus for skinning potatoes, and United States patent No. 686,576, dated November 12, 1901, granted to Justin Blache for potato peeling machine.

There were two Blache machines and both were imported by a Mr. Otto from Paris, France, to New York City in 1904 to peel potatoes. The small Blache machine was an exhibit before the Circuit Court of Appeals in the suit of American Fruit Machinery Co. v. Robinson Machine Co., 191 Fed., supra, and was operated before the court. Mr. Robinson testified that one of the two Blache machines was exhibited to him and operated in his presence in 1904. The Blache machines were not successfully exploited. A machine made under the Schulte patent was apparently never exploited, and it is plain would not be a practical success. Defendants, however, contend that the Schulte and Blache patents show that Robinson was not the first inventor of a rotating, abrading disc having raised portions striated and having lower portions also striated, and therefore that Robinson was not a pioneer in this art, and consequently that claims 1, 2, 3, and 4, in addition to the requirements of their phraseology, should be limited to and construed to mean a disc having the horizontal flat striated portion in combination with the raised portions, using the word "flat" in the strict sense above referred to.

It is clear that there is no difference in operation between the flat disc with raised portions and the bowl-shaped disc with raised portions. Prior to Robinson's patent, as the record shows, there had been a good many attempts to invent a practical commercial device for peeling

vegetables. It is quite clear from the record that the device made under Robinson's patent was the first to attain commercial success. Apparently, there was a genuine need for such an article, as will be readily understood when it is appreciated that hotels and restaurants cook and serve great quantities of vegetables which it is important, for purposes of speed and economy, to peel in mass.

Latterly, such machines have been in demand for Army and Navy purposes.

The courts in patent cases necessarily strive to attain a correct result between two opposing tendencies, one on the part of the owner of a patent to stretch it beyond its just limits, and the other on the part of the infringer to hold down the patent to a narrow interpretation and thus open the way for competition free of the patent monopoly. Thus it is that the prior art, the practical results, the need met by the invention, and like facts enable the courts, in an elastic way, to determine whether there shall be accorded to claims a broad or a narrow or limited scope.

In the case at bar, I am satisfied that the claims are entitled to a broad scope. Nothing in the patent law is better known than that a combination of old elements or the introduction of only a single new element in combination with old elements often exemplifies an invention of a high order. When the patentee has "produced a structure which inaugurates a new industry and at once becomes popular," his invention is entitled to a high place in the art concerned. Auto-Vacuum Freezer Co. v. William A. Sexton, 239 Fed. 898, 153 C. C. A. 26.

I am of opinion, therefore, that the claims here should receive the construction placed upon them by Judge Learned Hand in the Whyte's Case. I shall adopt the following language of his in respect of the question involved in the use of the word "flat" in the claims here under consideration:

"However, that decision (American Fruit Machinery Company v. Robinson Machine Co., 191 F. R. 723) seems to stand squarely in the path of a similar result in the case of Whyte's. The rule which in deference to the decision of another court requires me to adopt its view of a patent's scope does not, however, absolve me from the necessity of deciding according to my own conviction, which I am bound to do. Nast, Foes & Co. v. Stover Mfg. Co., 177 U. S. 485, 488. And, though with real deference, I cannot view the construction of the patent in the same way as the Circuit Court of Appeals for the Third Circuit. The disc in Whyte's machine was, I should say, certainly a horizontal disc. It was as certainly not literally a flat disk and as in the case of the striate, if the matter is to end with the literal language of the claims, it can only end against the plaintiff, but it does not end so. No one has anywhere suggested that the slight curve in section of the disc makes the least difference in result or that it was essential to the allowance of the patent viewed from the prior art. Obviously it could not make any difference either in function or result. * * * Moreover, even if the question of language be pressed, the word, 'flat,' should be construed only in contradiction with the 'raised portions' which are elements of the claims. It seems to me that the patentee's purpose when he used the word was to contrast the word 'horizontal' with the upright sides of the vessel, and the word, 'flat,' with the 'raised portions.' If so, the main part of the disc need be flat only in distinction with the 'raised portions,' as it is, and may be a shallow saucer.'

Viewing the claims of the patent in this light, I hold that the bowl-shaped disc of the defendants infringes claims 1, 2, 3, and 4.

2. *Res Adjudicata.*—The particular question here presented has some elements of novelty. In the case in the Third Circuit, supra, the alleged infringing device was a spiral disc. The decree in that case forever settled the controversy in respect of the spiral device there alleged to have infringed, and defendant American Machinery Company may manufacture or/and sell the spiral device in any jurisdiction.

In the case at bar, however, there is a new device, i. e., the bowl-shaped disc, different from the spiral device. The tort alleged is a new tort and gives rise to a new cause of action.

[3] What then can be said to have been decided in the Third Circuit case? An examination of the record in the Third Circuit case discloses that the present alleged infringing device was not before the court. Whether, in all cases, the opinion of the court may be examined in order to determine what was decided is a debatable question, but where a decree dismisses a bill in general terms without setting forth the ground of such dismissal, it would seem that the opinion of the court may be resorted to in order to determine what issues were decided. Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 633, 15 Sup. Ct. 733, 39 L. Ed. 859; D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 88 C. C. A. 606.

As said by Judge Severens in the D'Arcy Case, supra, 161 Fed. at page 737, 88 C. C. A. 606:

"In the present case one of the alleged infringing spring supports is identical with that held to infringe in the Lord Case. The pleadings and decree in the Lord Case were general, declaring simply that the defendant had infringed. There is nothing, therefore, in them which indicates with precision what kind of a spring support was held to infringe. But the Circuit Court filed an opinion, and this opinion was adopted as its own by the Circuit Court of Appeals on appeal to that court. 148 Fed. 16, 78 C. C. A. 167. And we think that we may, and should, refer to the opinion to definitely ascertain what questions were presented to the court and decided by the decree. Stearns v. Lawrence, 83 Fed. 738, 28 C. C. A. 66; Corcoran v. Canal Co., 94 U. S. 741, 24 L. Ed. 190; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 690, 15 Sup. Ct. 733, 39 L. Ed. 859. From that we learn that a certain specific structure was held to infringe, and no other. That structure is identified as being one of the structures alleged to infringe in the present case. Upon these facts we think the court below rightly held that the defendant was precluded by the former decree from denying the validity of the patent, and was also precluded from denying that the use and sale of the particular spring support involved in the adjudication was an infringement of the patent in suit."

[4] In the case here at bar, both sides refer to the opinion of Judge Lanning in the Third Circuit case to support their contentions.

But if an opinion may be resorted to, in connection with the question of res adjudicata such resort is only to ascertain the facts. The essential fact in the Third Circuit case was that certain devices were held not to infringe claims 1, 2, and 3 of the patent here under consideration. The construction, placed by the court in the Third Circuit upon the claims, explained one of the reasons for the court's decisions. In other words, the court expressed its opinion as to the meaning of "flat," and for that reason, among others, concluded that the devices

did not infringe. The principal issues, however, in that lawsuit, were: (1) The validity of the patent; and (2) whether the claims in issue were infringed. But under the doctrine of Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, a second action upon a new cause of action is not barred unless the first action between the parties has disposed of the matters which are in issue in the second action. The opinion of the court in the Third Circuit constitutes merely a reason. It cannot be regarded as a fact or issue or question which was litigated and disposed of, because validity and infringement were the issues, questions, and facts.

As affecting res adjudicata, therefore, it seems to me that it cannot be said, as matter of law, that because the court in the Third Circuit was of a certain opinion as to the meaning of the word "flat," therefore that construction of the claims of the patent is res adjudicata against this plaintiff in a case where an entirely new device is alleged to infringe. In the latter instance, a plaintiff is entitled to have the question of infringement independently determined, so far as concerns res adjudicata, and the opinion of the court in prior cases between the same parties cannot constitute an estoppel. The estoppel is to be found in the decree, and if the decree is not clear as to what was decided then for enlightenment the record may be examined and, in some circumstances, the opinion. It is held, therefore, that the previous decree is not res adjudicata.

[5] 3. *Equitable Estoppel.*—The facts in this case are somewhat peculiar. According to the testimony of Mr. Matthews, vice president of the defendant company, it has been engaged in continuously making and selling throughout the United States potato peeling machines provided with the bowl-shaped disc, complained of in this suit, from July, 1911, down to the trial of this suit in January, 1921.

It made and sold 21 of such machines during the last six months of 1911 and the following mentioned quantities of such machines during each calendar year from 1911 to 1921, viz.: 1912, 180; 1913, 182; 1914, 190; 1915, 193; 1916, 300; 1917, 444; 1918, 568; 1919, 394; 1920, 354; total, 2,860.

During the period from December, 1911, down to 1921, it has sold more than 200 of such machines for use in restaurants, hotels, and other places in New York City, and these have been in constant practical use by the purchasers of them.

Prior to 1916 at least 27 hotels, restaurants, public institutions, and others in the city of New York purchased such machines from defendant company or its dealers and used such machines in this city for peeling potatoes; and at least 4 dealers located in this city purchased such machines from defendant company and had them on exhibition here and sold them to parties in this city.

Brett, the other defendant, has been a customer of American Machinery Company since some time in 1911 down to the trial of this suit in January, 1921, and during all that time has been purchasing from that company such machines f. o. b. Philadelphia, and has been selling such machines in the city of New York and other places within the vicinity of this city, and has been exhibiting these machines.

Defendant company, almost every year since 1911, has supplied such machines to various dealers, like Duparquet, Hout & Moneuse Company, L. Barth & Sons, and Bramhall-Deane Company, to be exhibited by them in public exhibitions, in both New York City and Philadelphia, and such exhibitions were usually held at conventions of hotel men and under the auspices of kitchen equipment sales agencies.

Defendant company, from some time in 1916, down to 1921, widely distributed throughout the United States printed folders and printed circulars containing illustrations and descriptions of these machines.

For the purpose of manufacturing such machines, it has employees and machinery. Parts for such machines are bought by the company from other parties and are used in the assembling of such machines, but a substantial amount of the work is done by this company in completing such machines. This company has two floors, one of which has a space of 13,500 square feet, more than two-thirds of which is used in the manufacture of such machines.

It has expended more than $20,000 for advertising, display notices, circulars, and the like, and for expense in carrying on the business of selling such machines.

Its business of manufacturing and selling potato peeling machines having the bowl-shaped disc complained of in this suit constitutes at least 40 per cent. of its entire business annually, and is larger than its business in any other product made and sold by it.

Defendant company discontinued making and selling the potato peeling machines having the spiral form of disc when the decision of Judge McPherson was rendered, June 3, 1911, holding claims 1, 2, and 3 of the Robinson patent, No. 809,582, to be valid and infringed by that company, and soon thereafter began making and selling potato peeling machines having the bowl-shaped discs complained of in this suit. It did not resume the manufacture and sale of the machines with the spiral form of discs after it had a lawful right to do so by reason of the decision rendered by the United States Circuit Court of Appeals for the Third Circuit, December 6, 1911, because it had adopted this bowl-shaped disc as its standard product, and had gone to the expense of making patterns for casting this form of disc in various sizes, and had put such machines on the market, having been advised by counsel that it had the right to do so, and, moreover, it was pleased with the operation of the bowl-shaped disc and considered it better than the spiral form of disc; and it has continued to equip its machines with this bowl-shaped form of disc exclusively, since the summer of 1911.

Mr. Robinson, who testified on behalf of plaintiff in this suit, is president and general manager of plaintiff corporation, and prior to the organization and incorporation of plaintiff corporation was president and general manager of the predecessors in title to plaintiff, i. e., of Imperial Machine Company and Robinson Machine Company. He, as president and general manager of these three corporations, had control of and managed the business of them while each of them was the owner of this Robinson patent, No. 809,582.

Robinson, while under cross-examination, testified that he knew of Horn & Hardart Baking Company having places of business in Philadelphia and New York City; that in 1913 that company gave him orders for his potato peeling machines and told him that it was then using potato peeling machines of American Machinery Company in its restaurant in New York City.

In answer to the question, "Did they tell you whether or not the machines had the bowl-shaped discs," Robinson testified, "They did not tell me anything outside of what I have stated, and I did not inquire."

In other words, he knew in 1913 that defendant company was selling potato peeling machines, but he did not even ask what kind of machines were being sold.

Robinson further testified upon cross-examination in substance that as early as 1916 he had a printed circular or folder of American Machinery Company like those marked defendants' Exhibits A and B; and that he got a number of printed circulars of American Machinery Company from time to time.

There is some confusion as to what discs were before Judge McPherson, but there is no reason to doubt that defendant began the manufacture and sale of discs like the infringing disc in 1911 and began to circularize the trade in 1915.

Robinson testified that the first time he saw a disc like plaintiff's Exhibit 4 (the infringing disc here concerned) was in Whyte's restaurant in 1918. During the period from 1913 (the Horn & Hardart incident) to 1918 (the Whyte incident), the situation was that the only decision of an appellate court was in favor of defendant company.

There can be no question that defendants' bowl-shaped disc under the construction of the Third Circuit case would have been held not to infringe.

The defendant company was therefore entirely justified in following advice of counsel, in manufacturing and selling their bowl-shaped disc. They did this openly and not in the secret way employed by fly by night infringers. The slightest inquiry by Robinson in 1913 would no doubt have informed him as to the nature and make-up of the infringing device. It may fairly be inferred, however, that he did not wish to venture to bring suit in the territory of the Third Circuit in view of the decision of the Circuit Court of Appeals for that circuit. Certainly, after he saw the circular or circulars in 1916, he could no longer remain quiescent. While, undoubtedly, he had financial obstacles, he nevertheless brought other suits before the suit against Whyte's and by the time he began the Whyte's suit he had obtained, as the record shows, some favorable decisions, which possibly raised hopes he had not theretofore entertained. Defendant company was his bitter adversary and was selling large numbers of machines under circumstances where any reasonable effort would have enabled plaintiff to ascertain the facts necessary to frame the usual bill in equity. When this suit was originally brought, Brett was the only defendant against whom jurisdiction would lie. Because of the conditions developed on the motion for temporary injunction, defendant company

was practically forced to come into this jurisdiction. If there had been no decision in the Third Circuit, the case would have been different. Defendant company then would have taken its chances and suffered the result of the hazard. When, however, the manufacture and sale is lawful in one jurisdiction, the test in another jurisdiction should be promptly undertaken where sales are open and notorious and easily susceptible of ascertainment.

There is, however, a difference between interposing an equitable estoppel, so as to leave the field free to the competitor, and the denial of an accounting.

Where an alleged infringer is led into starting a new industry or enterprise, estoppel has been applied; but it is a defense cautiously allowed. It cannot be said in this case that a new industry was started by defendant. Robinson was the pioneer in the practical and commercial side of the art. Under our system, there were eight other circuits where the patent and the claims might receive an interpretation different from that given by the Third Circuit case. That was one of the chances defendant company took when it concluded to submit itself to this jurisdiction. On all the facts in the case, it seems inequitable to deprive plaintiff of the benefit of patent during its short remaining life. On the other hand, plaintiff cannot, by its inaction on all the facts here disclosed, profit to the extent of obtaining damages or profits from defendants; for I am of opinion that as matter of law, on the facts in this case, both defendants are in the same position.

It seems to me, also, that notwithstanding the decision in the Whyte's Case, defendant should not be penalized, from the accounting standpoint, for continuing its sales until a decision was had after a trial; for the Whyte's Case ended after the decision on the preliminary injunction and there was no trial.

As the results in an effort to work out equity are in some respects not usual, they may be thus summarized:

(1) The patent is valid.

(2) Claims 1, 2, 3, and 4 are infringed.

(3) An injunction will issue restraining defendants from manufacturing, selling, etc., plaintiff's Exhibit 4, except that deliveries may be made by defendants on all binding orders or contracts made or received in good faith up to and including this 2d day of May, 1921, as evidenced by an appropriate affidavit to be filed in the office of the clerk of this court.

(4) There will be no accounting up to and including May 2, 1921, where orders have been received in good faith as supra.

Submit decree on notice.

NOTE.—1. The injunction will be suspended, if defendants so apply, on appropriate terms.

2. The matter of sales to the United States will be taken up on the settlement of the decree.

3. No costs.

WILCOX & WHITE CO. v. LEISER.

(District Court, S. D. New York. January 10, 1918.)

Trade-marks and trade-names and unfair competition ⊂=61—Trade-mark for self-playing musical instruments held to extend to phonographs in preparation for the market.

The word "Angelus," registered by complainant as a trade-mark for self-playing musical instruments which it had manufactured and sold for 25 years, during which time its trade-mark had become widely and favorably known, *held* to extend to phonographs which it was preparing to manufacture and sell under such trade-mark, though it had not as yet placed them on the market, and to entitle complainant to protection against the use of the word by defendant in his trade-name and on phonographs which he had recently commenced to make and sell.

In Equity. Suit by the Wilcox & White Company against Frank J. Leiser. On motion for preliminary injunction. Granted.

Mitchell & Allyn, of New York City, for plaintiff.
T. C. Spelling, of New York City, for defendant.

MANTON, District Judge. Plaintiff sues for infringement of trade-mark and for unfair competition, and moves for a preliminary injunction pendente lite restraining the defendant from the use of the word "Angelus" in his trade-mark, the "Angelus Phonograph Co."

Plaintiff manufactures mechanically-operated musical instruments or self-playing musical instruments, for which it has a registered trade-mark "Angelus." This trade-mark has been registered on three occasions. The last certificate shows the registration for mechanical music playing instruments and music sheets therefor. The defendant has recently embarked in the business of manufacturing phonographs and has started in a small way. He says he sold a small number and has spent upwards of $1,500 in advertising. He has applied to the Patent Office for the registration of the word "Angelus" as a valid trade-mark. Plaintiff has spent upwards of half a million dollars in advertising the trade-mark and has enjoyed a good reputation for 25 years in the manufacture of self-playing musical instruments, using the trade-mark "Angelus." Plaintiff has not made use of this trade-mark in connection with phonographs, but is about to do so, for it has been experimenting for several years to perfect an instrument which, it says, will reach the efficiency worthy of its mark, and states that it makes no pretense of offering for sale to the public, at the present time, phonographs under this mark, although it has done so solely for trial use. The plaintiff is entitled to protection against infringement of this trade-mark in all self-playing instruments which it has placed on the market, and the question here is whether it should be extended to phonographs which it expects to place upon the market as against this defendant.

The defendant places the mark "Angelus" on instruments which he sells and which are not manufactured by him but assembled by

him from parts which he purchases. His advertisements, such as plaintiff's Exhibit B, state that the Angelus Phonograph Company is the manufacturer of the famous Angelus phonograph. This was sent out in the form of a circular letter and later in an advertisement in a trade journal, wherein his product was referred to as the famous Angelus instrument. The use of the name was adopted shortly prior to August 1, 1917, and he has done nothing to make the trade-mark "Angelus" famous as applied to musical instruments. On the other hand, the plaintiff has, as the affidavits indicate, made such trade-mark famous by its advertising and that of its agents. The chief product of the plaintiff seems to have been a player piano, but it now anticipates making a phonograph, using the name "Angelus" as its trade-mark, and as it says, it will be a warranty to its customers that the phonograph will be of the same high grade of make and efficiency as has been the player piano.. It therefore is jealous and zealous of the protection of its trade-mark.

As the business of self-playing piano manufacturers has grown in the past years, it seems to be their policy to enter the field of the manufacture of phonographs, and this plaintiff is about to embark in the manufacture of that product. With a reputation thus established, using this trade-mark, it would be inequitable for the defendant to be permitted to use the name "Angelus" in his firm name, for the plaintiff has property rights in said name "Angelus" which should not be infringed. Nor is a court of equity so helpless and impotent to help a plaintiff where the piracy is just started (Gannert v. Rupert, 127 Fed. 962, 62 C. C. A. 594), and the court should interfere where the defendant seeks to get the benefit of plaintiff's reputation and advertising and forestall the extension of his trade. Obviously, the defendant had adopted the plaintiff's identical trade-mark "Angelus" for these reasons, for no other reason is advanced why the name "Angelus" should be used by the defendant. While the phonograph is a different musical instrument, it is a self-playing instrument and is so related to the player piano that the piracy of a well-known trade-mark used in the advertising and sale of a phonograph will fall within the mischief which is intended to be prevented by principles of equity. Using this name upon phonographs, the public would at once conclude that it was the plaintiff's make, and permitting it is to place the plaintiff's reputation in the hands of the defendant and enable him to get the benefit thereof. This the court should not permit. Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565; Layton Pure Food Co. v. Church & White, 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274.

An injunction will therefore be granted pending the trial of the action.

[In Borden Ice Cream Co. v. Borden's Condensed Milk Co., 3 T. M. Rep. 80, 201 Fed. 510, 121 C. C. A. 200, the United States Circuit Court of Appeals held that an unfulfilled intention on respondent's part to extend its business to ice cream did not entitle it to an in-

junction against one who anticipated its plans, in the use of the name "Borden's" on ice cream. The intimate relation between ice cream, on the one hand, and the numerous milk products of the respondent, on the other, was, in this case, ignored.]

ALUMINUM COOKING UTENSIL CO. v. SARGOY BROS. & CO.

(District Court, E. D. New York. June 30, 1921.)

1. **Trade-marks and trade-names and unfair competition ⇐45—Trade-mark cannot be given validity by classification in Patent Office.**
   Validity of a trade-mark cannot depend alone on classification or indexing by the Patent Office, and a valid trade-mark cannot be obtained by two different manufacturers for goods in the same general class, having the same descriptive properties and similar essential characteristics, so that the general public would be misled, though they are placed by the patent office in different classes.

2. **Trade-marks and trade-names and unfair competition ⇐71—Unfair competition by use of name on articles of similar general characteristics.**
   The registration and use by complainant for years of the word "Wear-ever" as a trade-mark for aluminum articles, though stated to be particularly intended for use on cooking utensils, *held* to preclude the obtaining of a valid trade-mark in the word as applied to tin wash boilers, which are sold in the same stores and alongside of complainant's aluminum ware, and the use of such name by defendant stamped on the paper covering of its tin boilers, together with a picture resembling one used by complainant in its advertising, *held* to constitute unfair competition.

In Equity. Suit by the Aluminum Cooking Utensil Company against Sargoy Bros. & Co. Decree for complainant.

Kay, Totten & Brown, of Pittsburgh, Pa. (Robert D. Totten, of Pittsburgh, Pa., of counsel), for plaintiff.

Samuel D. Jones, of New York City (H. P. King, E. T. Fenwick, and C. R. Allen, all of New York City, of counsel), for defendants.

CHATFIELD, District Judge. The plaintiff brings this action for infringement of trade-mark and also upon a charge of unfair competition. Plaintiff is a corporation organized under the laws of Pennsylvania, and having its principal place of business in Pittsburgh in that state. It has for some 16 or 17 years placed upon the market aluminum dishes or vessels for use in household and kitchen work. It evidently has at all times had its attention fixed upon the idea of "cooking" utensils, for which the metallic material aluminum is particularly advantageous.

The corporate title of the company is the Aluminum Cooking Utensil Company. It has during these years sold extensively and advertised very widely at great expense its so-called "Wear-Ever" aluminum vessels and utensils. The result has been that the public has recognized, as a standard or staple article, aluminum vessels of the "Wear-Ever" grade or brand.

Such trade reputation is a valuable asset which will be protected under the doctrine of unfair competition and also under the trade-mark statute, if the particular design, mark, or device has been validly filed.

In 1903, the plaintiff attempted to file the trade-mark "Wearever," and stated that the class of merchandise upon which it intended to place its trade-mark was aluminium and aluminium alloys. With the same limitation in idea which was present when the name of the company was chosen, it was further stated that the trade-mark is particularly intended for use upon cooking utensils made of aluminium and aluminium alloys, with utter disregard of the apparent fact that a pan or dish might be used to heat water for shaving or washing, and thus not be brought within the class of cooking utensils, except in so far as the water might be cooked or heated in the same way as if used in the preparation of food.

The testimony in this case shows that in the Patent Office cooking utensils are considered and classified as a different line of commercial manufacture from articles for laundry purposes or articles for household work, like cleaning or scrubbing, though a pail or dish for the mere containing of hot water, and in which water might be heated, would fall in either class.

The defendants are manufacturers of tin wash boilers. They first put them on the market under such trade-names as Boilrite or S. B., and then later, appreciating the value of the name "Wear Ever," and knowing that the plaintiff did not manufacture or sell a wash boiler, they have added to their lines of merchandise a better grade of tin wash boiler, either with copper bottom or in some instances made entirely of copper, around which they have placed a paper wrapper entirely covering the sides of the boiler and stamped in large letters with the words "Wear Ever," and also having upon the side, in colors, the picture of a young woman holding before her, by the handles, a wash boiler. This picture resembles in general characteristics the figure of a young woman (extensively used by the plaintiff in its advertisement) holding and raising in front of her by the handles a utensil, to which she seeks to attract attention and to indicate the light and attractive character of the article.

The defendant has cited a number of valid trade-marks such as "Wearever" applied to rubber goods, "Everwear" for harness, shoe leather, etc., "Wearever" applied to tooth brushes, to establish the proposition that the words Wear Ever as a name or sign cannot be monopolized by the person who first uses it as a trade-mark upon a class of articles entirely dissimilar or not connected with some other line of articles upon which the same word is placed as a trade-mark.

[1] Validity of trade-mark cannot depend upon classification or indexing by the Patent Office alone. The defendants have filed a trade-mark consisting of an outline of the Western Hemisphere, with a wash boiler, and the words "Wear Ever" superimposed thereon. This trade-mark was registered as a search of the laundry appliances and machines in class No. 24 did not disclose the "Wear Ever" trade-mark in the cooking utensil class.

A valid trade-mark cannot be obtained for goods in the same general class, having the same descriptive properties, and similar essential characteristics, so that the general public would be misled. Johnson Educator Food Co. v. Sylvanus Smith & Co., 175 O. G. 268, 37 App. D. C. 107. Otherwise mere similarity of mark is not sufficient. G. & J. Tire Co. v. G. J. G. Motor Car Co., 190 O. G. 550, 39 App. D. C. 508.

Many such cases have been cited by the plaintiff showing decisions in the Patent Office and on appeal therefrom, where applications for trade-mark have been disallowed on the ground that conflict between marks applied to goods of similar classes would deceive the public. H. Wolf & Sons v. Lord & Taylor, 202 O. G. 632, 41 App. D. C. 514, where it was sought to use the word "Onyx" for underwear after having been registered for hosiery; the case of Anglo-American, etc., Light Co. v. General Electric Co., 215 O. G. 325, 43 App. D. C. 385, with reference to use of the word "Mazda;" the Fishbeck Soap Co. v. Kleeno Mfg. Co., 216 O. G. 663, 44 App. D. C. 6, where "Kleeno" was sought to be filed for washing materials after having already been filed for polishing material; in Wilcox & White Co. v. Leiser, 276 Fed. 445, decided in the Southern District of New York, it was held that the word "Angelus" could not be used on a phonograph after having been filed to cover a player piano; Van Zile et al. v. Norub Mfg. Co. (D. C.) 228 Fed. 829, where a germicide and cleanser was held to be in the same general class with a washing powder.

When the two classes so overlap and border upon each other that utensils in the laundry class are used to boil or cook water and washing solutions as well as soiled clothes, and on frequent occasions to cook vegetables or to heat glass cans for canning, etc., it will be seen how close the classes are in this direction. The use of cooking utensils for the preparation of starch, heating of water, and even boiling of clothes, or for use as a child's bath-tub, show the closeness of demarcation from the other direction.

The evidence in this case shows that hardware stores sell racks for canning fruit and vegetables in wash boilers, and the public generally fail to recognize any such distinction as that occasioned by the Patent Office classification, particularly as the aluminum dishes and the wash boilers would be sold side by side in the same store.

Confusion could have been avoided if the plaintiff had at any time considered it necessary or advantageous to depart from its use of the word "cooking," and the lack of necessity for limiting their trade-mark is shown by the fact that the certificate of incorporation of the plaintiff company included the making and selling of aluminum articles for "household use" as well as articles for cooking.

The plaintiff manufactures cuspidors out of aluminum, and undoubtedly would have already put upon the market aluminum wash boilers, except that their size has made the cost prohibitive.

[2] This brings us to the question of unfair competition. It is not necessary to show, in a case where the court has jurisdiction to take up the question of unfair competition, that the trade-mark is specifical-

ly infringed. If a defendant is brought into court under the charge of trade-mark infringement, and the case proves to be entirely one of unfair competition, the court may have no jurisdiction over the cause of action unless diversity of citizenship be shown. In the present case we have both grounds of jurisdiction, and the plaintiff certainly makes out a case of unfair competition when it shows that the defendants are placing upon the market an article of tin, in general resembling aluminum, sold in stores dealing in household supplies, in such a way that the "Wear-Ever" cooking utensils and the "Wear Ever" wash boiler would be substantially side by side in its exposure for public inspection and convenience, where the paper wrapper is obviously copied from the plaintiff's advertising matter, where a large portion of the tin surface is covered up so that the uneducated or not-understanding person might fail to note the difference between the metal aluminum and the metal tin, and where the purpose of putting this article on the market in that form is shown by the significant opportunity presented by the plaintiff's failure to have wash boilers as one article in their line of utensils. The defendants seek to excuse their act by showing that their wash boilers are "good" tin wash boilers and that a purchaser is not cheated. They also show that the plaintiff does not sell wash boilers, and therefore there is no competition in the wash boilers themselves. But there is no question that the defendants are endeavoring to take advantage of, and thus obtain unjust gain from the demand "created" in a closely associated and substantially kindred branch of the trade, by giving the impression that their article, at a very cheap price, is one of the more expensive utensils which the public has grown to know as "Wear-Ever" aluminum articles. If the defendants could sell a tin wash boiler of such construction that it could be in no way used for cooking purposes, they could legally use their trade-mark, but still be held liable.

In Van Zile v. Norub Mfg. Co., supra, it was held that the term "unfair competition" covered the sale of an imitation article at cut rate prices, where the articles so resembled each other, and were to be used for the same purpose, that customers buying at retail would fail to notice that they were obtaining the defendant's product, and where the defendant would thereby be able to obtain unjust enrichment by what was in effect unfair competition.

In Aunt Jemima Mills Co. v. Rigney, 247 Fed. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039, it was held that the words "Aunt Jemima," when used with respect to pancake flour, or associated in the mind of the public with a particular product, could not be taken by another manufacturer as a brand for maple syrup, because of the certainty that the public would consider the name in its association with the well known article, and thus even though no injury was inflicted by competition, and even though the sale of the pancake flour might be enhanced by the preparation and sale of a syrup, the court held that the defendants could not take undue advantage and unjustly enrich themselves at the expense of the plaintiff.

The record makes it plain that the defendants are competing unfairly with the plaintiff by trading upon the public's belief in the "Wear

Ever" name and the demand created for "Wear-Ever" articles by the plaintiff's advertising. They are also using a trade-mark which cannot legally exist for use on articles so closely related as the defendants' wash boilers are to the plaintiff's line of goods. The plaintiff has used this trade-mark for a sufficient period so that the public has apparently come to recognize it as a label, independent of registration, and in the use made thereof it is not a mere descriptive term.

For all these reasons the plaintiff is entitled to a decree.

DOUGHERTY v. PAYNE, Director General of Railroads.

(District Court, S. D. Florida. June 9, 1921.)

No. 1123.

Railroads ⇐5½, New, vol. 6A Key-No. Series—Director General not suable for malicious prosecution.

An action for malicious prosecution cannot be maintained against the Director General of Railroads. as such, for an act of one of the employees of a railroad system under his control.

At Law. Action by Pearl Dougherty against John Barton Payne, Director General of Railroads. On motion for leave to file amended declaration. Denied.

Butler & Boyer, of Jacksonville, Fla., for plaintiff.

John E. & Julian Hartridge, of Jacksonville, Fla., for defendant.

CALL, District Judge. This cause comes on for a hearing upon the motion for leave to file an amended declaration. Heretofore, on May 27th inst., a demurrer was sustained to the declaration.

The fifth ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer, for the actions of one of the employees of a railroad system under his control. A careful study of the acts of Congress covering the governmental control of transportation systems seems to me to answer this question in the negative. Such being my view, no purpose would be subserved in granting the motion to amend, and it will therefore be denied.

DREXEL FURNITURE CO. v. BAILEY, Collector of Internal Revenue.

(District Court, W. D. North Carolina, at Greensboro. December 10, 1921.)

1. **States ⊜4—Congress cannot interfere with states' control of their internal affairs.**
   Congress has no power to interfere with the control by the states of their internal affairs.

2. **Constitutional law ⊜47—Court will disregard form and look at substance of act in ascertaining whether it interferes with states' control of domestic affairs.**
   In ascertaining whether an act is unconstitutional in that it interferes with the control by the states of their internal affairs, the court will disregard the form of the act and look at the substance.

3. **Constitutional law ⊜12—That which is implied is as much a part of the Constitution as that which is expressed.**
   That which is necessarily implied is as much a part of the Constitution as that which is expressed.

4. **States ⊜4—Statute interfering with states' control of internal affairs invalid, regardless of professed purpose.**
   A statute which directly or by a necessary operation substantially and necessarily disquiets and disturbs the states in their control of their internal affairs is invalid, regardless of the professed purpose for which it was enacted, since the purpose must be determined by its natural and reasonable effect, and not by the language used.

5. **Internal revenue ⊜2—Child Labor Act held unconstitutional.**
   Revenue Act Feb. 24, 1919 (Comp. St. Ann. Supp. 1919, §§ 6336⅞a–6336⅞h), in so far as it imposes a tax additional to all other taxes on the profits of manufacturers employing child labor, *held* unconstitutional, as an attempt to regulate a purely internal affair of the states; the real purpose of the act being to prohibit the employment of child labor, and not to raise revenue.

6. **Internal revenue ⊜38—Child labor tax paid under protest recoverable on statute being held invalid.**
   Employer who paid tax imposed on employers of child labor under Act Feb. 24, 1919 (Comp. St. Ann. Supp. 1919, §§ 6336⅞a–6336⅞h), under protest and with notice to collector that it would sue to recover tax upon ground that the law was unconstitutional, could recover amount so paid with interest on the statute being held unconstitutional.

At Law. Action by the Drexel Furniture Company against J. W. Bailey, individually and as Collector of Internal Revenue. Judgment for plaintiff.

This suit is brought by the plaintiff, a manufacturing corporation of this district, against the defendant, a former collector of internal revenue for the district of North Carolina, to recover a tax assessed against it under the provisions of the Revenue Act of February, 1919 (Comp. St. Ann. Supp. 1919, §§ 6336⅞a–6336⅞h), imposing or seeking to impose a 10 per cent. tax additional to all other taxes on the profits arising from the sale or disposition of the products of mines, mills, workshops, factories, or manufacturing establishments which at any time during the year shall have employed or permitted to work children under certain prescribed ages and for periods longer than specified in the act. The assessment, amounting to $6,312.79. was paid under duress and with notice of protest and the purpose to sue to recover it back, upon the ground that the law under which it was assessed and

collected is unconstitutional. The conditions required by law with respect to bringing suit, such as filing claim for refund, etc., were duly complied with by the plaintiff before the suit was brought. An amended complaint was filed by permission of the court, to which were attached as exhibits the notice of assessment and other papers relating to the payment of the tax under protest, claim for refund, etc. A demurrer was filed by the defendant, and upon consideration of the case the court, being of opinion that the tax was illegally assessed and collected because the law under which this was done is unconstitutional, overruled the demurrer and gave judgment in favor of the plaintiff for the amount of the tax paid.

William P. Bynum, of Greensboro, N. C., for plaintiff.
Frank A. Linney, U. S. Atty., of Boone, N. C., for defendant.

BOYD, District Judge (after stating the facts as above). The question of the constitutionality of the statute challenged in this suit has heretofore been considered by this court, and it is deemed sufficient now to refer to the opinion rendered in the case of George v. Bailey, Collector, 274 Fed. 639. The opinion in that suit was based chiefly upon the case of Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724.

The great principle emphasized in that case and those cited by the court is that the preservation of the states and the maintenance of all the rights remaining in them after the adoption of the Constitution and the Tenth Amendment thereto are "as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." If the vast field of power claimed by this act belongs to Congress, then it may be truly asserted that the states, as self-governing sovereigns with respect to their domestic concerns, exist merely at the will of Congress.

[1, 2] The court cannot convince itself that Congress has such power. If it has, then it may so legislate as not only seriously to affect, but even to destroy, the form of government which the Constitution was formed to create and protect. In a matter of such importance this court feels it to be its duty to disregard the form of the act and to look at the substance.

[3] That which is necessarily implied is as much a part of the Constitution as that which is expressed. As declared by the Supreme Court in the Passenger Tax Cases, 7 How. 283, 428, 12 L. Ed. 702:

"That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the states. The Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the states."

[4] If, therefore, the statute under consideration either directly or by its necessary operation substantially and necessarily disquiets and disturbs the states in their control of their internal affairs, it must be held invalid, whatever may have been the professed purpose for which it was enacted.

In determining that question the necessary result of the statute must be taken into consideration, "even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Collins v. New Hampshire, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 43 L. Ed. 60.

[5] The purpose of the act in question appears upon its face. It is disclosed by its title and by its scope and inevitable effect. Through the medium of a tax, Congress here, as through the medium of a regulation of commerce in the act of September 1, 1916 (chapter 432, 39 Stat. 675), has attempted to fix the standard of labor for mines, quarries, factories, mills, etc., in the various states. The act was not intended to, nor will it, raise revenue. This was admitted, if not openly declared, by its sponsors during its passage through Congress. It was intended solely to prohibit the employment of child labor.

Whatever else it may be in theory, it is in substance and fact a tax upon the employment of child labor and is so labeled by Congress. The title of the act is "A tax upon the employment of child labor." In other words, it is a frank attempt to regulate a purely internal affair of the states, evidently because in the opinion of Congress the states have not regulated it as the Congress thinks it should be regulated.

[6] The court feels constrained, therefore, to hold the act invalid as violative of the federal Constitution and to overrule the demurrer and enter judgment for the plaintiff for the amount of the tax paid, with interest as demanded.

Some additional grounds for the conclusion of the Court in this case will be found in the case of George v. Collector, supra.

WAHL v. WRIGHT.

(Court of Appeals of District of Columbia. Submitted May 9, 1921. Decided Nov. 7, 1921.)

No. 1346.

1. **Patents ⊂=91(3)—Evidence held to show that junior applicant made disclosure prior to senior.**
   In interference proceedings, evidence on behalf of the junior applicant *held* to show that a drawing produced by him, which disclosed the invention, was made and exhibited to others several years prior to the date claimed by the senior applicant.

2. **Patents ⊂=91(3)—Completion of machine held to establish diligence for required time.**
   Evidence that the junior applicant had a completed machine embodying the invention in operation three months after the date allowed the senior applicant shows that the junior applicant was active and diligent for several months prior to the completion of the machine and is sufficient to establish, during the requisite period, diligence resulting in reduction to practice.

Smyth, Chief Justice, dissenting.

Appeal from the Commissioner of Patents.

Interference proceedings between John C. Wahl and Walter Wright. From a decision of the Commissioner of Patents awarding priority as to all counts in issue to Wright, Wahl appeals as to those counts found to read upon his machine. Reversed.

See, also, Wahl v. Barrett, 50 App. D. C. 391, 273 Fed. 355; Same v. Wright, —— App. D. C. ——, 273 Fed. 766.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for appellant.

W. L. Morris and B. C. Stickney, both of New York City, for appellee.

ROBB, Associate Justice. This is an appeal from a decision of the Patent Office in an interference proceeding awarding priority to the appellee Wright. The invention relates to mechanism for controlling the computations of a totalizer in a combined typewriting and computing machine. More specifically, as stated by the Examiner of Interferences:

"It comprehends two controlling means, one automatic and the other manual, a means whereby one of these is made operative and the other inoperative at will."

The issue originally contained 19 counts. The Examiner of Interferences found that counts 10, 11, 12, 13, 15, 18, 19, and 20 were not readable upon Wahl's disclosure and awarded them to Wright. As to the other counts, he found that Wright was restricted to his filing date of June 29, 1910, for conception and disclosure and that inasmuch as Wahl, on April 1, 1910, had completed and successfully operated a machine embodying the subject-matter of those counts,

awarded them to him. The Board of Examiners in Chief found that count 18 was readable upon Wahl's disclosure, but they also found that Wright had established conception and disclosure of all the claims as early as January of 1910, and that Wahl was entitled to no earlier date than that of the completion of his machine in April, following. This finding resulted, of course, in an award of priority as to all the counts to Wright. The Commissioner affirmed the decision of the Board. Wahl appealed as to counts 1 to 9, inclusive, and 14, 16, 17, and 18; in other words, as to the counts found by the Board to read upon the machine that was completed April 1, 1910.

Wahl introduced in evidence a drawing (Exhibit No. 14), which bore date of July 18, 1907. This drawing was delivered when made to Mr. Roberts, president and treasurer of the Wahl Adding Machine Company, who testified as follows:

"Of a lot of papers, including tracings and blueprints, handed to me at the time, this was the only one on heavy manilla paper. I thought that to fold it up in the small shape necessary to place it in the document files, where I kept such papers, would crease it and spoil the drawing; so I rolled it up and placed it in the cupboard in the vault, where I kept books, original patent papers and other documents which could not be readily placed in the document files."

The drawing therefore was not discovered until after the original preliminary statement had been made. We attach no importance to this fact. Several years had elapsed, the drawing was not in the place where such drawings usually were kept, and it was not at all strange that Mr. Roberts should have forgotten that it had been placed in the vault cupboard. He identified the drawing and stated that, so far as he could judge, it had not been changed.

A Mr. Stevens, formerly president of the Wahl Company, when asked about this drawing said:

"I would say that this is the drawing showed me, or one like it, at least, since it shows the mechanism as I understood Mr. Wahl to explain it."

In cross-examination this witness said: "When Mr. Wahl showed me the drawing he explained to me how it operated." He further testified in considerable detail as to the disclosure made to him at the time, that is, in 1907.

A Mr. Lanphear, at the time in litigation with the Wahl Company, was called as a witness concerning this drawing. He also testified at considerable length for Wright, who characterized him as "one of the best-posted men" he "had come in contact with in connection with machines of this nature." In 1907 Mr. Lanphear was connected with the Wahl Company in the capacity of salesman. He testified that in February or March of 1907 he discussed with Wahl the advisability of perfecting a machine that would accomplish automatic subtraction, and that Wahl immediately began to design means to that end; that he "was in close, practically daily, consultation with him" and that he felt very positive that "that was not only the original subtraction machine commercially, but original automatic subtraction machine." Asked whether Wahl had ever shown him a drawing of a

machine that would perform automatic subtraction, he answered in the affirmative and stated that Wahl explained the operation of the machine to him. The witness then was asked to state his understanding of this drawing at the time it was shown him, and replied:

"My understanding was that it would, in a position at the right of the detail column, automatically subtract, or be set at subtraction; the actual subtracting operation, of course, being accomplished by striking the typewriter keys."

Witness further testified that he understood the mechanism of the machine, how it worked to accomplish the functions it was designed to perform. He fixed the time as between March and September of 1907. He then was shown the 1907 drawing, and thereupon stated that, while he could not identify it in detail, he could say he had seen "such a drawing and it would accomplish these things"; that he could not definitely identify it, but "either saw this one or something like it—I don't know which." He further testified that Wahl's disclosure included means for disabling the automatic subtracting feature and for manual control. This witness was not cross-examined, nor was any objection whatever interposed as to the character of the questions propounded to him. It is significant that the activities of Wright in this particular field did not begin until a time subsequent to an interview which Mr. Lanphear had with him after he had seen the Wahl drawing. We do not intimate, however, that there was any breach of confidence on the part of Mr. Lanphear, as no secret of what he had accomplished was made by Mr. Wahl, who testified very fully as to his activities in conceiving and perfecting this invention.

[1] The tribunals of the Patent Office rejected this drawing of 1907 as a disclosure of the invention here involved, and the board and the Commissioner accepted as to Wright's disclosure in January fragmentary drawings which the Examiner of Interferences characterized as utterly insufficient. We do not deem it necessary to pass upon the correctness of the findings of the Board and Commissioner on this point, as we have reached the conclusion that under the evidence the Wahl drawing of 1907 and the explanation then made must be accepted as disclosing the invention of the issue. Some criticism was made of this drawing because there were certain free-hand additions to it; but the important fact was overlooked that it also contained several parts drawn to scale relating to mechanism necessary for the automatic to manual shift, that is, to the invention of the issue. To reject this drawing would require the rejection as well of the testimony of several witnesses whose credibility stands unimpeached. Mr. Lanphear probably was as well qualified to understand the Wahl disclosure concerning it as any witness who testified. That he did understand it is apparent from his testimony, and it is further apparent that in his testimony he was not at all disposed to go beyond the literal truth.

[2] When we come to consider that all the tribunals of the Patent Office found that Wahl, as early as April 1st, had completed and successfully operated a machine embodying this invention, it will be apparent, without a discussion of the evidence, that Wahl was active and diligent for many months prior to that date. Being fully con-

vinced that Wahl was the first to conceive and that his conception during the requisite period was followed by diligence resulting in reduction to practice, we award him priority of invention and reverse the decision as to the counts here involved.

Reversed.

SMYTH, Chief Justice (dissenting). Wahl is the junior party and therefore, if he would prevail, must sustain the burden of proof. His Exhibit 14 is relied upon by the court as establishing conception and disclosure in 1907. The three tribunals of the Patent Office united in rejecting this exhibit as not sufficiently identified. We have often said that where there are three concurring decisions of the office on a question of fact, we will not reverse the decision of the Commissioner unless he is manifestly wrong. Flora v. Powrie, 23 App. D. C. 195, Bourn v. Hill, 27 App. D. C. 291, Gammeter v. Thropp, 42 App. D. C. 564, and Jobski v. Johnson, 47 App. D. C. 230. The opinion takes no notice of this rule.

When in 1914 Wahl filed his preliminary statement, he was not aware of Exhibit 14, for he made no mention of it in the statement. Not until about a year and a half afterwards did he think of it. Then he asked and obtained leave to amend his statement so as to refer to it. It is a little singular that he should have forgotten so important a document if he ever believed that it existed, as it now is, in 1907 and disclosed the invention. A large part of the exhibit is drawn according to scale by rule and compass, while the other part is in rough and free-hand lines. Wahl does not contend that the first part contains the issue. Every element relied upon by him is in the latter part. If the two parts were made at the same time, why was not a like style of drawing adopted? If not made contemporaneously, when was the addition placed there? These questions are not answered by the record, and this is a cause for suspicion.

Wahl, of course, testified to the existence of the exhibit in 1907 and that it disclosed the invention according to his interpretation. For corroboration he relies upon Roberts, Stevens, and Lanphear. Roberts said he discovered no material difference between the exhibit and the drawing which he saw in 1907, but added that he could not read mechanical drawings readily. He does not say why he was able to identify the exhibit, or that he ever looked at it with a view to seeing what kind of structure it represented. Stevens testified: "* * * My impression is that this drawing [Exhibit 14] has left out a great many parts." Lanphear, the chief reliance of Wahl in this respect, is spoken of as a salesman of unusual intelligence, but one who is not a mechanic or a draftsman. According to his testimony, Wahl showed him the drawing in 1907, but when asked if he recognized Exhibit 14 as the drawing then shown to him, he said: "I don't believe I could identify it in detail." He did not differentiate between the parts he could identify and those he could not. In answer to a question calling for his understanding of the exhibit, he said that it would "automatically subtract, or be set at subtraction automatically." If that was all that it would do, it did not disclose the invention, be-

cause it did not reveal any way of disabling the automatic subtraction feature and of controlling it manually. True, later, in response to a direct question as to whether it did disclose that element, he said briefly, "It did." He was not cross-examined by Wright, presumably because the latter did not believe his testimony aided Wahl in any respect. Goldberg, a patent attorney, who said that in 1907 he "practically had charge of all their patents," and that Wahl consulted him regularly, was called as a witness but was not interrogated with respect to Exhibit 14. If it existed then, and was regarded as disclosing the issue, he would have known it. His silence is significant. The Commissioner of Patents summarizes the testimony thus with respect to Exhibit 14:

"If this testimony be carefully scrutinized, it will be found that Lanphear does not enlighten on just the points necessary. He does not state that he understands this drawing, Exhibit 14, to disclose the invention he had in mind. At best, what he said in reply to leading questions may be construed as meaning that some drawing that Wahl showed him years before disclosed a manual control for disabling the subtracting feature. He was unable to say whether a drawing which Wahl had shown him was the same as the present drawings of Exhibit 14, and so far as any other drawing that Wahl may have shown him is concerned, Lanphear's testimony is worthless, since the other drawing is not of record to show if it disclosed the invention in operative form."

It is upon testimony thus characterized that the court overturns the three decisions of the Patent Office. In my judgment it does not establish by even a fair preponderance that Exhibit 14 as it now appears was in existence in 1907.

But if we assume that its existence at that time is established by a sufficient quantum of evidence, does it disclose the invention? If not, Wahl cannot prevail. The Examiner of Interferences held that there was a serious doubt in his mind as to whether it "shows mechanism capable of carrying out the operation ascribed thereto." The Board said that it failed to disclose the subject-matter of any of the counts, and the Commissioner declared that it was "insufficient to show whether it discloses the invention in operative form." These men are all experts, especially the Commissioner, who was for years principal examiner of the division in the Patent Office in which the applications originated. If the Commissioner's views with respect to it are right, his judgment should not be reversed. What are the views of the court upon the subject? The opinion does not say. Are not the parties entitled to know?

Even if it is assumed that Exhibit 14 shows conception and disclosure by Wahl in 1907, he must still prove that he was diligent when and after Wright entered the field, or fail in the contest. He relies on his Exhibit 2 for proof of this, but the Examiner of Interferences and the Board found that it did not disclose the invention of some of the issues, and the Commissioner did not pass on the question. To overturn the presumption that Wright, being the senior party, is entitled to prevail, there must be a judgment of this court upon the matter; but none is expressly given.

For these and other reasons which might be stated I dissent.

BEYER v. BROWNLOW et al., Com'rs.

(Court of Appeals of District of Columbia. Submitted October 7, 1921. Decided November 7, 1921.)

No. 3674.

1. **Eminent domain ⟸239—District can demand jury on setting aside Commissioners' report.**
   Under Code of Law 1901, § 487, giving any of the parties interested, dissatisfied with the appraisement of damages in condemnation proceedings by Commissioners, the right to a jury to assess damages, when construed in connection with other sections of the same chapter, in which the expression "any persons" or "any parties" interested clearly includes the Commissioners of the District, the right to demand a jury is not limited to the owners of the land, but may be exercised by the Commissioners of the District.

2. **Eminent domain ⟸239—Provision for action by District does not exclude right to jury.**
   The provision of Code of Law 1901, §§ 490, 491, that if the finding of the Commissioners to appraise damages should not be objected to by the parties interested and the Commissioners of the District are satisfied therewith, or if the verdict is confirmed by the court and is satisfactory to the Commissioners of the District, the Commissioners shall pay the award, etc., does not indicate that the expression any "parties interested," in section 487, giving the right to a jury trial, should be restricted to owners of the land.

Appeal from the Supreme Court of the District of Columbia.

Proceedings by Louis Brownlow and others, as Commissioners of the District of Columbia, against Amanda Beyer to condemn land for public use. From an order entered on motion of the Commissioners of the District directing the impaneling of a jury to assess the damages, the defendant appeals. Affirmed.

Rudolph H. Yeatman, of Washington, D. C., for appellant.

F. H. Stephens and George P. Borse, both of Washington, D. C., for appellees.

ROBB, Associate Justice. This is a special appeal from an order in the Supreme Court of the District, entered on motion of the Commissioners of the District and over the objection of appellant, setting aside the report and award of commissioners appointed to appraise the value of the respective interests of all parties concerned in land sought to be condemned for public use under the provisions of chapter 15 of the Code of the District, and directing that a jury be impaneled to assess damages; the contention of appellant being that the Commissioners of the District have no right to have such damages assessed by a jury.

Chapter 15 of the Code relates to condemnation of land for public use. Section 483 provides that in the event land is needed for the use of the United States or by the Commissioners of the District of Columbia for public purposes, and it cannot be acquired by purchase,

"application may be made to the Supreme Court of the District by petition in the name of the United States or of said Commissioners" for the condemnation of the land, etc. Section 484 states what the petition must show. Section 485 requires the court to cite "all the owners and other persons interested" to appear in court at a time fixed to answer the petition, and, finally, this section directs the court to proceed "to appoint three capable and disinterested commissioners to appraise the value of the respective interests of all persons concerned in such lands." Section 486 provides that after the commissioners have been duly sworn they shall examine the premises "and hear the persons in interest." This section further provides that when such report or the verdict of a jury thereafter provided for is confirmed by the court, the President of the United States, in cases of condemnation for the use of the United States, "shall, if he thinks the public interest requires it," cause payment to be made, etc. Section 487 reads as follows:

"Sec. 487. *Jury.*—If any of the parties interested, or the guardian ad litem appointed for any such person who may be under a disability, shall be dissatisfied with the appraisement of the commissioners, the marshal shall be directed to summon a jury of seven disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least six days' notice of the time and place of meeting."

Section 488 provides for the summoning of a jury by the marshal and requires the jury to take certain benefits into consideration in returning their verdict. Section 489 provides that—

"The jury having been upon the premises and, after hearing the parties, having assessed the damages, shall make out a written verdict. * * * The verdict of the jury may be excepted to by any party interested, and may be set aside by the court for good reasons, and a new jury directed to be summoned."

In section 490 it is provided that—

"If the finding of the commissioners to appraise should not be objected to by the parties interested, and, in cases of condemnation for the use of the District, the Commissioners of the District are satisfied therewith, or if the verdict of the jury is confirmed by the court and is satisfactory to the Commissioners of the District," the Commissioners shall pay the award, etc.

Section 491 makes it optional with the Commissioners to abide by the verdict of the jury or, within a reasonable time to be fixed by the court, to abandon the proceeding.

[1] At the outset it is well to note that this is an adversary proceeding in a court, involving two parties, the District and "all persons concerned in such lands." Had the statute, instead of providing for a court proceeding, provided that the damages might be assessed in the first instance by the Commissioners of the District, it would logically follow that they might not appeal from their own decision and invoke an assessment by a jury. This distinction was carefully pointed out in Marshal Fishing Co. v. Hadley Falls, 5 Cush. (Mass.) 602.

Having the above distinction in mind, we think it would be going far to rule that the words "any of the parties interested," as used in section 487, should be given such a restricted meaning as to include

only owners of the land and exclude the party equally interested in the proceeding, namely, the District. It must be conceded, of course, that under the above provisions of section 486, relating to the proceeding before the appraisal commissioners, the District has a right to be heard and therefore is one of the "persons in interest" therein mentioned. It is equally apparent that the District is a "party interested" within the meaning of section 489, for it is unthinkable that it was intended in that section to permit exceptions by the landowners to the finding of the jury and withhold that right from the District, the party who would be compelled to pay the damages. This fact that the District is a "person" as well as a "party," within the meaning of the act, of itself is significant and inconsistent with the idea that the act limits the right to a jury hearing to the landowners or "persons" and does not give such right to the "parties" in the proceeding, which must include the District. Moreover, the District being one of the "persons in interest," within the meaning of section 486, and a "party interested," within the meaning of section 489, it would require a strained and unreasonable construction to hold that it is not one of the "parties interested," within the meaning of section 489. And analyzing section 487 we find support for our view that it includes both parties to the proceeding, for in the latter part of the section notice to the "parties interested" is required. It hardly would be contended that where the landowners had expressed dissatisfaction with the appraisement of the commissioners and demanded a jury hearing, no notice would be necessary to the District of the time and place of such hearing. If the "parties interested," as used in the latter part of this section, include the District, the same term in the first part of the section should receive the same interpretation in the absence of a contrary intent.

[2] Section 486 authorizes the President of the United States, in cases of condemnation for the use of the United States, where he thinks the public interest requires, to take certain action. In the enactment of section 490 Congress apparently intended to make substantially the same provision as to the authority of the Commissioners of the District where the condemnation was for District purposes. While the provisions of this section are somewhat ambiguous, it may not be said that they evince a purpose on the part of Congress to narrow the meaning of the term "parties interested," as used in the preceding sections.

Viewing this chapter as a whole, and having in mind its scope and purpose, we are convinced that it was the intent of Congress to make these proceedings adversary throughout and allow either party to invoke the jury hearing provided by section 487. It follows that the judgment must be affirmed, with costs.

Affirmed.

KELLOGG v. WINCHELL et al.

(Court of Appeals of District of Columbia. Submitted October 11, 1921. Decided November 7, 1921.)

No. 3479.

1. **Wills ⟸697(1)—Bill to construe not maintainable by person claiming no interest.**
   Though equity will entertain a suit to construe a will at the request of a trustee, guardian, or the like, so that positive directions may be given to him, a bill merely requesting that certain provisions of a will be construed, without showing that plaintiff was an executor or trustee, or that he asserted any right of property in himself or any one else which he asked the court to adjudicate, is insufficient.

2. **Equity ⟸427(3)—Prayer for general relief authorizes only relief permissible under pleadings.**
   Though under the prayer for general relief, the court can give any relief to which the allegations of the bill entitle plaintiff, it cannot give him relief not authorized by the allegations.

3. **Costs ⟸240—Taxed to intervener after abandonment by appellant.**
   Where appellant abandoned his appeal after it was docketed, but his attorney intervened to protect his claim to the property under his contract with appellant and was permitted to prosecute the appeal, the costs which were incurred after the abandonment by appellant will be taxed on affirmance to the intervener and not to appellant.

Appeal from the Supreme Court of the District of Columbia.

Suit by Sherman Kellogg against Fred A. Winchell and others. From a decree dismissing the bill for failure to state a cause of action, plaintiff appeals. Affirmed.

See, also, —— App. D. C. ——, 273 Fed. 745.

Henry E. Davis, Edmond C. Fletcher and Walter C. Clephane, all of Washington, D. C., for appellant.

Frank J. Hogan, George E. Hamilton, and John J. Hamilton, all of Washington, D. C., for appellees.

SMYTH, Chief Justice. This cause comes here from the action of the trial court in dismissing Kellogg's bill on the ground that it did not state a cause of action.

Kellogg, a legatee and devisee under his brother's will, instituted a suit in equity for the sole purpose of having the will construed. After asking twelve questions with respect to the meaning of different items, he prayed (a) that the will be construed; (b) that the executor be directed as to the manner in which certain personal estate in his hands should be distributed; (c) that the trustee be directed as to whom belonged the legal title to real estate described in item 4 of the will, and the accrued rents and profits arising therefrom; and (d) for general relief.

[1] It will be observed at a glance that he asserts no right of property in himself or in anybody else which he asks the court to adjudicate

and protect. The purpose of the bill is to procure the advice of the court as to the meaning of certain provisions of the will. A court of equity does not sit for that purpose, unless where the request is made by a trustee, guardian, or the like, and then only that positive directions may be given to him. Of course, if the executor or trustee were charged by Kellogg with doing, or attempting to do, something inconsistent with his rights under the will, as he saw them, it would be proper for him to appeal to the court for protection, and as an incident to the granting of that protection it might become necessary to construe the will. But he makes no such charge.

[2] Under the prayer for general relief, the court had power to give him any assistance which the allegations of his bill entitled him to; but, as we have already remarked, they did not entitle him to any. Without further discussion, we dispose of this case by saying that it is ruled by Jordan v. O'Brien, 33 App. D. C. 189. The decision in that case is in harmony with the great weight of authority upon the point involved, and we adhere to it.

[3] After this appeal was docketed, the appellant abandoned it; but his attorney, Mr. Edmond C. Fletcher, claiming an interest in the subject-matter by reason of a contract which he had with the appellant, was permitted to intervene and prosecute the appeal for the purpose of protecting his interests. Kellogg v. Winchell, —— App. D. C. ——, 273 Fed. 745. The appellant should not be taxed with costs accruing after the abandonment. From that time on Mr. Fletcher must be held liable.

The decree of the lower court is affirmed. The costs up to the time of the intervention are assessed against the appellant Kellogg, and all costs after that against the intervener Fletcher.

Affirmed.

WESTERN WELL WORKS, Inc., et al. v. LAYNE & BOWLER CORPORATION.

(Circuit Court of Appeals, Ninth Circuit. October 17, 1921. Rehearing Denied January 16, 1922.)

No. 3627.

1. **Patents ⟸246—One element of combination patent may be infringed.**
Suit may be maintained for infringement by the use of one part of a patented machine, where it constitutes an independent invention and is claimed as such.

2. **Patents ⟸165—Patentee limited by claims.**
A patent is no broader than its claims, and, if the language of a claim is clear and distinct, the patentee is bound by it.

3. **Patents ⟸328—821,653, for well mechanism, claims 9, 13, and 20, held valid, but not infringed.**
The Layne patent, No. 821,653, for well mechanism comprising a pump and apparatus for drawing water from driven or artesian wells, claims 9, 13, and 20, *held* valid, but not infringed by the apparatus of the Halstead patent, No. 1,228,770, or by the modified apparatus used by defendants.

4. **Patents ⟸112(3)—Later patent presumed for different invention from that of earlier patent.**
The issuance of a later patent raises a presumption that the invention claimed is different from that of an earlier patent, and the burden of proof rests upon a complainant to establish infringement.

Gilbert, Circuit Judge, dissenting.

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

Suit in equity by the Layne & Bowler Corporation against the Western Well Works, Inc., and others. Decree for complainant, and defendants appeal. Reversed.

This suit was brought for infringement of claims 9, 13, and 20 of letters patent No. 821,653, issued May 29, 1906, on an application filed April 28, 1903, to Mahlon E. Layne for "well mechanism"; the plaintiff and appellee being the assignee of said Layne.

Chas. E. Townsend and Wm. A. Loftus, both of San Francisco, Cal., for appellants.

Frederick S. Lyon, of Los Angeles, Cal., William K. White, of San Francisco, Cal., and Leonard S. Lyon, of Los Angeles, Cal., for appellee.

Raymond Ives Blakeslee, of Los Angeles, Cal., and Charles C. Montgomery, of Los Angeles, Cal., as amici curiæ.

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

MORROW, Circuit Judge. This is an appeal by the defendants from the interlocutory decree of the District Court of the United States for the Northern District of California, Second Division, entered De-

cember 31, 1920. The validity of patent No. 821,653 for "well mechanism," and the infringement of claims 9, 13, and 20, were in issue. The decree sustains the validity of the claims and holds that the defendants had infringed said claims, and directs a permanent injunction to issue against the defendants, enjoining and restraining them from making, using, selling, or causing to be made, used, or sold, any well mechanism embodying or containing the invention described in said letters patent and claimed in and by said claims 9, 13, and 20.

In the application for the patent in suit, Layne declared that he had "invented certain new and useful improvements in well mechanism," and he specifies that his "invention relates to the apparatus used for drawing water from driven or artesian wells, and particularly to the means for adjusting a pump therein."

The objects of the invention, he declares, are:

"To provide means by which the piping and the pump may be all assembled in proper shape before inserting it into the well; to provide means by which a pump may be placed in any desired position in a well, centered, raised, or lowered and fixed in position by manipulating from the outside entirely; to provide means for adjusting the length of the piping leading from the pump to the surface at will and to lower the pump from time to time without taking it out of the well; to provide improved means for centering and fixing the pump in proper position in the well casing; to provide improved means for manipulating the packing of the pump shaft, and proper adjustment of the pump in place by means at the surface of the ground; to provide for the proper action of a pump without stopping up the well, so that the water may be either flowed into or pumped out of the same at pleasure; to provide a superior mounting for a centrifugal pump in the well, manipulated from the surface of the ground; to provide an extensible pump shaft separately supported at intervals along its length; to provide an automatic centering device for the pump in the well; to provide for mounting the pump and the shaft in a closed casing which is open to operate from the top; to obviate the necessity of making large wells for descending into them in order to arrange the pump, and to generally improve and cheapen the apparatus used for the above purposes."

[1] The specification informs the public of the objects to be accomplished by the improvements in the well mechanism invented by the applicant, and for the purpose of claiming all his improvements in the mechanism as inventions he makes 22 claims. Six of these claims, namely, those numbered 1, 2, 8, 11, 16, and 19, assemble certain specified elements in each claim as forming in such claim a unit of invention in the mechanism. The remaining claims, namely, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 17, 18, 20, 21, and 22, assemble certain specified elements in combination in each claim as also forming in such claim a unit of invention in the mechanism. The various elements in all these claims relate to the one principal invention of a "well mechanism." In that relation they are all designed to co-operate in co-operating towards the common end of being employed in an apparatus to be used for drawing clean water from a driven or artesian well. The patent comes within the rule stated by Mr. Justice Story in Wyeth v. Stone, 1 Story, 273, 292, 30 Fed. Cas. page 723, No. 18,107, where it was held that a patent for several machines, each being a distinct and independent invention, is valid where they have a common purpose and are auxiliary to the same common end. It is

not necessary, in order to maintain a suit upon such a patent, says the court, "that there should be a violation of the patent throughout. It is sufficient if any one of the invented machines or improvements is wrongfully used; for that, pro tanto, violates the patent."

To the same effect is Emerson v. Hogg, 2 Blatchf. 1, 8, 8 Fed. Cas. 628, No. 4,440; Hogg v. Emerson, 6 How. 437, 12 L. Ed. 505; Hogg v. Emerson, 11 How. 587, 13 L. Ed. 824.

This rule applies to the invention described in a separate claim as well as to the invention described in the patent as a whole.

The claims charged to have been infringed in this case are 9, 13, and 20 of the combination class. For convenience and accuracy of reference we separate the elements of these claims into clauses, as follows:

Claim 9:
(1) In a well mechanism
(2) the combination with a pump casing, of
(3) a rotary pump, of
(4) a jointed pump shaft, and
(5) a closed casing surrounding the pump shaft
(6) from the pump to the top of the well.

Claim 13:
(1) The combination with
(2) a pump and its
(3) actuating shaft of
(4) a sectional casing therefor
(5) provided at each end of each section, with
(6) a fixed block with
(7) bearings for the shaft;
(8) the casing being closed at the top and provided with
(9) an air vent.

Claim 20:
(1) The combination of
(2) a well casing,
(3) a rotary pump therein, and
(4) a line shaft for the pump
(5) entirely closed off from the water in the well.

Referring to the specification and assemblage of the parts of the mechanism in preferred forms illustrated in the drawings accompanying the application for the patent, we find that the "rotary pump" mentioned in clause 3 of claim 9, the "pump" mentioned in clause 2 of claim 13, and the "rotary pump" mentioned in clause 3 of claim 20, have the same identical function, and the approved form of the "pump" used by the inventor is a centrifugal pump. We find also that the "jointed pump shaft" mentioned in clause 4 of claim 9, the "actuating shaft" mentioned in clause 3 of claim 13, and the "line shaft" mentioned in clause 4 of claim 20, perform the same function, the preferred form of which is declared by the specification to be made in sections "which are attached together by means of sliding keys so as to allow of some vertical play with relation to each other."

We find, also, that the combination with a "pump casing" mentioned in clause 2 of claim 9, the "closed casing surrounding the pump shaft" mentioned in clause 5 of claim 9, the "sectional casing" mentioned in clause 4 of claim 13, the "casing being closed at the top" in clause 8 of claim 13, and the "well casing" of clause 2, claim 20, by which the pump is "entirely closed off from the water in the well" mentioned in the last two words of clause 4 and in clause 5 of claim 20, perform the same function, the preferred form of which is declared by the specification to be made in joints of any desired length, with stuffing box at surface of ground at top of pump, so that by the use of the packing boxes an air-tight chamber can be maintained.

In clause 8 of claim 13 "the casing being closed at the top" is followed by the addition in clause 9, "and provided with an air vent," and the "sectional casing" of clause 4 of claim 13 is provided in clause 5 "at each end of each section" with "a fixed block" in clause 6, and with "bearings for the shaft" in clause 7.

This analysis discloses that the essential elements of these three claims consist of (1) a pump, and (2) a pump shaft entirely closed off from the water in the well by (3) a sectional pump casing provided at the end of each section with (4) a fixed block with (5) bearings for the shaft, and (6) the casing being closed at the top and provided with an air vent.

One of the problems for the inventor of this character of pump was to protect the bearings from the sand and water carried up from the well bottom. Another problem was to provide a method for efficiently lubricating the bearings of the pump shaft while it was in operation. No one could descend into the driven well for that purpose, and while oil might be carried to the bearings in small pipes, it was also a problem to keep the used and spent oil from escaping into the water conduit.

To meet these problems the specification describes the closed casing as designed to keep the water out and retain clean fluid for the efficient lubrication of the shaft bearings.

It is contended by the plaintiff that this closed shaft casing has three functions, namely: (1) Protection of the shaft and its bearings from the water and sand pumped to the surface; (2) lubrication of the shaft bearings; and (3) alignment of the shaft.

In the specification we find that one of the functions claimed for this casing is to protect the shaft and its bearings from the water and sand pumped to the surface. Another function claimed is to inclose the means provided for the lubrication of the shaft bearings, but further than this the specification does not go.

In claim 18 the combination includes "a pump and means for suspending it from the top of the well." The plaintiff claims that by this suspension the pump hangs pendent from the top of the well like a plumb bob in the well cavity, and that the shaft casing will also so hang and thus hold in alignment the shaft bearings mounted within the casing, and thereby maintain the shaft in alignment. But we do not find any claim for this suspended structure either in claim 9, 13, or 20, and there is no charge that claim 18 has been infringed.

There is a device mentioned in claim 7 of a combination with a well casing and a pump, a series of wedges suspended by rods from the top of the well for operating the same to wedge the pump casing against the well casing. In claim 8 it is said that these wedges are mounted upon toggle links. It is claimed that this device enters into the mechanism of the shaft casing and has also the function of alignment of the shaft, but there is no charge that either claim 7 or claim 8 has been infringed by the defendant, and it appears from the testimony that this device has been abandoned by the plaintiff and is no longer a part of the mechanism in actual use.

M. E. Layne, the patentee, was a witness for the plaintiff in this case. He was asked on cross-examination if he had ever used the wedges for the function specified in the patent or at all. His answer was: "We have never used the wedges." He was asked concerning the use of the toggles connecting with the wedges, or the parts represented by the rods or links connecting with the toggles, or the rods or links connecting with the wedges, and his reply was that none of them had ever been used. This testimony was given September 2, 1920. The patent was issued to Mr. Layne May 29, 1906.

It seems clear to us that the alignment is not a function of the shaft casing, but is a function of the means used for suspending the apparatus from the top of the well, combined with the law of gravity. This means for suspending the mechanism is to operate on the shaft casing and not the shaft casing upon the means of suspension, and this suspending device for alignment provided for in claim 18 is no part of this controversy. In other words, we are of the opinion that alignment is not a function of any of the elements of either of the claims under consideration.

[2] In Wilson & Willard Mfg. Co. v. Union Tool Co. et al., 249 Fed. 729, 734, 161 C. C. A. 639, 644, this court held:

"That the patentee is limited to his claims, and the patent is no broader than the claims, and, if the language of the claims in the patent is clear and distinct, the patentee is bound by the language he has employed"

—citing Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, on page 278 (24 L. Ed. 344), where the Supreme Court of the United States say:

"But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. * * * When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. Merrill v. Yeomans, 94 U. S. 568. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

We have placed some emphasis upon the fact that all the claims in this patent relate to one principal operative invention of a well mechan-

ism, and in that relation they all in a more or less direct and practical way were designed to co-operate and supplement each other to the common intent and purpose of being employed in an operating pump apparatus for a driven or artesian well; but when we turn to the analysis of the claims in suit, we find that the essential elements claimed to have been infringed are limited and narrow and relate only to combinations of a rotary pump with an actuating shaft entirely closed off from the water in the well by the casing surrounding the pump shaft.

[3] This patent has been before the Circuit Court of Appeals in the Fifth Circuit, on the question of the validity of the patent and the infringement of certain of its claims. In El Campo Mach. Co. v. Layne, 195 Fed. 83, 115 C. C. A. 115, it was held that the patent was valid and claim 13 infringed. In Van Ness v. Layne, 213 Fed. 804, 130 C. C. A. 462, the patent was held valid and claim 20 infringed. In that case the court sustained the claim of the plaintiff that the protecting casing had three functions, namely: (1) To exclude water and detritus from the shaft and its bearings; (2) to provide a means of lubricating the bearings of each section of the shaft from the top of the well without removing the apparatus from it; and (3) to align the bearings and the shaft so as to prevent lateral displacement in the well and keep the shaft in a vertical position. But the court was not very confident that the protective casing as set out in the specification contained novelty enough to constitute invention. The fact, however, that there was for some time an unfilled want for some such apparatus as that disclosed by the patent, in the deep well irrigating industry, persuaded the court that the idea involved invention, though theoretically its novelty and patentability might admit of doubt. With respect to the third function of the shaft casing in aligning the bearings and pump shaft so as to keep the latter in a vertical position in the well, the court was of the opinion that in the absence of intermediate support the tendency of the shaft, if suspended only from the top, would be to swing laterally in the well and so get out of alignment. The court found that this tendency is corrected by taking advantage of the downward pressure of the shaft due to gravity, in connection with the intermediate bearings through which the shaft passes. The court here refers to the bearings for the shaft mentioned in claim 13, but the court found that the defendant's pump in that case infringed the closed pump casing only as to protection and lubrication. With respect to alignment the defendant claimed that his pump was suspended from the top bearing exclusively, and that the lower bearing in his pump performed no function after the casing was fixed in position in the well, and that the intermediate bearings were functionally different from those of the patent in suit. The court appears to have sustained the defendant's contention, for it refused to find that claim 13 had been infringed, finding infringement only with respect to claim 20.

In Getty v. Layne (C. C. A.) 262 Fed. 141, the court followed its decisions in the previous cases, determining the question of the validity of the patent in favor of the plaintiff, but the court held that

the patent was not entitled to the wide range of equivalents of a pioneer patent. With respect to claim 20 and the function of the closed casing, the court held that the defendant's pump in that case could not be held to infringe the means that Layne used to keep the shaft properly aligned, since that was accomplished by suspending the mechanism from the top of the well, while the defendant's pump mechanism received its support by resting on the bottom of the well.

Our conclusion is that the shaft casing has only two functions: (1) To protect the shaft and its bearings from the water and sand pumped to the surface, and (2), to inclose the means provided for lubrication of the shaft bearings. The function of alignment is therefore dismissed from further consideration.

With respect to the shaft casing protecting the shaft from the ingress of water, claim 20 provides that the line shaft shall be entirely closed off from the water. In the specification the inventor declares:

"I consider it of great advantage also to arrange the pump shaft in a closed casing with stuffing box at surface of ground at top of pump, so that by the use of the packing boxes an air-tight chamber can be maintained, and water kept out of the casing, or kept filled with clean liquid, if desired, thereby providing an efficient lubricating system for all bearings of the pump."

There is a pipe or tubular shaft mentioned in the specification which has for one of its purposes a convenient means for forcing the liquid out of the pump shaft casing by forcing air in at the top of the casing. The function of this tubular shaft is further explained by the statement that by forcing air in at the top of the casing by means of a pipe located at that point, the liquid can be forced down into the bottom of the casing, and by means of a small opening at the bottom of the tubular shaft the fluid can be forced out at the top through a pipe outlet and thus keep the casing clear in order to leave the bearings clean therein and not interfere with the working of the pump; or, it is further stated that "this operation may be reversed." This specification clearly calls for an air-tight casing as provided in the other specification previously referred to.

In Getty v. Layne (C. C. A.) 262 Fed. 141, the court, on page 143, in discussing lubrication, referred to the closed casing as causing a stagnation of oil in the bearings. The court said:

"Layne's method of lubrication was to put the oil in at the top and to permit it to descend to each of the bearings, and remain stagnant within the shaft casing until ejected from the top after it had become spent by air pressure through an air vent. When it was ejected, it was replaced by clean oil from the top again. On the other hand, the oil was confined at the bottom of the well by use of a packing or stuffing box. Getty adopted a circulatory system of lubrication. By it the oil was also introduced from the top, and descended to the lower bearings by gravity. However, at the bottom there was only a partial obstruction to its exit, presented by a long sleeve bearing. Its passage out from the shaft casing was automatic and continuous, so that there was a constant and free flow of lubricant from the top of the line shaft, throughout its length, and out through its bottom. This method was claimed to be necessary to Getty's device, because wear on the upper bearing required a continuous supply of fresh oil for its proper lubrication. These functional differences between the stagnant and circulatory systems of lubrication prevent their being considered as merely mechanical equivalents."

The difference between the Layne patent and the Getty mechanism, as it appears in Getty v. Layne, supra, is essentially the difference between the Layne patent and the defendants' mechanism in this case. In the Layne patent the shaft casing is entirely closed, or that is the invention claimed in claim 20 and is necessarily the operative device of that claim and of claims 9 and 13, and by this device the oil becomes stagnant in the bearings and is blown out when sufficiently used or spent, while the defendants' shaft is not entirely closed but permits the oil to circulate down through the bearings and out at the bottom while the pump is in operation.

We are of the opinion that there is invention in the entirely closed casing of the Layne patent as claimed in claims 9, 13, and 20, particularly claim 20, functioning as it does in complete protection to the line shaft from the ingress of water and sand and in protecting the means for lubrication.

The next question is that of infringement. Have the defendants infringed claims 9, 13, and 20 of the plaintiff as thus construed and limited?

The defendants in their answer deny infringement of plaintiff's patent, and allege that the well mechanism charged by the plaintiff as an infringement of the patent in this case was manufactured in accordance with and under the protection of letters patent No. 1,228,770, issued to Stanley M. Halstead, June 5, 1917.

[4] In Ransome v. Hyatt, 69 Fed. 148, 16 C. C. A. 185, this court held that the issuance of a later patent was prima facie a presumption of a patentable difference between it and an earlier patent, following the decisions of the Supreme Court in Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 261, 15 Sup. Ct. 837, 39 L. Ed. 973. It is also a rule of law that infringement being denied, the burden of proof is upon the plaintiff to establish the charge. Fuller v. Yentzger, 94 U. S. 299, 305, 24 L. Ed. 107; Bates v. Coe, 98 U. S. 31, 49, 25 L. Ed. 68. We start, then, with a presumption in favor of the defendants' apparatus under the Halstead patent, and against the alleged infringement, and the burden of proof upon the plaintiff to establish infringement.

The plaintiff contends that there is no substantial difference between the two mechanisms; that defendants' mechanism, as installed, accomplishes the same result as the plaintiff's by substantially the same means, operating in substantially the same way. The court below was of that opinion. The controversy requires a careful examination of the defendants' apparatus in performing the function of protection to the shaft and in the lubrication of the bearings.

In the application for the Halstead patent the inventor stated that one of the objects of the invention was to keep the bearings of the pump shaft properly lubricated. The means for such lubrication is set forth in the specification. It will be seen that the means involves also the method of protection, or lack of protection, to the shaft bearings. The specification is as follows:

"When these parts are properly assembled and fitted, * * * I am enabled to lubricate all of the bearings with a very small amount of oil in an emulsified form. * * * Conduits * * * do not fit tightly into their respective rabbets, but effect a loose sliding fit, thereby permitting a small amount of water to work its way through into the interior of said conduits at these points, the water thus entering being practically free of sand or grit of any kind because of the filtering action of the small space through which it makes its way. This provision for a small quantity of water in the conduits is made so that when oil is fed into the top bearing * * * and makes its way through said bearing down the shaft to the second bearing, * * * it mixes with the water at said bearing and is emulsified by the rotary action of the shaft. * * * This emulsion passes down through the successive bearings until the bottom bearing * * * is reached, where it passes out through channel * * * and auxiliary conduits into the well proper. * * *

"It is, of course, well known that clear water is an excellent lubricant, but the tendency of the shaft to corrode renders its use objectionable when used alone. The use of oil alone is highly objectionable as it contaminates the water to such a degree as to become a nuisance when fed from the top or bottom, and requires a more or less complicated system of pipes when fed directly to each bearing, besides adding considerably to the expense of operating. I obviate these objectionable features by using an oil emulsion as a lubricant as above described, thereby providing a cheap lubricating medium, preventing corrosion of the shaft, not contaminating the water delivered and, on account of the constant flow of water through the bearings, providing an efficient cooling system for said bearings."

We have not had the opportunity of seeing the plaintiff's pump at work, nor that of the defendants; but we have carefully examined and analyzed the specifications and claims of both patents and have endeavored to understand their mechanisms and the methods of their operation, by the aid of the expert testimony. The fact remains, however, that we must depend largely upon the facts as related by the witnesses concerning the actual working of these pumps.

E. P. Lesley, a professor of mechanical engineering at Stanford University, was called as a witness for the defendants at the trial. He testified that he had been familiar with the defendants' pump for about two years. In the past year he had been retained by them in an advisory capacity and he had watched operations in their shop; had examined their pump and had superintended the installation of one pump at Stanford University; had tested the pumps manufactured by the Western Well Works, making observations of the various component parts. Referring to the model of the pump in evidence, he identified it as representing substantially the Halstead patent. He explained the operation of the model as follows:

"In operation, this pump is driven from the top, either by a belt connection or a direct-connecting motor, and the runner is rotated; the centrifugal action of the runner drives the water out in the passage of the discharge column, and it is delivered at the surface of the ground, or above the surface, as may be desired. The particular feature of this pump which may need further explanation is the lubricating system. The top, what has been called the top tube bearing No. 11, is provided with holes that are adapted to receive an oil pipe, to which is attached a drip feed oil cup. Oil is fed into a small receptacle, which is channeled in the upper end of the tube bearing member, No. 11, and as the shaft is rotated it is fed and moved by gravity down the shaft-inclosing casing, No. 8, until it reaches a point near the top of the pump, where it may meet, or where it meets a recess that is cored in

the part No. 17, in the bearing part of No. 17; here are provided two drain pipes; these are made in this side installation of quarter-inch pipe that is inserted in the mold before casting. These drainpipes are open to the well without the discharge casing, so that lubricant fed and moving by gravity, or fed by other means down the shaft-inclosing casing, runs out into the well at this point."

The witness was asked if he had made any tests to satisfy himself that the mode of operation he had described was correct. He replied that he had made a number of tests as to the operation of the defendants' pump with respect to lubrication. The tests were made after the commencement of the suit. One of the tests was of a pump installed by the defendant the Western Well Works Corporation, at the farm of E. W. Connant near San Jose, Cal. The evidence was introduced for the purpose of showing that there was a leakage of water through the line joints of the conduit or shaft casing as stated in the specification of the Halstead patent. It would not be practicable to refer to these tests in detail. They were not satisfactory to the court below and were not accepted for the purpose of drawing inferences therefrom as the opinion of an expert, but it was held that such inferences would be drawn by the court. The evidence did, however, tend to prove that some water passed through the conduit or shaft casing at the tube joints to the interior shaft. But there was testimony, on the other hand, tending to show that the connections of the shaft casing were so shaped as to be made tight, and that white lead was used on the joints and hard grease introduced into the interior of the casing so that no water of any amount could pass into the interior of the shaft casing. We think the preponderance of the testimony tended to establish that fact, and we concur with the court below upon that question; but the controlling question still remains to be determined. Does the lubricating oil introduced into the defendants' shaft casing pass down through the bearings, and after being used and spent, finally pass out at the bottom of the shaft into the well proper through a channel or auxiliary conduit constructed for that purpose? If it does, then it is not the same mechanical device for lubrication claimed and specified in the plaintiff's patent. The plaintiff's device does not have any outlet for the used and spent oil to pass out into the well, and as we understand the mechanical construction of plaintiff's pump, it was devised, in part at least, for the specific purpose of avoiding that objection.

That this objection was deemed serious at that time appears from the testimony relating to the Byron Jackson pump set up in the defendants' answer as an anticipation of the Layne mechanism. We did not discuss that feature of the case when we were considering the elements of the Layne patent, for the reason that while the Jackson pump appeared to be earlier in its conception in point of time, we did not deem it an anticipation in the element of the line shaft for the pump being entirely closed off from the water in the well, as claimed in claim 20 of the Layne patent. The testimony relating to this feature of the Jackson pump mechanism is found in the testimony of Daniel W. Mead, a graduate of Cornell University, a civil engineer by profession, and a professor of hydraulic and sanitary engineering at

the University of Wisconsin. He was employed to develop the water supply for the city of Rockford, Ill. In that connection he came to San Francisco to interview various manufacturers of centrifugal pumping machines and met, among others, Byron Jackson of the Byron Jackson Machinery Company, who was engaged in the manufacture of centrifugal pumps. With a representative of that company Prof. Mead visited pumping plants in the Sacramento Valley and in San Jose, Cal. He entered into a contract for the furnishing of three pumps for the city of Rockford, Ill., to be operated 85 feet below the surface in a shaft 15 feet in diameter. The pumps were furnished and worked successfully. He was employed to develop a great many deep wells, which he did, using the Byron Jackson centrifugal pump, in bored wells of from 8 to 15 inches in diameter. Among others, one for the Pabst Brewing Company at Milwaukee, Wis. This pump was installed in 1903, and raised the water about 200 feet in a bored well 15 inches in diameter. The correspondence between Prof. Mead and Byron Jackson Machine Works relating to this pump for the Pabst Brewing Company is in the record, from which it appears that Jackson was asked for the designs for a centrifugal pump for a well of the specified dimensions. Jackson replied under date of February 17, 1902, that he could design a pump for a 16-inch well to be placed 150 feet below the surface, to discharge directly into the center of the shaft running through the pipes, thus to be coupled up and hung in the well by the pipe, having no other framework. "But the difficulty in this problem," he said, "is oiling the shafting and friction of couplings in water." After some correspondence Prof. Mead came to San Francisco and saw Mr. Jackson upon the subject of pumps and their construction.

In the correspondence and discussion that followed between Mead and Jackson, the witness said that he, himself, did not appreciate the necessity of an inner pipe and raised the objection that it added to the expense and inquired why it was used. Jackson called the attention of the witness to the fact that in deep wells frequently more or less sand is discharged and that the sand coming up in the water is apt to get in the bearings and destroy them. Another point he made was that water lubrication was not satisfactory and that the bearings should be lubricated with oil; that the bearings of the shaft were to be located inside the central pipe so that they could receive oil from the surface and be free from the action of either standing water or water discharged by the pump, and the bearing plates were also to act as a separator between the outer pipe and the inner pipe, and to give together with the pipes a continuous connection from the drive head above to the pumps below.

Under date of April 20, 1903, the Pabst Brewing Company submitted to Byron Jackson the form of agreement for the construction of a centrifugal pump for a 15-inch well 200 feet deep, to be delivered within 60 days. The agreement contains specifications for the pump, among others:

"Bearings approximately every ten (10) feet and suitable means for providing for oiling the same, which will allow no mixture of oil and water."

Under date of April 29, 1903, Jackson wrote to Prof. Mead, in Chicago, as follows:

"It is true that this design of a pump does not take very much material or work after it is once developed, but at present no such pump has been developed and I want to get a price that will help to pay for the developing, and now that I have the order for the Pabst Brewing Company, I propose to make this pump and test it anyway, whether it is ever shipped and installed or not."

In a letter dated May 22, 1903, Jackson refused to sign the contract for the pump, containing a clause providing that there should be no discharge into the well of a mixture of oil and water. He states his objection to that part of the contract as follows:

"In your contract under heading of 'Pump' in the line next to the last on the first page, reading as follows: 'Which will allow no mixture of the oil and water,' I think this is an impossibility to make such a design, besides my blueprints are very clear and show that the excess of oil after passing through all the bearings on the line shaft will discharge into the well, and I specially mention this in some of my correspondence with Mr. Mead. This objection, however, is a common one and was made at Rockford and many other places where we put in city water works pumps, but after years of use, the amount of oil passing into the water has not proved a serious item; but if it is a serious item in your case, I do not know how to remedy it and for this reason, if no other, I would have to decline your contract."

Under date of June 9, 1903, Mr. Jackson again wrote to Prof. Mead that he would have to decline the Pabst contract, saying:

"I certainly was surprised that they should put in the contract that we would guarantee not to get any oil in the water, as that was impossible."

Again, under date of June 30, 1903, Jackson wrote to Prof. Mead, declining the contract, as follows:

"Now, I shall have to decline to sign this part of the contract, because the undue quantity will all depend upon the amount of oil supplied to the oilers and the use for which the water may be intended, because I know of no method of retaining the oil in the bearings and all of the waste oil is there to pass into the water pumped."

In a letter dated September 5, 1903, Mr. Jackson still objects to the proposed contract, saying:

"You will note that I make no guaranty regarding oil injuring the water or making it in any way unsuitable for the use of the Pabst Brewing Company. * * * There may be instances where the oil would accumulate on top of the water and be seen and commented on. If the oil is detrimental it is barely possible that some kinds of oil may be less detrimental than others; for instance, sweet oil, cotton seed oil, or even castor oil, might be good for the health."

The pump was finally accepted by the Pabst Brewing Company without the clause in the contract providing that there should be no discharge of oil into the water in the well.

The Layne application for a patent was filed in the Patent Office April 28, 1903. The dominant element in that invention was the claim for a line shaft for the pump entirely closed off from the water in the well. On the day following, that is to say, on April 29, 1903, Byron Jackson, an experienced and well-known manufacturer of centrifugal pumps, who had developed substantially all the other essential ele-

ments of the Layne improvement but that one element, declared that a pump with that element in it had not been developed (not then knowing, of course, of the application for the Layne patent), and on May 23, 1903, he declared that it was impossible to make a pump that would not allow a mixture of oil in the water, and on that account he declined to make the contract with the Pabst Company. This refusal to make a contract, with the provision not to allow a mixture of oil and water in the well, he repeated until it was waived by the Pabst Company and a pump accepted without it.

We think this evidence establishes very clearly that the Jackson mechanism was not an anticipation of that dominant feature of the Layne invention. The defendants' pump is substantially the Jackson mechanism with respect to the discharge of used or spent oil from the bottom shaft into the water of the well, and is therefore not an infringement of plaintiff's patent for an entirely closed casing for the line shaft.

The decree of the court below is reversed, with directions to dismiss the bill, with costs to the defendants.

GILBERT, Circuit Judge (dissenting). I submit that the question of infringement in this case is not determinable upon the mechanism described in the Halstead patent. It is determinable upon the mechanism which was actually used by the appellants at the time of the institution of the suit. The court below found, and it is so shown by the evidence, that while at the outset the appellants may have undertaken to follow the Halstead patent, they had abandoned it at the time when the suit was commenced, and were using great care so to construct their mechanism as to make a perfect union between casing and coupling with the complete exclusion of water; that the joints of their structure were sealed with white lead, and for a considerable distance the space between the driving shaft and the walls of the casing was packed with hard grease. There can be no doubt that the appellee's invention did, as was said in the case of Getty v. Layne (C. C. A.) 262 Fed. 141, "accomplish a revolution in the well-drilling industry." And while the invention may not be said to be of a pioneer character, it is, nevertheless, an invention of such merit as to be entitled to protection against a reasonable range of mechanical equivalents. In both the appellee's and appellants' mechanisms the oil is introduced at the top in substantially the same manner, and by gravity it traverses the entire length of the shaft, thereby lubricating all the bearings. In both there is some escape of oil through the lowest bearing. The contention that the two systems are differentiated in that the appellee's lubricating system is static, while that of the appellants' is circulatory, is not sustained by the proofs. In the appellants' mechanism, the shaft casing being made impervious to water and packed with hard cup grease a distance above and below each bearing, the ingress of water is prevented, and the movement of the lubricating oil is impeded, so that there is no substantial difference in the operation of the two lubricating systems. Both use a closed casing surrounding the pump shaft from the pump to the top of the well, the

casing being sufficiently closed to allow the feeding of a lubricating fluid down through the same to the various bearing parts for the shaft therein. Both accomplish the same result by substantially the same means, operated in substantially the same way. The fact that the appellants' static lubricants are supplemented by the use of an emulsifying oil is unimportant. The fact that in the appellants' mechanism more oil escapes from the lowest bearing than in the appellee's is also unimportant. The ultimate disposition of the lubricant after its office is fulfilled is immaterial. These differences do not enable the appellants to appropriate the substance of the appellee's invention.

In brief, the evidence shows that the appellants, as does the appellee, use a deep well pump mechanism assembled unit by unit, and lowered into the well bore so as to hang from the surface, the mechanism consisting of: (1) A pump impeller attached to a sectional power shaft extending from the pump to the top of the well, and inclosed in a casing; (2) a water discharge sectional casing extending from the pump casing to the top of the well; (3) a sectional casing extending from the pump casing to the top of the well, provided at the end of each section with a fixed block, with bearings for the shaft closed at the top, the casing being adapted to hold the power shaft in alignment by means of the bearings to protect the power shaft and its bearings from injurious action of sand or soil in the water, and to form a means for conducting lubricant from the top down through each shaft bearing.

I think that the decree of the court below should be affirmed.

I. T. S. RUBBER CO. v. ESSEX RUBBER CO.

(Circuit Court of Appeals, First Circuit. November 29, 1921.)

No. 1505.

Courts ⇐405(5)—Appeal from District Court's decree dismissing suit for infringement of patent held properly taken to Circuit Court of Appeals.

Where suit to enjoin infringement of patent was brought in district of federal court in which it was admitted that the defendant had a regular and established place of business, and in which defendant had concededly sold the goods claimed to infringe the plaintiff's patent, appeal from decree of dismissal "for want of jurisdiction" on the ground that the goods sold by defendant did not in fact infringe plaintiff's patent, and that therefore there was no infringement in the district, was properly taken to the Circuit Court of Appeals instead of to the Supreme Court, since the question decided by the District Court was not one going to its jurisdiction under Jud. Code, § 48 (Comp. St. § 1030), but was a question depending for its determination upon general principles applicable alike in any jurisdiction.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Bill by the I. T. S. Rubber Company against the Essex Rubber Company. Bill dismissed (270 Fed. 593), and complainant appeals. On motion to dismiss appeal. Motion denied.

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

Charles A. Brown, of Chicago, Ill. (F. O. Richey, of Elyria, Ohio, and Nathan Heard and F. A. Tennant, both of Boston, Mass., on the brief), for appellant.

Lucius E. Varney, of New York City (Frederick L. Emery, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. This is a bill in equity brought by the I. T. S. Rubber Company, an Ohio corporation, against the Essex Rubber Company, a New Jersey corporation, alleged to "have a regular and established place of business at 58 Lincoln street, Boston, Mass., within the district of Massachusetts, wherein the acts of infringement herein complained of took place," for infringement of letters patent No. 14,049, reissued January 11, 1916, and now owned by the plaintiff.

In its answer the defendant admitted that it was a New Jersey corporation with a regular and established place of business at 58 Lincoln street, Boston, Mass., within the district of Massachusetts, but denied that any acts of infringement were committed by it there or elsewhere in the district of Massachusetts, and specially reserved its right to contest the jurisdiction of the District Court.

It was stipulated between the parties that heels forming Plaintiff's Exhibits Nos. 1 and 2, Defendant's Heel, Series A and B, were sold by the defendant in the district of Massachusetts between January 11, 1916 (the date of the patent in suit), and the filing of the bill, and that the acts of infringement pleaded in the bill as above set forth consisted in the sale by the defendant within the district of Massachusetts of the heel lifts constituting Plaintiff's Exhibits Nos. 1 and 2, or other heel lifts exactly like them except as to size and color.

The defendant then moved to dismiss the bill on the ground that the court was without jurisdiction of the cause. After hearing the motion the court entered a decree which, among other things, stated that—

"It appearing that an act of infringement in this district is essential to jurisdiction, and that, to establish such act of infringement, plaintiff relies solely upon the sale in this district of heel lifts forming Plaintiff's Exhibits Nos. 1 and 2, Defendant's Heels, Series A and B (or heel lifts exactly like them except as to size and color); now, upon consideration thereof, this court finds that the heel lifts forming said exhibits each have their upper side and rear edges straight and all in one plane, and that letters patent in suit, to wit, reissue patent No. 14,049, are insufficient in scope to cover such heel lifts, and therefore that there is no infringement in this district; wherefore it is

"Ordered, adjudged, and decreed that the bill of complaint be, and the same hereby is, dismissed for want of jurisdiction."

From this decree the I. T. S. Rubber Company appealed to this court. The defendant then filed a motion requesting a dismissal of the appeal, asserting that the decree below was based solely on the ground that the District Court was without jurisdiction, and that in such case an appeal could be taken only to the Supreme Court.

Section 48 of the Judicial Code (Comp. St. § 1030) provides:

"In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

In this case it is conceded that the defendant has a regular and established place of business at Boston, within the district, and that heels represented by plaintiff's exhibits or others exactly like them were sold by the defendant in Massachusetts after the reissue of plaintiff's patent and prior to the bringing of this bill. It is denied, however, that these heels infringe the plaintiff's patent, and the court below has so found. Having made this finding, it ruled that it was without jurisdiction of the cause under section 48 of the Code; in other words, the ruling was that, to establish its jurisdiction, the plaintiff must show not only that the defendant had a place of business in Massachusetts and sold the articles in question in that district, but that those articles in fact infringed; that an allegation that they infringed was not enough.

The plaintiff, on the other hand, contends that, inasmuch as it was conceded that the defendant had an established place of business at Boston, and that the alleged infringing heels were sold there, the jurisdiction of the District Court was made to appear, without proof that the alleged infringing heels were such in fact; that the question whether they infringed or not was one of a general nature going to the merits of the cause, which any court of concurrent jurisdiction might pass upon, and was not a question involving the power of the District Court as a federal court.

In De Rees v. Costaguta, 254 U. S. 166, 173, 41 Sup. Ct. 69, 71 (65 L. Ed. ——), it is said:

"Since the decision of Sheppard v. Adams, 168 U. S. 618, it has been the accepted doctrine that, where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as Merriam & Co. v. Saalfield, 241 U. S. 22, 26."

In Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808, the Supreme Court, in construing section 48 of the Judicial Code (then a part of the act of March 3, 1897, c. 395, 29 Stat. 695), held in substance that, when a defendant is sued for infringement of letters patent in a district other than that of which it is an inhabitant, the question whether it has an established place of business in that district is a preliminary question of fact going to the jurisdiction of the court, and that, if the fact is found against the plaintiff and the cause dismissed for want of jurisdiction, the appeal should be to the Supreme Court. This was the position and holding of this court in American Electric Welding Co. v. Lalance

& Grosjean Mfg. Co., 249 Fed. 968, 162 C. C. A. 166, decided March 18, 1918.

In Tyler Co. v. Ludlow-Saylor Wire Co., supra, it further appeared that the alleged infringing sale did not in fact take place within the district in which the suit was brought. This also was apparently held to be a preliminary question of fact, going to the jurisdiction of the District Court in which the suit was brought as a federal court. But so far as we can ascertain it has never been determined that it is a preliminary question, going to the jurisdiction of the court as a federal court, whether the article sold in fact infringed.

The Supreme Court in De Rees v. Costaguta, 254 U. S. 166, 41 Sup. Ct. 69, 65 L. Ed. ——, in construing section 57 of the Judicial Code (Comp. St. § 1039), passed upon a question analogous to the one under consideration and which lends aid to its solution.

Section 57 reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be, or, where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service of publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district," etc.

In that suit it appeared that the plaintiff was a resident and citizen of New Jersey, and filed a bill in the District Court for the Southern District of New York against David Costaguta, Marcos A. Algiers, Alejandro Sassoeli, Eugenio Ottolenghi, individually, and as copartners composing the firm of David Costaguta & Co., asserting that they were aliens and residents of the republic of Argentine, South America. Renado Taffell, a British subject, but a resident of the Southern District of New York, and the American-European Trading Corporation, a New York corporation, were also joined as defendants. The bill set forth a contract whereby it was alleged that a copartnership existed between the plaintiff and Costaguta & Co. for the buying and selling of hosiery; that to carry the contract into effect a place of business was established in New York City; that a disagreement arose between the parties; that the plaintiff elected to terminate the contract and demanded liquidation and an accounting;

that the firm of Costaguta & Co. caused the American-European Corporation to be organized and certain assets of the copartnership transferred to the corporation in fraud of the plaintiff; and that the assets were within the territorial jurisdiction of the Southern District of New York. The plaintiff prayed for a liquidation and an accounting establishing what sum, if any, was due him; that he be decreed to have a lien upon all the property of the defendants and on the property and assets of the American-European Corporation; and that a receiver pendente lite be named. An order was issued requiring the defendants to show cause why such receiver should not be appointed and the defendants required to transfer the property to the receiver, etc. The subpœna and order were served upon the resident defendants. The plaintiff then procured an order authorizing service upon the nonresident defendants by publication under section 57. The nonresident defendants filed a special appearance asking that the order of service by publication be set aside and vacated. The District Court denied the plaintiff's motion for an injunction and a receiver, granted the nonresidents' motion to vacate the order for service, and dismissed the bill solely on the ground that the case as made by the bill did not state a legal or equitable claim to or lien upon the property in the district to give it jurisdiction within the meaning of section 57. On that dismissal an appeal was taken to the Supreme Court under section 238 of the Code (Comp. St. § 1215) upon the question of the jurisdiction of the court. It appears that the District Court regarded the question whether the plaintiff, under the contract, had a lien upon or a right in the assets or property within the district as one going to the jurisdiction of the court as a federal court.

The Supreme Court held that the question decided by the District Court was one determined upon principles which would be equally applicable had the question been presented in other jurisdictions and therefore did not involve the jurisdiction of the federal court as such; that, such being the case, the appeal should have been taken to the Court of Appeals, and, having been taken to the Supreme Court, should be dismissed for want of jurisdiction.

We are of the opinion that the question presented by this case differs in no respect from that in the Costaguta Case; that the questions in both cases depend for their determination upon general principles applicable alike in any jurisdiction in which they may arise; and that neither involves the jurisdiction of the federal court as such.

If the defendant's construction of the statute were correct, then, notwithstanding the court had determined in its favor a question going to the merits of the cause and one which ordinarily would entitle it to an unqualified decree of dismissal, the case would have to be dismissed for want of jurisdiction. We do not think a construction necessitating such a result can be entertained.

As the question passed upon by the District Court was one not going to its jurisdiction as a federal court, the appeal was properly taken to this court, and the motion to dismiss is denied.

CORDELL PETROLEUM CO. v. MICHNA et al.

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

No. 3602.

1. **Boundaries ⟸3(4)—Calls for river as natural boundary prevail over calls for courses and distances.**
   In the absence of mistake or fraud, calls for courses and distances in a survey yield to calls for a river as a natural boundary.
2. **Boundaries ⟸3(4)—Survey calling for river as boundary sustained.**
   Title under a survey calling for a river as one of the boundaries *held* to prevail over a title derived under a later survey purporting to be of a tract lying between the earlier survey and the river.

Appeal from the District Court of the United States for the Northern District of Texas; James Clifton Wilson, Judge.

Suit in equity by the Cordell Petroleum Company against E. Michna and others. Decree for defendants, and complainant appeals. Affirmed.

W. D. Gordon, of Beaumont, Tex., and K. C. Barkley, of Houston, Tex., for appellant.

B. K. Goree and Wm. E. Allen, both of Fort Worth, Tex., and P. B. Cox, I. W. Keys, Tarlton Morrow, and W. F. Weeks, all of Wichita Falls, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is an appeal from a final decree dismissing appellant's bill of complaint, in which the following averments were made:

That on May 6, 1889, the state of Texas by letters patent conveyed to Newton S. Walton a tract of land described in the A. A. Durfee survey; that Walton died in 1894; and that appellant purchased from his devisees certain described land included within the said Durfee survey.

That Walton by his will appointed Robert J. Hill and Jefferson Johnson independent executors, with power to sell real estate which in their opinion could not be partitioned; that Hill failed to qualify as executor; but that Johnson qualified and acted as sole executor, as it is conceded he had the right to do under the terms of the will.

That on April 22, 1913, Johnson, as independent executor, for a consideration of $100, executed a deed to one D. P. Taylor of all the land in the Durfee survey; that appellees claimed to have acquired title by deed from Taylor to appellant's land in the Durfee survey, and were exercising acts of ownership; and that some of them had placed on record leases and documents which constituted clouds upon appellant's title.

That the deed from Johnson to Taylor was void, for the reasons that Johnson's authority to make it had long since ceased; that the consideration was inadequate: and that title had theretofore become vested in the devisees under Walton's will.

That oil had been discovered in the vicinity of the land; that appellees were executing leases and conveyances thus casting clouds upon appellant's title, and were striving to prevent by force and violence the exercise of acts of ownership by appellant.

The bill prayed for an injunction restraining appellees from interfering with appellant, and from committing further trespasses upon the land; that the deeds under which appellees claim be canceled as clouds upon appellant's title, and for general relief.

Appellees pleaded title (1) under the deed from the independent executor to Taylor; (2) by adverse possession under the Texas statutes of limitations; and (3) under prior letters patent, issued by the state of Texas in 1879, of a tract of land described in the F. W. Huseman survey, which included the land in suit. It was thereupon averred that the later patent of the land described in the Durfee survey was void.

Walton's will contained the following instructions:

"It is my desire that they (the executors) manage my business affairs as they may deem best and when they deem realty not subject to partition they are authorized to sell the same. * * * It is my desire that the probate court have nothing to do with my property further than as required by law, to wit, probating will and filing of an inventory. * * * As to the Haskell Co. lands I own an undivided three-fourth interest therein and W. M. Walton my father the other one-fourth. I have expended much money on these lands and these should be held for some years yet. The Haskell lands are the Peter Allen 2/3 Lea. & Labor."

Appellant's deed from the devisees under this will was dated July 26, 1919, at a time when the discovery of oil upon the lands in litigation was considered probable.

In the year 1861, R. F. Luckett, district surveyor for the state of Texas, made surveys of a number of tracts of land south of Red river in Wichita county, Tex., among them being survey 819, in the name of William Droddy. The field notes of the Droddy survey were not introduced in evidence, but the survey is represented by a map filed in the General Land Office as being bounded on the north by Red river, on the west by survey 820, in the name of Lewis Powell, and on the east in part by survey 818, in the name of T. E. & L. Co.

The field notes of the Huseman survey were introduced in evidence, and are as follows:

"Beginning at the N. W. Cor. of Sur. No. 818, Texas Land & Emigration Co. Thence south 4845 vrs. a stake in Prairie; thence west 1900 vrs. a stake in E. B. Line of Lewis Powell's sur.; thence north with said Powell 3925 vrs. a stake in bank of Red river; thence down said river with its meanders N. 64° E. 2111 vrs. to the beginning.

"Dated May 12th, 1879."

The Huseman survey is given the number 819, which is represented on the official surveyor's map as being the number of the Droddy survey.

Survey 818 is bounded on the east by survey 812, in the name of Elizabeth Stanley, and the Stanley survey in turn is bounded on the east by survey 810, in the name of William R. Rivers. The field notes of each of these surveys were introduced in evidence. The field notes

of the survey lying farthest east, which is survey 810, represent its western line as "beginning at a stake on the bank of Red river"; thence south and east and north "to a stake on the bank of Red river"; thence "up the river with its meanders to the place of beginning." The field notes represent the Stanley survey, 812, as beginning at the northwest corner of survey 810, and thence "up the river with its meanders," to a "stake in bottom chittim," etc. The field notes represent the T. E. & L. Co. survey, 818, as lying "on the south bank of Red river," and as "beginning at the upper or N. W. corner of No. 812, a stake in river bottom a chittim"; thence "up the river with its meanders" to a "stake in bottom." The field notes represent survey 820, in the name of Lewis Powell, as "lying on the south bank of Red river," and as "beginning at the upper or N. W. corner of survey No. 819 in the name of William Droddy. * * * Thence S. 63¼° west up the river." The description of the Durfee survey in the patent to Walton is as follows:

"Beginning at the N. E. corner of F. W. Huseman survey and the S. W. corner of Sur. of 1280 acres Sur. for Lucinda Meadows; thence N. 80 W. with W. line of said Meadow Sur. 1309 varas a stake on the bank of the river the N. W. cor. of said Meadow. Thence up the river with its meanders S. 66½° W. 526 vrs. S. 42° W. 1350 vrs.

"S. 40° W. 1175 vrs. a stake on bank of the river in W. line of L. Powells survey.

"Thence N. 68° E. 350 varas the N. E. corner of said Powells survey an elm brs. S. 38½° W. 143 vrs.

"Thence N. 71° E. 2115 vrs. the N. E. corner of said Huseman and the beginning."

The field notes of the Lucinda Meadow survey, referred to in the foregoing description of the Durfee survey, were also in evidence, and purport to represent a tract of land lying between the Rivers, Stanley and T. E. & L. Co. surveys (being surveys 810, 812, and 818), and the Red river, just as the land in the Durfee survey patented to Walton is represented to lie between the Huseman and a part of the Powell surveys (being surveys 819 and 820) and the Red river.

It was undisputed that the common line between the Powell and the Huseman surveys extends to the bank of the Red river. There was some testimony that the eastern boundary line of the Huseman survey did not extend to the river, but it is apparent from the testimony that this conclusion was arrived at by following course and distance, and by ignoring the call of the field notes for the meanders of the river. It was not claimed that the northeast corner was located by reference to any witness trees, marks, or bearings called for by the field notes.

The District Court found from the evidence that the Red river was the northern boundary line of the Huseman survey, and therefore included the land involved in this suit, and that consequently the junior patent to Walton, which also included the land in suit, was void. The court further held that the suit was barred by the Texas statutes of limitations. No finding was made upon the validity of the deed from the independent executor to Taylor.

Both the Huseman and the Durfee surveys are represented as having a river boundary, and in case of conflict, of course, the Huseman or senior survey should be upheld, and the Durfee or junior survey declared void.

Each of the five surveys of 1861 above referred to is represented on the plat as having the Red river as a northern boundary. The field notes of all except the Droddy survey were in evidence, and each of them were represented as being on the south bank of the Red river. It was stated in Schnackenberg v. State (Tex. Civ. App.) 229 S. W. 934, which was a case dealing with these surveys, that the field notes of the Droddy survey had been lost; but, as pointed out in that case, the survey can be located by its companion surveys, and it is no doubt true that the Huseman survey took the place of the Droddy survey. The field notes of the Huseman survey also give it a river boundary. Its west boundary line extends to the river, and from that point the call of the field notes is "thence down said river with its meanders N. 64° E. 2111 vrs. to the beginning."

[1] It is made to appear, therefore, upon consideration of the field notes and plats of official surveys, that Red river was represented to be the northern boundary of the Huseman and companion surveys made in 1861; and it is conceded, as it must of necessity be conceded in the absence of mistake or fraud, that the general rule is that calls for courses and distances yield to calls for the river as the natural boundary. Some of the cases in the Supreme Court of the United States so holding are cited in Greene et al. v. United States (C. C. A.) 274 Fed. 145, and in Lane et al. v. United States (C. C. A.) 274 Fed. 290, decided at the last term of this court. This familiar principle of law has been recognized in Rosetti v. Camille (Tex. Civ. App.) 199 S. W. 526, and recently applied by the Court of Civil Appeals of Texas to the Huseman survey, in Schnackenberg v. State, supra.

[2] Appellant contends for an exception, and for giving effect to the calls for courses and distances to the exclusion of calls for a river boundary, because it is claimed the evidence shows that the surveyors who testified for appellant actually traced out the north line of the Huseman survey and found vacant land between it and Red river. We are of opinion that the contention is untenable. No surveyor who testified for appellant claimed to have made an independent investigation in an effort to locate the northeast corner of the Huseman survey. They all assumed a point away from the river to be the northeast corner, and upon that assumption arrived at the conclusion that there was vacant and unappropriated land between the survey and the river. In other words, they did not trace the footsteps of the original surveyor as claimed in the argument. No fraud in the original survey is claimed, and no mistake in it is shown by the evidence. When taken in connection with its companion surveys, the Huseman survey is conclusively shown by the evidence to have included the lands involved in this suit. It therefore becomes unnecessary to consider the evidence relating to the claims of title by appellees based upon statutes of limitations and upon the validity of the deed from Walton's inde-

pendent executor to Taylor, which was prior in time to the deed under which appellant claims.

Error is not made to appear by any of the assignments of error, and the decree is therefore affirmed.

SOUTHERN OIL CORPORATION v. WAGGONER.

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

No. 3701.

1. **Courts ⟸340—Conformity statute subject to specific provisions of federal statutes.**

The conformity statute (Rev. St. § 914 [Comp. St. § 1537]) requires conformity of proceedings in the federal courts to the state practice only "as near as may be," and leaves the court with power to reject any subordinate provision of the state statutes which in its judgment would tend to defeat the ends of justice, and such requirement is also subordinate to any specific provision of the federal statutes as to pleading or procedure.

2. **Courts ⟸344—Federal courts required to ignore merely formal defects in pleadings or process.**

Under Rev. St. § 954 (Comp. St. § 1591), providing that "no summons * * * 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," a court properly refused to quash a citation requiring defendant to appear at the next regular term, to be held "on the fourth Monday in March," which was the day fixed by law for the beginning of the term, because it further erroneously stated "it being the 29th day of March," which was merely surplusage, though under the state practice it would have rendered the process invalid.

3. **Appeal and error ⟸1170(1)—Technical errors not ground for reversal.**

Under Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), providing that appellate courts shall give judgment without regard to technical errors which do not affect the substantial rights of the parties, denial of a motion to quash process, even if error, is not ground for reversal where defendant appeared and was not prejudiced by the alleged defect in the process.

4. **Trover and conversion ⟸11—Refusal of purchasers of lessees to deliver oil owned by lessor held a conversion.**

Plaintiff was a lessor of oil lands on a royalty of one-eighth of the product; the lessees sold their oil and delivered it, including plaintiff's share, into defendant's pipe line; on refusal of plaintiff to accept the price paid the lessees, defendant offered to deliver his share of the oil in kind, and plaintiff accepted the offer and designated the lines into which it should be delivered. *Held*, that defendant's failure to make such delivery constituted a conversion which entitled plaintiff to recover the market price at the time of the conversion.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action at law by R. M. Waggoner against the Southern Oil Corporation. Judgment for plaintiff and defendant brings error. Affirmed.

William J. Berne, of Fort Worth, Tex., for plaintiff in error.

W. F. Weeks and Tarlton Morrow, both of Wichita Falls, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. R. M. Waggoner was the owner of certain oil lands in Wichita county, Tex. He had leased these lands to several lessees on a royalty of one-eighth of the oil produced. The leases provided that said royalty should be delivered to the credit of lessor in the pipe line to which he may connect his wells. These lessees thereafter made contracts for the delivery of certain quantities of oil to the Southern Oil Corporation (hereinafter styled defendant). The oil so delivered included the one-eighth part of production reserved as a royalty to said lessor, Waggoner. The evidence offered by the defendant company admitted that it had received approximately 12,000 barrels of Waggoner's oil and had not paid him for it, but had tendered him $1.25 per barrel therefor, which he had refused.

It appeared from defendant's testimony also that from some time in September, 1919, a few days after defendant started to run the oil purchased, a controversy had arisen between it and Waggoner, he declining to sell his oil at the price defendant was paying for the seven-eighths of his lessees. This controversy was continuing when on November 26, 1919, the defendant by letter, reciting that it understood Waggoner was unwilling to accept the price it was paying his lessees, tendered to Waggoner his one-eighth of the oil, which had been, or should thereafter be, run into its lines on the contracts it had made with such lessees to be delivered into such storage or pipe line connections as he might furnish or procure, and asked that he would at once make arrangements to handle his share.

On December 8th Waggoner acknowledged receipt of this letter, and asked for a statement of the amount of his oil held by defendant company. On or about December 10th he notified defendant to deliver his oil into the pipes line of the American Refining Company or Texas Company, or that of any other common carrier, and demanded that defendant take no more of his oil.

On December 20, 1919, defendant was again notified to deliver said oil into the pipe line of the American Refining Company or the Texas Company.

The defendant failed to make or tender further any delivery of oil, and on January 24, 1920, Waggoner filed this suit in the United States District Court for the Northern District of Texas, alleging a conversion of said oil and that its market value during December, 1919, was $2.50 per barrel.

A citation issued on January 28, 1920, which required the defendant to appear at the next regular term of said District Court to be held "on the fourth Monday, it being the 29th day of March next, to answer the petition" in said case, and required the marshal to return same on or before March 29, 1920. This citation was served on January 29, 1920, and returned by the marshal on February 21st.

On March 29, 1920, said defendant appeared specially for the sole purpose of filing a motion to quash said citation for want of certainty because requiring defendant to appear on the fourth Monday, March 29th next, and the writ to be returned on or before said date.

The motion was overruled, and the defendant answered.

The case was tried on October 1, 1920, and resulted in a verdict finding the conversion of 12,044.74 barrels of oil of the market price of $2.50 per barrel and assessing plaintiff's damages at $30,111.85, and judgment was entered accordingly.

1. The first point urged is that the citation was fatally defective and should have been quashed.

It is insisted that, as March 29th was not possibly the fourth Monday in March, the writ was void for ambiguity under the decisions of the Texas appellate courts, and would have been quashed in the state court, and that these rulings are controlling in the United States courts in Texas.

The following among other cases are relied on as sustaining this contention: Taylor v. Taylor (Tex. Civ. App.) 157 S. W. 1184; Weems v. Watson, 91 Tex. 35, 40 S. W. 722; Kimmell v. Edwards (Tex. Civ. App.) 193 S. W. 363; Simms v. Miears (Tex. Civ. App.) 190 S. W. 544.

But, even if it be conceded that such would be the rule in the state courts, it does not follow that the same rule would obtain in the United States courts under the provisions of the federal statutes regulating the issuance and amendment of pleadings and process.

[1] While the act of Congress of June 1, 1872 (Rev. St. § 914; U. S. Comp. St. § 1537), provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform, 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 such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding"

—yet, as was decided by the Supreme Court of the United States:

"the conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals." Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 300 (23 L. Ed. 898).

This decision has been cited with approval, and the further rule laid down that—

"Whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter. Ex parte Fisk, 113 U. S. 713, 721; Whitford v. Clark County, 119 U. S. 522." Southern Pacific Co. v. Denton, 146 U. S. 202, 209, 13 Sup. Ct. 44, 47 (36 L. Ed. 942).

[2] The Congress has provided a definite rule governing its own courts on the subject of abating, arresting, or quashing process, or the return thereon, in civil causes.

"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 a 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." Rev. St. § 954; U. S. Comp. St. § 1591.

This statute of the United States would prevail even if there was an express provision of a state statute to the contrary. Mexican Central Railway v. Duthie, 189 U. S. 76, 78, 23 Sup. Ct. 610, 47 L. Ed. 715.

Here the only defect in this citation was that, after calling on the defendant to appear at the next regular term of the court to be held on the fourth Monday in March, a day of the month was stated which could not have been such fourth Monday in March. The act of Congress (39 Stat. at L. 939 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1095b]) fixed the regular term of this court as convening on the fourth Monday in March. The citation summoned the defendant to appear at the regular term of said court, and said defendant was conclusively charged by the law with knowledge that the fourth Monday in March was the beginning of the regular term. He therefore could not lawfully have assumed that the regular term convened on any day but the fourth Monday in March, and should have regarded the words "it being the 29th day" as surplusage.

[3] Further, a recent act of Congress requires that—

This court, "on the hearing of any appeal, certiorari, writ of error * * * 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. at L. c. 48, p. 1181 (Comp. St. Ann. Supp. 1919, § 1246).

It does not appear that the defendant has been in any way prejudiced by this misrecital of the date of the fourth Monday in March.

Had the court sustained the objection, under the federal statute first above quoted it would have resulted only in an amendment of the citation by striking the superfluous and erroneous date, and by the service of the citation so amended. The further steps in the case would have been the same as have taken place, to wit, pleading to the merits and a trial on the issues raised.

On the overruling of the motion to quash, such pleadings were filed and such a trial had. We therefore find no ground for reversing the judgment of the District Court because of the refusal to quash the citation.

[4] This case is one to recover damages for the conversion of the oil of the plaintiff Waggoner by the defendant; the plaintiff claiming as damages the market price of said oil at the time of said conversion.

It appears that there were two classes of buyers for said oil, the larger companies owning pipe lines and other smaller purchasers. The larger companies posted each month a price which they would pay for oil to the extent of their capacity for storing. This was known as the "posted price." The price offered by the other purchasers was less, and known as the "bootlegger" price. The posted price from August, 1919, to some time in November was considerably higher than the "bootlegger" price, and it was insisted that the court erred in admitting evidence of the posted price during August, 1919, and succeeding months, as it was not fairly evidence of the market value; the defendant insisting that the bootlegger price was the market price.

In the view we take of this case it is unnecessary to consider this question. It is admitted that by the end of November, 1919, the market price of oil such as that of plaintiff under either contention was quite $2.50 per barrel.

It is conceded by the defendant that at no time had it made any agreement with the plaintiff as to the purchase of his oil; that it knowingly received the plaintiff's share of the oil in order to get the portion of the oil of the lessees which it had purchased; it furnished to plaintiff from time to time statements showing such oil amounted to 12,044.74 barrels; and that plaintiff refused to sell his oil at the price which defendant was paying to said lessees. Finally, failing to agree on a purchase, on November 26, 1919, it tendered delivery to plaintiff of the oil, received and to be received, and plaintiff advised defendant of his readiness to accept such delivery.

When the defendant tendered to the plaintiff a delivery of his oil in kind and the plaintiff accepted the tender, called for the oil and designated the pipe lines through which defendant should deliver it, and the defendant thereafter failed to make any delivery, the defendant then converted the oil, and plaintiff could recover as damages for such conversion the then market price.

The judgment in this case is for no more than the evidence warrants, and is affirmed.

MACNEALE et al. v. LALANCE & GROSJEAN MFG. CO.

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

No. 3540.

1. Patents ⊜216—Seller of machines liable under contract for expense of defending infringement suit against purchaser.

Under a provison of a contract for the sale of machines that the seller would on notice, at its own expense, defend any suits that might be brought "for alleged infringement of any electrical or mechanical patents relating to the machines" sold, it is not a defense to an action by the purchaser to recover the expense incurred in defending against an in-

---

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

fringement suit which the seller failed to defend on notice and request that the machines sold were adapted to other uses which did not infringe the patent sued on, where that was the use for which they were made, equipped, and sold, or that the suit was based on the product of the machines and not on the machines themselves, or that the suit was dismissed on objections to jurisdiction and not on the merits, especially where a motion for preliminary injunction was also heard.

2. **Corporations ⟸619—On voluntary dissolution under Ohio statute directors hold assets first for benefit of creditors.**

On voluntary dissolution of a corporation under Gen. Code Ohio, § 8742, the directors become trustees for both creditors and stockholders, and, if they distribute the assets to stockholders before paying obligations of the corporation under its contracts, they are personally liable on such contracts.

In Error to the District Court of the United States, for the Western Division of the Southern District of Ohio; John W. Peck, Judge.

Action at law by the Lalance & Grosjean Manufacturing Company against Neil Macneale and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs in error were directors of the Toledo Electric Welder Company, an Ohio corporation, at the time that corporation was dissolved by the voluntary surrender of its charter and the distribution of its assets, January 9, 1917, and as such directors became trustees for creditors and stockholders of the dissolved corporation to the extent of the assets coming into their hands.

On the 4th day of March, 1915, and prior to its dissolution, the Toledo Electric Welder Company sold the Lalance & Grosjean Manufacturing Company, the defendants in error, three spot welding machines of different sizes and specifications. The terms and conditions of each written contract of sale contained among other provisions the following:

"The company agrees that it shall, at its own expense, defend any suits that may be instituted by any party against the purchaser for alleged infringement of any electrical or mechanical patents relating to the machinery furnished under this proposal, provided the purchaser shall have made all payments then due therefor and gives to the company immediate notice in writing of the institution of such suits, and permits the company, through its counsel, to defend the same, and gives all needed information, assistance and authority to enable the company to so do, and thereupon in case of final award of damages in such suit the company will pay such award."

On June 12, 1917, the American Electric Welding Company and the Thomson Electric Welding Company filed in the District Court of the United States for the District of Massachusetts a bill of complaint against the Lalance & Grosjean Manufacturing Company for the infringement of letters patent No. 1,046,066, known as the Harmatta patent, alleging that the defendants in that suit had sold electrically welded articles covered by said Harmatta letters patent and embodying the invention therein recited and included within the aforesaid field of articles under said patent exclusively granted by mesne assignment to the American Electric Welding Company, and praying for an injunction and an accounting of profits.

The Lalance & Grosjean Manufacturing Company filed a motion to quash the service of process and dismiss the bill of complaint for the reasons that it had no regular and established place of business within the district of Massachusetts; that it did not appear that its acts of infringement had been in said district; that service had not been made on any agent of the defendant conducting business for it in said district; and that the service of the order to show cause against a preliminary injunction was insufficient. Affidavits in support of this motion were also filed.

On the 11th day of August, 1917, this motion came on to be heard with plaintiff's motion for a preliminary injunction, which hearing resulted in an order and decree by that court sustaining the motion of the defendants to quash the service and dismissing the bill of complaint for want of jurisdiction of the defendant.

This defendant in error expended in defending against that suit in the District Court of Massachusetts the sum of $6,572 in costs and expenses and payment of counsel fees.

On the 7th day of October, 1920, the defendant in error, Lalance & Grosjean Manufacturing Company, filed its petition in the United States District Court for the Southern District of Ohio, Western Division, against these plaintiffs in error, to recover, among other things, the money it had expended as above stated, in defending itself against the infringement suit brought against it by the American Electric Welding Company and the Thomson Electric Welding Company in the District Court of the District of Massachusetts. It also sought to recover in this action money expended by it in defense of an action brought by the American Welding Company against the Jordan Marsh Company of Boston, Mass., one of its customers, for a like infringement; but that District Court held that it was not entitled, under the terms and conditions of its written contract, to recover the expense of that suit, and the defendant in error has not prosecuted a cross-petition to reverse that judgment.

In addition to the facts above stated, the petition of the Lalance & Grosjean Manufacturing Company further averred that it had made all payments due under these contracts; that it had given immediate notice in writing of the institution of said suit to the Toledo Electric Welder Company, and would permit it to defend the same and would give it all needed information, assistance, and authority to enable that company to do so; and that thereafter it gave to each of the defendants like notice, but that the Toledo Electric Welder Company and the defendants failed, neglected, and refused to defend said suit.

The plaintiffs in error filed an answer to this petition admitting the corporate capacity of the plaintiff and the Toledo Electric Welder Company; the dissolution of the Toledo Electric Welder Company on February 7, 1917; that these defendants and Frank Warren, now deceased, were directors of the Toledo Electric Welder Company acting last before the time of dissolution of said company; that assets of said company in excess of $30,000 came into the hands of said defendants and said Frank Warren as such directors; that in the year 1915 the Toledo Electric Welder Company sold certain electric spot welding machines to plaintiff and that the plaintiff had paid in full therefor; that plaintiff advised these defendants and attempted to advise the Toledo Electric Welder Company, after its dissolution, of the institution of the suit by the American Electric Welding Company and the Thomson Electric Welding Company against the plaintiff in the District Court of the United States and that plaintiff advised these answering defendants and attempted to advise the dissolved corporation that it would permit them through their counsel to defend said suit and would give all needed assistance and authority to enable it to do so, and for want of information sufficient therefor to base belief, denied each and every other allegation of the petition not expressly admitted. Upon the issue so joined the jury returned a verdict for the plaintiff for the sum of $6,572. A motion for new trial was overruled and judgment was entered upon the verdict.

The plaintiffs in error are now asking a reversal of this judgment for the reasons:

(1) The Harmatta patent was not one relating to the machinery furnished.

(2) The machinery furnished was adapted to uses within the field of electric welding outside of the limited field of electric welding known as spot welding.

(3) The Harmatta patent did not cover the whole field of electrical spot welding, but only single processes within that field. The machines were adapted to do electric spot welding not covered by Harmatta patent.

Joseph S. Graydon, of Cincinnati, Ohio (Maxwell & Ramsey and Burton P. Hollister, all of Cincinnati, Ohio, on the brief), for plaintiffs in error.

Edward Colston, of Cincinnati, Ohio (Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, and Masten & Nichols, of New York City, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] In the determination of these questions it is wholly unimportant whether the Harmatta patent is a valid one or whether the use of the machines sold by the Toledo Electric Welder Company to the Lalance & Grosjean Manufacturing Company actually infringed the Harmatta patent. By the terms of the contract sued upon, the Toledo Electric Welder Company agreed at its own expense to defend any suits that might be instituted by any party against the Lalance & Grosjean Manufacturing Company for alleged infringement of any electrical or mechanical patent relating to the machinery furnished. This, of course, included all suits of this character regardless of the merits, and regardless of the failure or success of such suits. The question here is whether the suit brought upon this patent in the District Court of Massachusetts was a suit based upon the claim of alleged infringement of any electrical or mechanical patent relating to the machinery furnished. If it was such a suit, then these plaintiffs in error, under this contract, were called upon to defend, although they might have successfully defended upon either one of the propositions now advanced.

Upon a careful reading of the complaint in that case, it is clear that there can be but one answer to this question. That suit was based upon the validity of the Harmatta patent and the infringement thereof by this defendant in error in that it had sold electrically welded articles embodying the invention of the Harmatta patent as therein recited and included within the articles under said patent exclusively granted to the plaintiff, the American Electric Welding Company. It is admitted that the spot welding of these articles was accomplished by the use of the machines purchased by Lalance & Grosjean from the Toledo Electric Welder Company, and that when so purchased these machines were equipped to do this particular kind and character of spot welding. It would seem to be clear that a patent which would prevent the use of a machine in the expected way or prevent the sale of the product made upon the machine in the expected way was and is a patent relating to the machinery furnished. The contract of sale and purchase did not limit the obligation of the seller to defend suits charging infringements of patents covering machinery only, but broadly included alleged infringements of any electrical patent or any mechanical patent relating to the machinery furnished. Certainly a patent covering the product of a machine is a patent relating to that machine.

The case of Thomson Electric Welding Co. v. Barney & Berry, Inc., 227 Fed. 428, 142 C. C. A. 124, was similar in character to the suit against the defendant in error in the District Court of Massachusetts.

In that action, the United States Circuit Court of Appeals of the First Circuit held the Harmatta patent valid and infringed by the use and sale of skates, parts of which were welded with the Toledo machine.

The Lalance & Grosjean Manufacturing Company was charged with like infringement of this same patent by like methods and was confronted with the possibility of a like judgment being entered against it. It is therefore clear that this was a suit for "an alleged infringement of an electrical or mechanical patent relating to the machinery furnished," within not only the letter, but the meaning, of that contract. The opportunity was afforded to these plaintiffs in error to defend against that suit and prove that the allegations of the complaint were not true. It would seem unnecessary to say that they cannot make the defense in this suit that they could have made and should have made in that one. The contract does not call for defending suits for actual infringement only, but for alleged infringement. The plaintiffs in error cannot now be permitted to plead and prove as a defense in this case, that the allegations contained in that complaint were untrue.

It is said, however, that the machinery could be used to do butt welding and for other processes of spot welding not within the Harmatta patent. While the evidence offered does not support these contentions, nevertheless, if these claims were admitted to be true, they would constitute no defense to plaintiffs' action. The evidence is uncontradicted, however, that these machines were not adapted for butt welding, but it is argued that the witness meant only that they were not equipped for butt welding; that they could easily have been so equipped by the removal of the pointed electrodes and the substitution of other electrodes suitable for butting the ends of bars together. That may be true, nevertheless the machines were sold as spot welding machines and were equipped with pointed electrodes not only suitable, but specifically adapted to the same process of spot welding as the processes purporting to be covered by the Harmatta patent. The fact that they were so equipped with pointed electrodes when they were sold and delivered to the purchaser is sufficient to show that they were sold by the Toledo Company and purchased by the Lalance & Grosjean Manufacturing Company for the purpose of being used for that particular kind of spot welding.

Not only that, but they were designated in the contract of sale as spot welding machines. There is therefore absolutely no force in the claim that the defendants below were not required by these contracts to defend against a suit for the infringement of a patent covering this particular form of spot welding which the machines were adapted and equipped to do at the time of their sale and delivery, merely because the purchaser might, by changing their equipment, have used them for other forms of spot welding than those purported to be covered by the Harmatta patent and which other forms of spot welding the defendant in error in the course of its business may or may not have had need or occasion to do.

It is further insisted that no recovery could be had against these plaintiffs in error for the reason that under the terms of the contract they were not required to assume the defense of a suit for infringe-

ment where the only question presented to the court was raised by the defendant's plea to the jurisdiction. This claim on behalf of the plaintiffs in error overlooks the fact that the complainants in that suit filed a motion for a preliminary injunction and that this preliminary injunction came on to be heard in connection with defendant's motion to quash service of process.

It is true that under the terms of this contract the Toledo Company, or these plaintiffs as trustees, had a right to elect whether they would try this case upon its merits or upon the motion to dismiss for want of jurisdiction. They may have preferred a hearing upon the merits to a dismissal of the case, and, in such event, they would have had the right, had they asserted it, to choose their own line of defense. The letter of June 28th not only contained a notice of the bringing of this suit, but also the fact that notice of a motion for preliminary injunction was served upon the defendant. This letter also requested the Toledo Company to assume the defense of this suit without expense to the Lalance & Grosjean Manufacturing Company. Had the Ohio company been in existence at that time and had it appeared and elected to defend the suit upon its merits, it could have required the Lalance & Grosjean Company to withdraw this motion to quash or to prosecute it at its own expense. The Ohio corporation having been dissolved, these defendants as trustees for the creditors of the defunct corporation could have assumed and exercised the same control of this case, regardless of any theory that the Lalance & Grosjean Company may have had in reference to the kind or character of defense that should be made. This they did not do. So far as this record discloses, they neither defended nor offered to defend. Upon the failure of the Toledo corporation or of these plaintiffs in error to appear and assume the defense of this case, the Lalance & Grosjean Manufacturing Company had the right to make any and all defenses that in its judgment seemed right and prudent to make. These plaintiffs in error cannot now be heard to say they would have made some other defense. In any event, this motion to dismiss was not the only defense made in that suit, for it also appears that the motion for a temporary injunction was heard in connection with the motion to dismiss.

It is also insisted that the notice attempted to be served upon the Toledo Company and actually served upon these plaintiffs in error was defective in that it failed to advise that a motion to dismiss had been filed. They admitted in their answer that the defendant in error served a notice of the pendency of this suit upon these plaintiffs in error. Therefore there was no issue raised by the pleading as to notice or the sufficiency of notice. It is insisted, however, in view of the fact that it now appears that the motion to dismiss was sustained and the case was never heard upon its merits, the plaintiffs in error should have been permitted to amend their answer in that respect. This court is of the opinion, however, that the notice was sufficient for all the purposes of this case. It gave to these plaintiffs in error the opportunity to do the thing that the company they represented had agreed to do; nevertheless they wholly failed and neglected even to com-

municate with this defendant in error, much less offer to take charge of the defense.

[2] It is suggested, however, that the Ohio corporation having been dissolved and the assets of that company distributed, there was no one to perform the obligation of this contract on the part of the Toledo Company, and that these plaintiffs in error had no money of the company at their disposal to pay the expense of such defense. Nevertheless, as directors of the Toledo Company at the time that corporation was dissolved, plaintiffs became and were trustees, not only for its stockholders but for creditors, of the assets coming into their hands as such directors. Section 8742, Ohio G. C. If they distributed these assets to its stockholders before the payment of its creditors, or the performance of the obligations of its contracts, they did so at their own risk. They were fully advised by the suit of the American Electric Welding Company against Barney & Berry, Inc., that suits of this character were being brought. They knew or ought to have known that it was the duty of the company under its contracts to defend and to pay damages awarded, and being in control of the corporate assets, they should have applied the same to this purpose. They cannot now be heard to defend upon the theory that at the time that action was brought they had no assets of the company in their hands with which to pay the expenses of defending the suit or reimburse the defendant in error for the money expended by it in making such defense.

For the reasons above stated judgment is affirmed.

YAFFEE v. UNITED STATES.

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

No. 3548.

1. **Indictment and information ⟸3—Unlawful sale may be prosecuted by information "infamous crime."**
   The offense of selling liquor is not an "infamous crime" within the meaning of the Fifth Constitutional Amendment, and may be prosecuted by information.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Infamous Crime.]

2. **Indictment and information ⟸42—Information may be filed against person under bond for appearance before grand jury.**
   The fact that a person has been arrested and bound over and is under bond for his appearance before the grand jury does not affect the right of the district attorney to file an information against him for the same offense.

3. **Criminal law ⟸1149—Leave to file information within discretion of court.**
   The granting of leave to a district attorney to file a criminal information is within the discretion of the court, and its order is reviewable only for abuse of discretion.

4. **Indictment and information ⟸40—Leave to file information not invalid because affidavit was made before notary public.**
   An order of a federal court granting leave to file an information *held* not invalid because the affidavit on which it was made was sworn to before a notary public; no objection to the affidavit having been made.

---

5. Criminal law ⊜1044—Order granting leave to file information may not be first attacked in appellate court.

That the testimony on the trial of the person on whose affidavit an order granting leave to file an information was based disclosed that he had no personal knowledge of the facts therein stated *held* not reviewable where no motion for its revocation was made in the trial court.

6. Criminal law ⊜695(2), 697—Objection and exception to admission of evidence must be specific.

An objection and exception to the admission of evidence must be sufficiently definite to inform the court of the precise thing to which the objection relates and the precise ruling complained of.

7. Intoxicating liquors ⊜223(6)—Evidence of sale by defendant's bartender held admissible.

Under an information charging an unlawful sale of whisky by defendant, the admission of evidence that the sale was made by another *held* not error, where there was evidence that such other was defendant's bartender, and tending to show that defendant delivered the whisky to the bartender and had full knowledge of the sale.

8. Criminal law ⊜1059(2)—Instructions will not be reviewed except on specific exceptions.

Exceptions to the charge must be specific, and a general exception will not be considered by the appellate court except where there is manifest error upon a question vital to defendant.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John W. Peck, Judge.

Criminal prosecution by the United States against George Yaffee. Judgment of conviction, and defendant brings error. Affirmed.

On the 2d day of October, 1920, the United States attorney for the Southern district of Ohio, having first obtained leave for that purpose from the United States District Court for the Southern District of Ohio, Western Division, filed in that court an information, the first count of which charged George Yaffee with unlawfully selling and furnishing intoxicating liquor. The second count charged him with unlawful possession of intoxicating liquor.

For the purpose of obtaining leave from the court to file such information and in support thereof, the district attorney also filed the affidavit of W. J. Meininger, a federal prohibition agent, which affidavit stated that the affiant had actual personal knowledge as to the truth of the matters and things set forth in the information, and that the information is true in substance and fact.

The defendant George Yaffee thereupon filed a motion to strike this information from the file for the reason "that the filing of the information herein was contrary to law, in that, as the punishment for the offense may include imprisonment, no information or leave to file can be legally secured, without notice of the intention to file such information has been given the defendant." This motion was overruled by the court, to which ruling the defendant then and there excepted.

Defendant thereupon filed another motion to dismiss this information, which motion reads as follows: "And now comes the defendant and represents to the court that he was during the present term of this court arrested on the same charge which the present information calls upon him to answer and stand trial upon, and that said arrest was before Hon. Joseph Alder, late commissioner of this court, and that he was bound over to the grand jury, and gave bond to await the action of the grand jury, that said grand jury has neither returned an indictment nor ignored said charge, and that the information filed herein, was filed without notice to him, and he hereby moves the court to dismiss all proceedings under said information for the following

cause: that the filing of said information was without authority of law and contrary to law; that the court has no jurisdiction to hear and determine said charge until after the grand jury has made its final report to this court." This motion was also overruled by the court, to which ruling the defendant then and there excepted. The defendant thereupon entered a plea of not guilty.

Upon the issue joined by the information and the plea the jury found the defendant guilty in manner and form as charged in the first count. A motion for new trial was overruled, and sentence was pronounced against the defendant.

Harry Hess, of Cincinnati, Ohio (Harry Hess, of Cincinnati, Ohio, on the brief), for plaintiff in error.

R. T. Dickerson, Asst. U. S. Atty., of Cincinnati, Ohio (James R. Clark, U. S. Atty., of Cincinnati, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] The first motion to dismiss was properly overruled by the District Court for the reason that the offense charged in the information is not a capital or infamous crime, but is merely a misdemeanor for which, under the provisions of Amendment 5 of the federal Constitution, the accused may be prosecuted other than upon presentment or indictment by a grand jury. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; U. S. v. Lindsay-Wells Co. (D. C.) 186 Fed. 248; U. S. v. Quaritius (D. C.) 267 Fed. 227; U. S. v. Achen (D. C.) 267 Fed. 595; U. S. v. Baugh (C. C.) 1 Fed. 784–787.

[2] There is no averment in the second motion to dismiss the information that the grand jury was in session at the time the information was filed. However, it does appear, if that fact is important, that this information was filed on the 2d day of October, 1920, and that the grand jury was not impaneled until October 5th of that year. State v. Anderson, 252 Mo. 83, 158 S. W. 817.

The fact that defendant was arrested on a complaint before the information was filed is no ground for dismissing the information. Evans v. State, 36 Tex. Cr. R. 32, 35 S. W. 169. Nor, in the absence of a statute to the contrary, is the right to file an information affected by the fact that the grand jury is in session. State v. Cole, 38 La. Ann. 843.

The right of the district attorney to file an information is not an absolute or unqualified right. Before doing so he must secure leave of the court.

[3] Where it appears to the court by the affidavit filed therewith by the district attorney that probable cause exists for the filing of such information, the court in its discretion may grant such leave, and its order cannot be reversed except for an abuse of discretion. This motion presents no question of abuse of discretion, but, on the contrary, it is based upon the theory that the court, upon the state of facts then existing, had no authority to exercise any discretion, and that the filing of this information was without authority of law and contrary to law.

In the prosecution of an offense other than an infamous crime, the accused has no constitutional right to object to a prosecution by information instead of by indictment. The order of the commissioner discharging the accused or the failure of the grand jury to indict would not prevent the district attorney from filing an information charging the same offense charged in the complaint before the commissioner and investigated by the grand jury. The defendant of course, cannot twice be put in jeopardy for the same offense, but the defendant is fully protected in that right even though a grand jury should return an indictment against him for the same offense before or after the trial upon the information. Therefore the filing of an information at any time in the course of a criminal prosecution, either while a hearing upon a complaint charging the same offense is pending before the commissioner or after such hearing and before indictment by the grand jury or after a demurrer has been sustained to an indictment by the grand jury, cannot possibly prejudice the rights of the accused to a fair, speedy, and impartial trial. U. S. v. Achen, supra; Evans v. State, supra; State v. Cole, supra; U. S. v. Quaritius, supra.

For the reasons above stated, the overruling of the second motion to dismiss the information must be affirmed.

[4] It is now insisted, however, that the affidavit filed in support of the information and for the purpose of obtaining leave to file the same was verified before a notary public, and that under the laws of the United States a notary public has no authority to administer any oaths in connection with criminal prosecution.

Neither of the motions presented by the defendant to dismiss this information raised this objection to the affidavit, nor does it appear that any objection was made by the accused to the verification of this affidavit before verdict or sentence.

This identical question was answered by this court in the case of Simpson v. U. S., 241 Fed. 841, 154 C. C. A. 543, and it is wholly unnecessary to repeat here the reasons stated by Knappen, Circuit Judge, speaking for the court, for the conclusions reached in that case upon this question.

[5] W. J. Meininger, who subscribed and swore to the affidavit filed with the information in this case, was also called by the government as a witness in this case. It is claimed on behalf of the plaintiff in error that it appears from the oral evidence of this witness that he had no actual personal knowledge as to the truth of the matters and things set forth in the information, and that therefore the statement in the affidavit that he had such knowledge was false, and for that reason the court ought not to have permitted the filing of the information. This objection, even if it were a valid one, like the objection to the official capacity of the officer taking the affidavit, comes too late. The affidavit as filed met every requirement of the law, and the court had authority upon the statements contained in that affidavit to grant leave to file the information. If in the course of the trial it appeared from the evidence of the same witness that he had no personal knowledge of the facts at the time he made and subscribed to this

affidavit, then it was the duty of the defendant to call this to the attention of the court and move the court to revoke the leave granted to file the information and dismiss the prosecution.

Such a motion would have secured a finding by the court whether there was in fact any substantial conflict between the oral evidence of the witness and the statements contained in his affidavit, and an order and ruling based upon that finding. This the defendant did not do. Therefore this record presents no order or ruling of the trial court upon this question subject to review and reversal in this case.

[6] The plaintiff in error also asks a reversal of this conviction and sentence for error of the court in admitting in evidence the bottle and contents which the evidence tends to prove was purchased by Richter from the plaintiff in error, or rather from his barkeeper, Wesley Kellum, for the reason that the bottle at that time had a label pasted thereon which contained certain statements written by the witness for the purpose of identification. The record upon this question is as follows:

"Mr. Dickerson: I wish to introduce the bottle and contents in evidence
"Mr. Hess: Object.
"The Court: Overruled.
"Mr. Hess: Exception."

An objection and exception must be sufficiently definite to inform the court of the precise thing to which the objection relates and the precise ruling complained of. U. S. v. Fidelity Co., 236 U. S. 512–529, 35 Sup. Ct. 298, 59 L. Ed. 696.

A litigant cannot be permitted to trifle with a court and thereby secure a new trial upon questions not fully and fairly presented by the objection and exception. The objection in this case was a general objection to the admission of the bottle and contents in evidence. There was nothing in the objection to suggest to the court that the objection was based upon the label attached to the bottle. If the court's attention had been directed to this label, it would probably have ordered that it be removed before the bottle and contents were admitted in evidence, and, if it had failed to do so, then the question would have been fairly presented to the trial court, and a ruling obtained thereon, the correctness of which ruling could be determined by a reviewing court. Evidence had been offered tending to prove that this bottle and its contents were purchased from the defendant through his bartender Kellum; that the contents of this bottle was 45 per cent. alcohol or 90 proof whisky. The objection was directed solely to the admission of this bottle and contents, and not to the label on the bottle, and therefore was properly overruled.

[7] The objection to evidence tending to prove that the sale of intoxicating liquor to Richter was actually made by Wesley Kellum, because the information charges that the sale was made by the defendant George Yaffee, is without merit. There is evidence in this record tending to prove that Kellum was the bartender for Yaffee, that Yaffee not only had full knowledge that the sale was made, but

that he procured and delivered the whisky to Kellum to make this sale. It would seem unnecessary to say that, if the jury believed this evidence, then it follows that the authorized acts of Yaffee's agent or bartender were the acts of his principal. Even if Yaffee were not the principal, but merely aided and abetted Kellum in the commission of the crime charged, this evidence would be competent as tending to prove defendant guilty of the unlawful sale of intoxicating liquors in manner and form as charged in the information.

[8] Exceptions to the charge of a court must be specific. Gardner v. U. S., 230 Fed. 575, 144 C. C. A. 629. A general exception will not be considered by the court except where there is manifest error in the charge upon a question vital to defendant. Tucker v. U. S., 224, Fed. 833–841, 140 C. C. A. 279. The case presented does not require the exercise of this extraordinary authority.

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

SLOAT-DARRAGH CO. v. GENERAL COAL CO.

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

No. 3558.

1. **Sales ⟸53(1)—Whether defendant ordered shipments of coal as purchaser or as agent for seller held question for jury.**

   Whether in a sale of 100 cars of coal, delivered on defendant's written order to a third party, defendant was the purchaser and liable for the price or acted as agent for the seller, the price stated in the order being "less 10c commission to us," *held* a question for the jury in view of the fact that, as requested in the order, the invoices were sent to defendant, and the coal charged to its account, and that it sent its check in payment for the first month's shipments, on which, however, it stopped payment on the bankruptcy of the company to which the coal was delivered.

2. **Evidence ⟸459(2)—Evidence held admissible on question of construction of contract.**

   On an issue as to whether defendant was the purchaser or acted as agent for the seller in a sale of coal delivered to a third party, a written order for the coal given by such third party to defendant, which was stamped as received and retained by defendant, *held* competent evidence.

3. **Subrogation ⟸7(1), 41(4)—Guarantor paying debt of another may maintain action at law thereon.**

   Where plaintiff for a valuable consideration guaranteed the accounts of a coal company, and under such guaranty paid an account against defendant, it was subrogated to the right of the company to maintain an action at law to recover the account, which action it might bring in its own name, without joining the original creditor, where under the laws of the state an action is required to be brought in the name of the real party in interest.

4. **Trial ⟸59(2)—Order of proof is within discretion of court.**

   The order of proof is within the judicial discretion of the trial judge.

In Error to the District Court of the United States for the Southern District of Ohio; John W. Peck, Judge.

Action at law by the General Coal Company against the Sloat-Darragh Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harry E. Marble and Guy W. Mallon, both of Cincinnati, Ohio (Mallon & Vordenberg, of Cincinnati, Ohio, and E. A. Belden, of Hamilton, Ohio, on the brief), for plaintiff in error.

Connor Hall, of Huntington, W. Va., for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error (hereinafter called plaintiff) was engaged at Huntington, W. Va., in buying and selling coal. Plaintiff in error (whom we shall call defendant) was a jobber of coal at Hamilton, Ohio. Plaintiff sued for the purchase price of 100 cars of coal alleged to have been sold to defendant by the Carbon Hills Collieries Company, a producer of coal at Huntington; plaintiff basing its right of recovery upon subrogation by virtue of an alleged payment by it of the indebtedness from defendant to the Collieries Company for the purchase price of the coal, in pursuance of an alleged assumption and guaranty by plaintiff of the payment and collection of defendant's indebtedness to the Collieries Company. The meritorious defense presented was that defendant was not the purchaser of the coal, but was merely the Collieries Company's agent in a sale thereof to the Hamilton-Otto Coke Company of Hamilton, Ohio, which defendant asserts was the Collieries Company's actual debtor. Plaintiff's succession to the Collieries Company's asserted original right of recovery is also challenged. A motion to direct verdict for defendant was overruled, and the case submitted to the jury under a charge which is not in the record, nor made the subject of criticism; the grounds of the motion to direct being lack of evidence not only of defendant's agreement to purchase, and of the existence of a cause of action on the theory of subrogation, but also of plaintiff's alleged payment for the coal prior to the beginning of suit; also variance between the petition and proofs as to the purchase price of the coal. A motion for new trial was overruled. This review involves also certain subsidiary questions, which will appear in the course of the opinion.

[1] 1. Confirming a telephone conversation had on the previous evening between defendant and the Collieries Company's representative, the former, on January 14, 1919, sent by mail to the Collieries Company its order No. 564, upon a form partly typewritten and partly printed, for the shipment by the Collieries Company to the Hamilton-Otto Company of—

"100 cars r. o. m. [run of mine] at $2.15 per ton f. o. b. mines. Start shipment January 20th. Three cars daily. Shipping notices to us promptly. Above price less 10c commission to us. *Please acknowledge receipt of this order. Mail all papers and charge account of Sloat-Darragh Company, Hamilton, O.*"

The words we have italicized were printed; substantially all the remaining words we have quoted were typewritten. This order was inclosed in a letter from an officer of the defendant to the manager of the Collieries Company, containing among other things, this statement:

"Please find inclosed herewith our formal order No. 564 at the special price agreed upon, and, while you are at liberty to invoice direct upon the consignee, yet we believe we could get better service all around if you mail invoices

to us. I will leave this matter optional with you, but would like you to advise us which you expect to do as soon as possible."

Plaintiff, which was then the selling agent of the Collieries Company, on January 16th acknowledged to defendant its "order for 100 cars of Eagle gas coal for the Hamilton-Otto Coke Company," the letter of acknowledgment containing this statement:

"We have instructed the C. and O. people to mail you promptly postal notices and our office will render you the invoices as per your suggestion, which is absolutely in line with our ideas."

The following acknowledgment was appended to plaintiff's letter:

"We thank you for your order No. 564 for 100 cars Eagle gas coal to be shipped at rate of three per day to the Hamilton-Otto Coke Company, * * * price $2.15 f. o. b. mines, less 10 cents per ton commission to you."

On January 20th the Hamilton-Otto Company gave to defendant its written order for shipment to its address "mailing memo. bill and bill lading the day of shipment, and regular invoice in duplicate as promptly as possible" of "three cars per day of Eagle coal from Carbon Hill Collieries Company, Logan Co., W. Va., to be r. o. m. at $2.15 per ton f. o. b. mines. * * * This order not to exceed 100 cars." The coal was consigned by the Collieries Company to the Hamilton-Otto Company, and invoices were made out against and mailed to defendant covering the various shipments. The evidence tends to show that the billing was at $2.05 per ton. On February 21st, in reply to plaintiff's inquiry whether check for the January account had been mailed, defendant inclosed its check for $3,615.49 "covering the January shipments, as per your invoices," at the same time advising plaintiff of the receipt of its telegraphic inquiry and of the fact that the check was mailed. Later, and on the evening of that day, bankruptcy proceedings were instituted against the Hamilton-Otto Company. Defendant thereupon stopped payment of its check. There was other testimony, both written and oral, addressed to the merits of the controversy. It is not fairly open to question that there was sufficient evidence to justify submitting the contention that defendant, and not the Hamilton-Otto Company, was the real purchaser of the coal and was the Collieries Company's actual debtor, provided oral testimony of the agreement was properly admitted, against defendant's insistence that the written order of January 14th, and its acceptance of January 16th, clearly and unambiguously showed that defendant acted merely as agent for the Collieries Company in the sale of the coal to the Hamilton-Otto Company.

Without conceding that, in considering the admissibility of oral testimony, we are limited to the written order and its acceptance, and may not look to defendant's letter accompanying its order, we are of opinion that the order and acceptance, taken together, do not clearly and unambiguously show a contract of agency only.[1] Neither "principal" nor "agent" is mentioned. The two writings will be searched in

[1] It is immaterial to the conclusion reached whether or not defendant's letter accompanying its order is considered part of the original contract.

vain for language clearly and unmistakably indicating a mere agency contract. The order is headed "The Sloat-Darragh Coal Company [followed by address]. Order No. 564." It is stamped "United States Fuel Administration License No. X-01709." Plaintiff's formal acknowledgment relates to "*Your order*[2] No. 564 for 100 cars," etc. Defendant's order requests not only that shipping notices be sent to it, but that the account for the coal *be charged to defendant*. Plaintiff's letter of acknowledgment not only advises of the instruction to mail defendant the postal notices, but also, in inferable meaning, that the invoices will be charged to defendant. It is true that in case of conflict between written and printed provisions of a contract those in writing will control. Bank v. Insurance Co., 83 Ohio St. 309, 330, 94 N. E. 834. But there is here no irreconcilable conflict between the printed request to charge to defendant and the remaining provisions of the contract. Plaintiff's letter of acknowledgment is open to construction as an acceptance of and agreement to the printed direction to charge to defendant. It is also true that the word "commission" has a natural tendency to suggest an agency contract, as being compensation for services rendered; but that is not its sole meaning. The fuel administrator's rules, with which defendant was familiar, treat the words "profits" and "commissions" interchangeably as indicating the advance which may be charged upon resale of coal. In view of defendant's familiarity with the Fuel Administrator's rules and instructions, it was not error to permit reference thereto. But, even had the word "commission" been a misnomer, it was not enough of itself "to convert into an agency what was in fact a sale." The contract must be construed as a whole. Kelley v. Sibley (C. C. A. 7) 137 Fed. 586, 591, 69 C. C. A. 674. Moreover, even an agency would not be necessarily inconsistent with defendant's personal liability to pay for the invoices. Gable v. Vonnegut Co. (C. C. A. 6) 274 Fed. 66. And see in this connection Interstate Co. v. Log Mountain Co. (C. C. A. 6) 271 Fed. 76, 78. It is also true that in a previous sale by the collieries Company to the Hamilton-Otto Company defendant acted merely as the seller's agent; but, if that fact is to be considered in interpreting the contract before us, as being part of the circumstances under which the contract was made, it is significant that under the former agency relation the invoices were not charged to defendant, but to the Hamilton-Otto Company; and in considering the written contract we may properly look to the contemporaneous construction placed upon it by the parties, as evidenced by the written order given by the Hamilton-Otto Company to defendant, as well as by the initial payment by defendant of the January invoices, which failed of completeness only as before stated.

[2] The Hamilton-Otto Company's order given defendant was not incompetent as a mere assertion of a third party. Defendant received it, stamped it as received January 21, 1919, and (according to the evidence) retained it until and upon the first trial of this case. The written contract not being clearly and unambiguously a contract of

[2] All italics in this opinion are ours, unless otherwise indicated.

agency, it is enough to say that there was oral testimony tending to show an actual sale, as well as testimony tending to show the contrary. It scarcely need be said that on this motion for directed verdict the testimony must be construed in its aspect most favorable to plaintiff. It is enough that there was substantial testimony tending to sustain plaintiff's contention in this respect. The verdict must be treated as finding that defendant was the original debtor of the Collieries Company.

[3] 2. The denial of plaintiff's alleged succession to and right of recovery of defendant's original debt to the Collieries Company rests upon the contention that plaintiff was a stranger to the debt at its inception; that it never became liable for it by reason of any relation which it bore to defendant, but remained a stranger until it voluntarily assumed to pay the debt; that the payment of the debt did not ipso facto effect subrogation, but merely gave a right thereto which could be enforced only by action in equity and to which the Collieries Company would be a necessary party; and, further, that there was not sufficient payment by plaintiff to give right of subrogation.

We cannot agree with this contention. There was evidence that plaintiff, for a valuable consideration from the Collieries Company, guaranteed its accounts for January, 1919, and thereafter, thus including the debt in question. Defendant treats this as a claimed assumption and guaranty of payment and collection of the account. We may safely accept that construction.

As was said by the District Judge in overruling a demurrer to the petition:

"The right of subrogation arises whenever one, under compulsion or to protect his property interests, pays a debt which ought in equity and good conscience, to be paid by another." [3]

A prominent illustration is found in the general rule, applicable not only to fire, marine, accident, and casualty insurance, but to indemnity contracts of all kinds, that the indemnifier, on paying to the idemnified the amount of the loss on the property involved, is subrogated in a corresponding amount to the indemnified's right of action against any other person responsible for the loss. Hall v. Railroad Companies, 80 U. S. (13 Wall.) 367, 371, 20 L. Ed. 594 (insurance against fire); Travelers' Ins. Co. v. Gt. Lakes, etc., Co. (C. C. A. 6) 184 Fed. 426, 429, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60 (casualty insurance); United States v. Fidelity & Guaranty Co. (C. C. A. 6) 247 Fed. 16, 20 [1] (fidelity insurance); U. S. Fidelity, etc., Co. v. Union Bank, etc. (C. C. A. 6) 228 Fed. 448, 452, 143 C. C. A. 30 (bond of public official); U. S. Casualty Co. v. Bagley, 129 Mich. 70, 87 N. W. 1044, 55 L. R.

[3] The broad rule is thus stated in Pomeroy's Eq. Jurisp. (2d Ed.) § 2345: "Whenever a party discharges an obligation in performance of a legal duty—that is, an obligation for the performance of which he was legally bound—but for which his liability was subsequent to that of another party, he is entitled to be subrogated to, and to have the benefit of, all rights of the creditor and all securities which may at any time have been put into the creditor's hands by a party whose liability is prior to his own, or which the creditor may have obtained from such party."

[1] 159 C. C. A. 234.

A. 616, 95 Am. St. Rep. 424 (insurance of manufacturer against leakage of water). It is not material whether the principal obligation arises ex contractu or ex delicto. Pomeroy's Eq. Jurisp., supra, § 2345, p. 5187. It is true that a voluntary payment of a debt by one who is a stranger thereto gives no right of subrogation (Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639; Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052); but it was not essential to plaintiff's recovery that defendant be a party to the contract of guaranty (Pomeroy's Eq. Jurisp., supra, § 2345), for the right of subrogation does not rest on contract or privity between defendant and the subrogee; it arises out of the nature of the contract as one of indemnity (St. Louis, etc., Ry. Co. v. Insurance Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154). Nor was an assignment from the Collieries Company to the plaintiff of the former's indebtedness against defendant, or even an agreement that plaintiff should be subrogated to the right of the Collieries Company, necessary to right of action. Federal Ins. Co. v. Detroit Ins. Co. (C. C. A. 6) 202 Fed. 648, 651, 652, 121 C. C. A. 58. Plaintiff was not a stranger to the debt at the time it made the payment; by virtue of its contract it had assumed and guaranteed the payment and collection of the indebtedness in question.[4] Nor was it necessary in this case that suit be had in equity. No relief was asked by way of compelling delivery of securities or other equitable remedy. The right to which plaintiff was subrogated was merely to collect the indebtedness from defendant to the Collieries Company. By the now generally recognized rule, plaintiff had the right to sue at law, and, although at the common law the suit would have been in the name of the Collieries Company for the use and benefit of plaintiff, yet as, in Ohio, the party in interest is allowed to recover in his own name (G. C. § 11241), plaintiff had the right to sue in its own name, and without joining the Collieries Company as a party. Albany, etc., Co. v. Lundberg, 121 U. S. 451, 454, 7 Sup. Ct. 958, 30 L. Ed. 982; Gt. Lakes Eng. Co. Case, supra, 184 Fed. 432, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60; Turk v. Railway Co. (C. C. A. 6) 218 Fed. 315, 317, 134 C. C. A. 111. The testimony of plaintiff's manager tended to show payment in full by plaintiff to the Collieries Company previous to the commencement of suit. A discussion of the evidence upon that subject would not be helpful. It is enough to say that, if the jury believed the testimony of this witness, it was justified in finding such antecedent payment.

[4] 3. The remaining criticisms call for little discussion: (a) The objection that plaintiff was allowed to introduce in evidence its acknowledgment of the receipt from defendant of the order for the coal,

[4] There is nothing to the contrary of this principle in Barber Asphalt Pav. Co. v. Traction Co. (C. C. A. 6) 202 Fed. 817, 121 C. C. A. 125, where it was held that a guaranty by the paving company to the city to keep the pavement in good repair for a given period was not a contract of indemnity, imposing a secondary liability only on the paving company, so as to entitle it, on being compelled to pay for repairs to the pavement, to subrogation to the city's right of recovery against the traction company for so constructing its road as to cause the defects in the pavement.

as well as of the letter inclosing that order, without first introducing defendant's letter transmitting the order, is answered by the consideration that the order of proof is necessarily within the judicial discretion of the trial judge, that the order had already been introduced, and that defendant's letter accompanying it was later introduced by defendant. The jury thus had the benefit of defendant's letter in finally determining the effect of plaintiff's letter of acknowledgment, and prejudicial error cannot be predicated because of apprehension that the jury had meanwhile obtained a wrong impression. (b) It is said by defendant's counsel that, after the motion for new trial was argued and submitted, the trial judge announced that he would overrule the motion upon the filing of a receipt from the Collieries Company, made at the time of payment, showing that the debt had been paid by plaintiff for the coal involved; that later, without notice to defendant, an affidavit of the Collieries Company's president was filed, and the motion for new trial overruled. The affidavit is criticized as failing to show when the coal was paid for, or that payment had been made before commencement of suit.[5] In this there was no reversible error. The motion for new trial was addressed to the sound discretion of the court, and is not reviewable here. If the trial judge saw fit, for his own satisfaction, to require such proof of receipt, conformity to this requirement was not essential to the right to refuse new trial. It is to be presumed that the judge was satisfied with the showing. As already said, plaintiff's testimony tended to show the fact of such timely payment. (c) The asserted variance between the petition and the proofs, in that the former states the purchase price of the coal as $2.05 per ton, while, as defendant asserts, the contract price was $2.15 per ton, with 10 cents commission to defendant, is disposed of by what is said in the first paragraph of this opinion. (d) The question of weight of evidence was addressed only to the trial court. We cannot consider it. (e) Upon redirect examination of the defendant's only witness counsel offered to introduce a letter and four telegrams, stated by counsel to have been mislaid, whereby defendant was prevented from offering them in chief. The offered exhibits were rejected without statement of reason for that action, which can be reviewed only in case of abuse of discretion. The record does not indicate such abuse. In the first proffered exhibit, which antedates defendant's repudiation of liability, plaintiff agreed to pay demurrage charges on coal accumulated in the Hamilton-Otto Company's yards, due to the fact that plaintiff's shipments were made more rapidly than called for. The four other proffered exhibits were telegrams ranging from six to nine days after the Hamilton-Otto Company's bankruptcy, relating to demurrage on cars received by that company thereafter, resulting in its taking the same and paying demurrage thereon. The pertinency of these several exhibits, if any, is very remote. We see no necessary inconsistency between plaintiff's attitude as shown by these proffered exhibits and its construction of the contract in question as one of sale to defendant. Whoever was the pur-

[5] The judge's announcement was apparently oral. It is not in the record, and counsel seem to disagree as to what it was.

chaser, plaintiff was interested in the subject of demurrage and in getting the cars accepted.

In our opinion the case was properly submitted to the jury, and without prejudicial error. The judgment of the District Court is affirmed.

SOUTH ATLANTIC PACKING & PROVISION CO. v. YORK MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. October 26, 1921.)

No. 3637.

1. **Appeal and error ⟸997(3)—Verdict directed on request of both parties not reviewable if sustained by any evidence.**
   Where both parties request direction of verdict, if sustained by any evidence the judgment will be affirmed unless error of law is shown.

2. **Sales ⟸288(4)—Failure to give notice of objection to machinery within time required by contract held acceptance.**
   Under a contract to furnish and install ice-making machinery, requiring plaintiff to give written notice when the plant was ready to charge, a provision that unless defendant gave written notice within 30 days thereafter, specifying any defect or failure to operate it, defendant should be deemed to have accepted the plant as complying with the contract, *held* valid and enforceable, and a failure to give such notice within 30 days after plaintiff's notice of completion *held* a complete acceptance, and to preclude defendant from claiming breach of a warranty that the plant would produce a stated quantity of ice per ton of coal consumed.

3. **Courts ⟸347—Allowance of amendments largely discretionary.**
   The allowance of amendments in the federal courts is governed by Rev. St. § 954 (Comp. St. § 1591), and is largely a matter of discretion, which ordinarily will not be controlled.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action at law by the York Manufacturing Company against the South Atlantic Packing & Provision Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis M. Oliver and Edgar J. Oliver, both of Savannah, Ga., for plaintiff in error.

H. C. Niles, of York, Pa., and Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The York Manufacturing Company (hereinafter called the plaintiff) brought suit in the United States District Court for the Southern District of Georgia at Savannah against the South Atlantic Packing & Provision Company (hereinafter called the defendant) to recover the price of certain ice-producing machinery installed for it under a written contract. The machinery was to be affixed to and used with certain other machinery of the defendant.

The chief purpose of the contract was to convert a distilled-water ice plant into a raw-water ice plant.

The contract provided for the furnishing and installing of certain described machinery and appliances as per specifications and contained two guaranties:

(1) That the plant when changed as specified will be capable of producing 100 tons of merchantable raw-water ice per day of 24 hours when in full and continuous operation and when properly operated in accordance with plaintiff's instructions.

(2) That the coal consumption of this plant when producing 100 tons of ice per 24 hours will be not less than a ratio of 16 tons of ice per ton of 14,000 b. t. u. coal burned, based on the guaranteed boiler evaporation of 9 pounds of water per pound of coal with 185 pounds of steam 160 degrees superheat at boiler.

The guaranty of quality of ice was based on water being taken from well known as No. 3 which had been tested.

The contract further provided that the machinery should be furnished and the plant be "ready for charging" on or about March 15, 1916 (erroneously stated as 1915), provided the defendant had performed within the time specified therefor all the agreements set forth in the specifications accompanying said contract to be by it performed; in event of defendant's default, the time for completion should be correspondingly extended.

There was a dispute as to whether the defendant did so perform; but by mutual consent the time for performance was waived, the plaintiff adjusting the defendant's plant to continue making ice meanwhile. The plaintiff presented a proposed written agreement for such extension, but the defendant by resolution of its board of directors refused to accept or sign the same.

Many demands were made by defendant of the plaintiff during the time when the work of furnishing the machinery and placing it in the plant was in progress. These demands appear in the main to have been complied with.

The contract also provided that when the plant was ready for charging the plaintiff should furnish a written notice to defendant of that fact, and that if for a period of 30 days after the plant so furnished was erected ready to charge the defendant should fail to notify the plaintiff in writing of any claim that the said machinery, apparatus, or plant as furnished did not fulfill the terms and requirements of the contract, specifying in what particular or particulars it failed, this should in itself be considered an acknowledgment by the purchaser that the said machinery, apparatus, or plant as furnished did fulfill the said terms and requirements, and should constitute a complete acceptance of the same as fulfilling all the terms and requirements of the contract.

If such notice of failure was given within said 30 days, the plaintiff was to remedy any such defects.

If the parties disagreed as to the same, then the plaintiff had the privilege to elect, on 30 days' notice of its intention so to do, to remove its machinery and refund any purchase money paid which

would operate as a full and complete settlement between said parties of all claims under said contract.

On June 5, 1917, said plaintiff served on the defendant a written notice, dated June 1st, stating that the plant was erected ready to charge in accordance with said contract.

The contract provided that plaintiff's engineer should remain with the plant for 15 days from the date the plant was ready to charge in order to instruct the defendant's men and make needed adjustments, C. Munger remained, as such engineer, until June 28th.

On July 6, 1917, the plaintiff, not having heard anything from defendant in reply to its notice dated June 1st, wrote calling attention to its completion of the contract, the nonpayment of the portion of the purchase money due, and declared the entire price of the machinery furnished due under the terms of the contract.

The defendant pleaded in answer to the suit:

(a) The delay in the completion of the contract from March 15, 1916, until the present time.

(b) The failure to furnish machinery as specified in said contract.

(c) The failure of the plant to produce 16 tons of ice to one ton of coal, 14,000 b. t. u., and the failure of the plant to produce 100 tons of merchantable ice in 24 hours' continuous operation.

Two amendments to said answer were offered, which the court refused to allow.

The court excluded all testimony offered to show that the plant did not comply in all respects with the contract and did not fulfill its terms and requirements, on the ground that defendant, having failed to give notice of such claim of defects and failures within 30 days after receiving notice that the plant was erected ready to charge, had under the terms of the contract accepted said plant as fully complying with said contract and its guaranties and could not thereafter attack the same.

He admitted the evidence tendered as to the delay in completion after March 15, 1916, and the claim for damages therefor.

[1] Both plaintiff and defendant requested the court to direct a verdict in its favor. The court directed a verdict for the plaintiff. If there is any evidence to support the verdict, unless some error of law is shown, the judgment of the District Court must be affirmed. Bradley Timber Co. v. White, 121 Fed. 779, 784, 58 C. C. A. 55; City of Colorado v. Harrison, 228 Fed. 894, 143 C. C. A. 292; Lockhart v. Tri-State Loan & Trust Co. (C. C. A.) 268 Fed. 523; Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Sena v. American Co., 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559.

[2] The main question in the case is: Was the court correct in its ruling as to the effect of the failure of the defendant to point out in writing within 30 days after receipt of notice that the plant was erected ready to charge, wherein the machinery, apparatus, and plant failed to fulfill the terms and requirements of the contract?

Construing together the clause of the contract requiring written notice to be given to the purchaser of the time when the plant is ready for charging, and the provision that if for a period of 30 days after

such plant is erected ready to charge the purchaser shall fail to notify the seller in writing of his claim that the same does not fulfill the terms and requirements of the contract, specifying wherein it does so fail, we hold that the contract requires that such notice shall be given by the purchaser within 30 days from the time when it receives the written notice aforesaid, and that the failure to give such notice within said 30 days constituted a complete acceptance of said machinery, apparatus, and plant as fulfilling all of said terms and requirements. We cannot assent to the construction insisted on by the defendant that the plant must in point of fact be completed ready for charging in accordance with the contract before the 30 days for such notice that it does not comply therewith begins to run, for the reason that if it did in fact so comply there would be no occasion for such notice.

Further construing this contract, we think that the requirement of it that the plant will produce 100 tons of ice on a 24-hour continuous run, and will make at least 16 tons of ice to one ton of coal, 14,000 b. t. u., upon the conditions named in such warranty, is conditioned by the requirement that any claim that it does not fulfill the requirements of such guaranty shall not be open to the purchaser unless he makes the same within 30 days from the time when he receives notice that the plant is erected ready for charging. The law is well laid down by the Supreme Court of Georgia, as follows:

> Where, in a sale of machinery, there is an express warranty as to quality, and by the terms of the warranty liability of the seller is predicated upon conditions which must be performed by the buyer before liability upon the part of the seller is to attach, such as that the buyer is to take the property on trial for a specified time, and, upon its failure to fulfill the warranty, give written notice at once to the seller at a designated place, and also to the agent of the seller through whom the property was received, stating in what parts and wherein the property fails to fulfill the warranty, the seller will not be held liable on the warranty unless the buyer complies with such conditions." Brooks Bros. Lumber Co. v. Case Threshing Machine Co., 136 Ga. 754, 755, 72 S. E. 40.

To the same effect, also, Mayes v. McCormick Machine Co., 110 Ga. 545, 35 S. E. 714; International Harvester Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034; Walker & Rogers v. Malsby Co., 134 Ga. 399, 67 S. E. 1039; Cuthbert Ice Co. v. York Mfg. Co., 20 Ga. App. 695, 696, 93 S. E. 279.

The court did not err in excluding the evidence offered that the written notice given by the plaintiff to the defendant that the plant was erected ready for charging was in any way withdrawn by Munger, there being no evidence in the record of any authority on the part of Munger to withdraw the same and the evidence in the record showing that the defendant had expressly been put on notice by the plaintiff, previously, that none of its subordinates employed on the work had any authority to change any of the provisions of the contract.

In regard to the testimony excluded by the court, the testimony of each witness was offered as a whole. The burden of the testimony of each witness objected to bore mainly upon the question whether the plant as completed complied with the contract, and its exclu-

sion was proper under the ruling of the court that the failure of defendant to give written notice, within 30 days after being notified of its erection ready for charging, of the failure of said plant, debarred this defense. If there were any portions of the testimony which may have been admissible on other issues, they were not separately offered, after the court had excluded the testimony as a whole upon the ground above stated, and no error is assigned except upon the exclusion of said testimony as an entirety.

[3] It is not perceived wherein the failure of the court to allow the defendant to amend its answer operated to exclude it from fully proving any defense to which it was entitled under the above ruling. Each defense relied on was set up in the answer as originally filed. The allowance of amendments to pleadings in the United States courts is governed by the federal statute (Rev. St. § 954; U. S. Comp. St. § 1591; Mexican Central Rwy. Co. v. Duthie, 189 U. S. 76, 78, 23 Sup. Ct. 610, 47 L. Ed. 715), and is largely a matter of discretion which will not be usually controlled (Mexican Central Rwy. Co. v. Pinkney, 149 U. S. 194, 201, 13 Sup. Ct. 859, 37 L. Ed. 699; Chapman v. Barney, 129 U. S. 677, 681, 9 Sup. Ct. 426, 32 L. Ed. 800).

It cannot be said that on the questions of fact raised by the remaining pleadings there was no evidence which would sustain a finding that there had been an implied agreement extending the time for the completion of the contract on the condition of plaintiff doing the work necessary to allow the manufacture of raw-water ice during the intervening period with defendant's plant as then constituted, and also that there was some evidence that plaintiff had not suffered pecuniary damage. As the court was requested by both parties to direct a verdict in the case, under the above authorities, his direction thereof in favor of the plaintiff is not subject to review, no error of law appearing.

The judgment of the District Court is therefore affirmed.

BINGHAM MINES CO. v. BIANCO.

(Circuit Court of Appeals, Eighth Circuit. October 18, 1921.)

No. 5644.

1. Death ⟸54—Consent of widow to action by administrator must be questioned by plea.

In an action by an administrator for the benefit of the widow and children to recover damages for the death of his intestate, the failure of plaintiff to prove that the widow consented to his bringing the action does not entitle defendant to a directed verdict, where it had failed to give notice in any way by its answer that it desired such proof to be made.

2. Master and servant ⟸217(15)—Risk from unguarded electric wire assumed by miner knowing danger.

An experienced miner, 29 years old, who had worked six months in a drift containing an unprotected electric trolley wire five feet above the floor level at the place where he worked, and who knew of the existence

of the wire and appreciated the danger of coming in contact with it, and had been warned of the danger, *held* to have assumed the risk.

3. **Evidence ⊂=354(8)—Time book and reports of master held admissible against him.**
In an action for the death of a servant, the time book and report kept by the employees of defendant in the course of its business were competent on behalf of the servant to show he was employed on dates specified therein.

4. **Witnesses ⊂=406—Time book and report showing decedent's employment on stated date held admissible in contradiction.**
Where defendant in an action for the death of a servant had introduced evidence that on a certain date decedent had a fit in the witness' store, to show that his death may have resulted from such a fit, a time book and report showing that on the date specified decedent was employed by defendant and was not in the store of the witness was admissible in contradiction of the witness' testimony.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Domenico Bianco, as administrator, etc., against the Bingham Mines Company. Judgment for the plaintiff, and defendant brings error. Reversed and remanded for new trial.

Mahlon E. Wilson, of Salt Lake City, Utah, for plaintiff in error.
Culbert L. Olson, of Salt Lake City, Utah, for defendant in error.

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

YOUMANS, District Judge. Defendant in error, hereafter called plaintiff, as administrator of the estate of James Ozzello, deceased, brought suit against plaintiff in error, hereafter called defendant, for damages for the death of James Ozzello, alleged to have been caused by the negligence of defendant. Plaintiff recovered judgment for the benefit of the widow and two minor children of Ozzello. Defendant brings error to reverse that judgment.

On or about October 13, 1914, James Ozzello was employed by defendant in the underground workings of its mine. At the time of the injury which resulted in his death, Ozzello was engaged in loading ore cars with ore and waste at an ore chute known as chute No. 9 in a certain drift of defendant's mine.

The ore cars were moved into and out of the drift by means of an electric motor. The electric power for it was furnished through a trolley wire that was extended into the drift.

Plaintiff alleged and introduced proof tending to show that this wire was extended at a height of five feet and two inches above the floor level of the drift at the place where Ozzello was working. The motor was operated by a motorman who controlled the electric power used to propel the motor. The ore cars were moved by the motor into the drift near No. 9 chute and left there to be loaded with ore and waste. When the cars were so placed, the motor was disconnected therefrom and moved to another part of the mine. It was the duty of Ozzello to load the cars with ore or waste and to couple them up when so loaded.

Ozzello had been engaged in this work for six months. The wire was bare and unguarded. No one was present at the time the injury was sustained.

James Airole testified as follows:

"I had worked in No. 9 stope 13 or 14 months before the accident. The cars were hauled in and out of the mine with a motor. The motor had a trolley pole and the pole ran along the wire; it tipped to the wire side. The mucker loaded the cars at chute No. 9. Jim Ozzello was doing that on the date of the accident. He went into work after 7 in the morning. He went with me up the manway into the stope 150 feet above the drift and worked there all day. When I came off shift, I came down this manway. On other occasions before the accident, I had seen Jim Ozzello loading cars at the chute. He would raise the board and let the ore come out of the chute, and stand by the chute, and when the car was loaded, he would push it ahead. He sometimes loaded six, sometimes seven, sometimes ten, sometimes four cars. The empty cars would be standing near the manway. He would push the loaded car ahead, then go and get an empty car and load it with ore and push it up, and I don't know how he got to couple them up. After they were all loaded, the motor would come in and take them out. On the date of the accident, in the afternoon, we quit work about half past 3 and changed our clothes up there. My partner was Jim Procarione. We came down about 20 minutes to 4. The chute and manway are divided by partitions. We came down the manway. We brought buckets, a saw, and an ax, and put them on the skip and ran the skip from the top up there and down the manway. The buckets, saw, and ax were ahead of us, and we came down on the right side of the manway or the middle. When I came down the manway, I saw James Ozzello. He was pushing an empty car under the chute. I was then about 10 feet up the manway. I said to him: 'How many cars have you got to load, Jim?' And he said: 'This is the last one.' I was then 10 feet up the manway. * * * The motor was not there at that time. It came in about 10 minutes later. We talked until the motor came in, and asked: 'Where did Jim go?' We were standing to the right of the manway, some little distance. My partner asked: 'Where Jim go?' The motorman connected onto the train, and pulled the cars out. We stayed there a minute or two, right on the track. The cars stopped, the last car being about 15 or 20 feet from the ore chute. I do not know exactly. We stopped behind the car, two or three feet. We saw Jim Ozello dead on the side, on the left-hand side going out. Ozzello's arm was over the track, and a wheel of the car was on top of his arm. The body was lying on the belly, with head turned to the left side of the drift, with the right side of his face down, the left hand lying along the left side, and the right arm extending over the track at about the elbow; the body being directly under the trolley wire on the left-hand side of the drift looking out, or where the trolley wire would come. The hind wheel of the car was on his arm at about the elbow; the hind wheel was off the track between the rails on the ground. Ozzello was dead. * * * I had worked around No. 9 chute about two years. Ozzello had been there about six or seven months, maybe more. He had been there four or five or six months, almost every day. * * *

"The place where we found the body of Ozzello was 15 or 20 feet from the ore chute; went to work in the drift above the manway about 7:30 and worked there until along in the afternoon, and then started to come down, about 20 minutes to 4. We quit at half past 3 and then started down. I did not look at my watch any more. When we got down it was about 15 minutes to 4. I was in the manway when I saw Ozello about 10 feet above the drift. He was pushing the car under the chute, and that was when he said: 'This is the last car I have got to load.' There was no car under the chute at that time. He was right behind the empty car pushing it up under the chute. I saw him quit pushing it. I was then coming down the manway. I didn't see where he went. He put the car under the chute, and the last time I saw him, before I saw him dead, he was standing behind the car. * * *

I had a lamp with me; Jim Ozzello had his lamp. Ozzello had to pass the car on the left-hand side of the drift going out. I did not see him go down on either side. I did not see him after he left the car. Nobody can pass on the right-hand side of the car, going down the drift. I saw the trolley wire there. I did not see it when I was in the manway looking at him. I saw it when I got down. I knew it was there; had seen it in the morning and saw it every day. If a man would raise his lamp, he could see it. When a man has his lamp lit, he has got to look where he puts his feet, but if he raised his lamp he could see it."

The facts stated by Airole were corroborated by other witnesses. Bert Sorossi, shift boss, testified for the defendant as follows:

"I knew James Ozzello. I was present at the time his body was found on the track. He had been working there about nine months in and about No. 9 chute; been working about six months; he had been working about nine months steadily off and on. He worked six months under the other shift boss, and three months under the witness shift boss. I had known him a little over nine months. I went in when I heard he was killed; saw his dead body lying on the ground. It was about 15 feet below No. 9 chute. * * * I had some talk with him a few days before the accident. I see he had a pick and shovel. He was going up there in the stope. I said to him: 'Better look out, Jim, the wire is charged there.' He said to me: 'Yes, I look for that.'"

The complaint alleges that defendant was negligent in the following particulars:

"(a) That the defendant carelessly and negligently maintained said trolley wire in said drift at an insufficient elevation, to wit, at a height of about five feet and two inches above the floor level of the drift at such points in the drift and about the ore chute where the deceased was performing his work that the deceased was thereby unnecessarily and carelessly exposed to the danger of contact with said wire.

"(b) That the defendant carelessly and negligently failed and neglected to protect said trolley wire from being exposed to contact with the deceased and other workmen similarly employed by it.

"(c) That the defendant carelessly and negligently caused and permitted said trolley wire to carry an unnecessarily high and dangerous voltage of electric pressure, to wit, 500 volts.

"(d) That the defendant carelessly and negligently caused and permitted said trolley wire to be charged with electricity while the deceased was engaged in the performance of his work.

"(e) That the defendant carelessly and negligently failed and neglected to adopt and enforce any measure, or promulgate and enforce any rule or regulation, to prevent or prohibit its motorman or other person intrusted by the defendant with the operation of electric switches and the control of electric power in its said mine, from causing said trolley wire to be charged with said electric power while the deceased was engaged in the performance of his work."

The answer denied the allegations of negligence. In addition, the affirmative defenses were set up of (a) contributory negligence (b) assumption of risk, and (c) injury by a fellow servant.

At the conclusion of the testimony defendant moved the court to instruct the jury to return a verdict in its favor on the following grounds:

(1) The failure of the evidence to show that plaintiff had the consent of the wife and children to bring the suit.

(2) The failure of the evidence to show negligence.

(3) The failure of the evidence to show the death was caused by electricity.

(4) That the testimony showed that Ozzello assumed the risk of coming in contact with the wire.

(5) That the testimony showed contributory negligence on the part of the deceased.

This motion was overruled, which action of the court is assigned as error.

[1] With regard to the contention of defendant that the evidence did not show that the widow and minor children had given their consent to the bringing of the suit, it is sufficient to say that this defense was not set up in the answer. Such proof was waived by defendant when it failed to give notice in some way that it desired this showing to be made in order that it might be protected against another suit on the same cause of action by the widow or minor children.

This case is unlike that of Spokane, etc., Railroad Co., v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915F, 736, relied on by defendant. In that case Josephine Whitley, as administratrix of the estate of her husband, A. P. Whitley, brought suit for damages for the negligent killing of her husband. Under the laws of Idaho, the state in which the cause of action arose, the widow and mother were the heirs of the deceased. In her complaint the widow did not allege that the mother was an heir under the laws of Idaho, or that any recovery was sought on her behalf. The railroad company in its answer set up as an affirmative defense that the mother had sued in Idaho as one of the heirs, and that if the plaintiff succeeded the defendant would be exposed to a double recovery. In the instant case the complaint shows that the suit was brought for the benefit of the widow and children. By a proper plea the plaintiff would have been notified of the contention of defendant and would have had the opportunity of securing proof of the consent of the widow and children. The trial court committed no error in refusing an instructed verdict upon that ground.

[2] In considering the defense of assumption of risk, the question is whether in view of his age, intelligence, and experience Ozzello knew of the existence of the wire, that it transmitted a current of electricity, and that he appreciated the danger that would result in coming in contact with it. He was 29 years of age. He had worked in that drift six months, and in addition he had been warned of the danger. The conclusion must be that he assumed the risk.

In the case of Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725–728, 115 C. C. A. 515, 45 L. R. A. (N. S.) 387, the following rules are laid down for the determination of assumed risk:

"1. A servant by entering and continuing in the employment of a master without complaint assumes the ordinary risks and dangers of the employment and the extraordinary risks and dangers thereof which he knows and appreciates."

"2. Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily ob-

served by him by the reasonable use of his senses, having in view his age, intelligence, and experience,' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes."

"3. When a defect is obvious or 'so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,' and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them."

"4. No duty rests on the master to warn a servant of defects, risks, or dangers that are 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience.'"

In the case of Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, Mr. Justice Moody, speaking for the court, said:

"The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

In the case of Southern Pacific Co. v. Berkshire, 254 U. S. 415, 41 Sup. Ct. 162, 65 L. Ed. ——, decided by the Supreme Court of the United States January 3, 1921, the facts were stated by Mr. Justice Holmes, speaking for the court, as follows:

"The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Tex., to Deming, N. M. At Carney, in New Mexico, he was found sitting on his engineer's seat, unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane, or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers. In order to have uniformity the Post Office Department fixes the distance of the cranes from the equipment, and the length of the hooks, so that, in the language of a witness for the plaintiff, 'the same hook that will take a sack off a crane in Arizona or New Mexico will take it as it goes through Western Kansas.' The evidence was all to the effect that this crane stood at the same distance as all the others along the road. The end of the crane when elevated was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event.

"Linder had been upon this route for some years, had passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead, through a front window. About a mile before reaching Carney Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side.

"In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the traveling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. The first element in it is the standard of conduct to be laid down for the road. The standard concerns a permanent condition not only at this place, but at many places along the road and presumably at innumerable others on all the large railroads of the United States. There are no special circumstances to qualify this part of the question—which is whether or not it is consistent with the duty of a railroad to its employees to erect railroad cranes of which the end of the arm when in use is 14 inches from the side of the train. The railroad is required and presumed to know its duty in the matter and it would seem that the court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case. See Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485. * * *

"But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train. As we have said, the only possible inference on the uncontradicted evidence of the plaintiff's witnesses was that he leaned out considerably more than fourteen inches as shown by the position of his body and the place of the cut on his head. The probability is that the distance of the crane was somewhat greater than the minimum that we have assumed, but that we lay on one side. Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law. Butler v. Frazee, 211 U. S. 459, 465–467; Kenney v. Middaugh, 118 Fed. 209."

See, also, McAdoo, Director General of Railroads, v. Anzellotti (C. C. A. 2d Circuit) 271 Fed. 268.

The court erred in refusing to give to the jury a peremptory instruction on the ground of assumption of risk.

[3] The court permitted the plaintiff to introduce in testimony on rebuttal over objection of defendant the time book furnished by the defendant company for the months of August and September, 1914, which showed the name of Ozzello and the dates on which he was working in the month of September, 1914. This time book was introduced by the plaintiff for the purpose of showing that Ozzello was at work in the mine and was not in the store of the witness Fahrni who had previously testified for the defendant that Ozzello had a fit in his store during the month of September, 1914.

[4] The court also permitted the plaintiff to introduce in testimony on rebuttal, over the objection of the defendant, a daily report of the foreman in defendant's mine. This report was introduced by plaintiff to show that upon September 22, 1914, Ozzello was at work in the mine and was not at Fahrni's store. The time book and report, having been made by employees of defendant in the course of its business, were competent for the purpose of showing where Ozzello was

on the dates indicated, to contradict the statement of the witness who testified that on a certain occasion Ozzello had a fit in his store. The object of the defendant in introducing Fahrni's testimony was to show that Ozzello was subject to fits and that his death was occasioned by his falling down in a fit in the drift and being run over by the loaded ore cars. It was not error to admit this testimony.

For the error in refusing to instruct the jury to return a verdict for the defendant on the ground of the assumption of risk, the cause is reversed and remanded for a new trial.

HARBISON-WALKER REFRACTORIES CO. v. PORTSMOUTH REFRACTORIES CO.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1921. On Motion for Rehearing, October 12, 1921.)

No. 3501.

1. **Mines and minerals ⟸71—Right to mine on tract, given by lease contract, held not exclusive.**
   A right given by a contract to mine fire clay and coal on a 720-acre tract of land on a royalty basis *held* not exclusive, and a subsequent lease giving to another similar rights on a part of the tract *held* valid, and to give equal rights on such part.
2. **Mines and minerals ⟸71—Separate lessees on same tract held to have equal rights.**
   Where plaintiff and defendant were operating on the same tract of land under separate leases giving them equal rights to mine fire clay and coal, each was bound to operate its mines in accordance with good mining methods and to avoid, so far as reasonably possible, any interference with, or damage or hindrance to, the operations of the other, and is liable only for violation of such duty; neither having the right to segregate and claim exclusive rights in any part of the tract.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; John W. Peck, Judge.

Suit in equity by the Portsmouth Refractories Company against the Harbison-Walker Refractories Company. Decree for complainant, and defendant appeals. Reversed and remanded for modification.

On the 11th day of May, 1907, the York Portland Cement Company, a corporation, was the owner of a tract of land containing 720 acres in Washington township, Lawrence county, Ohio, and was then and there engaged in stripping operations on this land for limestone, which it used in the manufacture of cement. This land was and is underlaid with seams of fire clay and coal, which in the course of this stripping operation for limestone it became necessary to remove.

On the date above named, the York Portland Cement Company entered into a contract with the Portsmouth Refractories Company, also a corporation, by the terms of which it agreed for a price stipulated therein, to furnish to the Portsmouth Company the plastic fire clay, flint fire clay, sand rock fire clay, and coal which was moved by it in the course of its stripping operation for limestone. It was further agreed that in case these minerals, so procured from the stripping operation, were not sufficient to supply the demands and requirements of the Portsmouth Refractories Company, the Cement Company

might produce sufficient for that purpose by opening drift mines, irrespective of and apart from the stripping operation. It was further provided in this contract that, if the Cement Company should cease operating its land for its own raw material and should not elect to open drift mines thereon to supply the Portsmouth Refractories Company with the necessary material, the Portsmouth Company, upon the failure of the Cement Company to supply its demands and requirements, should have the right and privilege of putting in its own mines on said land of the Cement Company in such manner as would not interfere with the operation of the Cement Company, for the purpose of supplying itself with material for its own use, and that the Portsmouth Company should pay to the Cement Company an agreed royalty for all material mined by it. Shortly thereafter the Cement Company discontinued the stripping operation on this land for limestone, and elected not to open any drift mines to supply the Portsmouth Refractories Company with coal and clay, and the Portsmouth Company thereupon proceeded to and did open up coal mines and clay mines at different places upon this property.

On the 6th day of December, 1913, the York Portland Cement Company, by and through its receiver, sold and conveyed this land to Levi D. York, who is still the owner thereof. On the 17th day of June, 1914, Levi D. York entered into a contract of lease with the Harbison-Walker Refractories Company, by the terms of which it granted to that company the exclusive right and privilege to enter upon 250 acres of this 720-acre tract for the purpose of exploiting, mining, and removing fire clay therefrom. This 250 acres is specifically described in the lease by metes and bounds. It was also further provided that the right to mine, granted to the Harbison-Walker Refractories Company by this lease, should include all practical methods then in use, or which might thereafter be used, and the use of improved machinery and fixtures or appliances for said purposes, and the right to strip the surface for, excavate, dig, bore, draft, quarry, and otherwise explore for and mine said minerals, with the right to remove all pillars and supports that may be left in the progress of said mining. On the 23d day of August, 1916, Levi D. York made, executed, and delivered to the Harbison-Walker Refractories Company another contract of lease, containing similar terms and provisions, for two other small tracts of land, aggregating about 120 acres, which land was also a part of the original 720-acre tract covered by the Portsmouth Refractories Company's contract.

Shortly after the execution and delivery to it of the first lease in 1914, the Harbison-Walker Refractories Company began operation in the extreme lower end of the 250-acre tract for the mining and removal of clay by drift mines, which operation was abandoned shortly after the second lease was executed, and the lessee then began stripping operations for No. 5 clay at some distance north of its first operation, and in the immediate vicinity of drift mines then being operated for the production of coal by the Portsmouth Refractories Company. It further appears from the evidence that it is materially cheaper to obtain fire clay by stripping than by drift mining, where the over burden is not too great; that at the place where the stripping operations were commenced and prosecuted by defendant "there was a comparatively small over burden, so that the clay could be obtained quite cheaply"; that the defendant could not have stripped in the neighborhood of the first drift mines it opened on account of the steepness of the hill, and that the place where it began to strip was the nearest to such first operation by defendant where stripping was practicable. The Portsmouth Refractories Company was then and still is securing its clay some distance south of its brick plant, on a portion of the 720 acres not covered by the Harbison-Walker lease. These stripping operations continued until they had passed some distance beyond the coal mine then being operated by the Portsmouth Refractories Company.

After it had secured all the clay available by the stripping process over and above and in the immediate vicinity of the Portsmouth Company's coal mine, it opened up several drift mines for clay at a point where the stripping operations ceased by reason of the increased overburden. These drifts, after progressing into the hill about 150 feet, were abandoned, for the reason, as stated by witnesses for plaintiff in error, that the roof began to give them

so much trouble that it became necessary to abandon them temporarily and start new openings, with the intention to work around the old drifts in an effort to reclaim them. It appears that during the time these operations were in progress, and up until the time of the commencement of this suit in May of 1918, the Portsmouth Company made no objection or protest directly to the Harbison-Walker Company, but in July, 1917, wrote a letter of complaint to Levi D. York, who in turn notified the Harbison-Walker Company of the substance of this letter. Thereupon Mr. Campbell, district mine superintendent of the Harbison-Walker Company, telephoned Mr. Hitchcock, president of the Portsmouth Company, requesting that he meet him at these mines and try to arrange some amicable understanding. In reply to this, Mr. Hitchcock stated, in effect, that a meeting was useless, and that the Harbison-Walker Company would have to discontinue its mining operation, as otherwise it would absolutely ruin the Portsmouth Company's coal mine. Mr. Hitchcock made some further protests to Mr. York from time to time, but no further protest was made directly to the Harbison-Walker Company.

On the 28th day of May, 1918, the Portsmouth Company filed in the common pleas court of Scioto county, Ohio, a petition against the Harbison-Walker Company, averring among other things that its grant from the York Portland Cement Company to open, maintain, and operate mines upon said premises is prior in time and paramount in right to the grant of York to the Harbison-Walker Company; that the defendant acquired no rights, privileges, uses, easements, or grants by virtue of its leases from said York, but, on the contrary, the same are void and of no effect.

The plaintiff further averred that, even if said leases from York to the Harbison-Walker Refractories Company were valid leases, the defendant, in violation of the rights of the plaintiff, opened mines and conducted stripping operations at such locations and in such manner as wrongfully and unlawfully to interfere with plaintiff in the exercise of its rights and privileges under its grant from the York Portland Cement Company, and had thereby destroyed its roadways, natural and artificial drainage and caused water to be collected on the surface above plaintiff's mines, where defendant had conducted stripping operations, and also in the openings or drifts that had been abandoned by defendant, so as to cause the plaintiff's mine to become wet, difficult, and expensive to operate, and necessitating systems of drainage not otherwise necessary; that defendant had also, in its mining operation, used high and dangerous explosives, thereby imperiling the lives and safety of plaintiff's employés; and further averred that the continuance of such wrongful, improper, negligent, and unlawful operation of these mines by defendant would deprive plaintiff of its convenient access to coal and fire clay, which minerals are the necessary raw materials for its plant.

The prayer of the petition asked: (1) That the defendant be enjoined from operating any mine or mines upon any part of the 250-acre tract. This was upon the theory that the grant from York to the defendant is null and void, and in conflict with and subservient and subject to the rights of the plaintiff. (2) That if the court should find that the defendant had under the York leases acquired the rights, privileges, and easements to operate and maintain said mines, it be enjoined from obstructing the drains of the plaintiff, destroying its roadway, dumping either in such manner and places that the same may slip over and upon the entrance of the mines of the plaintiff, obstructing natural water courses, casting rock, earth, and débris upon the premises of the plaintiff by explosives or otherwise, and operating about the mines of the plaintiff to such an extent as to interfere with the same. (3) For damages in the sum of $150,000.

Upon petition of the defendant this cause was removed from the state court to the United States District Court, Southern District of Ohio, Western Division, in which court the defendant filed an answer admitting its corporate capacity, the contract of the plaintiff with the York Portland Cement Company, the sale of this property to York, the leases executed by York to the defendant, and that it was operating upon this 250-acre tract; denied it wrongfully, unlawfully, and in violation of the rights of plaintiff, opened such mines at such location and in such manner as wrongfully and unlawfully to

interfere with the plaintiff in the exercise of its rights under its contract with the York Portland Cement Company; that it had destroyed or obstructed roadways, natural or artificial drains, or that it had conducted its mining operation in a wrongful, improper, negligent, or unlawful manner; and further denied that the plaintiff had been damaged by it in any sum or amount whatever.

On the issue so joined the district court found that the plaintiff had no exclusive rights in this property, that the defendant's leases from York were valid, and that the rights of the plaintiff to conduct mining operations on this 250-acre tract to supply itself with so much clay and coal as may be necessary for the carrying on of its business, was contemporaneous and coexistent with the defendant's right of operation. The court further found upon the issues of fact in this case for the plaintiff, and enjoined the defendant from carrying on any mining operations over and above the mines of the plaintiff, and while there remains a reasonable, available supply of fire clay and coal for the defendant to work elsewhere on the lands leased by it from Levi D. York, and from operating within the region laid off and surveyed by the plaintiff for its mining operations as shown by the white dotted lines on the map, introduced in evidence in the District Court and marked Exhibit No. 5, except that the defendant may haul over the surface of any lands contained within said region.

Walter Schmitt, of Cincinnati, Ohio, and Oscar W. Newman, of Columbus, Ohio (Bettinger, Schmitt & Kreis, of Cincinnati, Ohio, and James E. MacCloskey, Jr., of Pittsburgh, Pa., on the brief), for appellant.

Charles H. Stephens of Cincinnati, Ohio, and Henry Bannon, of Portsmouth, Ohio (Charles H. Stephens, Jr., of Cincinnati, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. [1, 2] The District Court properly held that the lease from York to the Harbison-Walker Refractories Company is valid; that the rights of the plaintiff and defendant to mine and remove coal and clay from this 250 acres of land were and are contemporaneous and coexistent. Therefore it was the duty of each, in the exercise of these rights and privileges, to avoid, so far as reasonably possible, any interference with, or damage or hindrance to, the other party having equal rights in these premises; but it by no means follows that the plaintiff, whose rights extended to the entire 720 acres, could, by the location of its coal mine on this 250 acres, in which both parties had equal rights, appropriate to itself all the fire clay and the coal situated in the locality of its coal operations.

Nor could it by surveying, in connection with the mine it was actually operating, a large acreage of this 250-acre tract, in which both plaintiff and defendant had an equal interest, sequester to itself both the coal and the clay in that tract so surveyed, to the exclusion of the defendant, who, at the time this action was brought and for almost two years prior thereto, in pursuance of its lawful rights under its lease from York, was engaged in the active mining of clay and coal from the tract so surveyed by plaintiff, and without any protest on the part of plaintiff other than as appears in the statement of facts. Nor did the plaintiff in its petition claim that by the location of its coal mine at this place it appropriated to itself the fire

clay lying above the coal seam, nor did it ask, in the event that the court held that the defendant's lease is valid, that the defendant be enjoined from mining or removing clay or coal from any portion of this 250 acres, except *above its mines,* and even in that respect the prayer of the petition is that the defendant be enjoined from "operating above the mines of the plaintiff to such an extent as interferes with the same."

Evidence was introduced, however, on the part of the plaintiff tending to prove that it is not proper practice to mine this fire clay before or during the mining of the coal. Evidence was also introduced on the part of the defendant tending to prove that the mining of the clay first is the proper practice and good mining methods, for the reason that the subsidence of the earth's surface where coal has been removed makes it more difficult and expensive to remove the upper strata of clay.

Whether it is or is not the better practice to remove the coal first, where one individual or corporation owns the exclusive right to mine and remove both clay and coal is not determinative of the question presented in this case. It is clear from this evidence that the mining of either clay or coal first necessarily injuriously affects, to some extent, the mining of the other mineral later. Nevertheless the evidence in this case is not such as to show that the mining of the clay first has such an injurious effect upon the mining of the coal later that one lessee, having a right to mine the clay, should be enjoined from so doing until another lessee, having the right to mine the coal, has removed all the coal therefrom, thereby causing such an irregular subsidence of the earth's surface as to make the mining of the clay more difficult and expensive. The situation in this case is not different, so far as this question is concerned, than if the plaintiff had the exclusive right of mining the coal only, and the defendant had the exclusive right of mining the clay only. Nor does it appear that the stripping operations necessary to mine and remove this clay differs in any respect from the rights reserved by the York Cement Company to strip and remove the surface for limestone, for it appears from the contract between the York Cement Company and the Portsmouth Company that the stripping operation, in which the York Cement Company was then engaged, extended, not only to the removal of the fire clay, but the coal also.

The evidence offered in the trial of this case fully sustains the finding of the trial court that the defendant, in the exercise of its right to mine and remove this clay, did not avoid, as far as possible, any interference with, or damage or hindrance to, the plaintiff in the operation of its coal mine, in that it destroyed the plaintiff's roadways to the timber land, without providing other roadways substantially as convenient, and that it failed to make any effort whatever to drain the water collecting on the surface of the ground over plaintiff's actual mining operation, after it had finished stripping the same. However, keeping in mind the relative, contemporaneous, and coexistent rights of the parties to this action, and the duty of each in the exercise of these rights and privileges to avoid as far as pos-

sible any interference with, or damage or hindrance to, the other lessee, and keeping also in mind the fact that the defendant's rights are restricted to about one-half of the 720-acre tract covered by the plaintiff's contract, and that but comparatively only a small portion of this can be mined to advantage by stripping, it would seem that the equities of this case would be fully served by limiting the plaintiff's relief, by way of injunction, to the prayer of its petition that the defendant be restrained from obstructing the drains of the plaintiff, destroying its roadways, dumping earth in such manner and places that the same may slip over and upon the entries of the mines of the plaintiff, obstructing natural water courses, casting rock, earth, and débris upon the premises of the plaintiff by explosives or otherwise, operating above the mines of the plaintiff to such an extent as unreasonably interferes with the same; and it is therefore ordered and decreed that the injunction as granted by the District Court be so modified.

The judgment of the trial court, awarding the plaintiff damages in the sum of $120, is affirmed.

It does not clearly appear, from the order of reference to ascertain the further damages of the plaintiff, whether the special master commissioner is or is not directed, in the ascertainment of such damages, to take into account the water accumulating in the drifts made by the defendants to remove the clay after it had finished stripping operations over defendant's working place. The right of the plaintiff to recover damages upon this ground, of interference with its rights, depends entirely upon whether the defendant in making these drifts was simply gouging for the purpose of securing clay as cheaply as possible, or was in good faith attempting to operate drift mines to remove all available clay therefrom. In the latter case, the damages to the plaintiff would be merely incidental to the defendant's lawful and proper exercise of its right to mine and remove this clay. Upon this question there is a serious conflict in the evidence. The defendant offered evidence tending to prove that it was operating in good faith and was compelled to abandon these drifts temporarily, on account of the condition of the roof, but that it was and is its intention to work around the old drifts in an effort to reclaim them. There is some evidence offered on the part of the plaintiff that these drifts are merely gouges. Wangler, a civil and mining engineer of Dayton, Ohio, who has been engaged in that profession a little over 20 years, was called as an expert witness on behalf of the plaintiff. He testified in reference thereto as follows:

"This gouge—I will say drift; I don't want to use that word 'gouge,' because it don't sound good to me; I don't believe it was the intention to do that at all; I don't believe it was the intention of the Harbison-Walker Company to gouge that property, what is called a gouge, because I believe it is a drift. * * * The observation that I had of that was that they had done a lot of timbering there. * * * Extra heavy timbers, probably eight, ten, twelve inch timbers, I imagine, and as I remember they were probably four to six feet apart on either side of the roadway."

This witness was certainly well qualified to tell a drift from a gouge. He was a disinterested witness, yet his evidence was wholly

favorable, in practically all other respects, to the plaintiff, and naturally this part of his evidence favorable to the defendant should be given serious consideration by a court or jury, as against the evidence of an interested or clearly antagonistic witness. It would therefore appear that the order to the master commissioner, directing him to ascertain further damages due to the plaintiff, should specifically exclude from the master's consideration unavoidable damages incident to the proper, careful, and legitimate exercise by the defendant of its right to mine and remove this clay, and the order of reference should be so modified as specifically to direct the special master commissioner to ascertain the reasonable cost of constructing and maintaining sufficient drains to carry away the water which it may be reasonably anticipated will accumulate in the pits and low places above and reasonably approximate to plaintiff's mine, caused and produced by the defendant's stripping operations.

For the purpose of accomplishing such modifications the decree is reversed as to the injunction, and as to the order of reference, and this cause is remanded to the District Court, with directions to enter such modified decree.

The judgment against defendant for costs in the District Court is affirmed. In this court each party will pay its own costs, and judgment may be entered accordingly.

On Motion for Rehearing.

While the petition of the Portsmouth Refractories Company does not ask that the Harbison-Walker Refractories Company be enjoined from the operation of its coal mine upon the 250-acre tract described in its petition for reasons other than as averred in its petition, that the alleged grant from Levi D. York to the defendant is null and void and of no force and effect, and in conflict with the rights of the plaintiff, and subservient to the rights of the plaintiff, nevertheless evidence was introduced, without objection, tending to show that it is operating its coal mine in such near proximity to plaintiff's coal mine that in one place it has broken through and into plaintiff's mine.

It is therefore further ordered and adjudged, upon the motion for rehearing, that the plaintiff be permitted by the District Court to amend its petition in this respect to conform to the evidence, and that upon such amended petition the Harbison-Walker Refractories Company be enjoined from operating its present coal mine in the direction of the present workings of the appellee's coal mine, but may work the same only in an easterly and southerly direction, until it reaches and passes the east dotted line on the map of the Portsmouth Refractories property referred to in the decree of the District Court.

The motion for rehearing is overruled.

HUDSON MFG. CO. v. LOUDEN MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1921.)

No. 5528.

1. **Patents ⟸328—990,827, for cattle stanchions, held valid and infringed.**
The Louden patent, No. 990,827, for cattle stanchions, claims 1, 2, and 3, *held* valid and infringed.

2. **Patents ⟸167 (1)—Claims to be construed with specification and drawings.**
The claims of a patent and the specification and drawings are to be construed together for the purpose of ascertaining from the entire contract between the United States and the patentee, of which each is a part, the actual intention of the parties.

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

Suit in equity by the Louden Machinery Company against the Hudson Manufacturing Company, impleaded as the Hudson & Thurber Company. Decree for complainant, and defendant appeals. Affirmed.

James F. Williamson, of Minneapolis, Minn., for appellant.

W. Clyde Jones, of Chicago, Ill. (Robert Lewis Ames, of Chicago, Ill., and John G. Barwise, of Fairfield, Iowa, on the brief), for appellee.

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

LEWIS, District Judge. The Louden Machinery Company brought this suit against the Hudson Manufacturing Company, charging in its complaint that the latter was infringing upon rights secured to the former by Letters Patent No. 990,827, for an improvement to cattle stanchions, issued to William Louden on April 25, 1911, on his application made September 26, 1907, which Louden had assigned to plaintiff, and also charging defendant with unfair competition in putting on the market stanchions so like plaintiff's improved patented device in form, type, style, size and appearance that the trade could not distinguish between them, and prayed that defendant be enjoined, and for judgment for profits received by defendant, and for damages, and to that end that discovery and accounting be had.

The answer set up as defenses that Louden was not the original and first inventor, that his patent is void because the improvement claimed by him was not novel, that it was old in the prior art, that it had been previously patented to others and that it had been on public sale and in use for more than two years prior to his application. It denied specifically invention by Louden and infringement and unfair competition by defendant, and plead abandonment by plaintiff.

[1] The case went to a Master, who took the proof and found all of the issues in favor of the plaintiff below. His report states his conclusions as to the material and controverted facts, and contains

his views as to the law applicable thereto, and he recommended that a decree be entered in favor of the complainant, finding the patent valid and that the defendant had infringed on the patent rights as to Claims 1, 2 and 3, and had been guilty of unfair competition in trade. The trial court regarded appellant's exceptions to the findings and conclusions of the Master as bringing all the facts under review, and "assumed the burden of reaching an independent decision upon the substantial merits without regard to any presumptions in favor of the Master's action." It thereafter overruled each and all of the exceptions and found that "The findings of fact conform to the preponderance of evidence and no contrary determinations could fairly be made upon the record presented"; and decreed the patent valid and Claims 1, 2 and 3 thereof deliberately and wilfully infringed upon by defendant, and that defendant had been guilty of unfair competition in trade as charged in the complaint, "in that it has made and marked its said stanchions by devices and representations calculated to mislead and deceive the ultimate purchasers or users of stanchions, and with the intent in effect of misleading and deceiving said ultimate purchasers or users in violation of the rights of plaintiff." It was further decreed that the defendant be permanently enjoined from further infringement, and that plaintiff recover profits received by defendant and damages sustained by it by reason of the infringement and unfair competition. The claims charged to have been infringed upon are these:

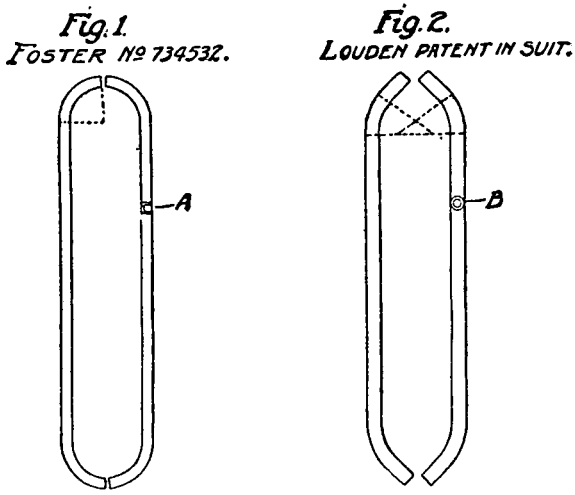
"1. In cattle stanchions, two coacting members having their central portions spaced apart and approximately parallel, and their upper and lower portions inclined toward each other at a uniform angle, the bends in the members forming said inclines being at equal distances from the respective ends, and the inclined portions beyond the bends being approximately straight, a hinge connection affixed to the lower meeting ends of the members and latching means secured to the upper meeting ends of the members, whereby they may be opened and closed and latched together and unlatched from each other.

"2. In cattle stanchions, two coacting members having their central portions spaced apart and approximately parallel, and their upper and lower portions inclined toward each other at a uniform angle, the bends in the members forming said inclines being at equal distances from the respective ends, and the inclined portions beyond the bends being approximately straight, and connections having straight ends secured to the ends of the members in such relation as to operate therewith regardless of the lengths of the inclined portions of the members.

"3. In cattle stanchions, two coacting members having their central portions spaced apart and approximately parallel, and their upper and lower portions inclined toward each other at a uniform angle, the bends in the members forming said inclines being at equal distances from the respective ends, and the inclined portions beyond the bends being approximately straight, latching means secured to the upper meeting ends of the members, a hinge casting secured to each of the lower meeting ends of the members and a bolt to connect said castings together."

Before Louden, the two ends of cattle stanchions were square or circular. Those with round ends, when made of metal, required that each end of each side member be bent to an approximate quarter-circle. Appropriate metal fittings secured over the ends of the members joined them together at top and bottom, the one at bot-

tom having a hinge and at the top means for latching and unlatching, so that when unlatched a side member would swing out and permit the animal's head to pass through. Then the side member could be swung back on the hinge at the bottom and securely latched at the top. Taking the drawings which accompanied Louden's application and are a part of the specification in his letters patent, we find that the ends of his stanchion are in form V-shaped. The contrast between stanchions with round ends and those with V-shaped ends, without the couplings at top and bottom, is illustrated by Foster's patent, issued in 1903, compared with Louden's, thus:



The difference between the two is obvious. The semi-circular ends require bends, each covering 90 degrees, while the V-shaped ends include angles of only 45 degrees, that is, the ends are deflected inwardly to that extent; and the ends of the former rest at approximate horizontal, while those of the latter stand at approximate 45 degrees from the perpendicular. It seems unnecessary to illustrate the square-end type.

The evidence convinced the Master and the trial court that the strain of cattle held in stanchions having flat or Roman arched ends had a tendency to twist or turn the side members on their horizontal axis at their ends within the hinge and latch fittings which coupled and held them together, and thus to break or weaken the point of union; and they were further convinced that Louden's V-shaped ends greatly lessened, if it did not wholly eliminate the effect of that strain by transferring a large part of it into a lateral pull on the four ends of the side members. And so the Master found, and the court sustained the finding, that

"The 'V' shaped end conformations practically eliminate torsional strain on hinge and latch fittings when cattle lunge forward or backward against the stanchion sides in reaching to their feed, or in getting up and lying down,

or in trying to get out of the stanchions, in comparison with the torsional strain on the hinge and latch fittings of any stanchions of the prior art."

And we, after a review of the record, reach the same conclusion. Louden's improvement, then, was not merely a change in the form of the stanchion, but such a change employed and put in action mechanical principles and powers not available in the use of stanchions then used or known to the trade or shown in any prior patent. It converted, in large part, the strain exerted on the coupling members from torsion to tention, and in this way obviated the tendency to loosen them and put them out of repair.

The evidence also convinced the Master and the trial court that the flat or Roman arched ends afforded occasion to the animal to get its forefoot or leg fast under the end of the stanchion, so that in attempting to extricate it the animal might be seriously injured. Evidence was adduced of such occurrences, showing that valuable animals had been almost wholly ruined in that way. And so the Master found, and the finding was sustained by the trial court, that

"The sloping or V-shaped end formations make it practically impossible for cattle to get their forelegs or feet caught between the bottom of the stanchions and the sill or curb of the frame or stall, as compared with any stanchions of the prior art."

We think that conclusion also is sustained by the proof. These two elements in Louden's improvement gave functional advantages not to be obtained in the use of stanchions with square or circular ends.

It is also shown without contradiction that to make the quarter-circle bend on the ends of metal stanchion members it was necessary to use a machine, and that in gripping the end of the member in the machine for that purpose it became necessary, after the bend was made, to cut off and throw aside three or four inches of each end of each member, and that only one end of the member could be bent at one time; whereas, both ends of a side member, as shown in Louden's drawings, could be made at once by placing the member in a stamping press, and that none of the material was wasted or had to be cut off. Also each side member with a quarter-circle bend was about three inches longer in a completed stanchion than the member in a stanchion made with V-shaped ends, although the two stanchions when completed are of the same length and width. Furthermore, the Louden bend could be made easily of hard tubular steel, which was the most desirable, both in strength and form, without damage to the material, whereas, it was difficult to make the quarter-circle bend of such material without great risk of damage, if at all; and the bends made in the stamping press will be in alignment, but if made by a bending machine one end at a time they are not always so, and require further work to bring them in alignment.

Louden first made and put out for use his stanchions in December, 1905, or early in January, 1906. In the latter year 2,745 were marketed and the number increased every year thereafter, so that in 1910, the year just previous to the issuance of his patent, 52,472 were made and sold. The appellee had succeeded in entering into

a contract in 1908 with the Elyria Iron & Steel Co. of Elyria, Ohio, to furnish high carbon steel bent pipes in accordance with the plans and instructions furnished by appellee for the side members of the Louden stanchion, and after that the number of stanchions which appellee was able to dispose of became very large, amounting to 577,201 for the twelve years from 1906 to 1917, both inclusive, which were sold, at a total of $626,230.00. The stanchion had proven a success, and none other could compete with it commercially. It gained the name and reputation of the Louden bend. The appellant purchased the rights of the Foster patent, with round ends, but found that it could not successfully compete with the Louden stanchion. It found that in order to do so it was necessary to make a stanchion with V-shaped ends, and it thereupon entered into a contract for the purchase of the bent side members. That contract, as well as correspondence between it and the manufacturer who furnished it with the side members, refers to the bend as the Louden bend, and appellant thereupon put upon the market its stanchion, charged as the infringing device under the name of "Modoc 60," which is an exact copy of the drawings accompanying the Louden patent, as to side members.

Considering, then, Claims 1, 2 and 3 of the Louden patent in connection with the specification and drawings which are a part of it, under the evidence we do not doubt that his improvement was new and useful, that he was the original and first discoverer, and that it was patentable.

[2] But appellant argues that the language of Claims 1, 2 and 3 is simple and their meaning clear, that the thing described is obvious and that, therefore, there is no room for interpretation; hence the specification and drawings relied upon in reaching the foregoing conclusions cannot be resorted to. But none of the claims deals with the angle of the bends directly, though indirectly they require that the bends shall be at uniform angles, that is, "their upper and lower portions inclined toward each other at a uniform angle." This requirement could be met by deflecting the ends so that they would circumscribe an obtuse angle, resulting in an unusable and absurd structure, or to circumscribe an angle so acute that it would be wholly unfitted for the intended purpose. This, we think, renders the claims ambiguous as to the degree to which the ends should be deflected from their course, and makes clearly applicable to this case the familiar principle announced in O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 C. C. A. 53, wherein this court held:

"The specification and claims of a patent constitute a contract between the United States and the patentee, and they are to be read and construed together in the same way and by the same rules by which other contracts are interpreted. The specification which forms a part of the same petition or application as the claims must be read and interpreted with them, not for the purpose of limiting, or of contracting, or of expanding, the latter, but for the purpose of ascertaining from the entire agreement, of which each is a part, the actual intention of the parties."

See, also, I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 C. C. A. 576; Stilwell-Bierce & Smith-Vaile Co. v.

Eufaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584; Canda v. Michigan Iron Co., 124 Fed. 486, 61 C. C. A. 194; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Fed. 267, 56 C. C. A. 547. Turning to the specification we find this:

"These members * * * have their upper and lower ends bent toward each other at an angle of approximately 45 degrees, so that they will meet the corresponding ends of the opposite members approximately halfway and will stand at approximately right angles to each other. The bends may be gradual curves, but between the curves and the end of the members, there must be a straight portion long enough and inclined at the proper angle to receive and support the hinge and latch members."

The drawings which accompanied the patent referred to in that part of the specification just read show the ends of the side members bent toward each other at an angle of approximately 45 degrees, and that they stand at approximately right angles to each other. When the claims are thus interpreted and construed the conclusions which we have reached therefrom seem to necessarily follow, so that the patented improvement, as defined by the claims, when read in the light of the specification and drawings, consisted in a stanchion having V-shaped ends bent toward each other at an angle of approximately 45 degrees and standing toward each other at approximately right angles.

It is also contended that appellee is estopped by the file wrapper record to claim that Louden's patent calls for a stanchion with approximate 45 degree bends in its side members. It is true that Claim 2 in Louden's original application called for an angle of approximately 45 degrees, and that this claim was rejected by the examiner. Claims 5 and 6 in that application, which provided that the side members should have their upper and lower ends bent at a uniform angle, were allowed. This action of the examiner appears to have been taken because of difference in the hinge members as found in the rejected claims from those which were allowed. The applicant then put in a claim which provided that the meeting ends of the two members should stand at approximately right angles to each other, which by indirection was a reinstatement of the rejected claim. This also was rejected by the examiner on his ruling that the shape of the side members was a matter of design. The applicant contended "there is more in the shape of the members A and B (side members) than mere design," but the examiner persisted in his holding that to bend the ends to form an angle with the main part of the member did not involve patentability. The applicant submitted to the ruling and then put in the claims as we now have them. The specification in the original application contained this:

"These members * * * have their upper and lower ends bent at an angle of approximately 45 degrees, so that they will meet the corresponding ends of the opposite members approximately halfway."

To this was added, "and will stand at approximately right angles to each other," as now found in the specification. In view of the construction that we have given to Claims 1, 2 and 3, we fail to find facts necessary to support the claim of estoppel.

In April, 1905, William Louden made his application for letters patent for improvement in cattle stanchions, which he did not press to final determination but abandoned. The file wrapper in that proceeding was introduced in evidence. It is contended that that application, taken in connection with stanchions that Louden made and put on the market about that time, operated as an abandonment by him and dedication to the public of the stanchion which the appellee now claims exclusive right to make and sell under patent No. 990,827. That application contained no claim for a stanchion with V-shaped ends nor that the side members shall be bent to any approximate angle, nor that the side members shall meet each other at approximately right angles, nor is the word "angle" used at all in any connection, either in the claims or specification in that application. The drawings which accompanied it showed a stanchion with circular or Roman arched ends. Louden made and sold some stanchions, as he testified, in accordance with that application, with round or circular ends, out of gas pipe, which is soft and easily bent, as compared with high carbon steel tubing. The experiment was a failure. The side members were bent out of shape, causing the latch and hinge members to become unworkable and needing repair. Some of them were returned to Louden for repairs, others, after being used a few months, were thrown aside as unusable, and some of them found their way to the scrap pile and were sold as junk by the pound. Ten years and more had passed, but appellant found and brought into court two of them, on which it relied and attempted to show that the side members were made with straight ends at the points of meeting for attachment of hinge and latch members. At best the evidence put in serious doubt whether the ends were in the same shape as they were when put out by Louden, and also when the change, if any, had taken place. But conceding to it all that appellant claims we regard the fact of slight significance. The most that could be claimed is that the ends were approximately straight for only about three inches, and extended but slightly, if at all, beyond the hinge and latch members. That condition would exist in stanchions with semi-circular ends also. At least the variation between the two exhibits relied upon and a stanchion with semi-circular ends would be slight in that respect and of no significance. We agree with the court below that the evidence relied upon does not sustain the contention.

It has not seemed to us necessary to review here the testimony on the question of unfair competition, further than to say that we are of opinion that it abundantly sustains that issue in favor of the plaintiff below. Reserving to appellee its right to have the profits and damages to which it may be entitled assessed the decree is affirmed.

The appellant's motion to tax the cost of printing parts of the transcript of the record which were brought up by appellee's praecipe will be overruled, and the clerk is directed to enter an order accordingly.

AUTO ACETYLENE LIGHT CO. et al. v. PREST-O-LITE CO., Inc.

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

No. 3546.

Injunction ⊂=223(1)—Against unfair competition held violated.

An injunction restraining defendant from recharging and re-using acetylene gas tanks filled and sold by complainant without obliterating by plating or enameling the name and all identifying marks of complainant, *held* violated where the characteristic label of complainant, giving directions for use, was not obliterated, and its name was covered with a removable enamel or paint applied with a brush.

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

Suit in equity by the Prest-O-Lite Company, Inc., against the Auto Acetylene Light Company and others. On appeal by defendants from an order adjudging a contempt. Affirmed.

See, also, 276 Fed. 537.

W. S. Thurstin, Jr., of Toledo, Ohio, for appellants.

Frank S. Lewis, of Toledo, Ohio (Doyle & Lewis, of Toledo, Ohio, and Winter & Winter, of New York City, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The merits of the controversy, out of which grows the present appeal, were before this court in Auto Light Co. v. Prest-O-Lite Co., 264 Fed. 810. The general situation need not be restated. We reached the conclusion that the acts of the Auto Light Company constituted unfair competition and should be enjoined. The decree of the court below, which was affirmed by this court, forbade the Light Company to refill—

"any cylinder or tank upon which the word Prest-O-Lite, complainant's name, or complainant's label, appears, without replating or enameling the outer surface of such cylinders or tanks, so that the name of the Prest-O-Lite Company and the word Prest-O-Lite and all complainant's labels shall be obliterated, to the complete extent that either plating or enameling can be made so to obliterate, and such obliteration by plating or enameling shall not be dispensed with, no matter how such name and trade-mark and labels appear, whether plated, etched, or otherwise, and, in addition thereto, plating or stamping on the outer surface of the tank in legible and permanent form a notice that such tank has been refilled or recharged by the defendants or their agents."

After the remand, complainant instituted a contempt proceeding, alleging that the forbidden practice was still continued, and this resulted in a finding in complainant's favor. Still later, a second contempt proceeding was instituted, and the master found—and the court confirmed the finding—that the defendant was refilling and putting out Prest-O-Lite tanks without that obliteration which the decree required. The court thereupon ordered payment of an amount estimated to be sufficient to cover complainant's expenses and counsel fees in the contempt matter, and from this order defendant appeals.

It was said in our former opinion that the essence of the wrong complained of consists in the palming off of defendant's acetylene gas for complainant's Prest-O-Lite gas. This was a comprehensive statement of the essential wrong as charged in that case, but the present record indicates that the statement may be somewhat broadened. It is the container which, by its inscription, labels, and appearance, accomplishes the deception as to its contents. The evil does not necessarily cease with the mere delivery of the tank to the user. Unless he is explicitly informed, he not only thinks he is getting Prest-O-Lite gas in his tank, but he thinks it is a Prest-O-Lite tank, which will entitle him to the benefit of the Prest-O-Lite service system, and give him the right to exchange this tank, when exhausted, for a full one at any Prest-O-Lite station. See Prest-O-Lite Co. v. Davis (C. C. A. 6) 215 Fed. 349, 350, 131 C. C. A. 491. If the immediate user is fully informed as to the character of the tank's contents, nevertheless a tank of deceptive appearance puts it in his power to deceive a purchaser from him, or even an inattentive Prest-O-Lite agent, to whom he may present the tank for exchange. The obliteration of markings, called for by the decree in this case and by the decrees of other courts, the form of which we followed, was required in order that the chances of deception, both as to the gas contained in the tanks and as to the capacity of the tank for continued use under complainant's service system, should be minimized.

With this in mind, we come to examine what defendant did and failed to do in the way of obliteration. Complainant's label consisted of its name in large type, followed by several lines, in smaller type, of description of the contents of the tank and its manner of use, the whole inclosed by a border and all etched into the metal. See 264 Fed., supra, at page 812. Complainant's name was also etched in smaller type upon the gauge at one end of the tank. Defendant's practice was not uniform, and, in some instances, showed an entire failure to attempt some part of the necessary obliteration; but, rejecting these instances as inadvertent, and giving the defendant the benefit of its best efforts, we find that the name of the complainant, in large type at the beginning of the notice, was buffed off, and the same was done in a second and perhaps a third place in the notice, where the name is in smaller type. These buffed erasures were then covered with what is called a white enamel, put on with a brush. Complainant's name upon the gauge was covered with the same material. There was no attempt to cover the remainder of the label, and its characteristic border and arrangement and details of description remained. The stenciled notice of refilling by defendant was not unduly noticeable, but as to that alone there might not be sufficient ground of complaint. The general impression—at least, the hasty impression—produced by a tank thus treated may well be that it is a Prest-O-Lite tank having the Prest-O-Lite label, and that some daubs of white paint have been carelessly spilled upon it.

The evidence shows that this white material was commonly sold in prepared form under the name of "white enamel," and that it is not uncommon to speak of treating surfaces with this material as

enameling, while the enameling, which is intended when the word is more technically used, calls for a process of applying a finish and baking the same under intense heat, whereby the finish becomes reasonably permanent. The paint enamel, put on cold, is not only likely to scale off, but it may be removed by commercial varnish removers. It is, in effect, an opaque varnish.

Full compliance with the decree is not to be tested by any nice definition of enameling, and it is unnecessary to decide whether under some circumstances the paint enamel might satisfy a decree which called for "enameling." In this case obliteration was the essential thing. Plating and enameling were mentioned only because they seemed to provide the best means of obliteration. Neither one was directed; but, if one would obliterate better than the other under particular conditions, that one must be employed. We think it is clear enough that, if the paint enamel made an imperfectly permanent obliteration, the other enamel should be used, or, if the baking process was not feasible with this tank, then plating should be employed. Further, the failure to cover other parts of the characteristic label is a lack of compliance with the decree. This failure is not justified by the fact that the description of the contents is required by the interstate commerce rules, if the tank is to be transported in interstate commerce. If defendant wishes the tanks it puts out to be so transported, it can attach its own qualifying inscription; but it cannot rightly use the necessity for such an inscription as a reason for not removing a substantial part of complainant's label. That the decree does not impose an impossible standard, nor amount to an indirect destruction of defendant's lawful business, is apparent from the conceded fact that it is now renickeling its refilled tanks in a way that seems to be effective and at a cost that is not prohibitory.

The record does not present the question, raised by the defendant in argument, as to the effect of such a stamping or deep cutting by the complainant of its name on its tanks as wholly to prevent the effective obliteration thereof; but, if such a question has a hypothetical bearing on the issue, we may observe that, if it proves to be commercially impracticable for defendant to refill complainant's tanks without leaving them in such condition that they tend to carry deception as to their contents and their status, the alternative is simple and obvious.

The decree is affirmed.

AUTO ACETYLENE LIGHT CO. et al. v. PREST-O-LITE CO., Inc.

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

No. 3547.

1. **Courts ⇐280—Burden of disproving jurisdictional allegations on defendant.**
   Where a bill contains appropriate jurisdictional allegations, showing diversity of citizenship and the requisite amount in controversy, jurisdiction is affirmatively shown prima facie, and the burden of proof on an issue joined thereon rests on the defendant.
2. **Sales ⇐4(2)—Contracts for sale of acetylene gas in tanks held to retain title to the tanks in the seller.**
   Delivery by complainant to consumers of acetylene gas in tanks, under contracts expressly reserving title to the tanks and providing that complainant shall keep filled tanks in reserve and exchange them for empty tanks when returned without charge, except for the contents, *held* to effectively retain title to the tanks in complainant.
3. **Injunction ⇐63—Will be granted to restrain encouragement of breach of contract.**
   The refilling by defendant of acetylene gas tanks furnished by complainant to its customers for their use, but which remains its property, and in so doing knowingly assisting and encouraging such customers to violate their contracts under which the tanks were furnished, *held* a violation of complainant's rights, which entitled it to an injunction.
4. **Monopolies ⇐17(1)—Contracts under which tanks are furnished to purchasers of acetylene gas held not in restraint of trade.**
   Contracts under which complainant furnishes acetylene gas to consumers in tanks to which it retains the title, charging a fixed sum for their use, with an agreement by the consumer to return them when empty and by complainant to exchange filled tanks therefor, charging only for the contents, and that, if it fails to do so it will return a ratable part of the charge for their use, *held* not unconscionable nor in restraint of trade, in violation of Clayton Act Oct. 15, 1914, § 3 (Comp. St. § 8835c).

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

Suit in equity by the Prest-O-Lite Company, Inc., against the Auto Acetylene Light Company and Llewellyn Young. Decree for complainant, and defendants appeal. Affirmed.

See, also, 276 Fed. 534.

W. S. Thurstin, Jr., of Toledo, Ohio, for appellants.

Keyes Winter, of New York City (Doyle & Lewis, of Toledo, Ohio, Winter & Winter, of New York City, Frank S. Lewis, of Toledo, Ohio, and Keyes Winter, of New York City, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. The Prest-O-Lite Company has for many years been engaged in generating, storing, and distributing acetylene gas for use in automobile lighting and in welding. Its gas is stored in portable steel cylinders lined with asbestos or other porous

material, which absorbs a quantity of acetone, which, in turn, is saturated with acetylene gas introduced under pressure; the outflow for consumption being valve-controlled. The entire package, so filled, is furnished the consumer in the first instance. When the gas is consumed, the tank is, under complainant's system, accepted at any one of a large number of agencies throughout the United States in exchange for a package fully charged by plaintiff. Its right to protection against unfair competition has been recognized and enforced in a long series of litigation relating to cylinders for automobile lighting.[1]

In 1913 plaintiff extended its service to the welding trade, and has a large number of customers, to whom it is supplying this service under a system generally similar to that relating to automobile lighting, but differing therefrom in the fact that its welding tanks are supplied (to its customers) under contracts which treat the tanks as held by the consumer as containers merely of plaintiff's gas, and on rental only; each tank bearing on the outer surface permanent legends, including the serial number of the cylinder, the date of manufacture, its weight, and the fact that it is plaintiff's property, together with the statement that the acetylene is prepared and pressed into porous substance by the plaintiff, the latter's compliance with certain governmental specifications, and that, when empty, it is to be redelivered to plaintiff. The defendant Auto Acetylene Light Company is engaged at Toledo, Ohio, in manufacturing and selling acetylene gas in tanks of the same general nature as those of complainant and in refilling the same. The defendant Young is the general manager of the corporate defendant.

The bill of complaint alleges defendant's knowledge of plaintiff's rights, including its contracts and exchange service, and charges that defendants are inducing, procuring, and assisting plaintiff's customers to violate their contracts with plaintiff, by refilling plaintiff's tanks with defendants' acetylene gas, to plaintiff's injury, as specifically set forth in the bill. An injunction was prayed against such interference with plaintiff's rights. Hearing was had upon affidavits presented by both parties, and preliminary injunctions allowed. Defendants answered, denying the jurisdiction of the court, as well as plaintiff's right to relief upon the merits, alleging especially, in substance, that plaintiff's contracts with its consumers amounted really to sales, that such consumers believed that they were thereby purchasing the tanks, and that the contracts violate the Clayton Act. The corporate defendant also asked that plaintiff be enjoined from representing to its customers that plaintiff is the owner of the tanks, and from seeking to prevent such consumers from having their tanks refilled by defendant.

In overruling a motion for rehearing of the application for preliminary injunction, upon which numerous affidavits were filed by each party, the court suggested that final submission be stipulated, "if there

[1] Searchlight Co. v. Prest-O-Lite Co. (C. C. A. 7) 215 Fed. 692, 131 C. C. A. 626; Prest-O-Lite Co. v. Davis (C. C. A. 6) 215 Fed. 349, 131 C. C. A. 491; Prest-O-Lite Co. v. Heiden (C. C. A. 8) 219 Fed. 845, 135 C. C. A. 515, L. R. A. 1915F, 945; Prest-O-Lite Co. v. Ray, 220 N. Y. 522, 116 N. E. 350; Auto Acetylene Co. v. Prest-O-Lite Co. (C. C. A. 6) 264 Fed. 810; Auto Acetylene Co. v. Prest-O-Lite Co. (No. 3546) 276 Fed. 534, this day decided by this court.

is nothing more of fact to be advanced." Counsel accordingly stipulated for such submission "upon the pleadings and affidavits heretofore filed and the record herein." The final decree, which is the subject of this appeal, was thereupon entered, enjoining defendants from interfering with plaintiff's system of exchange, causing such welding service contracts to be violated, procuring the delivery of plaintiff's exhausted tanks to any one other than plaintiff for refilling or otherwise, from receiving or refilling such tanks or damaging the same, and from dealing in or exchanging plaintiff's welding tanks.

[1] 1. Jurisdiction. The fifteenth paragraph of the bill asserts that the value of plaintiff's business of distributing acetylene gas through its service system and its contracts, and the value of plaintiff's contracts with its customers, as well as the amount in controversy, exceed $5,000, exclusive of interest and costs. The answer denied generally the allegations of this paragraph. The bill also alleged that plaintiff was a corporation organized under the laws of New York and a citizen and resident of that state, that the corporate defendant was organized under the laws of Ohio and was a citizen and resident of that state, and that both defendants were citizens and residents of the Northern district of Ohio; jurisdiction being claimed on account of this diversity of citizenship. The answer disclaims knowledge or information as to whether plaintiff has the corporate organization and citizenship alleged, and for lack of knowledge thereof denies the same. The bill of complaint was sworn to upon knowledge and belief; the answer, on belief. The affidavits are silent upon both questions of jurisdiction.

Passing the question whether the submission of the case upon the affidavits amounted to an admission that there were no controverted questions of fact as to jurisdiction, the burden of proof was upon defendants as to whatever issue was presented respecting the amount in controversy. Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 335, 27 Sup. Ct. 529, 51 L. Ed. 821. Not only is there no apparent reason in principle for distinguishing, as respects burden of proof, between allegations of plaintiff's residence and citizenship and the amount in controversy, but upon express authority we think the burden on defendants as to the former question as well. Adams v. Shirk (C. C. A. 7) 117 Fed. 801, 803, 55 C. C. A. 25; Hill v. Walker (C. C. A. 8), 167 Fed. 241, 243 et seq., 92 C. C. A. 633; Nichols v. Cleveland (C. C. A. 6), 247 Fed. 731 and note at 733, 159 C. C. A. 589; Foster's Fed. Practice (4th Ed.) vol. 2, p. 960.[2] Apart, therefore, from the fact that the assignments of error do not raise the question of jurisdiction, we think defendants precluded from asserting in this court the defense of lack of jurisdiction, which, indeed, seems never to have been brought to the actual attention of the District Court. It would, however, be our duty to dismiss the suit upon our own motion, if it

[2] See, in this connection, Chase v. Wetzler, 225 U. S. 79, 85 et seq., 32 Sup. Ct. 659, 56 L. Ed. 990; Roberts v. Langenbach (C. C. A. 6) 119 Fed. 349, 352, 56 C. C. A. 253; Detroit, etc., Ry. Co. v. Kimball (C. C. A. 6) 211 Fed. 633, and note at page 635, 128 C. C. A. 565.

satisfactorily appeared that it does not involve a controversy within the jurisdiction of the District Court. Judicial Code, § 37 (Comp. St. § 1019).

But such is not the case. Upon the face of the pleadings jurisdiction is, prima facie, affirmatively shown. Adams v. Shirk, supra, 117 Fed. at p. 805, 55 C. C. A. 25. Not only would there otherwise seem no reason to question that plaintiff is a citizen of New York, in view of the express and sworn allegation of the bill and its denial only for lack of knowledge, but in the case of this plaintiff against these same defendants, heard in the court below and reviewed here (264 Fed. 810 [No. 3354]), the bill expressly asserts that the plaintiff is "a corporation organized and existing pursuant to the laws of the state of New York, and is a citizen of said state"; the answer in terms admits "the corporate capacity of the plaintiff herein," which normally means its corporate capacity as stated in the bill.

As to amount or value in dispute the same result must be reached. As said in Bitterman v. L. & N. Ry. Co., 207 U. S. 205, 225, 28 Sup. Ct. 91, 98 (52 L. Ed. 171, 21 Ann. Cas. 693) the substantial character of this averment is "to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced. Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 336." It is manifestly impossible for any one to state accurately in advance the actual pecuniary loss which would result to plaintiff through the alleged threatened injuries. Griffith v. Vick Co. (C. C. A. 6) 272 Fed. at pp. 248, 249. The evidence in this case generally as to the nature and extent of plaintiff's business makes it appear not improbable that the business sought to be protected is worth much more than the jurisdictional amount of $3,000, and, indeed, that the threatened acts of defendants might reasonably be expected to cause damage to plaintiff in excess of that sum.

[2] 2. Does plaintiff own the tanks? Its written agreements with consumers in plain terms declare that the tanks are not sold, but remain plaintiff's property. They recite that plaintiff is engaged in manufacturing and distributing Prest-O-Lite gas, consisting of dissolved acetylene compressed and stored in uniform steel cylinders, to be used for welding and other purposes; that after a certain use the acetylene becomes exhausted, and that other changes from wear and tear occur, making it impracticable and unsafe for others than the original manufacturer to refill the tanks; that it is necessary that plaintiff hold tanks in reserve while the empty cylinders are being retested, repaired, and refilled, in order to obtain continuous and uninterrupted service. There is express declaration that for the reasons recited it is intended that the title to the cylinders should remain in plaintiff; that in consideration of the consumer's payment as rental of $25 or $50 (dependent on the size of tank), plus an exchange fee later mentioned, plaintiff shall deliver to the consumer at any of its branches or operating plants east of the state of Colorado a given number of tanks of a described style filled with acetylene gas, and shall

hold at the consumer's disposal (or that of the holder of the cylinders) reserve tanks necessary to make immediate exchanges.

It is provided (1) that the tank shall be redelivered to plaintiff whenever it becomes exhausted of gas, plaintiff thereupon immediately delivering to the consumer (or to the holder of the redelivered cylinder), not the same tank, but a standard tank of similar size and style, regardless of the condition in which the surrendered tank might be at that time through ordinary wear and tear, unavoidable accident, or act of God; (2) that in such exchange no payments shall be made plaintiff at greater rate than the lowest current price charged by it for exchanges in similar quantity in the locality where the tank issued shall be used, such exchange price being based on the number of cubic feet of acetylene gas contained in the tank; (3) that, if plaintiff unreasonably refuses to issues its tanks as agreed, it shall pay the consumer (or his assignees) an amount equal to the sum paid upon the original issue of the tank, less 5 per cent. for each year the agreement shall have run, but in no case less than 50 per cent. of the original payment; (4) the customer is given authority, through transfer of the tank, to assign all his rights therein.

[3] There is convincing evidence that defendants were actively assisting and encouraging consumers to violate their contracts with plaintiff in having Prest-O-Lite tanks filled by defendants, instead of returning them to plaintiff for that purpose, and with knowledge that they are stamped as plaintiff's property. This is plainly an invasion of plaintiff's rights, unless its contracts with its customers amounted to sales of the tanks, or are void, because unconscionable when made, or for violation of the Clayton Act. We think the contracts under which the tanks were issued are plainly incapable of an interpretation as intended to pass plaintiff's title to the tanks, and that consumers would not be justified in thinking otherwise.

[4] 3. In our opinion plaintiff's contracts cannot be declared unconscionable. It is not open to defendants to raise this question, unless in the right of consumers. The substance of the showing (so far as satisfactory) which may be thought to affect the question of unconscionableness is, we think, this: Plaintiff has no depot at Toledo; its nearest station being at Detroit, which is about 60 miles away. To send cylinders back and forth by rail takes time. The defendants do business at Toledo, and there is testimony on the part of several of plaintiff's customers that defendants' service would be more economical, prompt, adequate, and satisfactory than the given consumer was then able to obtain from plaintiff, and that, but for the provisions of the consumer's contract with plaintiff, and the restraining order issued in this cause, such consumer would have its tanks refilled by the defendant company. It satisfactorily appears that plaintiff, so far as its own action is concerned, meets the demands of its customers with reasonable promptness; its uniform practice has been, on receipt by mail of an exchange order, together with bill of lading for the returned empty tanks, immediately to ship a corresponding number of filled cylinders without waiting for the receipt of the empty ones; the customer thereby receiving the former practically as soon as plain-

tiff receives the latter. In the case of the customer most prominently mentioned in the record it affirmatively appears that the return shipments were in most instances made on the day the bill of lading was received from the consumer, and in no case later than the following day.

We do not understand it to be claimed that plaintiff has ever had a depot at Toledo, or nearer than at Detroit. Plainly, the fact that it is now more convenient for certain customers at or near Toledo to do business with defendants has no tendency to impugn the conscionableness of the contracts when made. Presumably the agreements would not have been made, unless at the time regarded by the consumers as for their interests. The consumers are not obliged to surrender all their rights under their contracts with plaintiff, in case they no longer wish the latter's service. They have an absolute right to transfer their rights to others, who thereby acquire all of the rights of the original consumer. Nor are they forbidden to buy acetylene gas from other dealers, so long as they do not use plaintiff's containers therefor. Nor can it be said that there is anything necessarily unconscionable in the exacting of the initial payments of $25 or $50 (dependent upon the size of the tank), in view of the provision for the return of a part thereof in the contingency before stated, the testimony that the fees mentioned are based upon tank depreciation, repairs, destruction, and replacement (there being testimony tending to show that the expected average life of a tank is about 10 years), as well as interest and taxes on investment in cylinders held in reserve, together with the fact that these payments are said to be below the market value of the respective sizes of tanks—competitors being said to sell those of equal size for $85 and $110, respectively. This testimony is not satisfactorily overcome by the testimony of defendant Young of his belief that the fees so charged by plaintiff as rent are in excess of actual value of the tanks, and that they cost plaintiff less than $25 and $50, respectively, and that the defendant named loans such tanks to large consumers of gas without any other charge than the regular price for refilling, at the same time selling his gas at the same or lower prices than charged by plaintiff. Plaintiff is not bound to do business without profit, nor is the conscionableness of the contracts to be tested by the course defendants see fit to take for purposes of competition.

4. The important question is whether the contract between plaintiff and its customers violates section 3 of the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730; U. S. C. S. § 8835c), which, so far as important here, makes it unlawful to lease "goods, wares, merchandise, machinery, supplies, or other commodities" on the condition, agreement, or understanding that the lessee shall not use the supplies of a competitor of the lessor, where the effect of such lease or condition, agreement, or understanding may be "to substantially lessen competition or tend to create a monopoly." If the transaction were an absolute sale of the tank, any restriction whatever upon its use would be void, independently of the Clayton Act. Motion Pictures Patents Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; Ford Motor Co.

v. Union Motor Sales Co. (C. C. A. 6) 244 Fed. 156, 156 C. C. A. 584. The contract in substance forbids the customer to use in the tank any acetylene gas except that manufactured and packed by plaintiff.

In considering whether the Clayton Act is violated, two questions suggest themselves: First, whether the contract effects a lease of a tank; and, second, whether the refilling of the tanks with gas amounts to using or dealing in "supplies" within the meaning of the act. These two questions are closely interrelated. In our opinion, both must be answered in the negative. Plainly no given tank is leased. Under the contract any tank, of one class or the other, is in the first instance delivered to the customer. This tank is to be returned when empty. The same tank is not then returned to the customer (and may never be), but another tank of the same class is returned, refilled, and so on to the end of the service. The customer has no interest in any particular tank, except while filled and in his possession, and then only because it is the container of the gas, which cannot otherwise be stored and delivered to the customer. The plaintiff holds at the disposal of its customers, in the course of the exchange service, its entire stock of reserve tanks.

The typical case of supplies, as in the Mimeograph Case (Henry v. Dick, 224 U. S. 1; 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880), is not presented. The dominant characteristic of the contract is the furnishing of acetylene gas.[3] It is more proper to say that the delivery of the storage tank as a package or container is merely incidental to the furnishing of the gas than that the former is the subject of a lease and the latter a supply for a leased package. Acetylene gas cannot be bought, sold, or delivered in the market in the way that ordinary merchandise and "supplies" are sold and delivered. Practically and commercially it can be delivered only by filling the package with gas compressed therein, a circumstance which differentiates it from supplies as the term is ordinarily used. The case presented is sui generis, and no case on all fours with it has been found.

Nor are we impressed that the contracts in question substantially or unreasonably lessen competition or tend to create a monopoly. Not only is there no suggestion of agreement between competing companies, through division of trade or regarding price, but the record shows a highly active competition between plaintiff and defendants, no stifling of which can be suggested, unless in the bare fact that the customer under contract with plaintiff is more apt, other things being equal, to obtain its gas from plaintiff than from a competitor. The case presents some, although not a perfect, analogy to the so-called pump and tank cases,[4] where it is held that a requirement that dealers distribute only the loaner's gasoline from leased devices is not an unfair method of competition, nor does it substantially lessen competition. Some meas-

[3] See, in this connection, Prest-O-Lite Co. v. Ray, supra, 220 N. Y. at p. 526, 116 N. E. 350.

[4] Standard Oil Co. v. Fed. Trade Com'n (C. C. A. 2) 273 Fed. 478; Canfield Oil Co. v. Fed. Trade Com'n, 274 Fed. 571, decided by this court June 29, 1921.

ure of support for our conclusion is found, also, in Curtis Publishing Co. v. Federal Trade Commission (C. C. A. 3) 270 Fed. 881.

In our opinion the instant case is not brought within either the letter or the spirit of the Clayton Act.

The decree of the District Court is accordingly affirmed.

SMALL GRAIN DISTILLING & DRUG CO. v. HAMILTON, Collector of Internal Revenue, et al.

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

No. 3596.

Internal revenue ⇐24—Intoxicating liquors ⇐146(1)—Manufacturers and wholesale druggists only authorized to sell at wholesale.

Under National Prohibition Act, tit. 2, §§ 3, 6, 11, manufacturers and wholesale druggists only are authorized to sell liquor at wholesale, and a jobber is not entitled to a permit to withdraw whisky from bond for sale to druggists.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Small Grain Distilling & Drug Company against Elwood Hamilton, Collector of Internal Revenue, and another. Decree for defendants, and complainant appeals. Affirmed.

A. J. Carroll, of Louisville, Ky., for appellant.

W. V. Gregory, U. S. Atty., of Louisville, Ky. (S. N. Russell, Asst. U. S. Atty., of Louisville, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Prior to January 16, 1920, the date when the National Prohibition Act (41 Stat. 305) took effect (see Dillon v. Gloss [May 16, 1921] 256 U. S. ——, 41 Sup. Ct. 510, 65 L. Ed. ——), the appellant (hereafter called the jobber) had been for some time a wholesale dealer in, or jobber of, whisky, and owned a considerable stock, part tax-paid and on the floor in its store, and part non-tax-paid and evidenced by bonded warehouse receipts. The jobber was permitted to sell its floor stock to druggists, but was refused any permission to tax-pay and withdraw any of its whisky in a bonded warehouse in connection with a sale thereof to wholesale druggists. In refusing such permission, the defendants below were acting pursuant to the opinion of the Attorney General, who had advised that jobbers did not have the right here claimed. The appellant filed its bill in the court below against the chief enforcement officer and the collector, and asked a preliminary injunction. The court denied this request and, on defendants' motion, dismissed the bill.

Section 3 of title 2 of the act is an absolute prohibition of manufacturing, transporting, or possessing any intoxicating liquor, except as authorized in the act, and provides further that, while liquor

for non-beverage purposes may be dealt in, this may be done "only as herein provided" and upon permit therefor. Section 6 wholly prohibits the manufacture, sale, or transport of liquor without a permit from the Commissioner (with exceptions not now important). Section 11 provides:

"All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities."

We have no doubt that it was within the power of Congress, conferred by the Eighteenth Amendment, to regulate and limit the sale of non-beverage liquor as far as Congress might reasonably think regulation and limitations were necessary to the effective enforcement of the prohibition of beverage liquor; indeed, this power thus to limit is not questioned by appellant's counsel, and we therefore come to the question whether, by the National Prohibition Act, Congress intended that jobbers of whisky should go out of business, since to permit wholesale druggists to buy only from manufacturers, and to permit retail druggists to buy only from manufacturers or wholesale druggists, might well be thought reasonably incidental to the authorized result. The prohibitory language of sections 3 and 6 is prima facie universal; those who seek to show a right within the exceptions stated must make that right clear. Nowhere in the act is the right of any one recognized to make sales at wholesale, except as section 11 necessarily implies that manufacturers and wholesale druggists may do so. The intermediate class of wholesalers and jobbers who are not druggists was well known, and the act could hardly have failed to provide a system of permits for them, if it was intended that they should have it. While it is by no means beyond dispute, yet we think it is reasonably clear that the act, in its general aspect and by the sections which have been quoted, evidences an intent that sales to druggists shall be made only by manufacturers and wholesale druggists. This conclusion is fortified by that clause of section 3, which says:

"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."

Coming to other specific sections and their intent: Section 10 is as follows:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The Commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided."

It is argued that section 10 provides that all persons selling shall make certain records, while section 11 requires manufacturers and wholesale and retail druggists selling to make certain additional records, and hence that the sales contemplated by section 10 reach sellers

not within the enumeration of section 11. There would be force in this inference, if sections 10 and 11 each related only to sellers; but section 10 is much more general. It provides for a general and primary record to be made by every person handling liquor, whether that person is vendor, or vendee, or carrier, and it prescribes a duty for every person concerned in the sale or delivery. Section 11 relates to vendors only, and prescribes a duty for them only. When this difference is observed, it is clear that the inference naturally to be drawn from section 11, that manufacturers and wholesale druggists are the only permissible wholesale vendors, is not weakened by any inconsistent inference from section 10.

Section 17 prohibits all advertising of liquor for sale, but permits manufacturers and wholesale druggists to mail price lists of the whisky they have for sale. Such inference as may be drawn from this section is confirmatory of that arising under section 11, viz. that it is only manufacturers and wholesale druggists who may lawfully sell at wholesale.

Section 37 is as follows:

"Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor." The remainder is not now pertinent.

Appellant's argument, based upon this section, is that it was intended to recognize the lawfulness of the business in question as carried on by jobbers, in so far as such business pertained to whisky manufactured before the act. This section says that nothing contained in the act shall "prevent the transportation of such liquor to * * * any wholesale druggist for sale to such druggist," and it is said that the right to transport for sale necessarily implies the right to sell, and carries with it, incidentally, the right to tax-pay and withdraw and sell old whisky in bond. It was thought by the Attorney General, in his opinion furnished to the Secretary of the Treasury (32 Atty. Gen. Op. 392), that the intent of section 37 was to permit jobbers to sell to druggists the tax-paid whisky which the jobbers had on their floors when the act went into effect, but that the right did not extend to the jobber's whisky in bond, evidenced by warehouse receipts. It is not easy to see any basis for this distinction. If there was an intent to authorize one class of sales by the jobber, it would seem that a similar intent must arise as to the other class. However, we think that an intent to allow the jobber to make either class of sales cannot be inferred from this section with that certainty necessary to establish an exception to the general prohibitions elsewhere found.

Section 37 does not deal directly with sale at all, but with two of the other generally prohibited things, viz. storage and transportation. It covers three classes of acts: (a) Storage in bonded warehouses; (b) transportation to bonded warehouses for storage; and (c) transportation to druggists for sale. The permission to store would naturally apply to all owners of whisky adapted to that purpose; but we think the reasonable meaning of (b) and (c), in view of the whole act, is

that the permission to transport to a warehouse for storage, or to a drug store for sale, applies only to that whisky otherwise authorized to be stored, and to those owners otherwise authorized to sell to druggists. The section, by permitting transportation, does not imply the right to sell. It intends only to permit the transportation of that which may lawfully be sold by the shipper to the consignee. The contrary conclusion would require us to say that permission to transport implies the right to sell, and that the right to sell, thus implied, furnishes the only known reason for permitting the transport, and, when thus stated, that construction is plainly untenable.

Accordingly we concur in the view underlying the decree below, viz. that the jobber has no right to sell to druggists the jobber's whisky in bond, and is not entitled to a permit therefor.

The decree is affirmed.

HUDSON v. HUDSON.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1921.)

No. 3734.

1. **Husband and wife ⟸49½(6)—Gift to wife not invalidated by subsequent joint use of property.**
   A gift by a husband to his wife where there is evidence of delivery is not rendered ineffective by the fact that during the marriage the property was jointly used.

2. **Appeal and error ⟸204(1)—Admission of evidence not objected to not ground of reversal.**
   A judgment for conversion is not subject to reversal because some of the evidence as to value was subject to an objection which was not made.

In Error to the District Court of the United States for the Eastern District of Texas; James Clifton Wilson, Judge.

Action at law by Mrs. Anna Bell Hudson against D. C. Hudson. Judgment for plaintiff, and defendant brings error. Affirmed.

John J. King, of Texarkana, Tex. (J. Q. Mahaffey and J. I. Wheeler, both of Texarkana, Tex., on the brief), for plaintiff in error.

C. A. Wheeler and S. I. Robison, both of Texarkana, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. After the defendant in error (herein referred to as the plaintiff) separated from the plaintiff in error (hereafter referred to as the defendant), about two months after their marriage, the former brought this suit to recover damages for the alleged conversion by the latter of described personal property, including an automobile, a piano, household furniture, and china and silverware, which it was alleged the defendant gave and delivered to the plaintiff as her separate property prior to and during the time they were living together as husband and wife. There was judg-

ment on a verdict in favor of the plaintiff assessing damages for the conversion of the above-mentioned articles.

Evidence in behalf of the plaintiff was to the following effect: About a month or six weeks before the marriage the defendant told the plaintiff that he was going to give her a car and asked her what kind she wanted, and she told him a Chandler. He bought a Chandler car, and brought it to the plaintiff's home, saying to her at that time that he was giving it to her as a present. From that time until the day of the marriage the car was kept in a garage at the residence of the plaintiff's father, where she lived, and was used by her. Several weeks prior to the marriage, after the defendant had mentioned to the plaintiff that he had children by a former wife, and that he was going to give her furniture so that it could not be taken from her in case of his death, they went together to a furniture store, and the plaintiff selected the furniture, the defendant on that occasion telling her to go ahead and get what she wanted. After the furniture so bought was delivered prior to the marriage at the residence the defendant had provided, the plaintiff went there and superintended the placing and arranging of the furniture. The day after the marriage the defendant told the plaintiff that he had bought her a piano for a wedding present, and that, if the one he had bought did not suit her, she could exchange it for another, and the plaintiff selected another piano of the same make, but having a different polish, and the one chosen by the plaintiff was delivered at the place of residence of herself and the defendant. The china and silverware were selected by the plaintiff before the marriage in pursuance of defendant's statement to her that he wanted her to go and get it, to get just what she wanted; that it was hers and for her use. While the plaintiff and defendant lived together as husband and wife the articles mentioned were kept at their place of residence, the husband and wife sharing in the use made of the automobile, the furniture, and the china and silverware. When the plaintiff left she took some of the silverware with her. Thereafter the defendant refused to allow her to take the other articles. There was evidence in conflict with material parts of that above summarized.

[1] The defendant excepted to the court's refusal to give the following requested written instruction:

"In this case, before the jury would be authorized to find any verdict for the conversion by the defendant of any of the property described in the plaintiff's petition, they must find that the plaintiff has proved by a preponderance of the evidence, not only that the defendant by words said he gave her the property, but in addition to this that the defendant delivered into the actual and exclusive possession of the plaintiff the property which she alleges he gave her, and unless the plaintiff has so proven by a preponderance of the evidence you will find for defendant."

In its oral charge the court instructed the jury to the effect that in order for such a gift as was claimed to be valid and binding upon the defendant it was necessary that the property be conveyed by a delivery of the actual control and possession of it, and that the fact that there was a joint use of the property by the husband and wife is not conclusive that there was no such gift.

We do not think that the above-mentioned rulings were erroneous. The delivery which is required to consummate a gift may consist in the donor authorizing and enabling the donee presently to take as owner, with the result that the donee acquires such dominion and control as owner as reasonably might be expected in view of the circumstances of the transaction and of the relations existing between the parties to it. If the donor's conduct and declarations show that dominion and control as owner were conferred on the donee, the fact that the donor thereafter shared in the use made of the thing does not keep the transaction from being effective as a gift, where the relations of the parties are such that their joint or common use of the thing is consistent with the donee being the owner of it. Where the transaction is one between husband and wife the required delivery need not involve the exclusion, while the parties live together as husband and wife, of the donor from participation in the use and possession of the subject of the gift. Blake v. Jones, Bailey, Eq. (S. C.) 141, 21 Am. Dec. 530; Morgan v. Ball, 81 Cal. 93, 22 Pac. 331, 5 L. R. A. 579, 15 Am. St. Rep. 34; 12 R. C. L. 936, 937. It is not uncommon, after a gift has been made, for the donor to share in the use or enjoyment of the thing given.

[2] As to some of the articles alleged to have been converted it is contended that there was no proper evidence of their value at the time of the alleged conversion. Evidence as to the prices paid by the defendant for the several articles a short time before the date of the alleged conversion was admitted without objection. In no way did the defendant invoke a ruling of the court on the question of the presence or absence of evidence upon which to base findings as to the value of the articles. No objection or exception was made to the action of the court in instructing the jury to find the reasonable and fair value of the property in the event of their finding that it was converted by the defendant as alleged. In the situation disclosed by the record the judgment is not subject to be reversed on the ground that some of the evidence as to value was subject to an objection which was not made.

The record does not show any reversible error.

The judgment is affirmed.

PIERCE OIL CORPORATION v. YOES et al.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1921.)
No. 3657.

Trial ⇐253(4)—Instructions which fail to submit material issues erroneous.

In an action for personal injuries to plaintiff resulting from the explosion of a can of gasoline which she bought for kerosene, based on the alleged negligence of defendant in furnishing to the retail dealer from whom plaintiff purchased gasoline instead of kerosene, instructions which permitted plaintiff to recover on a finding that gasoline was sold and delivered by defendant to the retail dealer as kerosene, regardless of any

question of negligence, and which failed to state to the jury the effect of plaintiff's contributory negligence, which was pleaded by defendant, if found, *held* erroneous as not responding to the issues.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action at law by Mrs. Annie Yoes and others against the Pierce Oil Corporation. Judgment for plaintiffs, and defendant brings error. Reversed.

S. B. Cantey and Alfred McKnight, both of Fort Worth, Tex., for plaintiff in error.

P. A. Martin, of Wichita Falls, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action against the plaintiff in error, the Pierce Oil Corporation (herein called the defendant), to recover damages for personal injuries sustained by the defendant in error Mrs. Annie Yoes (herein called the plaintiff), in consequence of an alleged explosion of gasoline in a can when she, believing that the fluid in the can was coal oil or kerosene, poured a small quantity of it on some wood she had arranged in a stove and with one hand struck a match to start a fire, while she was holding the can away from the stove with her other hand. The petition alleged that the injuries were the direct and proximate result of negligence on the part of the defendant, its agents, servants, or employees, in that they sold gasoline instead of kerosene to one Weinzaffel, a retail merchant, who sold the fluid in the can as kerosene. The petition alleged that the defendant, its agents, servants, or employees, either placed gasoline in a kerosene container, or that the defendant's agent or servant who was charged with the duty of delivering kerosene to Weinzaffel negligently and carelessly delivered gasoline. The above-mentioned allegations of the petition were duly put in issue; and the defendant set up as contributory negligence of the plaintiff that she undertook to start a fire in the stove in a manner which was dangerous and liable to result in an explosion, whether the fluid she used was kerosene or gasoline, in that she poured some of the fluid on fuel in the stove, and, while holding the can in one hand, with the top or spout left open, struck a match with the other hand, with the result that the fumes from the fluid were ignited, the explosion being caused thereby. A phase of the evidence adduced in the trial tended to prove that an employee of the defendant who was charged with the duty of delivering kerosene bought from the defendant by Weinzaffel negligently, but not intentionally, delivered a barrel of gasoline, and that the fluid used by the plaintiff was part of the contents of that barrel, sold by Weinzaffel as kerosene. Other evidence adduced was to the effect that that barrel contained kerosene. Testimony of the plaintiff was to the following effect. On the morning the explosion occurred she poured some of the fluid in an oil can on wood and chips in a stove and applied a lighted match. She then went into another room with

her baby. After putting the child down she returned to the room containing the stove, and finding that the fuel in the stove was not burning, poured some more of the fluid on it, and, while holding the open can in one hand, struck another match with the other hand, whereupon the explosion occurred. There was evidence furnishing support for a finding that what the plaintiff did was dangerous and likely to result in an explosion, though the fluid so used was kerosene. The defendant excepted to the court's refusal to instruct the jury to find in its favor and to portions of the court's charge to the jury which will be referred to.

In behalf of the defendant it is contended that a verdict in its favor should have been directed, on the ground that there was no evidence to warrant a finding that the fluid used by the plaintiff was part of that sold by the defendant to Weinzaffel as kerosene. The record does not sustain this contention.

A part of the court's oral charge to the jury was to the effect that the plaintiff was entitled to recover if she was injured in consequence of her undertaking to light a fire with gasoline bought from Weinzaffel as kerosene, which the defendant had sold and delivered to Weinzaffel as kerosene. That part of the charge was excepted to on the ground that under it the defendant could be held to liability in the absence of any negligence on its part in its transaction with Weinzaffel. We are of opinion that the exception was well taken. The claim asserted by the petition was based upon specified negligence chargeable against the defendant. Negligence alleged was a material element of the cause of action pleaded. The petition could not properly be sustained without a finding that there was negligence in a respect alleged. Under the evidence adduced the defendant could not be held to liability to the plaintiff except upon the ground of negligence chargeable against the former. It was not claimed that the defendant or anyone acting for it knowingly delivered gasoline on a sale of kerosene.

In another part of its charge the court gave the jury instructions for their guidance in determining whether the plaintiff was or was not negligent. No part of the charge informed the jury of the effect to be given to a finding that the plaintiff was guilty of contributory negligence. The defendant excepted to the part of the court's charge dealing with the subject of contributory negligence on the part of the plaintiff, because of its failure to inform the jury that the plaintiff was not entitled to recover if the jury found from the evidence that she was guilty of the contributory negligence pleaded by the defendant. The issue of contributory negligence on the part of the plaintiff was duly raised by the pleadings and the evidence. The defendant was entitled to have the jury adequately instructed by the court with reference to that issue. The part of the court's charge which undertook to deal with that issue was subject to objection on the ground that it failed to inform the jury of the effect to be given to a finding from the evidence that the plaintiff was guilty of the contributory negligence set up as a defense. The last-mentioned exception duly

called to the court's attention a fault in its charge of which the defendant was entitled to complain. The overruling of that exception was error calling for a reversal.

Because of the above-mentioned errors, the judgment is reversed.

ROUSSO v. BARBER et al.

(Circuit Court of Appeals, Third Circuit. November 3, 1921. Rehearing Denied November 22, 1921.)

No. 2741.

1. **Patents ⟸303—Discretion in ruling on application for preliminary injunction is judicial.**
   The sound discretion which the law requires of a judge in granting or refusing an application for preliminary injunction in a suit for infringement of a patent is not a mere personal whim, but is a judicial discretion, based on some valid matter.
2. **Patents ⟸298, 301(6)—Relative injury and obvious infringement considered in temporary injunction ruling.**
   In ruling on an application for preliminary injunction to restrain infringement of the patent, the judge may consider whether injustice might be inflicted on defendant greater than the benefit that might accrue to complainant, whether the injury to complainant by refusal of the injunction is one which a subsequent decree might not repair, and whether the infringement is an obvious one.
3. **Patents ⟸303—Refusal of temporary injunction held not abuse of discretion.**
   The refusal of a temporary injunction to restrain the infringement of a patent was not an abuse of discretion, though the validity of the patent had been sustained in prior adjudications, where the manufacturer of the alleged infringing device had ceased to manufacture, and the user was able to respond in damages for the infringement by the use, and where it appeared that the alleged infringing article was manufactured under a patent not considered in the adjudications of plaintiff's patent, and which was pending in the Patent Office at the same time of defendant's application, so that the presumption is there was patentable difference between the articles.
4. **Patents ⟸303—Judge need not decide issue between patents on application for preliminary injunction.**
   The trial judge is not bound, on the application on preliminary injunction to restrain infringement of a patent by an article manufactured under another patent, to decide the issue between the contesting patents.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit for infringement of patent by Jacques Rousso against Reuben E. Barber and another. From an order denying a motion for preliminary injunction, complainant appeals. Affirmed.

Joshua R. H. Potts, of Chicago, Ill. (George H. Rankin, of Pittsburgh, Pa., and Brayton G. Richards, of Chicago, Ill., of counsel), for appellant.

Henry Oliver Evans, of Pittsburgh, Pa., and Moseley Arthur Keller, of New York City, for appellees.

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

WOOLLEY, Circuit Judge. This appeal is from an order of the District Court denying a motion for preliminary injunction in a patent case. The suit is based on Letters Patent No. 1,157,046 to Rousso for a towel cabinet. The error charged to the trial court was its refusal to be controlled in the exercise of its discretion by prior adjudications sustaining the validity of the patent and by what is claimed to be palpable infringement. Philadelphia Trust Co. v. Edison E. L. Co., 65 Fed. 551, 13 C. C. A. 40; Elite Pottery Co. v. Dececo Co., 150 Fed. 581, 80 C. C. A. 567; Sherman-Clay & Co. v. Searchlight Horn Co., 214 Fed. 99, 130 C. C. A. 575.

[1, 2] Obviously, the "sound discretion" which the law requires of a judge in granting or refusing an application for a preliminary injunction in an infringement suit is not a mere personal whim, but is a judicial discretion based on some valid matter moving the court to its judgment. One of the matters to which the judge's mind is almost always directed is whether, in granting an injunction, an injustice might be inflicted upon the defendant greater than any benefit that might accrue to the complainant. Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 494, 121 C. C. A. 615. Another matter is whether in refusing an injunction, the injury which the complainant might sustain is one which a subsequent decree might not repair. Pullman v. Railway (C. C.) 5 Fed. 72, 73. Still another is the fact of obvious infringement, made more controlling when the infringement is of a patent which has been sustained by prior adjudications. But in this case it appears that the learned trial judge in denying the injunction did not yield to a mere personal notion nor lightly regarded the interests of the parties, but on the contrary based his action on several valid considerations: First, the lack of evidence showing irreparable injury to the complainant if an injunction were denied; and second, the presence of evidence showing some injury to one of the defendants if an injunction were granted.

[3, 4] Barber made the alleged infringing towel cabinets and Edith Oliver Rea placed them in the lavatories of her office building for public use. Barber had made only about sixty of the cabinets and had ceased manufacturing them several years ago. New York Grape Sugar Co. v. American Grape Sugar Co. (C. C.) 10 Fed. 837. Edith Oliver Rea is financially responsible for any damages resulting from her infringement as an user. However this may be, the pertinent matter by which the learned trial judge was evidently controlled in the exercise of his discretion is the fact that the alleged infringing towel cabinets were made under a patent to Barber; that the complainant's patent, though several times held valid, has not been adjudicated (so far as we are informed by the reported cases) with reference to Barber's invention; that both Rousso's application for a patent and Barber's application were pending in the Patent Office at the same time; that no interference was order between the co-pending applications; that Barber's patent has the Patent Office presumption of patentable difference and

of validity; and that, in consequence, his manufacture of towel cabinets under his patent was not such a palpable infringement as would sway the mind of a judge on an application for preliminary injunction. Brush Electric Co. v. Electric Storage Battery Co. (C. C.) 64 Fed. 775; Bailey Ringing Machine Co. v. Adams, Fed. Cas. No. 752. As the trial judge was not bound, at this stage of the case, to decide the issue between the contesting patents, we cannot say that he abused his discretion.

The decree below is affirmed.

DUNCAN et al. v. GIRAND.

(Circuit Court of Appeals, Fifth Circuit. November 18, 1921.)

No. 3736.

Bankruptcy ⊂=217(1)—Court held without power to enjoin foreclosure suit in state court.

A federal court *held* without authority at suit of a trustee in bankruptcy to enjoin prosecution in a state court to foreclose a mortgage given by third parties on real estate afterward purchased by bankrupts subject to the mortgage, where, while the trustee was made a party, no relief was asked against him.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

In Equity. Suit by W. G. Girand, trustee in bankruptcy of C. H. Butler and others, doing business as the Bank of Ranger, against T. W. Duncan and others. From an order granting an injunction, defendants appeal. Reversed.

J. M. Wagstaff, of Abilene, Tex., for appellants.

C. G. Whitten, of Abilene, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is an appeal from an order enjoining appellants from further prosecuting a suit to foreclose a mortgage upon real estate brought in a state court in Texas. The injunction issued in response to the prayer of the bill filed January 3, 1921, by the trustee in bankruptcy, upon the following state of facts: May 14, 1918, one Richard Gray and Blanche Gray, his wife, executed a purchase-money mortgage to secure the payment of two notes of $4,000 each, payable two and three years after date, respectively. Interest was payable semiannually. The mortgagors covenanted to pay the taxes, and to keep the property insured, and also to pay the notes and interest when due, and that in case of any default the entire indebtedness should at once become due and payable together with an attorney's fee of 20 per cent. The mortgage was duly recorded. The taxes and insurance premiums were not paid. January 11, 1919, there was a payment of $2,000 on one

of the notes, and interest on both notes was paid to November 14, 1919. The bankrupts, presumably prior to their bankruptcy, acquired the legal title, subject to the mortgage lien of appellants; and May 21, 1920, appellants filed suit to foreclose the mortgage against the original mortgagors. The trustee in bankruptcy, appellee here, was also made a party defendant. At his instance the foreclosure suit was continued at the October, 1920, term of court. Upon being informed that appellants desired to proceed with the foreclosure suit at the January, 1921, term, the trustee in bankruptcy brought this suit.

The mortgage created a valid lien which was not affected by the proceedings in bankruptcy. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. The right to enforce this lien by suit existed in favor of appellants only in the state court. No relief was sought against the trustee in bankruptcy. The trustee's title to mortgaged property is subject to the lien of the mortgage, and he is not obliged to take the title if the lien is a burdensome one. First National Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408. But, if the trustee desires to take the title, he can only do so by discharging the lien of the mortgage.

It was error to grant the injunction unless it was authorized by some law relating to proceedings in bankruptcy. R. S. § 720 (Comp. St. § 1242).

Section 23 of the Bankruptcy Act (Comp. St. § 9607) makes it clear that suits at law and in equity, "as distinguished from proceedings in bankruptcy," between trustees in bankruptcy and adverse claimants, were not withdrawn from the general jurisdiction of either State or federal courts. The general provisions of section 2 (7, 15) of the act (Comp. St. § 9586), empowering courts of bankruptcy to determine controversies in relation to the estates of bankrupts, and to issue all necessary orders, are relied upon by appellee to sustain the decree of the court below. It is not doubted that bankruptcy courts have power to protect their jurisdiction by writs of injunction. That power exists in all federal courts, notwithstanding section 720 of the Revised Statutes.

Section 11a of the act (Comp. St. § 9595) provides that a suit which is founded upon a claim from which a discharge would be a release may be stayed. Unless a suit is so founded, it was not intended that it should be stayed or enjoined. Metcalf v. Barker, supra.

No claim is made against the bankrupts in the foreclosure suit, and their discharge would not be a release from the lien of the mortgage. The claim which appellants are seeking to establish is against the original mortgagors, and cannot be affected in the slightest degree by the proceedings in bankruptcy.

It is apparent that the purpose of this suit is to prevent the collection of an attorney's fee if possible, and, if not, to prevent the collection of an amount as large as that contracted for. The right to an attorney's fee had accrued under the terms of the mortgage, by reason of the failure to pay taxes, insurance premiums, and interest. The bill does not offer to do equity, but insists upon being relieved

of an obligation which any court would be bound to recognize and enforce. We are of opinion that appellee should submit his rights to the state court.

The decree is reversed, and the cause remanded, with directions to dismiss the bill of complaint.

THE HELLIG OLAV.

(District Court, S. D. New York. September 17, 1921.)

No. 713.

Shipping ⇐141(1)—Failure to deliver cargo held due to restraint of princes.

A steamship bound for Copenhagen, with contraband cargo on board, was seized and taken to a British port, where the contraband was found, but was allowed to proceed to deliver her passengers and other cargo on an agreement by the agent of the steamship company to return the contraband cargo to England. On arrival at Copenhagen, it refused to deliver such cargo to the consignee and returned it to England on another vessel, where it was condemned by the prize court. *Held* that, in so carrying such cargo from and back to a British port, the company acted as agent of the British government, which did not lose its possession, and that the failure to make delivery to the consignee was due to restraint of princes within the exception of the bills of lading.

In Admiralty. Suit by the Sulzberger & Sons Company against the steamship Hellig Olav. Libel dismissed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Charles R. Hickox and E. S. Murphy, both of New York City, of counsel), for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder and Roscoe H. Hupper, both of New York City, of counsel), for claimant.

AUGUSTUS N. HAND, District Judge. This is a libel by the owners of cargo who charge that the steamship Hellig Olav on arriving at her port of destination failed to deliver the cargo, but that it was brought back to England in another vessel of the same line, where it was condemned as prize. The cargo was oil, meat and lard, and was contraband. The vessel sailed from New York April 1, 1915, and on April 10, when about 70 miles west of Scotland, was stopped by a British cruiser, which required her to proceed to Kirkwall for inspection. There, on April 11th, British officers came aboard and took the ship's papers. On April 14th, a British officer returned the papers and told the master that the ship was free to proceed on her voyage. In the interval between her arrest and sailing from Kirkwall, the London ship's agent gave a guaranty on behalf of the owners that if the vessel was allowed to proceed the cargo would be returned to England as soon as possible. This course was taken to convenience the steamer and to avoid delay to passengers and other cargo which would have

attended unloading contraband merchandise at Kirkwall. The Hellig Olav proceeded to Copenhagen, unloaded her cargo, but refused to deliver the contraband cargo in question, though demand for delivery was duly made by the consignee, and the cargo was brought back to Newcastle, England, on the steamship Alexander, of the same line, where it was condemned as lawful prize. This suit is brought in rem for failure to deliver, and conversion of the cargo.

The libelant appeared in the British Prize Court and, after the Crown had put in its proof, withdrew its claim and admitted that the merchandise was contraband. The decree of Sir Samuel Evans, Judge of the Prize Court, was pronounced on June 20, 1916.

The master was not served with any notice of seizure of any cargo at Kirkwall, and did not know anything about the arrangement between the ship's agents and the Crown for the return to England of the contraband; but he did not have anything to do with the delivery of cargo. It was left at Copenhagen and afterwards returned by the company to England.

The bills of lading contained the provision that—

"The carrier shall not be liable for loss or damage occasioned * * * by arrest and restraint of princes, rulers or people."

The question involves an important but exceedingly narrow point of law as to just what constitutes a "restraint of princes." Decisions upon a state of facts similar to those presented in this case are strangely few. Indeed, I have been referred to none where the situation is absolutely identical.

Certainly there was a "restraint of princes" at Kirkwall, for the ship was boarded and the papers were taken for the purpose of ascertaining whether she carried contraband merchandise, and of bringing such merchandise into the Prize Court if it was found. The merchandise in suit was found, and it is not disputed that it was contraband. At the request of the ship's agent it was not unloaded at Kirkwall and taken before a Prize Court, but was allowed to be carried out of the jurisdiction upon the promise to bring it back. Was this treatment of the merchandise a release from actual or constructive control which terminated the restraint so that the carriage to Copenhagen was had under the bills of lading and subject to the obligation imposed by the terms of those documents requiring delivery to the consignees?

The guaranty relating to the contraband goods in question was given by the ship's agents at London to the Director of Trade Division, Admiralty War Staff, and was in the following language:

"* * * In consideration of your allowing this steamer to proceed to Norway and Copenhagen, we hereby guarantee that the goods specified * * * shall be returned to this country as soon as possible."

In my opinion the most reasonable interpretation of the dealings between the parties is that the steamship company acted as the agent of the British government to carry the contraband merchandise to Denmark and return it thence to England to await the action of a prize court. This is what was in fact done, and I can see no peril to commercial understandings and transactions involved in such a decision.

Where a vessel has been arrested and released with advice or direction to go, or not to go, to certain ports, it has been held that the restraint had ceased and the voyage was not broken up. King v. Delaware Ins. Co., 6 Cranch, 71, 3 L. Ed. 155; Richardson v. Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92. In those cases, however, there was no attempt, as in the present suit, to retain an actual or constructive possession for the purpose of having a vessel or its cargo, adjudged a prize. In King v. Delaware Ins. Co., supra, there was no arrest to secure a prize, but a warning to an American vessel by a British vessel, after the unconditional release of the former, not to proceed to a French port. The warning was held by the Supreme Court to be based on a misunderstanding of the effect of British orders in Council, and not to constitute a restraint. In Richardson v. Marine Ins. Co., supra, an American vessel was boarded by a British privateer and advised to return home and not to proceed to Malaga, as the British orders in Council had declared a blockade of Spanish ports. There was no arrest of the ship, nor agreement on her part to carry out the advice of the privateer. It was held that the mere fear of loss was not a peril within the policy which justified the assured in abandoning the vessel as a total loss.

In King v. Delaware Ins. Co., supra, Chief Justice Marshall said:

"There did not, then, at the time the voyage was abandoned, exist, either in fact or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure."

It is contended that the company was in this case under no control of Great Britain as to the contraband cargo after the vessel was allowed to proceed from Kirkwall, and that it returned the cargo quia timebat and not because of any restraint of princes. All that depends on whether the voyage was broken up so far as the cargo in question was concerned before the vessel left Kirkwall. In The Alexander, Fed. Cas. No. 164, it was urged that the capture had been abandoned because no prize crew, but only a single prize master, had been put on board while the vessel was navigated by the captain and crew. Mr. Justice Story said:

"It is true that the master and crew of a prize ship are not compellable to navigate her, but if they voluntarily engage so to do, it is a legal waiver of the prize crew; and the parties are bound by their engagement, and the capture stands absolute. Such was the express decision of Sir William Scott in The Resolution, 6 C. Rob. (Adm.) 13, a case which as to the fact of capture, strongly resembles that before the court. This doctrine has also been fully recognized in the courts of common law, and does not seem to admit of any reasonable doubt. Wilcocks v. Union Ins. Co., 2 Binn. 574. * * * What indeed is necessary to constitute a capture? In ordinary cases the fact admits no doubt, and in point of law, nothing more is necessary than an intention of capture, followed up by an actual or constructive possession of the property. Force and violence, or physical superiority are not required. It is sufficient if there be a deditio or submission on the one side and an asserted possession on the other."

This sentence of the Circuit Court for the District of Massachusetts was affirmed by the Supreme Court in an opinion written by Chief Justice Marshall. 8 Cranch, 169, 3 L. Ed. 524.

The Alexander and the case of Wilcocks v. Union Ins. Co., 2 Bin. (Pa.) 574, 4 Am. Dec. 480, are in my opinion sufficient authority to justify me in carrying out the clear intention of the parties. The manifest purpose was to preserve, and not to abandon, the prize and to employ the company owning the vessel as an agent of the British government to hold the contraband merchandise until it in due course became amenable to the process of a Prize Court. The fact that it was at one time in Denmark, a neutral country, is quite immaterial. If, as I find to be the fact, it was, when it reached Copenhagen, already a lawful prize in the constructive possession of the captors, it could apparently have been condemned by the British courts. Hudson v. Guestier, 4 Cranch, 293, 2 L. Ed. 625; The Henrick and Maria, 4 Rob. 35; Cheriot v. Foussat, 3 Bin. (Pa.) 257. The transshipment to England, because proceedings in the British court after the merchandise had been returned to that country were more usual and more acceptable to the captors, cannot alter the situation. The acts of the captors were consistent and nowhere showed an abandonment. There was consequently no obligation to deliver the cargo at Copenhagen and a fortiori no conversion.

The libel is dismissed, with costs.

BLUE v. HERKIMER NAT. BANK:

(District Court, N. D. New York. December 3, 1921.)

1. **Highways ⟸113(4)—Assignments of moneys due contractor on road held properly filed.**
   Assignments of moneys due a road contractor from a state and county, filed with the state commissioner of highways, as the head of the department having charge of the construction of such improvement, and the state comptroller, as the officer charged with the custody and disbursement of the funds applicable to the contract therefor, and with the county treasurer, were filed as required by Lien Law N. Y. § 16, though not filed with the state treasurer, though the latter should file such assignments when requested.

2. **Bankruptcy ⟸303(3)—Evidence held insufficient to show assignments of moneys due bankrupt made to defraud creditors.**
   In a suit by a trustee in bankruptcy to set aside assignments of moneys due the bankrupt from a state and county on road contracts, evidence *held* insufficient to show a mutual plan of the bankrupt and defendant assignee to defraud creditors.

3. **Bankruptcy ⟸303(3)—Evidence held to show bill of sale security for loan, not absolute transfer.**
   In a suit against a national bank by a trustee in bankruptcy to set aside a bill of sale of road machinery of the bankrupt, the conduct of the parties, together with the great disparity between the value of the property and the consideration therefor and the fact the transferee was a national bank not authorized to engage in business other than banking, though it might take property in good faith in payment of banking debts previously contracted, *held* to show that the bill was given as security for money loaned and was not intended as an absolute transfer.

4. Bankruptcy ⊜302(4)—Bill of sale not set aside because not filed in town clerk's office or followed by early transfer of possession.

A court, on petition of a trustee in bankruptcy, cannot cancel a bill of sale of road machinery of the bankrupt on the ground it was not filed in the proper town clerk's office or followed by such early transfer of possession as the state statute requires, in the absence of a prayer for such relief and allegations that the instrument was intended to be a chattel mortgage.

5. Bankruptcy ⊜303(3)—Evidence held insufficient to show bill of sale executed to defraud creditors.

In a suit by a trustee in bankruptcy to set aside a bill of sale of road machinery of the bankrupt and for an accounting for the proceeds of the subsequent rental and sale thereof, evidence *held* insufficient, even though the instrument were intended as an absolute transfer, to show an intent to defraud creditors.

In Bankruptcy. Suit by A. Grant Blue, trustee in bankruptcy, against the Herkimer National Bank. Complaint dismissed without prejudice.

Willis, Doolittle & Guile, of Utica, N. Y. (Danaher & Danaher, of Meriden, Conn., of counsel), for plaintiff.

Snyder, Cristman & Earl, of Herkimer, N. Y., for defendant.

COOPER, District Judge. This is a suit in equity brought by the plaintiff as trustee in bankruptcy of Charles W. Tryon against the defendant, the Herkimer National Bank, to cancel and set aside two assignments of moneys due and to become due the bankrupt from the state of New York and the county of Madison on two certain road contracts and a bill of sale of road machinery of the said bankrupt and to compel the defendant bank to account for the moneys so received and the proceeds of the sale and rental of the road machinery.

The two assignments of moneys were made August 21, 1917, and the bill of sale was made September 1, 1917. The petition in bankruptcy was filed on the 4th of February, 1918. The transfers were filed with the head of the highway department of the state of New York, the state comptroller, and the county treasurer of the counties in which the roads were located. The bill of sale was filed in the Herkimer county clerk's office in the town of Herkimer, which was not the town of the bankrupt's residence nor the town in which the machinery was located.

The plaintiff brought this suit upon the theory that at the time of these transfers the bankrupt was insolvent and that both the bankrupt and the bank knew he was insolvent; that there was a mutual plan and scheme of the bankrupt Tryon and the defendant bank to hinder, delay, and defraud creditors, to carry the bank over the four months' statutory period, to enable the bank to secure a preference; and that as a corollary to the conduct of the bankrupt and the bank, the bankrupt was enabled to lull his creditors into security and to hold himself out as the owner of the road building machinery, by means of which he is alleged to have falsely secured credit.

The defense is that Tryon was not insolvent at the time of the

transfer; that the transfers were made prior to the four months' statutory period before bankruptcy; that if he were insolvent, he had no knowledge of his insolvency; that in any event, the bank had no knowledge that Tryon was insolvent at the time the transfers were made or had knowledge of facts sufficient to put it on inquiry; that the bank was entirely innocent and there was entire absence of fraud in the transaction.

It appears by the evidence that prior to 1916 the bankrupt was engaged in road building construction work in and about Meriden, Conn., and elsewhere. In 1916 he entered into a contract with the state of New York for the construction of the Poland-Trenton Highway in the county of Herkimer, moving himself and his family to the village of Poland, near the road, where he resided up to the time of the bankruptcy. Shortly thereafter he entered into a second contract with the state and the county of Madison for the construction of the Munsville-Pratts-Hollow-Pine-Woods county highway in the county of Madison. Both these roads were practically completed at the time of the bankruptcy.

In July, 1916, he had a conversation with Robert Earl, president of the defendant bank, with whom all important transactions took place. He asked for a loan of money, which was not definitely fixed but was to approximate $5,000. He informed Earl that he was borrowing money from a certain person of Meriden, Conn., who, he said, was charging him interest at the rate of 24 per cent. per year. He stated that his road building machinery was worth about $30,000; that he had real property in Meriden, Conn., in which his equity was about $8,000, and he had certain moneys coming on the Poland road contract and a small balance due on a previous contract in Rensselaer county in the state of New York. He said he expected to make a profit of about $8,000 on each of the two roads. He said his debts approximated $15,800 besides about $6,000 owed to the Acme Road Machinery Company secured by conditional sale contract handled by the Acme Company on a portion of the road machinery.

Of this $15,800, about $14,300 was due to an individual of Meriden, Conn., or to the individual and the bank of Meriden.

Tryon agreed to give the bank security upon his road-building machinery and an assignment of moneys due, and to become due, from the state of New York and from the county of Madison on the two roads, to protect the bank for the loan of the said $5,000.

Money was advanced by the bank to Tryon on notes made by him and indorsed by his wife. No formal assignments of money or security on the road machinery was given at the time, and not until over a year thereafter. With the entry of the United States into the war with Germany, the prices of labor, materials, and equipment greatly advanced. The debt of Tryon to the bank increased so that by August, 1917, it was about $21,000. Earl and Tryon got in touch with each other, and the bill of sale of the road machinery and the assignments of the moneys were prepared by an attorney in Herkimer, apparently in conformity with the arrangements made in July, 1916.

At the time of the delivery of these assignments and the bill of sale, the bank inquired of Tryon as to his financial condition and was informed that about $2,000 had been paid on the Meriden indebtedness and that a Buffalo debt of $1,000 had been paid, but that Tryon owed the Acme Road Machinery Company about $3,000 more than at the time of the arrangement in July, 1916; the said increase being due to the purchasing of additional machinery, which additional machinery was held as security for such amount.

After the assignments and the bill of sale were given, the business kept on as usual, no evident change of possession or ownership of the road building machinery taking place, Tryon continuing in charge of the work, apparently as before. During all the intervening period, moneys advanced by the bank to Tryon had been upon notes made by him and indorsed by his wife and when they became due they were charged to his account, and new notes, sometimes with slight reductions in amount, were given in renewal thereof. After the bill of sale the bank procured insurance in its own name but took no other steps in the way of asserting dominion over the property. At the time of the assignments of the moneys and the giving of the bill of sale, it was agreed that Tryon would need about $6,000 more to complete the roads, and this the bank agreed to advance. After the filing of the assignments, as the moneys were received from the state on the monthly estimates, they were deposited in Tryon's account by the bank. Maturing notes continued to be charged to his account and the proceeds of renewal notes and additional notes were credited to his account. Tryon continued paying laborers and procuring materials as before.

Tryon paid with checks on the Herkimer Bank certain payments due the individual of Meriden, Conn., his largest creditor other than the Herkimer Bank. This individual had knowledge that Tryon was obtaining money from the Herkimer Bank for his road work.

The Poland road was completed along about November, 1917, except labor and materials to the extent of about $300, and arrangement was made with the New York state highway department to retain that sum and pay the remainder of the moneys, including retained percentage, due on the road contract to the Herkimer Bank, and this was done.

The Madison county road was also practically completed, and nearly all the moneys likewise paid to the Herkimer Bank. Thereafter and a few weeks before the bankruptcy, the Herkimer Bank took possession of the road machinery and leased it for a time, from which it received upwards of $4,000 in rentals and subsequently, after the filing of the petition in bankruptcy, sold it, and still has in its possession the proceeds of the sale, less expenses of repairs and maintenance. The sale was had pursuant to an order made in the bankruptcy court under stipulations for preservation of the proceeds of the sale. The petition in bankruptcy was prepared by the same attorney who prepared the assignments and the bill of sale. The attorney's charge was paid by moneys received by Tryon from the defendant bank.

Just prior to the filing of the petition in bankruptcy, Earl opened up a special account in his own name with moneys received from the

state, by means of which he sought to pay some of the notes and other indebtedness.

By the time of the bankruptcy the bank had advanced to Tryon the sum of about $27,000. The schedules in the petition in bankruptcy show an indebtedness of $42,000, not including anything due the defendant. Of this amount $8,766.32 was due the Acme Road Building Company and was secured by conditional bill of sale. The indebtedness to the individual in Meriden and the bank of Meriden is stated to be $27,000, though apparently no loans were made by the individual or the bank in Meriden to Tryon at any time after Tryon began to do business with the Herkimer Bank. Some of the remainder were debts of more than six months' standing.

Upon the trial Tryon was not able to produce checks showing the disposition of the whole of these moneys, though many checks showing the use of the greater part thereof were produced by him.

This case must be considered from two aspects: First, that of the assignment of the moneys; and, second, the bill of sale.

Plaintiff relies for his proof of fraudulent co-operation with Tryon and the bank largely upon the facts above stated and the inferences to be drawn therefrom. There appears in the record no direct proof of any fraud on the part of the bank.

[1, 2] This court can find nothing which satisfactorily establishes any fraud on the part of the defendant bank. The bank advanced to Tryon the moneys, and the transactions with him so far as the bank records are concerned were conducted in the usual manner of banking. Tryon was introduced to the bank by a well-known customer, a responsible manufacturer of Herkimer county, who was also well known to the president. Up to the time of the giving of the assignments and the bill of sale, there is nothing shown which is inconsistent with the entire innocence and good faith on the part of the bank. The assignments by Tryon of the moneys due on the road contract were made in the customary way and were filed in all the places in which the statute requires such assignments to be filed. The moneys were paid by the state to the assignee, the bank, in the ordinary way.

The plaintiff contends that the assignments are invalid because not filed in all the statutory places and that failure to so file is also evidence of fraud. The statute providing for such assignments as set forth in section 16 of the Lien Law of the State of New York (Consol. Laws, c. 33) is as follows:

"No assignment of a contract for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor * * * upon * * * the head of the department or bureau having charge of the construction of such public improvement, * * * or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid unless such assignment or order, or a copy thereof, be filed * * * with the head of the department or bureau having charge of such construction, and with the * * * other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be enforcible from the time of such filing. * * * The * * * other

officer or person with whom the assignment, * * * or a copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose."

The assignments of moneys due and to become due were filed within 10 days with the state commissioner of highways, who is the head of that department or bureau; and with the state comptroller, as the financial officer of the state; and also with the treasurer of Madison county, as the financial officer of the county. This was a strict compliance with the letter of the law. The plaintiff contends that it should also have been filed with the state treasurer and cites as authority therefor the opinion of the Attorney General of the state for 1909 (page 401). The opinion merely states that where persons insist on also filing their assignments with the treasurer he should accept them. In other words, the comptroller draws the warrants before any money can be paid by the state treasurer and filing with the latter is not essential, but where assignees request such assignments to be filed with the state treasurer, then they should be filed. The rigid observance of the statutory requirements is all that can be asked. This adherence, therefore, relates back to the question of fraud, as to whether there was a concealment and suppression on the part of the bank or an open and proper transaction.

Nothing happened thereafter prior to the time of the bankruptcy which tends in any manner to establish fraud, so far as these assignments are concerned. The bank undoubtedly came to the conclusion that if Tryon was not financed so that he could complete the road, the completion of it by the state highway department or by some other contractor, after advertising for bids, would cost a great deal more and would jeopardize the moneys already advanced to Tryon. The payment by the bank to the attorney of $150 is somewhat equivocal in its character but, at its worst, only a suspicious circumstance. It may easily be that the bank felt sufficiently friendly to Tryon to advance him this money. At any rate, there are no circumstances which satisfactorily establish any fraud on the part of the bank. The plaintiff cannot, therefore, succeed so far as the assignments are concerned.

The position of the bank with reference to the transfer of the road machinery, called the bill of sale, is somewhat different.

Courts of equity will not be bound by the form or language of the instrument of transfer nor by its characterization by witnesses or parties at a later date under different circumstances, but will look to the intent of the parties.

[3] The original intent was that the bank was to be given security on the road machinery. Nothing else is contended or could be contended, especially when there was so great disparity between the value of the property transferred and the amount of money which passed, and where the transferee is a bank.

According to the bank's contention, Tryon's condition, except as to its own indebtedness, was better at the time of the giving of the bill of sale and the assignments than at the time of the agreement to give them. In spite of the increase in the indebtedness to the bank, there was still too much disparity of value to warrant the assumption that

the agreement to give security was changed to an agreement for an absolute transfer in the absence of clear and convincing evidence and circumstances. Such are not shown here. Aside from the form of the instrument and the insuring of the property in the bank's name, practically all of the conduct of the parties is consistent only with the intent that the bill of sale was given as part of the security for the money loaned and to be loaned. Security is the usual form in which banks safeguard their loans. They thereby retain the liability of the debtor for any deficiency. Banks, especially national banks, are not authorized to engage in business other than banking, though they may take property in good faith in payment or part payment of banking debts previously contracted, but usually by foreclosure of security given therefor.

[4] Viewed as a chattel mortgage, the bill of sale would be invalid as to creditors if not filed in the proper town clerk's office or followed by such early transfer of possession as the statute of New York requires.

But the court cannot give such relief in this action for the reason that the suit is not properly brought with appropriate allegations for such purpose.

There is no allegation that the instrument was intended to be a chattel mortgage, and no such relief asked.

The defendant was given no notice of such claim and has not been called upon to litigate it. Such relief must therefore await an appropriate action, and then decision will be made upon the proof then presented.

[5] The question as to whether or not the defendant bank would have a lien upon the chattels covered by the so-called bill of sale for moneys advanced, even if decreed to be a chattel mortgage and invalid as against creditors, must await such action for decision. Viewing the so-called bill of sale as in reality a chattel mortgage, much of the evidence relied upon by plaintiff as proof of fraud becomes harmless. Even considering the instrument as an absolute transfer, the court is unable to find satisfactory evidence of fraud upon which to find for the plaintiff.

The complaint must therefore be dismissed, but without prejudice to the bringing of an appropriate action to have the transfer in the form of a bill of sale decreed to be a chattel mortgage.

Judgment may be entered accordingly.

P. N. GRAY & CO., Inc., v. CAVALLIOTIS.

(District Court, E. D. New York. November 23, 1921.)

1. Parties ⇐7(2)—Agent in whose name contract is made may sue thereon as trustee of express trust.

Under Code Civ. Proc. N. Y. § 449, an action on a contract for the sale of merchandise to plaintiff, reciting that it was "acting as agent" for a named principal, and signed by plaintiff, *held* properly brought by plaintiff in its own name as "trustee of an express trust."

2. **Assignments ⇐97—Assignor contracts that he will do no act to deprive assignee of benefit of thing assigned.**
   By an assignment of a contract the assignor contracts that he will do no act to deprive the assignee of his rights under the assigned contract.

3. **Judgment ⇐250—Plaintiff entitled to relief, if complaint states good cause of action on any theory.**
   A plaintiff is entitled to relief on any theory on which his complaint states a good cause of action.

4. **Contracts ⇐314—Party who puts it out of his power to perform is liable for damages caused thereby.**
   Where one party to an executory contract prevents its performance, or puts it out of his power to perform it, the other party may regard it as terminated and recover whatever damage he has sustained thereby.

5. **Sales ⇐172—Embargo by foreign government does not excuse nonperformance of contract.**
   For a government embargo on the exportation of a commodity to excuse nonperformance of a contract requiring such exportation, the embargo must be by the government of the country where the contract is made and to be performed.

6. **Sales ⇐172—Government embargo held not to relieve party from performance of contract.**
   Where a contract by a Canadian refinery for the sale of a large quantity of sugar, to be delivered in New York, reserved the right to fill the contract from its New York refinery, the placing of an embargo by the Canadian government on the exportation of sugar *held* not to relieve the seller from the obligation of the contract.

7. **Estoppel ⇐63—Party who voluntarily put it out of his power to perform cannot set up embargo as defense to action for breach.**
   Where defendant, who had contracted for a purchase of sugar from a Canadian refinery, contracted for a resale of the sugar to plaintiff, but afterward for a large consideration released the Canadian company from its contract and thus put it out of his power to perform his contract with plaintiff, he cannot set up as a defense to an action for its breach that shipment by the Canadian company was prevented by a government embargo.

At Law. Action by P. N. Gray & Co., Inc., against Michael N. Cavalliotis, trading as the Ægean Trading Company. Trial to court. Judgment for plaintiff.

Shattuck, Glenn & Ganter, of New York City (Garrad Glenn, Wm. B. Walsh, Frederic C. Pitcher, and J. Steward Crawford, all of New York City, of counsel), for plaintiff.

Walter F. Welch, of New York City (Vincent P. Donihee, of Brooklyn, N. Y., of counsel), for defendant.

COOPER, District Judge. This is an action upon contract, tried by the court; a jury trial having been waived. Two main questions are presented, viz.: Whether plaintiff has an action upon the particular contract; and, second, whether he has brought the right one.

[1] The plaintiff is in the export trade, and acts as agent for foreign principals in the purchase and shipment of various commodities. The defendant is engaged in a general trading and export business in New York City. On August 22, 1919, the defendant entered into a contract with the Dominion Sugar Company, Limited, of Ontario,

Canada, for the purchase of 2,000 tons of standard cane refined granulated sugar, American style, at price of 9½ cents per pound, f. a. s. steamer New York City.

Subsequent thereto, and on the 22d of October, 1919, the plaintiff, as agent for Picard & Co., of Zurich, Switzerland, made a contract with the defendant; that portion thereof essential to this controversy being as follows:

"Michael N. Cavalliotis, trading under the registered name, the Ægean Trading Company, of 120 Liberty street, New York, N. Y., has this day sold to P. N. Gray & Co., Inc., of 6 Hanover street, New York, N. Y., acting as agents for Picard & Co., Limited, of Chatham, Ontario, to be placed in escrow in Irving National Bank, as per offer made by the Ægean Trading Company on the 18th of October, seventeen hundred fifty (1,750) tons of standard cane refined granulated sugar at the price of 10.50 cents per pound net cash in New York funds, in bond, f. a. s. steamer New York. * * *"

The Dominion Company had no knowledge of this agreement. A long exchange of correspondence followed between the defendant and the Dominion Sugar Company, and the latter complained that because of Canadian embargo it could not make deliveries. The defendant stated to the plaintiff that he could get a release of his contract with the refinery at a profit of 1½ cents per pound, and of this amount he would pay the plaintiff one-half cent per pound. This was not satisfactory to the plaintiff, and the defendant on January 29, 1920, without the knowledge or consent of the plaintiff, entered into an agreement with the Dominion Company, whereby the contract between the defendant and the Dominion Company was abrogated and fully discharged. Cavalliotis received as consideration for such release the sum of $84,800, at the rate of 2 cents per pound, apparently endeavoring to make a greater profit that he cared to disclose to the plaintiff.

From the Dominion Company's New York representative the plaintiff learned of the defendant's arrangement with the Dominion Company, and it immediately made a demand upon defendant for the delivery of the sugar, or else to pay over the difference between the contract and market price, and upon refusal this suit followed. The facts were substantially all conceded.

The contract is signed, "P. N. Gray & Co., Inc., by Wallace H. Foster, Secretary," and objection is made upon the trial that the plaintiff, as agent, cannot sue individually. The reference to the plaintiff in the body of the contract is that Cavalliotis has sold to "P. N. Gray & Co., Inc., of 6 Hanover street, New York, *acting as agents* for Picard & Co., Zurich." There are strong authorities for holding that at common law a contract in such form is the personal contract of the agent, upon which he may sue and be sued in his own name. Albany, etc., Co. v. Lundberg, 121 U. S. 451, 54, 7 Sup. Ct. 958, 30 L. Ed. 982, and cases therein cited.

By the Code of Civil Procedure of the state of New York it is provided:

"Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust,

or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. *A person*, with whom or *in whose name, a contract is made for the benefit of another, is a trustee of an express trust*, within the meaning of this section." Section 449.

Whether considered as a personal contract or a contract with an agent, the defendant cannot be relieved from liability. If the former, the recovery is payable to the agent personally; if the latter, it is payable to him as agent for Picard & Co. In Considerant v. Brisbane, 22 N. Y. 389, the plaintiff sued upon notes payable to "V. Considerant, as executive agent of the company, Bureau, Guillon, Godau & Co." The court held, in overruling a demurrer:

"Before the Code, I think, the remedy at law, upon an express contract of this character, must have been enforced in the name of the plaintiff; but that, if there was any doubt upon this subject, the plaintiff clearly falls within that description of person who, by the 113th [now 449th] section of the Code, shall be construed to be a 'trustee of an express trust,' and, as such, authorized to sue."

This was followed by Albany, etc., Co. v. Lundberg, supra, wherein the contract began, "I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co., of Stockholm, agree to sell," and the agreement was signed by Lundberg merely, in his own name. Upon the authority of Considerant v. Brisbane, the court, through Mr. Justice Gray, stated:

"The case, then, stands thus: If the agreement to sell is an agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to him personally, and the action on the contract must be brought in his name, even at common law. If, on the other hand, the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent, and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an action may be brought in his name. In either view, this action is rightly brought."

In Pitney v. Glens Falls Ins. Co., 65 N. Y. 8, it was held that, where an insurance policy was effected by an agent for a principal known to the insurer, but not named in the policy, the agent became trustee of an express trust with whom a contract is made for the benefit of another.

Even if the complaint does not specifically allege that the plaintiff is suing as trustee of an express trust, the contract is annexed to the complaint and made a part thereof, and specifically characterizes the plaintiff as agent or trustee for Picard & Co. and gives it standing in this court. In Schipper v. Milton, 51 App. Div. 522, 64 N. Y. Supp. 935, affirmed Smith v. Milton, 169 N. Y. 583, 62 N. E. 1100, it appeared that the contract in suit read, "sold for account of Messrs. Smith & Schipper, agents for W. F. Stevenson & Co., Manila." The court therein declared:

"It appears by the sold note, *which, by this allegation, is to be read as part of the complaint*, that the contract was made by the plaintiffs as agents for Messrs. W. F. Stevenson & Co., Manila, and that this firm was in fact the seller of this hemp to the defendants, and that the plaintiffs made this contract for them. This brings the case precisely within section 449 of the Code

of Civil Procedure, which provides that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and defines a trustee of an express trust as a person with whom or in whose name a contract is made for the benefit of another. Within the plain reading of this section of the Code, the plaintiffs, having made this contract for the benefit of W. F. Stevenson & Co., were entitled to maintain this action."

It must be held, therefore, that this action is properly brought by the plaintiff in its own name, without joining with it Picard & Co., its principal.

Whether or not the agreement between the plaintiff and defendant constitutes an assignment of the defendant's contract with the Dominion Sugar Company to the extent of 1,750 tons, or a sale by the defendant to the plaintiff of 1,750 tons of sugar, is not necessary to be determined in this action. In either aspect of the case, the plaintiff is entitled to recover, and the measure of damages is the same.

[2] This contract was assignable under the laws of this state. Section 41, Personal Property Law (Consol. Laws, c. 41). The general rule is that an executory contract, not necessarily personal in its character, which can, consistent with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable, in the absence of agreement to the contrary in the contract. Quinn v. Whitney, 204 N. Y. 363, 97 N. E. 724; New York Bank Note Co. v. Hamilton Co., 180 N. Y. 280, 73 N. E. 48; Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. Supp. 690.

Viewing the contract between the plaintiff and defendant (Exhibit B annexed to complaint) as an assignment pro tanto of the contract between the defendant and the Dominion Sugar Company, the assignor is held to have contracted that he will do no act to deprive the assignee of his rights under the assigned contract. Eaton v. Mellus, 7 Gray (Mass.) 556; Deering v. Farrington, 3 Keble, 304; Williston, Contracts, 849; 5 Corpus Juris, 968.

In Hinkel Iron Co. v. Cohn, 229 N. Y. 179, 184, 128 N. E. 113, a corporation of which defendant was president assigned to plaintiff a certain sum out of a designated payment to become due the corporation under a contract with the city of New York. The assignment was not filed. The corporation received the money and paid but a part thereof to the plaintiff, and the defendant, as president, withdrew the balance and applied it to the uses of the corporation. The corporation being bankrupt, action was brought against the defendant. Upon demurrer it was stated:

"The violation by a trustee of a trust relationship subjects the trustee to a personal liability thereafter by way of compensation or indemnification which the beneficiary may enforce. The defendant, with knowledge of all the facts, participated in and accomplished the conversion and misappropriation. He therefore is liable to the plaintiff for the amount converted."

The defendant, having deprived plaintiff of his rights under the agreement, is liable.

But there is nothing in the conduct of the parties prior to the action to indicate that the plaintiff has accepted the theory of an assignment of the contract in contradistinction to a sale of 1,750 tons of sugar. Indeed, the defendant claims that all the acts of the parties subsequent to the making of the contract indicate that it was assumed to be a sale by both parties. The contract having been set forth, the rights of the parties must be determined by the terms of that instrument, so far as they are dependent upon it. Greef v. Equitable Life Assur. Soc., 160 N. Y. 19, 29, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328, 4 N. E. 522.

[3] The plaintiff is entitled to relief upon any theory upon which his complaint states a good cause of action. Appleton v. Citizens' National Bank, 190 N. Y. 417, 422, 83 N. E. 470, 32 L. R. A. (N. S.) 543, affirmed 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; Exchange Bank v. Hubbard, 62 Fed. 112, 10 C. C. A. 295, 163 U. S. 690, 16 Sup. Ct. 1202, 41 L. Ed. 317. Viewing this as a sale, the defendant, by releasing the Dominion Company from its obligation to deliver 2,000 tons of sugar, effectually put it out of his power and admittedly made it impossible for him to perform his contract with the plaintiff.

[4] Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. Lovell v. St. Louis Mutual Life Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; American Loco Co. v. Harris, 239 Fed. 234; Simon v. Etgen, 213 N. Y. 589, 107 N. E. 1066; Patterson v. Meyerhofer, 204 N. Y. 96, 100, 97 N. E. 472; Union Ins. Co. v. Central Trust Co., 157 N. Y. 633, 644, 52 N. E. 671, 44 L. R. A. 227; Carnes v. Bassick, 187 App. Div. 280, 175 N. Y. Supp. 670. Plaintiff has therefore brought an appropriate action.

[5] Before passing to the question of damages, the affirmative defense must be considered. It is claimed by the defendant that an embargo was placed upon the exportation of sugar from Canada by the Canadian government, and that this embargo excused the Dominion Company from performance of its contract with the defendant, and therefore excused the Dominion Company and the defendant from delivering any sugar to the plaintiff. It is a general rule that, where performance of a contract is suspended by an official act of the government for a material length of time, execution of the contract is entirely excused. A government embargo placed upon the exportation of a commodity would be a defense to an action upon the contract involving the commodity. Roxford Knitting Mills v. Moore & Tierney (C. C. A.) 265 Fed. 177, 11 A. L. R. 1415; Mawhinney v. Millbrook Woolen Mills, Inc., 231 N. Y. 290, 132 N. E. 93.

But this relates to embargo or governmental interference by the government of the country in which the contract was made and in which it was to be performed. Foreign embargoes are ordinarily not an excuse for nonperformance. Krulewitch v. National Importing Co.,

195 App. Div. 544, 186 N. Y. Supp. 838; Richards v. Wreschner, 174 App. Div. 484, 156 N. Y. Supp. 1054, 158 N. Y. Supp. 1129.

[6] Moreover, the contract with the Dominion Company provided:

"Should we have any trouble in getting shipment down in time from the Canadian refinery *the seller has the privilege of shipping from the New York refinery.*"

This clause rendered inoperative any defense concerning the embargo, because, where rendered impossible to perform in one place by action of the government, nevertheless it was possible to perform in the other. It is only where both alternatives are rendered impossible that a legitimate defense could be predicated upon an embargo.

[7] The Dominion Company, apparently, did not consider itself protected by the Canadian embargo; otherwise, it would not have paid $84,800 to be released from its contract. When the Dominion Company paid so large a sum of money as this, it was not a payment for the mere purpose of avoiding a lawsuit. It was a recognition of its obligation under the contract. The defendant cannot be permitted with the one hand to accept moneys for the release by him of the Dominion Company from performance of its contract, and with the other hand put forth a claim that the Dominion Company could not lawfully be held to the performance of the same contract.

In any aspect of the case, the plaintiff's damage is the difference between the contract price for the sugar and the market value. The reasonable market price deducible from the evidence is 14¾ cents per pound, this being the lowest market price testified to by any disinterested witness. Damages should be awarded upon that basis. And as sugar is a commodity, the price of which on any market day is readily ascertainable, the plaintiff should be allowed interest from the date of the breach of contract, viz. January 29, 1920. Faber v. City of New York, 222 N. Y. 255, 262, 118 N. E. 609.

The court reserved decision on the various items of documentary evidence, as to which objection was made. The court overrules the objection to the receipt of such evidence in every instance, and receives the exhibits in evidence, and gives the objecting party an exception to the ruling to be entered in the record.

The plaintiff's motion to dismiss the affirmative defenses alleged in the answer is denied, with the exception given to the plaintiff. Defendant's motion to dismiss the complaint is also denied, with exception given to defendant.

Findings accompany this decision, and the proposed findings submitted by the respective parties are marked "Granted" or "Refused," as the case may be.

Judgment may be entered accordingly.

Findings of Fact and Conclusions of Law.

The parties to this action having filed with the clerk of this court a stipulation in writing waiving a jury, and consenting that the issues of fact herein may be tried and determined by the court without the intervention of a jury, the court to make special findings of fact here-

in, and an order having been entered herein accordingly, and said issues of fact having thereupon been tried before the court without a jury pursuant to said stipulation and order, and evidence having thereupon been taken, and the court, having heard the allegation and proofs of the parties, and having heard counsel fo the respective parties, does now make, pursuant to the directions of said stipulation and order, the following:

Special Findings of Fact.

(1) The plaintiff is a corporation duly organized and existing under and by virtue of the laws of Delaware, and a citizen and resident of that state, and is engaged in the export trade, and acts, among other things, as agent for foreign principals in the purchase and shipment of various commodities.

(2) Defendant is a citizen and resident of Corona, county of Queens, and state of New York, and within the Eastern district of New York, and does a general trading and export business.

(3) The amount in controversy herein exceeds the sum of $3,000, exclusive of interest and costs.

(4) Picard & Co., of Zurich, Switzerland, is a copartnership composed of Christian Neuser Picard, Jules J. Picard, and Raphael Picard, all of whom are residents of the republic of Switzerland.

(5) The Dominion Sugar Company, Limited, is a Canadian corporation, and manufactures refined sugar at Chatham, in the province of Ontario, Canada.

(6) On August 22, 1919, the defendant entered into a contract with the Dominion Sugar Company, Limited, for the purchase of 2,000 tons of standard cane refined granulated sugar, American style, at 9½ cents per pound, net cash New York funds, in bond f. a. s. Steamer New York, N. Y., this being the contract set forth as Exhibit A of the complaint herein.

(7) On October 22, 1921, the plaintiff and defendant executed the paper in writing, Exhibit B, annexed to the complaint.

(8) At the time of the making of the aforesaid contracts, a ton, as mentioned therein, according to a general custom and usage in the sugar trade in the city of New York, meant a long ton, namely, a ton of 2,240 pounds. By like custom, the letters "f. a s.," used in said contracts, have a well-defined meaning, namely, they are an abbreviation of the term "free alongside steamer," and that term means that all costs and charges incident to placing the subject-matter of the contracts within reach of the steamer's tackle for loading were included in the sales price, and to be borne by the seller, and were so used in each of the contracts.

(9) The aforesaid contract between defendant and the Dominion Sugar Company, Limited, contained, among other things, clauses to the following effect: (a) Delivery of the sugar therein referred to was to be made part late January, 1920, and part the first half of February, 1920; and (b) that the contract was contingent on strikes, accidents, fire, and other delays beyond seller's control, and should the Dominion Sugar Company, Limited, have any trouble in getting the

subject-matter of the contract down in time from the Canadian refinery, it was to have the privilege of shipping from New York refinery.

(10) The aforesaid contract between plaintiff and defendant contained, among other things, a clause to the effect that it was contingent on strikes, accidents, fire, and other delays beyond seller's control.

(11) On or about the 29th day of January, 1920, and prior to the expiration of the time reserved by the Dominion Sugar Company, Limited, for the delivery of the subject-matter of the aforesaid contract between defendant and said Dominion Sugar Company, Limited, defendant, without the knowledge or consent of the plaintiff, entered into an agreement with said Dominion Sugar Company, Limited, whereby the aforesaid contract between him and said Dominion Sugar Company, Limited, was canceled and released in consideration of the payment by said Dominion Sugar Company, Limited, to defendant, of the sum of $84,800, United States currency; that prior to the 29th day of January, 1920, the Dominion Sugar Company, Limited, notified the defendant that it would not perform its contract; that the Canadian government refused to permit export of sugar, and that the defendant notified the plaintiff thereof.

(12) Plaintiff has duly performed all the terms and conditions of said agreement entered into between it and the defendant, on plaintiff's part required to be done or performed, and made due demand upon the defendant for the delivery of the sugar referred to in said contract, and also demanded from the defendant payment of the sum of $215,600, damages alleged to have accrued by reason of defendant's alleged breach of said contract, but defendant has refused to deliver said sugar, or any part thereof, or make payment of said sum of $215,600, or any part thereof.

(13) Neither at the time when defendant settled with Dominion Sugar Company, as aforesaid, nor at any time prior thereto, did defendant notify the Dominion Sugar Company, Limited, of plaintiff's interest in said contract.

(14) Continuously from on or about the 27th day of January, 1920, until the early part of March, 1920, defendant represented to plaintiff that he had an offer of 1½ cents a pound from the Dominion Sugar Company, Limited, in settlement of all claims under his contract with said Sugar Company, of which alleged settlement offer he offered in turn to pay to plaintiff one-half cent a pound. This offer was repeatedly made by defendant to plaintiff, both immediately before and continuously after he had effected the aforesaid settlement with said Dominion Sugar Company, Limited, and at no time subsequent to the 27th day of January, 1920, did defendant disclose to plaintiff that he had fully discharged and abrogated his contract with said Dominion Sugar Company, Limited. Plaintiff's only knowledge of such discharge was gained from sources other than the defendant.

(15) On January 28 or 29, 1920, the defendant received an offer of 2 cents a pound from the Dominion Company, and settled accordingly; a release having been signed by him, dated January 29, 1920.

(16) The telegram containing the 2-cent offer to defendant from the Dominion Company was dated January 27, 1920, being the same day

on which defendant himself was in Canada, and prior to the time when he stated to the officers of the plaintiff that he had received an offer of 1½ cents from the Dominion Company.

(17) The defendant at no time offered to make a settlement with the plaintiff on the basis of the 2 cents a pound which he had received in full settlement of his contract with the Dominion Company.

(18) During the latter part of January, 1920, and the first half of February, at the port of New York, N. Y., the fair market price of sugar, of the kind and quality and deliverable under the terms referred to in the aforesaid contracts, was 14¾ cents per pound, and the difference between the contract price and the market price of said sugar, at the time and place of delivery, amounts to the sum of $166,300, which amount the plaintiff has sustained as damages.

Upon said facts as found, the court hereby makes the following:

Conclusions of Law.

1. The defense that plaintiff was not the real party in interest, and therefore not entitled to maintain this action, was not raised by the pleadings. It was therefore waived, and could not be properly raised upon the trial; but, even if such defense had been raised by the pleadings, it is not sustainable.

2. The plaintiff made the contract in its own name for the benefit of Picard & Co. It is therefore entitled to maintain this action in its own name under the provisions of section 449 of the Code of Civil Procedure.

3. The defendant, at a profit to himself, and without the knowledge or consent of the plaintiff, released the Dominion Sugar Company from its obligations to deliver the sugar which plaintiff was entitled to receive under its contract with the defendant. This constituted a breach of the contract between plaintiff and defendant, for which the defendant is liable in damages.

4. Judgment should be rendered for the plaintiff against the defendant for the sum of $166,300, together with interest thereon from the 27th day of January, 1920, and the costs and disbursements of this action, as demanded in plaintiff's complaint.

I accordingly, therefore, direct judgment for the plaintiff against the defendant for the sum of $166,300, together with interest thereon from the 29th day of January, 1920, and the costs and disbursements in this action, as demanded in the plaintiff's complaint.

GUNTHER v. HOME INS. CO. et al.

(District Court, D. Montana. November 18, 1921.)

No. 302.

1. **Bankruptcy ⟸293(1)—Bankruptcy court has jurisdiction of any proceeding to recover property of estate taken from its constructive possession.**
   A court of bankruptcy *held* to have jurisdiction of an ancillary suit by a trustee, based on the alleged conversion and concealment by bankrupt and the other defendants of assets of the estate, which were in possession of bankrupt at the time of the filing of the petition against him, and thus passed into the constructive possession of the court.

2. **Bankruptcy ⟸117(2)—All parties to concealment of property by bankrupt are liable to estate.**
   While a bankrupt, between the filing of a petition against him and adjudication, may maintain suits and may settle the same, any proceeds received by him he holds as trustee for his creditors, and where he converts or conceals sums received by him in settlement of suits, both he and any party making payment with reasonable ground to believe that he intended such conversion are liable to the estate therefor.

3. **New trial ⟸70—Verdict, not sustained by evidence showing liability of all defendants, set aside.**
   In an action against a number of defendants, whose liability depended on different facts, a directed verdict for plaintiff *held* not sustained by the evidence as to some of the defendants, which necessitated the granting of a new trial.

At Law. Action by Charles Gunther, trustee of the estate of Marion A. Bullyon, bankrupt, against the Home Insurance Company of New York and others. On motion by defendants for new trial. Granted.

Binnard & Rodger, of Butte, Mont., and Todd, Fosnes & Sterling, of St. Paul, Minn., for plaintiff.

Nolan & Donovan and Frank & Gaines, all of Butte, Mont., for defendants.

BOURQUIN, District Judge. Defendants move for a new trial. At the conclusion of plaintiff's case in chief, defendants' motions for a directed verdict were denied, and plaintiff's granted. The complaint sounds in conversion or detinue, though in essentials it is analogous to ancillary proceedings to compel accounting for trust property in custodia legis, with which defendants assumed to deal and dispose.

Plaintiff is trustee of an estate in bankruptcy owning the property, and defendants are Bullyon, the bankrupt, who was not served with process, five insurance companies, which issued to him fire policies on his merchandise, Frank & Gaines, their counsel, and Maury & Melzner, Bullyon's sometime counsel. Of the complaint it suffices to say it alleges that the policies issued; that the merchandise burned; that in this court involuntary proceedings in bankruptcy were instituted against Bullyon; that suits were commenced on the policies; that defendants had knowledge of the bankruptcy proceedings pending and reasonable cause to believe Bullyon would conceal from his estate in bankruptcy any moneys paid him; that with intent to aid him therein

and to benefit themselves they settled policies and suits; that Bullyon was adjudicated bankrupt, and plaintiff appointed trustee of his estate; that defendants conceal the terms, proceeds, and property of the settlement from plaintiff. All answers deny the settlement, reasonable cause to believe, intent, possession, and concealment alleged, and those of the companies also deny knowledge of the bankruptcy proceedings.

[1] There is no diverse citizenship, and defendants object to jurisdiction, contending that in the circumstances it is not granted by sections 23, 60, 67, or 70 of the Bankruptcy Act (Comp. St. §§ 9607, 9644, 9651, 9654). Be that as it may, jurisdiction exists by virtue of the principle that, when property is drawn into the jurisdiction and possession of a court for purposes of administration of it, there is, independent of statute, necessarily inherent incidental power in the court to hear and determine all questions respecting the property, and including accounting for it, either summarily or by subordinate and ancillary suit. It would be intolerable if a court, having property in administration and deprived of it, must suspend proceedings until its officer recovers it through the medium of other courts. The policies and credits they represented were in Bullyon's possession when the bankruptcy proceedings were instituted, from which time they were in custodia legis, in the jurisdiction and possession of the court; Bullyon a trustee thereof. See Murphy v. Hofman, 211 U. S. 568, 29 Sup. Ct. 154, 53 L. Ed. 327; Babbit v. Dutcher, 216 U. S. 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Bailey v. Co., 239 U. S. 276;[1] Fairbanks v. Wills, 240 U. S. 649, 36 Sup. Ct. 466, 60 L. Ed. 841. In re Denson (D. C.) 195 Fed. 854.

[2] Defendants object to the sufficiency of the complaint, in that, in the interval between bankruptcy proceedings instituted and adjudication, a bankrupt in respect to his property has power to conduct suits, and as a corollary to settle and conclude them. This will be granted. Johnson v. Collier, 222 U. S. 539, 32 Sup. Ct. 104, 56 L. Ed. 306. But the bankrupt's property is a trust fund for all creditors, and the bankrupt a trustee thereof. In consequence he and it are subject to the law of trusts and to the principles of equity applicable to trusts. Amongst these is that he and all parties dealing with him in respect to the trust property are bound to the utmost good faith and fair dealing; and though he have power to dispose of the trust property, if he does so to misappropriate the proceeds, the purchaser and all others with reasonable grounds to believe he intends misappropriation, who aid therein, are participators in his breach or devastavit, and equally with him liable to reimburse the beneficiaries. See Smith v. Ayers, 101 U. S. 328, 25 L. Ed. 955. In Montana these principles are statute law, and both impose upon such purchaser and others to "at their peril see to the proper application of money or other property paid or delivered" to the trustee—create them involuntary trustees, liable to account as such. Clearly enough Bullyon can be compelled herein to account for his breach of trust, and his codefendants are in no better case. The complaint states a cause of action.

[3] Defendants further contend, and truly, that the evidence does not sustain the verdict. Aside from admissions in the pleadings, plain-

[1] 36 Sup. Ct. 50, 60 L. Ed. 275.

tiff contented himself with admissions made by the individual defendants upon their examination before the referee in the bankruptcy proceedings, oral examination of Frank to produce the policies, receipts and money drafts of the settlement, stipulations for dismissal of the suits, Frank & Gaines' letter to counsel for petitioning creditors in bankruptcy, and their answer.

Upon objection, the admissions were limited to the maker, there being no offer to prove, then or later, that the alleged conspiracy or concert continued at the time of the admissions, nor that partnerships existed between Frank and Gaines, and Maury and Melzner, as later developed in the proof. There is no evidence that whatever Bullyon retained of the settlement proceeds was not by him delivered to plaintiff. In consequence the evidence wholly fails in respect to some defendants. Although defendants' motions for verdict contain the usual stereotyped "failure of proof," this anomalous state of the evidence and its deficiencies were not suggested, and it was assumed that, if the law was with plaintiff, the facts were proven.

In respect to all defendants the facts are proven as follows: Before and at the settlement they had knowledge that the policies issued, merchandise burned, bankruptcy instituted, Bullyon answered, Maury his counsel, suits on the policies by Bullyon, Maury his counsel, answers by the companies, Frank & Gaines their counsel, settlement of policies and suits for $4,000, and, later, that Bullyon was adjudicated bankrupt and a trustee appointed. In addition Frank's admissions are that before the fire for a debt Bullyon issued him a check, subsequently dishonored; that he next saw Bullyon under arrest for arson, in the county attorney's office and in jail; that Bullyon was and is accused by the companies and Frank of burning his merchandise; that Bullyon evaded notice to submit to examination in respect to the fire, merchandise, accounts, and books, and concealed himself; that Bullyon permitted sale on executions of the unburned merchandise, neglected to secure $600 surplus in the justice's hands, Frank "tipped off" creditors' counsel, so they might get it, and finally told Bullyon, whose counsel got it; that on November 9, 1918, Frank knew he would be "forced" to try the suits the following Monday, and that the bankruptcy proceedings were for trial two days later; that in the evening of the 9th (Saturday) Bullyon and Maury came to Frank's office and settled policies and suits on Frank's terms, viz. $4,000—Frank to retain $140 for an attaching creditor which he subsequently paid to plaintiff, $285 due local agents for premiums on the policies, and about $175 due Frank for the dishonored check; that he and Bullyon got the money at a bank open evenings, and he gave Bullyon $3,400, perhaps in Maury's presence.

Maury's admissions are that, in discussion of settlement, Frank insisted Bullyon burned the merchandise; that he was at the settlement, and had the policies; let Bullyon have them to receipt upon them for the money and give to Frank (Maury signed the receipts as witness); that Bullyon did his own "agreeing" with Frank, Maury remaining in another room; that he heard "dickering," but did not know terms nor amount Bullyon actually received; that when Bullyon re-

ceived the money, he and Maury went to the latter's office, and out of the proceeds Bullyon paid Maury part due him for services in the suits; that he was paid nothing for services in the bankruptcy proceedings, and did not attempt to collect for them; that what he (Maury) received is privileged, and will not be disclosed; that after adjudication Bullyon was several times in his office, but Maury did not advise him of the necessity to file schedules and to attend the creditors' first meeting; and that Bullyon left, but where he went is privileged and will not be disclosed (he did disclose this when the referee overruled the claim of privilege). The admissions of Gaines and Melzner indicate they knew little of the transactions, Frank and Maury acting therein.

In view of the limitations and deficiencies of this evidence, it is clear that the verdict in no part can stand against the companies, Gaines, and Melzner. So far as they are concerned, the gist of the proceedings, viz. that Bullyon misappropriated from plaintiff and withholds any of the proceeds of the settlement, and that defendants paid the proceeds to Bullyon with reasonable cause to believe he would thus violate his trust, is wholly unproven. Before a participant can be held, there must be proof of a principal delinquent. Generally speaking, the companies are bound by the knowledge had, acts done, and admissions made by their counsel during the transactions including the settlement; but this cannot be proven by counsel's admissions after the transactions are concluded, after the settlement. And if it be assumed that Frank's admissions, with other evidence competent against him, suffice to warrant the inference that he had the alleged reasonable cause to believe, it cannot be imputed to the companies, because his admissions, as received herein, made when they were, are incomptent against them. And for the same reason the companies are not chargeable with the portion of the trust fund retained by Frank in the settlement, the only misappropriation and withholding proven against any defendant. So, too, Frank's and Maury's knowledge, acts, and admissions are their partners', but cannot bind Gaines and Melzner herein, because of the objections and limitations when received in evidence as aforesaid. It would, perhaps, have been a simple matter to have secured herein affirmance from the witness stand of all these admissions by the makers, thus rendered competent against all defendants, or otherwise to prove the facts of them. So far as Frank is concerned, if the sufficiency of the evidence to warrant the inference aforesaid against him be assumed, it can serve as a basis for relief only when there be competent proof against him that Bullyon withholds the $3,400 paid him by Frank, and there is none. The inference, however, is not necessary in respect to the $600 Frank withheld in the settlement, and $460 of which he yet withholds from plaintiff. He received it charged with knowledge that it was in violation of Bullyon's duty and a devastavit in respect to a trust fund.

In respect to Maury, on familiar principles he is entitled to reasonable compensation for his services in the suits and settlement, payable out of the fund recovered, provided his conduct does not render the allowance inequitable. If he received more, the plaintiff can recover

it herein. Maury's admissions are not distinguished by candor—are inclined to evasion and inconsistency, perhaps less with themselves than with reasonable inferences. However, taken by themselves and without consideration of Frank's, as they must be, they do not warrant a finding that he agreed or knew that Frank, as a condition of the settlement, was withholding part of the trust fund or settlement proceeds.

And in respect to Maury, as to all other defendants, no proof that Bullyon withholds any proceeds of settlement that Maury left him, renders unnecessary inquiry whether Maury had the alleged reasonable cause to believe he would withhold them. Maury's claim of privilege in the matter of his compensation is not maintainable; and as in accounting it is his duty to disclose, were these proceedings avowedly in accounting, as they are in essence, it may be the principle of the ring and missing stone would hold him liable for the $3,400 Bullyon had when he entered Maury's office, departing with an undisclosed less amount.

It follows that a new trial must be and is granted to all defendants, save to Frank in respect to the $460 he withholds. In his admissions he disclaims any desire to retain the $175 for his own benefit, but asserts that the $285 for the premiums were properly withheld. The inference is that the local agents, as common, gave Bullyon time to pay the premiums, they paying the amount to the companies when issuing the policies. In these circumstances the local agents became creditors of Bullyon of the same class as others, not entitled to any preference, and Frank improperly retained the amount for them. At any rate, Frank failed to prove the premiums were a debt and set-off to the companies.

It is believed that, in view of the real character of the issues and proceedings involved, defendants may be found liable for different amounts, some severally, some jointly; that the disclosed severance and apportionment or division of the trust fund sufficiently converts the $460 into a separate issue, so that in respect to it a new trial may be denied to Frank, though granted to all other defendants, and a new trial granted to all defendants in respect to all other of the fund.

Order accordingly.

UNITED STATES v. LUMPKIN.*

(District Court, N. D. Georgia. November 15, 1921.)

1. **Game ⟸7—Treaty regulating killing of birds deals only with migratory birds.**

The treaty with Great Britain regulating the hunting and killing of migratory birds deals only with migratory birds and does not cover others in an effort to protect migratory birds.

2. **Game ⟸7—Mourning doves protected by migratory bird treaty, though particular doves do not migrate.**

The treaty with Great Britain regulating the hunting and killing of migratory birds, and providing that it shall cover birds therein specified including doves and wild pigeons, covers the killing of mourning doves, which are migratory in certain parts of the country, though there may be individuals or families that do not migrate and though they may not be migratory at all in a particular part of the country, as the treaty amounts to an agreement that such doves are migratory.

3. **Treaties ⟸2—Migratory bird treaty not beyond treaty-making powers, though there be doubt whether birds included have migrated.**

The migratory bird treaty with Great Britain does not transgress the limits of the treaty-making power as applied to mourning doves as to which the evidence raises a doubt as to whether they have migrated or not.

4. **Game ⟸9—Migratory character of mourning doves held not a question for the jury.**

The treaty between the United States and Great Britain for the protection of migratory birds declares that doves are migratory, and where the evidence fails to establish that they, or any distinct variety of them, are clearly nonmigratory, it is established as a matter of law that they are migratory birds within the meaning of such treaty, and in a prosecution for hunting or killing mourning doves in violation of the Migratory Bird Treaty Act of July 3, 1918 (Comp. St. Ann. Supp. 1919, §§ 8837a–8837m), the question whether the mourning doves hunted or killed may have been resident in any particular state cannot be heard by a jury.

5. **Game ⟸7—No defense that particular birds of migratory group did not migrate.**

In a prosecution for unlawfully hunting or killing birds of a species which migrates between the United States and Canada, and which is included within the terms of the treaty between the United States and Great Britain for the protection of migratory birds, it is no defense that the individual bird hunted or killed was not migratory.

6. **Game ⟸7—Mourning doves of Georgia are migratory birds.**

The effect of the treaty between the United States and Great Britain for the protection of migratory birds, ratified by the Senate and backed by the Migratory Bird Treaty Act of July 3, 1918 (Comp. St. Ann. Supp. 1919, §§ 8837a–8837m), and then reinforced by the interpretation of the Secretary of Agriculture, who was the executive officer selected to enforce it, is to say expressly that the mourning doves of Georgia are migratory.

Charge to the Jury.

7. **Game ⟸7—In prosecution for killing mourning doves, question whether they in fact migrated not in issue.**

In a prosecution under the act carrying the migratory bird treaty with Great Britain into effect for killing mourning doves during the closed

* 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 involved.

season specified in the act and treaty, the question whether the doves killed actually went out of Georgia or were raised in that state, or whether they came from Canada or anywhere else, is not in issue; the treaty being conclusive that mourning doves are migratory birds.

8. Game ⊂=9—No conviction for killing migratory birds unless they were mourning doves as charged in indictment.

In a prosecution under the act carrying the migratory bird treaty with Great Britain into effect for killing mourning doves within the closed season, defendant cannot be convicted unless the birds killed were mourning doves as charged in the indictment.

Criminal prosecution by the United States against Joseph H. Lumpkin. On motion to submit issues and charge to the jury. Case submitted to the jury.

Robert W. Williams, Sol. Department of Agriculture, of Washington, D. C., and John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for the United States.

S. C. Upson and H. M. Holden, both of Athens, Ga., for defendant.

Ruling of Court on Motion to Submit Issues to the Jury.

SIBLEY, District Judge. The substance of this charge is that the defendant hunted and killed mourning doves, migratory birds. That is the language of the indictment, and it is said to be a crime against the United States. The statute making it a crime is the act of Congress approved July 3, 1918 (Comp. St. Ann. Supp. 1919, §§ 8837a–8837m), which prohibits, among other things, the hunting or killing of any migratory bird included in the terms of a convention between the United States and Great Britain for the protection of migratory birds, etc. (39 Stat. 1702), and then enacts that any person, agency, partnership, or corporation who shall violate the provisions of said convention, that is, the treaty, or of this act, or who shall violate or fail to comply with any regulations made pursuant to this act, shall be guilty of a misdemeanor and shall be fined. The complaint here is, not of the violation of any regulation made by the Secretary of Agriculture, but of a violation of the treaty, and in the first part of the act it forbids the hunting or killing of migratory birds protected by the treaty. The treaty itself provides: "The close season on migratory game birds shall be between March 10th, and September 1st." Prior to that agreement as to the closed season is the agreement that—

"The high contracting powers declare that the migratory birds included in the terms of this convention shall be as follows."

Then there are three classes: First, migratory game birds; second, migratory insectivorous birds; and, third, migratory nongame birds. Under the first heading, "migratory game birds," a definition is made including in the treaty, by name, a number of species of birds, among which are "pigeons, including doves and wild pigeons." This is the vital part, it seems to me, of the law relied upon to sustain this indictment.

It is needless to say, of course, that the treaty, being a solemn agreement of the United States made with another power, is to be scrupu-

lously observed and fairly interpreted, and faithfully applied both by this government and the courts, and every citizen is involved in the faithful upholding of any treaty we make with any foreign country.

The question is whether or not the words of this treaty, which is simply followed by the act, prohibit the killing, prior to September 1st, of the doves described in this indictment and spoken of in this evidence.

[1] I am of the opinion that the purpose of this treaty was to deal only with migratory birds. I do not think there was any effort to protect migratory birds by covering others. That might have been a possible power, under the argument made here; but the mention of all these birds is in the definition of migratory birds and a part of it.

[2] I have been much interested in the argument that there may be distinct varieties of birds within some of these definitions that are indisputably nonmigratory, and that an attempt to regulate them would be in excess of the treaty-making power and an invasion of some reserved power of the states. That argument is applied to ground doves which, from this evidence, appear never to have been anywhere in the neighborhood of Canada, or to mocking birds, which are insectivorous perchers, and which likewise are not shown ever to be found far north. If the case concerned them, it seems to me it would present an interesting and perhaps a serious question. But this mourning dove mentioned in the indictment and spoken of in the evidence as a mourning or turtle dove does not appear to belong to such a distinct variety, so well established to be nonmigratory as to be comparable with those two. I think what this treaty means to say is this: Our purpose is to deal with migratory birds, but we do not want it left up in the air; we don't want it subject to uncertainties that will inevitably arise, and differences of opinion that will exist in various localities; we don't want hunters or birds under uncertainties of that sort, but we will proceed to examine and find out and agree as to what kind of birds we are talking about; and they mentioned doves. The evidence indicates that there are only two living varieties of doves, this mourning dove or turtle dove, and the ground dove. If, as contended by the defendant, the ground dove ought not to be considered in the treaty, then it could not have meant by "doves" anything except the mourning dove or turtle dove. He is the only dove left that the makers of it could have meant.

Now it may be that there are individuals or families of doves that do not actually migrate, yet this evidence throughout, by every witness, states that it is impossible to tell a migratory from a nonmigratory one. You cannot, even after killing him, tell which you have killed, much less can you tell before you shoot. I think that this treaty plainly states that it is agreed that doves (which certainly must have included turtle or mourning doves if it included any) are migratory. If it be possible that it could be established that there are varieties so clearly nonmigratory that they ought not to have been included or that they were not included, that that cannot be said of the variety of dove we are dealing with, because he is certainly migratory in certain parts of the country, because he leaves there entirely at certain seasons. He

may be nonmigratory here, because his habits vary unquestionably. He probably resides here to some extent all the year around, though nobody can demonstrate that.

[3-6] So the case is that the treaty-making power said doves are migratory, and this evidence fails to establish that they are not, or that any distinct variety of them is clearly nonmigratory. It seems to me clearly that it is the duty of the court to say and find that the effect of the treaty, ratified by the Senate and backed by this act of Congress, and then reinforced by the interpretation of the Secretary of Agriculture, who was the executive officer selected to enforce it, is to say expressly that the mourning doves of Georgia are migratory. That being true, the question raised cannot be heard in any court before a jury. I can see that this evidence, taken as a whole, may show that there may be a doubt as to whether mourning doves killed in Georgia have migrated or not. That is as far as it can go. Then, if that is in dispute, can it be said that no legislative power exists to prohibit their killing? To illustrate what is in my mind, if the Legislature of Georgia, in an attempt to keep down the boll weevil, should legislate against the killing of quail—I don't know whether quail are insectivorous or not; I know they eat grain and I think they eat insects. But suppose a man were to come into court and say:

"My quail are not that sort. They don't eat insects. In fact, they never saw a boll weevil, and I know my quail don't eat insects."

That is the very point that the Legislature has settled, though, and it does not lie in the mouth of any citizen to raise the issue. And I think this treaty is almost in that condition, except that there might be limits to the treaty-making power that are not on the Georgia Legislature. But I do not think those limits appear to be so clearly transgressed by the treaty here as to make this a question for a jury. I think it will have to be treated, under the evidence here as to turtle or mourning doves in this country, as being a matter established by law that they are migratory and cannot be killed contrary to the provisions of this treaty and of the act of Congress and the regulations of the Secretary of Agriculture.

Entertaining that view, gentlemen, I do not think there is any issue that can be submitted to the jury here except the single one of whether or not the defendant did hunt or kill mourning doves. If he did, then that they are migratory birds, as alleged in the indictment, follows as a matter of law, and the only question of fact that we have here in the case is whether or not the defendant, prior to September 1st, or on the date named in this indictment, killed mourning doves or hunted them.

Charge to the Jury.

Gentlemen of the Jury: This indictment has three counts in it, charging the defendant with hunting, killing, and possessing mourning doves, migratory birds, contrary to the act of Congress and treaty made between the United States and the kingdom of Great Britain forbidding the killing of them prior to September 1st, or between

March 10th and September 1st. He pleads not guilty to the charge, and that is the issue you are to try.

The fact is that in 1916 the United States, through the President and the Senate, acting in conformity with the Constitution, and of course by the consent of the states that made the Constitution, negotiated a treaty and agreement with Great Britain whereby certain matters affecting the migration of birds between Canada and the United States were to be settled and determined by agreement rather than in any other way. The making of these agreements with foreign nations is left, by the laws of this Union, to the President and the Senate. No state of this Union has any right to make any agreement whatever with any foreign country, because if there is any dispute or any fighting with a foreign country the United States has to do it, under the Constitution, and not the states. And with the purpose largely of avoiding disputes and disagreements and fights, the whole matter of dealing with them by treaties has been left to the President to negotiate the agreement and to the Senate to ratify and confirm, and after that it becomes binding and a part of the supreme law of this country; higher than the state laws; it is as high as the acts of Congress and a part of the supreme law of the land.

Now in this matter a treaty was made in 1916, between Great Britain and the United States, and that agreement was that from March 10th to September 1st there should be no killing in either country or any destruction by their citizens of various birds that were described therein as migratory birds. But the agreement went further than that and undertook to settle what were to be considered as migratory birds both in Canada and in the United States. Under this treaty, among the birds that they agreed to consider migratory birds were doves, with no description added—just the plain word "doves." Each of the parties agreed that their Legislatures should enact laws that would enforce and carry out all these agreements in each of the two countries, and Congress did enact a law making it a misdemeanor, punishable by a fine, for any person to do any act in contravention of this treaty. And that brings you to the charge made here, that this defendant, in contravention of that act and of that treaty, did, in August, which of course was prior to September 1st, kill doves, which are described as mourning doves.

[7] The only issue made in the case, after the ruling I have made as to what the law is, is whether or not you are satisfied beyond a reasonable doubt that he killed mourning doves prior to September 1st, or in August as it is charged in this indictment. If he did, then I charge you as a matter of law, by which I am bound and you are bound, that they are migratory birds. You need not consider the question whether or not they actually went out of Georgia, or were raised in Georgia, or whether they came from Canada or anywhere else at all. If they were mourning doves, they were migratory birds, as settled by this treaty, which became the law upon its adoption by the Senate and is backed by this act of Congress and we are bound by it.

[8] As to what a mourning dove is, you have heard the evidence on that question, and the contention of the government is that all doves,

except this little ground dove that is found in Florida, are mourning doves. There was some evidence claiming that there was in Georgia some distinct sort, they were not given any special name, but the witnesses said they knew them as "doves." The only question left in the case is as to whether or not you are convinced that the defendant killed mourning doves as alleged in the indictment. Any doves would be included in the treaty, but this indictment says "mourning doves," so he could not be convicted under this indictment unless it was mourning doves. It is for you to say whether or not you believe under the evidence in this case that he killed mourning doves, and, if so, I charge you as a matter of law that, under the treaty, they are migratory birds, and it is against the law to kill them before September 1st. If the defendant did that, you will be authorized to find him guilty under any one of these counts, or all of them, that for hunting, or killing, or having them in his possession, whichever you find to be true. If you find that he did not kill mourning doves, as charged, of course you will find him not guilty. Write on the indictment, "We the jury find the defendant guilty under" No. 1, or No. 2, or No. 3, or all, as you find, and if you find him not guilty of any, you will return a verdict of not guilty.

THE WEST CHEROW.

THE PENDRECHT.

(District Court, E. D. Virginia. October 21, 1921.)

1. Collision ⟸72(1)—Between vessels at anchor due to faults of both.

A collision during a high wind between the steamship West Cherow, light and high out of the water, and the steamship Pendrecht, which was low in the water, both at anchor in an open roadstead where there was abundant room, *held* due to faults of both vessels, the primary fault being that of the Pendrecht, which anchored last, in failing to give the West Cherow sufficient berth room, and the West Cherow being in fault for failing to move up on her anchor chain or to take other precautions when danger of collision became imminent because, owing to her height above the water, she began to be driven by the wind against the tide and toward the other vessel, which was held by the tide.

2. Admiralty ⟸4—Court has jurisdiction of suit in rem for collision occurring in Portuguese waters.

A court of admiralty of the United States *held* to have jurisdiction of a suit in rem against a foreign vessel found within its jurisdiction for a collision which occurred in Portuguese waters, but in an open roadstead largely used in world commerce, though the law of Portugal, while recognizing the liability of a vessel to a lien for a maritime tort arising from collision, provides for establishment of such liability primarily by a suit in personam against the owner or master.

In Admiralty. Libel and cross-libel for collision between the steamships West Cherow and Pendrecht. Decree dividing damages.

J. Frank Staley and H. T. Atkins, Sp. Asst. Attys. Gen., for the West Cherow.

Kirlin, Woolsey, Campbell, Hickox & Keating, and William H. McGrann, all of New York City, and Baird, White & Lanning, of Norfolk, Va., for the Pendrecht.

WADDILL, Circuit Judge. [1] The facts of the case are briefly these: The West Cherow, a large ship owned by the United States. 410 feet 5 inches long, 54 feet beam, and 29 feet 9 inches deep, and 8,582 dead weight tonnage, light, anchored under the direction of an official pilot in the roadstead of the Fayal Channel, in the Azores, on 75 fathoms of chain, on the evening of the 3d of February, 1920. Late in the evening of the following day, the Dutch steamship Pendrecht, an oil tanker 242 feet long, 18 feet beam, and 1,589 gross tons, also anchored in the immediate vicinity on 60 fathoms of chain, about 300 to 400 feet aft of the West Cherow. The ships remained in these positions, apparently swinging safely with the tides, until that evening of the 5th of February, when, about 12 o'clock noon of that day, a breeze set in, increasing in velocity between 12 and 2:30 o'clock, as claimed by the parties, respectively, to from 36 to 50 miles an hour. At 2:30, as claimed by the West Cherow, and 2:40, as claimed by the Pendrecht, the vessels came into collision; the port quarter of the West Cherow striking the starboard side of the Pendrecht slightly forward of amidship.

The West Cherow insists that she was in all respects free from fault for the collision, and that the same was caused by the failure of the Pendrecht to allow her sufficient berth room at the time of her anchorage. The Pendrecht, on the other hand, claims that ample berth room was allowed the West Cherow, and that the collision resulted from the dragging of the anchor of the West Cherow, caused by the high wind upon her exposed freeboard, and her failure to exercise proper maritime caution and skill in the navigation of the ship, by not letting out anchor chain, or moving up on her anchor, either of which, as claimed by the Pendrecht, would have averted the disaster.

This brief summary of the facts gives the issues between the parties, the correct determination of which will settle the dispute between them. It will readily be seen that the collision must have been brought about in one of the three ways indicated, as there was nothing in the prevailing conditions to have caused the ships to come together. These causes will be considered in the order named.

First. Did the Pendrecht foul the berth of the West Cherow upon coming to anchor? This is the primary question to be considered, because, if it did, that of itself would constitute fault on the part of the Pendrecht. The court has given full consideration to this feature of the case, and its conclusion is that, in the circumstances of this collision, an insufficient anchorage space was allowed the West Cherow by the Pendrecht, when the latter came to anchor. There was no excuse for the failure of the Pendrecht to allow ample berth room to the ship at anchor. It was in a roadstead, miles of deep water all round, and the anchorage in no way crowded. It is true the space allowed of 300 to 400 feet was sufficient, so long as the two vessels

swung the same way; but it was manifest to the Pendrecht that the West Cherow was light, riding high out of the water, some 40 feet, as the court recalls, from the water to the top of its superstructure. The Pendrecht, by reason of her construction, was low down in the water, and it was evident, in case of a storm arising, that the more exposed vessel would likely be influenced by the force of the wind; whereas, the less exposed vessel would be influenced by the tide. This, it seems to the court, is just what did occur, and was the primary cause of this collision, and ought to have been foreseen by any intelligent mariner. Anchorages that do not allow for a double swing of ships at anchor necessarily present the impending peril of one being driven by the wind, and the other swept by the tide. While in many instances, by reason of lack of space, such an anchorage might be justified, no such necessity existed here, and navigators likely to be affected by the insufficient berth room should have been admonished at all times to be upon guard to escape almost certain disaster, if the wind and tide conditions indicated, arose. The Juniata—The Sovereign of the Seas (D. C.) 124 Fed. 861, and cases cited; The Jason—The Hesperos (D. C.) 257 Fed. 438, 441.

Second. Considering the evidence introduced by the Pendrecht, that the West Cherow dragged her anchor, which was the sole cause of the collision, the court has given much consideration to the same. The testimony is squarely in conflict; those on the West Cherow scouting the suggestion that their anchor dragged, and those on the Pendrecht affirming that it did. This question must be solved in the light of all the evidence, and after viewing the testimony from every standpoint, and in the light of the circumstances of the collision, the court is convinced that there was no dragging of the anchor of the West Cherow. There was nothing in the surroundings to cause it to drag. The anchorage ground was of the best; the anchor strong and powerful, and her anchor chain of sufficient length; and there were no weather conditions that would have caused the anchor to drag. The navigators and crew of the Pendrecht, it is true, testified positively that the dragging occurred; but the facts as to the positions of the several members of the crew, their opportunities of knowledge, the fact that at the time most of them were engaged in employment incident to coaling their ship, the explanation they make as to how and why they observed the dragging, coupled with the mystery of the writing of the ship's log, and the failure to produce the rough log alleged to have been made at the time of the collision, one and all tend to discredit, rather than support, the dragging theory. The positions the vessels occupied quickly after the collision, and as they straightened out, likewise tend to refute the suggestion. Moreover, the Pendrecht, being clearly at fault in her original anchorage, should not be heard to rely on suggested faults of the ship imperiled by her conduct, in the absence of clear proof to the contrary.

Third. Coming now to the further defense of the Pendrecht, to the effect that the West Cherow failed to exercise proper maritime skill to avoid collision, by dropping another anchor, or by paying out or heaving in on her chain, or by operating her engines or otherwise,

as she might have done under the circumstances, the court's conclusion is that there is much force in some of these suggestions, especially that of the failure of the West Cherow to take timely action to avert the collision after the same became imminent, namely, that as the result of the wind she had become windrode, and the Pendrecht, lying low in the water, had become tiderode. For nearly 24 hours, these two vessels had remained in the positions they were in just preceding the collision. The masters of both vessels were charged with knowledge of the fact that the distance between the ships was only a safe anchorage so long as both vessels swung the same way. The West Cherow was a large ship, and high out of the water. Her navigators knew, or were charged with knowledge, that upon the coming of a considerable storm their ship would be affected more by the wind than the tide, if those forces were in opposite directions. The wind came at 12 o'clock. It was not very strong, it is true. It was not such a storm as swept the ship high out of the water, over one affected by the tide, but it was of sufficient velocity as that by 2 o'clock the West Cherow says she was held in the wind, and her bow forced from south-southwest to south. The collision occurred, according to the West Cherow, at 2:30, and 2:40 as claimed by the Pendrecht. The West Cherow had been admonished for 2½ hours of her possible dangerous condition, and from 2 o'clock, 30 minutes at least before the collision, of the actual danger, namely, from the time she admits being held in the wind against the tide. During this last 30 minutes, and from 1 o'clock on, as claimed by the first engineer of the West Cherow, he was, because of the exposed condition of the anchorage, continuously on watch, with 175 pounds of steam up to the throttle on three boilers (200 pounds being carried at sea), with the condenser in operation, the pump running with sufficient vacuum, and with steam on the winches. At 2:20 he was ordered to stand by, and he insists that, notwithstanding the steam on the three boilers as above stated, he could not have turned his engines over for 15 minutes, that is, until 2:35, and he did not, and was never ordered to, turn them over certainly until after the collision. He also claims that, after receiving the order to stand by at 2:20, it would have been unsafe or not desirable to turn his engines over, had he been ordered so to do, for possibly 15 minutes; that that time would be consumed, approximately, in warming up his engines, and thereby avoid stripping the blading of the seals.

This entire position respecting the handling of the engines on the occasion in question convinces the court that there was negligence on the part of the West Cherow's navigators in directing the working of her engines. At 1 o'clock, with steam on three engines, and in the condition described above, good seamanship required that her engines should have been so kept as to have responded immediately to orders to move the ship, and it was gross negligence after the ship became held in the wind, as the West Cherow claims, at 2 o'clock, to have remained 20 minutes before giving the order to stand by, so that the ship could be promptly moved in an emergency; and the failure then, and until after the collision, to give timely orders to turn the engines over,

was inexcusable. On the West Cherow's own showing, had the stand by order been given at 2 o'clock, when the ship was admittedly held in the wind, in 15 minutes the anchor could have been picked up, and the ship moved 15 minutes before the collision, and 25 minutes if the collision occurred at 2:40, instead of 2:30. Moreover, the court is not inclined to accept the view of this engineer, that in an emergency, under the conditions in which the engines were from 1 o'clock on, it would have required 15 minutes to turn his engines over. He thinks that a fair and reasonable time in which to move them, and says it was not advisable to turn them over in less time; but in the perilous condition in which the ships were then placed, this conservative statement of what the engineer might have done should not avail, as he could at least have taken some chance, possibly even slightly injuring his vessel, in order to escape a catastrophe that would naturally follow from the tardiness with which orders to move the ship were given. Entirely regardless of what this engineer did in the emergency in which he was placed, and he seems to have received no orders except to stand by, there can be no excuse for the failure of the West Cherow, with a full head of steam on three boilers, and everything in condition to promptly direct the ship's movements, to pick up her anchor, and thereby have avoided risk of collision. This action on her part should visit upon her partial responsibility for bringing about the collision, and hence to share the damages with the Pendrecht.

[2] Fourth. An interesting legal question has been presented in this case by the Pendrecht, namely, that an action in rem cannot be maintained, because the collision occurred in Portuguese waters, and there is no law of Portugal whereby damages for a tort sustained in collision can be recovered in in rem proceedings.

The court's conclusion upon this legal question is that an action in rem in an admiralty court of the United States, between a ship belonging to the United States, and a Dutch ship found within the United States, for a maritime tort occurring in one of the public navigable waters of Portugal, in an open sea and roadstead, largely used in world commerce, can and should be maintained, and that there is nothing in the law of Portugal, or its rules and regulations, with respect to the enforcement of maritime causes of action, that militates against this court exercising its full jurisdiction in the premises. It may be true, under the laws of Portugal, that a proceeding in rem against the res is not specifically provided for in its admiralty courts in that country, designated "courts of commerce," as prevails among maritime nations generally; yet the right to a lien, or rather to reach and hold liable the vessel itself, for maritime torts arising from collision, such as is recognized by the maritime law common to all civilized nations, is apparently acknowledged. The fact that the enforcement of this right to specifically reach the res involved in cases of collision has to be preceded by proceedings in personam, against the ship's master or owner, while the vessel is in her territorial waters, or can be made effective by "embargo" laid upon the ship after proof of fault has been offered, is not material, so far as the right of this

court to entertain this action in the present circumstances is concerned. To deny the right of a court of admiralty to entertain an action in rem in a case like the present would be to enable the ship, as such, to escape liability entirely for its torts, merely because it had fled from the jurisdiction of the Portuguese tribunals, where it might be impracticable, and indeed ineffective, to lay an "embargo" upon the res, or to proceed in personam against her master or owners; and that, too, when by the laws of that country the collision liability is recognized for a maritime tort, its enforcement only being delayed, as hereinbefore indicated.

The following authorities will be found generally to sustain the views herein stated: The Eagle, 8 Wall. 15, 20, 21, 19 L. Ed. 365; The Diana, 1 Lush. 539; The Courier, 1 Lush. 541; The Griefswald, Swabe, 430; The City of Mecca, 4 Asp. Maritime Cases, 412; Raikes Translation of the Maritime Code of Portugal, pp. 134 and 189; The Avon, Fed. Cas. No. 680; The Champion, Fed. Cas. Nos. 2,583, 2,584; The Kongsli (D. C.) 252 Fed. 267, 272.

Counsel for the respondent referred to quite an array of authority in support of their contention that this action could not be maintained, which have been fully considered, and do not seem to change or modify the views herein expressed, under the facts and circumstances of the present case. They refer to the class of cases of which The Cuzco (D. C.) 225 Fed. 169, and Smith v. Condry, 1 How. 29, 11 L. Ed. 35, are samples. But in those cases no lien liability of any sort existed against the ship for the cause of action involved. The Smith v. Condry case was decided upon the assumption that the collision was caused by the act of a compulsory pilot, for whose acts, under the local law, all liability was denied.

The court's conclusion upon the whole case is that it has jurisdiction, and that the collision occurred as the result of the joint negligence of the two vessels in collision, and a decree so declaring will be entered on presentation.

WALTON N. MOORE DRY GOODS CO., Inc., v. COMMERCIAL INDUSTRIAL CO., Ltd.

(District Court, N. D. California, Second Division. October 17, 1921.)

No. 16619.

1. Corporations ⇐668(4)—Service on stockholder or agent casually in state held not to give jurisdiction over foreign corporation.

Under Code Civ. Proc. Cal. § 411, providing for suit against "a foreign corporation * * * doing business and having a managing or business agent, cashier or secretary within this state" by service of process on such agent, cashier, or secretary, a federal court in California *held* not to have acquired jurisdiction of a personal action for breach of a contract made and to be performed at Vladivostok against a Russian corporation with its principal place of business at Vladivostok, and having no place of business or officer or managing agent in California, and not shown to have ever done business in the state, by service on a stockholder casual-

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

ly in San Francisco on private business and an agent who when passing through on other business was authorized to call on plaintiff and if possible settle the claim in controversy.

2. Corporations ⇐642(6)—Isolated transaction is not "doing business" within state.

The term "doing business," as used in Code Civ. Proc. Cal. § 411, prescribing the manner of serving process upon foreign corporations, is used in its broad and popular acceptation of meaning, and signifies something more substantial than a mere single or isolated transaction arising under a mode of dealing calling for neither a place of business nor a local agent.

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

At Law. Action by the Walton N. Moore Dry Goods Company, Inc., against the Commercial Industrial Company, Limited. On motion to quash service of summons and dismiss. Motion granted.

Motion to quash service of summons and dismiss the action for want of competent service upon defendant, a foreign corporation.

The plaintiff is a New York corporation having a place of business in San Francisco, where it carries on a wholesale dry goods business. and the defendant is a foreign corporation organized under the laws of Russia and doing business at Vladivostok and other points in the state or province of Siberia. The matter in suit grows out of the sale and consignment, some time prior to the bringing of the action, of merchandise by plaintiff in San Francisco to defendant in Vladivostok to be there paid for but the drafts for which were not honored on presentation, and it is alleged "that defendant then and there agreed with plaintiff that plaintiff should retake the said goods and ship the same out of Siberia, and should resell the same and charge the defendant with any loss which might be sustained by plaintiff in said transaction and which said defendant then and there agreed to pay to plaintiff;" that the consignment was thereupon reshipped to San Francisco by plaintiff and there sold, resulting in a loss to plaintiff which defendant has not paid and for which breach the action is brought.

The circumstances under which service in the action was had are these: In April, 1921, one Ivanoff called at the place of business of plaintiff in San Francisco bringing a letter of introduction from the defendant, wherein it was stated that the bearer "is our representative for the U. S. A. and Canada," and stated that, among other things, he was directed to "Settle the question about the goods which were shipped from Vladivostok." The interview of plaintiff with Ivanoff resulted in no adjustment of the demand, and the latter proceeded to New York, where the defendant maintains an office or place of business. Thereafter, about the 1st of August, 1921, Ivanhoff came to San Francisco to meet one Haieff, one of the principal owners or stockholders in the defendant corporation who was arriving from Vladivostok, and on the 2d of August Ivanoff and Haieff called at the place of business of the plaintiff in an endeavor to settle the matter in dispute between them. No adjustment was accomplished at this meeting, and a second conference was held on August 4th with no better success. On this latter date the plaintiff, having in the meantime had the action filed, procured the marshal to make service of summons upon both Ivanoff and Haieff, the return reciting as to each that he was served as "managing agent of defendant."

Thereupon the present motion was made. The affidavit of Ivanoff states that he was not, at the time of service, nor "at any time, or at all, the managing or business agent, cashier or secretary, or an officer or agent of aforesaid defendant or authorized by it to receive or accept service of summons upon it"; that he was in San Francisco on the occasion of the service merely temporarily and for the purpose of meeting Mr. Haieff and his daughter, who were Russians and could not speak the English language. in order to assist them and act as their interpreter in the matter of placing Mr. Haieff's

daughter in a young ladies' boarding school in California and to accompany Mr. Haieff to New York City. The affidavit of Haieff states that he was, on the occasion of the service upon him, "only temporarily and casually present in the city and county of San Francisco, state of California, and was not, and am not, present therein for the purpose of transacting business on behalf of defendant or of transacting any business except as hereinafter particularly set forth"; and, after referring to the service of summons upon him, states: "I am not now, nor was I at the time of the aforesaid pretended service of summons upon me, or at all, on or about the 4th day of August, 1921, or at any time, or at all, the managing or business agent, cashier or secretary or an officer or agent of aforesaid defendant or authorized by it to receive or accept service of summons upon it. After my home in Blagoveschensk, Russia, had been seized by the Bolsheviks, I, with my wife and children, escaped from Blagoveschensk to Harbin, China, and there decided to send my son Valentine first, and take my daughter Nadezda later, to the United States for the purpose of placing them in American schools for education, my wife and our remaining children to remain in Russia in accordance with said plan and for the further purpose of improving my health, which has been seriously impaired by reason of my previous experiences with the Bolsheviks in Russia; and for no other purpose, except as hereinafter mentioned, I have made this present visit to the state of California with my said daughter. I have entered my said son as a student at the University of California, and my said daughter at Castilleja School at Palo Alto, Santa Clara county, state of California. On or about the 2d day of August, 1921, and again on or about the 4th day of August, 1921, subsequent to all alleged happenings referred to in the complaint on file herein, I called on Walton N. Moore, president of plaintiff corporation herein, at his office in San Francisco, Cal., with Nicholas N. Ivanoff, who interpreted for me in the conversation which I then and there held with the said Walton N. Moore, since I have no knowledge of the English language, and I endeavored to ascertain from him upon what terms the controversy existing between plaintiff and defendant could be adjusted in order that I might make a report on the matter."

The affidavit of Walton N. Moore for the plaintiff states that Ivanoff and Haieff stated that they were authorized to settle the matter in dispute for the defendant; and there is an affidavit by one Garrissere in behalf of plaintiff to the effect that on August 20, 1921, the defendant purchased of a corporation represented by affiant a consignment of goods to be shipped to the Orient, and that in that transaction Ivanoff acted in behalf of and represented himself as the agent of the defendant, and that the goods were paid for by him by check drawn on a New York bank.

It does not appear that either of the parties upon whom service was made had any participation in the making of the contract in question or the transaction out of which it grew, or had anything to do therewith other than as above recited; nor does it appear that the defendant at the time of the service had or maintained within this state or district any office or place of business or carried on therein any general business transactions; that apparently the transaction in question was the only one pending at the time between the parties.

Gregory & Goodell, of San Francisco, Cal., for plaintiff.
Ambrose Gherini, of San Francisco, Cal., for defendant.

VAN FLEET, District Judge (after stating the facts as above). [1] A foreign corporation can be sued in a jurisdiction other than the state of its creation only when it is at the time doing business therein and maintains there a business or managing agent subject to service of process. Section 411 of the Code of Civil Procedure of the state, prescribing the manner of serving process of summons upon a defendant, provides for the delivering of a copy thereof as follows:

"If the suit is against a foreign corporation, or a nonresident joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier, or secretary."

[2] In my view the facts fail to bring the defendant within the statute. It was neither "doing business" within the state nor did it have "a managing or business agent, cashier or secretary" therein within any proper interpretation of its terms. The term "doing business" is used in its broad popular acceptation of meaning and signifies something more substantial than a mere single or isolated transaction arising under a mode of dealing calling for neither a place of business nor a local agent. The right of exemption of a foreign corporation from suit in a jurisdiction foreign to the state of its organization is one of substantive value and is not to be taken away by refinements based upon mere casual transactions which do not bring it in some definite substantial way within the ordinary meaning of the language of the statute. This will be found to be the effect of the more recent decisions of the Supreme and federal courts upon the subject, although there is some diversity of view found in cases from the state courts arising largely out of differences in local statutes.

As stated by Mr. Justice Brandeis in Phila. & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710:

"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. And even if it is doing business within the state the process will be valid only if served upon some authorized agent. St. Louis Southwestern Ry. Co. v. Alexander, 227 U. S. 218, 226. Whether the corporation was doing business within the state and whether the person served was an authorized agent are questions vital to the jurisdiction of the court." (Italics volunteered.)

And see, also, Toledo Rys. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982, and People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537.

A like view is taken by the Circuit Court of Appeals of this circuit in Doe v. Springfield Boiler & Manufacturing Co., 104 Fed. 684–687, 44 C. C. A. 128–131, wherein, in construing the same section of the Code, it is said:

"Legal service of process upon a corporation, which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States. The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the circuit and supreme courts of the United States, and the general consensus of opinion is that the corporation must transact within the state *some substantial part of its ordinary business* by its officers or agents *appointed and selected for that purpose*, and that the transaction of an isolated business act is not the carrying on or doing business in a state." (Italics volunteered.) Citing a large number of authorities.

And as to the character of the agent upon whom process may be made under the statute it is further said in that case:

"The term 'business agent,' as used in the statute, does not mean every man who is intrusted with a commission or an employment by a foreign corporation. * * * The statute was never intended to include under the term 'business agent' every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business, which may be, and is, conducted and carried on by the corporation within the state where the service is made—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for the corporation."

The facts here fall far short of meeting plaintiff's necessities under the principles thus announced. Neither the character of the business nor the authority of the agents bring it within the rule. While the agents may have been authorized to settle the matter in dispute, they were not agents of defendant in any general sense. To the same effect, see Cady v. Associated Colonies (C. C.) 119 Fed. 420–425; United States v. American Bell Telephone Co. (C. C.) 29 Fed. 17, 27, 41; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Ladd Metals Co. v. American Mining Co. (C. C.) 152 Fed. 1008; Welch v. Farmers' Loan & Trust Co., 165 Fed. 561, 91 C. C. A. 399.

In Louden Machinery Co. v. American Malleable Iron Co. (C. C.) 127 Fed. 1009, it is said:

"The defendant had no office, place of business, agent, agency, or property in Iowa, and never had. * * * As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state, surrenders itself to the Iowa courts because an agent, with or without authority, comes to this state, seeking to adjust such difference. If such be the law, then compromises, so much favored by law, are largely at an end as to foreign corporations."

And in Wilkins v. Queen City Savings Bk. & Trust Co. (C. C.) 154 Fed. 173, it is said:

"I do not understand that Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, is authority for the proposition that presence of an officer of a foreign corporation in this state for the purpose of discussing a proposed adjustment of the single controversy between it and plaintiff is sufficient to establish such a 'doing business within the state' as will take the case out of the rule laid down in Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113."

The case of Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015, from this circuit, principally relied upon by plaintiff, is readily distinguishable from the case of Doe v. Springfield Boiler & Mfg. Co. In the former case the facts showed that the contract sued upon was made and was to be performed in Los Angeles, where the suit was brought, and that the party upon whom service was made was, at the time, the secretary of the corporation and had come to Los Angeles where he was served, with reference to business transactions theretofore had between the parties, out of one of which the cause of action arose. In the present

case it is conceded that the contract sued upon was made and was to be performed at Vladivostok; and that the parties served were neither of them officers of the company in any other respect than that Ivanoff was a general business representative of defendant for Canada and the United States having his headquarters in New York, and had been merely specially requested to ascertain upon what terms the controversy between the parties could be accommodated. It is apparent therefore that there is nothing in that case which is at variance or out of harmony with the ruling in the case of Doe v. Springfield Boiler & Mfg. Co., and no purpose on the part of the court to ignore or depart from the principles announced in the latter case can be deduced from anything said in the former.

To hold the defendant amenable to the jurisdiction of this court, under the circumstances presented, would, I think, be rather harsh and inequitable as allowing the plaintiff to take advantage of a situation which does not in any substantial respect bring it within the right it invokes.

The motion to quash must be granted, and the action dismissed.

Such will be the order.

SPRINGER v. GARVAN, Alien Property Custodian, et al.

(District Court, S. D. Ohio, W. D. June 19, 1920.)

No. 194.

1. **War ⟸10(1)—Contract not invalid by reason of declaration of war.**
A contract by parents, who were German subjects, made on leaving the United States before this country entered the war, for the care of their children who were left in the United States, *held* valid, and not abrogated by the subsequent declaration of war with Germany.

2. **War ⟸12—Debts enforceable against assets of alien enemy.**
Debts enforceable against the assets of an alien enemy under Trading with the Enemy Act Oct. 6, 1917, § 9, as amended by Act July 11, 1919, include all valid obligations whenever created or accrued, and are not limited to those existing when the statute was enacted.

On Final Hearing.

3. **War ⟸12—Debt arising from performance of contract with alien enemy after passage of Trading with Enemy Act not enforceable against assets.**
An indebtedness arising out of the performance of an executory contract between an American citizen and a German subject who afterward became an alien enemy *held* recoverable from property in the hands of the Alien Property Custodian so far as based on performance before enactment of Trading with the Enemy Act Oct. 6, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j), but not so far as based on continued performance thereafter, which was made unlawful by section 3, except under license from the President.

In Equity. Suit by Alfred Springer against Francis P. Garvan, Alien Property Custodian, and another. Decree for complainant.

Moulinier, Bettman & Hunt and Albert W. Schwartz, all of Cincinnati, Ohio, for plaintiff.

R. T. Dickerson, Asst. U. S. Atty., of Cincinnati, Ohio, and Dean H. Stanley, Sp. Asst. Atty. Gen.

On Motion to Determine Points of Law Before Final Hearing.

PECK, District Judge. This action is brought under favor of section 9 of the Trading with the Enemy Act, as amended July 11, 1919 (41 Stat. 35, c. 6), and seeks to enforce as against seized assets of Christion Meyer and Elsa S. Meyer, his wife, German alien enemies, certain claims, among others, for support and maintenance of their children in the United States, furnished by plaintiff during the war, both before and after the passage of said act October 6, 1917, while the said parents were in Germany, pursuant to a contract made by plaintiff with the parents at the time of their departure from the United States before the war.

[1] The contract alleged bears analogy to that of a prisoner of war for support in enemy country generally held valid (Crawford v. The William Penn, Fed. Cas. No. 3,373, opinion by Mr. Justice Washington), and involved in its performance neither communication nor commerce with, nor benefit to, the enemy, and was not, therefore, abrogated by the declaration of war with Germany April 6, 1917. Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Tingley v. Muller, [1917] 2 L. R. Ch. Div. 144; Huberich on Trading with the Enemy, pp. 99, 100; Trotter on Law of Contract During and After War, pp. 37, 61.

[2] The debt which any person not an enemy or ally of an enemy may collect as against the assets of his alien enemy debtor, under amended section 9 aforesaid, need not have existed at the time of the enactment thereof. The term refers, by the common meaning of the language used, to all valid obligations whenever created or accrued; otherwise indebtedness created by license of the President (section 5a) subsequent to the enactment might be without means of enforcement.

The question whether so much of the debt as accrued after the date of the passage of said act is within the inhibition thereof, which forbids, inter alia, carrying on, completing, or performing any contract, agreement, or obligation except by license of the President, directly or indirectly with, for, or on account of an enemy, is reserved for consideration upon final hearing, when the facts will be more fully before the court.

On Final Hearing.

[3] By the bill complainant avers that his daughter, Elsa Springer Meyer, and her husband, Christian Meyer, are indebted to him in the sum of $10.276.76, and that his indebtedness arose in the following manner: Christian Meyer is a citizen of Germany. He and his wife lived in Cincinnati prior to the European War, and on the 28th of June, 1914, went to Germany for a visit, taking one child with them and leaving their two youngest children in charge of the complainant. Before leaving they agreed to reimburse the complainant for all money which he should send them (Meyer and his wife) or expend for their

support, maintenance, or expenses while in Europe, and for such sums as he should spend in the care and support of the children and their governess, as well as the wages of the latter. After the breaking out of the European War, and before the United States entered the war, he sent Mrs. Meyer sums aggregating $3,000 and boarded the children and their governess for 15 months, for which he charges $1,350. He expended $1,000 to take them to Germany to see their parents and bring them back in the fall of 1916 and winter of 1917, and expended the sum of $2,385.53 in boarding them and their governess at a hotel in Cincinnati after their return, and paid their governess $1,333.33 as wages. After the declaration of war by the United States he expended the further sum of $871.23 for board at the hotel and $266.61 for the governess' wages. Christian Meyer and his wife were enemies within the presidential proclamation, and the Alien Property Custodian seized certain securities and cash belonging to them. Complainant filed his claim with the Alien Property Custodian and an application for the transfer to him of the property, which amounted in all to about $9,500 in value and less than the amount of his claim. Christian Meyer and his wife assented in writing to the allowance of the claim. The Attorney General, entertaining doubts as to the validity of the claim, disallowed it. Complainant prays for the allowance of his claim against the property in the hands of the Alien Property Custodian and Treasurer of the United States, for the payment of the sum, and the transfer to him of the securities held. Christian Meyer and his wife, by a joint answer, admit the indebtedness and consent to the granting of the relief prayed. The Alien Property Custodian pleads want of knowledge and demands strict proof of the facts relating to the existence of the debt.

On complainant's motion to dispose of questions of law before trial it has heretofore been determined that the debt for the support furnished the children after declaration of war by the United States, and prior to the passage of the Trading with the Enemy Act, October 6, 1917, was not one that was invalid on account of the state of war, by the common law.

The evidence offered by the plaintiff tends in general to support the allegations of the bill. When Meyer and his wife went to Europe it was with the intention of returning in two months. They made an oral agreement with the complainant, all three parties being present, that inasmuch as they intended to go abroad and stay a short time, any expenditures the complainant should have in connection with the two children to be left with him, or any remittances he should make to Meyer and his wife Meyer would reimburse, saying he had money at the Central Trust Company. Complainant exacted no written agreement, as he knew Meyer was financially good. Mr. and Mrs. Meyer pledged themselves that in all things he should be reimbursed. Meyer and his wife had not lived with the complainant, but maintained a home of their own. Complainant took the children to his home and kept them and their governess there until the 1st of October, 1915, when the entire family moved to a residential hotel, which was within the means of the parties. The charges there were reasonable, and the

governess was paid a reasonable wage, from $8 to $9 a week. Meyer, being a German citizen and a reserve officer in the German navy, was held to service in Germany. In November, 1916, the complainant took the two children to Germany in order that their mother might see them, she being greatly distressed and suffering in health on account of the separation. Upon arrival in Germany complainant was again told by his daughter and son-in-law that he should be reimbursed for his outlays. The trip cost about $4,000, of which he charged one-fourth, as the children's expense, against Meyer and his wife. Complainant brought the youngest child, a mere baby, back home, leaving two children with the parents, deeming the conditions in Germany with regard to food supply at that time not such as to warrant leaving the youngest. Complainant continued to support this child and the governess. While Meyer and his wife gave complainant power of attorney to enter their safe deposit box in the bank at Cincinnati, he was not given power to reimburse himself. The remittances made them were necessary for their support.

The government offered no evidence except an inventory of the property seized by the Alien Property Custodian.

The following conclusions are reached:

The evidence sufficiently shows that there was a contract to reimburse for remittances and all outlays made on account of the children. While this conclusion rests upon the testimony of complainant alone, it is uncontradicted, the witness is unimpeached, his testimony is not improbable, but, on the other hand, is convincing. The contract, however, must be taken as he has stated it. He has stated merely that he was to be reimbursed for outlays made on behalf of the children and remittances sent to the parents. His grandchildren came to his house for a two months' stay while their parents went to Europe. I am unable to conclude that the intent of the agreement was that he should charge, and they should pay, board for the keep of the children while they were guests in his house. I take it that the contract related rather to direct outlays, expenditures, and advancements of money. Such were its terms as testified to by complainant. Complainant can take nothing on the theory of implied contract. He was dealing with his daughter and his son-in-law. The succor which they received at his hands will be attributed to parental generosity unless an express contract to repay be shown. And, as defendants stand in a position similar to that of an administrator defending the estate of a decedent against such a claim, complainant must estabish the contract by evidence that is clear and convincing. Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999, as modified by Merrick v. Ditzler, 91 Ohio St. 256, 266, 110 N. E. 493. And the same rule that requires that the evidence in cases of this kind should be clear and convincing would require that the contract should be strictly limited to, and not be extended beyond its clear purport and intent. The same ruling will apply to board furnished the governess at the complainant's house.

It is found that the outlays for the board of the chidren and governess at the hotel, money advanced, and wages paid to the governess prior to the entry of the United States into the World War were direct

cash outlays for which the complainant is entitled to reimbursement in accordance with the terms of the contract.

By the contract complainant was to keep and maintain the children until the return of the parents. While his daughter was in Europe she asked to have the children sent over by a trustworthy person. Pursuant to this request he himself took them abroad; his daughter being in ignorance of his coming until he arrived. The transportation of the children so requested necessitated an expenditure of money which came within the terms of the contract to reimburse for all outlays. One-fourth of the total expense of the trip was certainly not an unreasonable portion to charge against the parents. The item is allowed.

That portion of the complainant's claim resulting from performance of the contract after the passage of Trading with the Enemy Act Oct. 6, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j) must be disallowed. By section 3 of the act it was made unlawful for any person to trade with or on behalf of an enemy except by license of the President; and complainant has shown no license. By section 2 "trade" is defined to mean, among other things, to pay or satisfy a debt or obligation; to carry on, complete, or perform any contract, agreement, or obligation. By section 5 the President was given authority to grant licenses to trade, notwithstanding the provisions of section 3. The complainant contends, despite the breadth of the definition contained in the act, that the contracts thereby prohibited are only those which would have been invalid at common law between citizens of this and an enemy country, which were, generally speaking, those which involved intercourse or communication, and those which might tend to better the enemy's economic position or be detrimental to this country, and in certain other exceptional instances. Trotter on Law of Contract During and After War, p. 61, § 13. The general principles are stated, and the cases up to that time thoroughly reviewed in Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142, which is cited with approval in Williams v. Paine, 169 U. S. at page 72, 18 Sup. Ct. 279, 42 L. Ed. 658. Both of those cases arose during the Civil War. In the first it was held that a lease between a citizen of Mississippi and a citizen of Massachusetts residing in Mississippi, made during the war and involving neither intercourse nor trade across the line of hostilities, was valid, and in the other that a power of attorney, executed before the war by one thereafter who became an enemy to one who remained a loyal citizen continued valid. But there is a vast difference between the terms of the act then in force, which simply forbade "all commercial intercourse" during hostilities (12 Stat. 257; and see presidential proclamation, 13 Stat. 731) and that now under consideration. The broadest and most comprehensive language is used to define the words "to trade," and there is no suggestion anywhere in the act of any limitation on their scope except that of presidential license. Congress evidently considered such power an ample substitute for the exceptions to the rule at common law. The language used does not indicate that it was the intention merely to declare the common law with reference to the character of trade interdicted. As the act contains no ambiguity, it is not within

the province of the court to ingraft exceptions upon it by construction. Therefore so much of this claim as accrued subsequent to the date of the passage of the act cannot be allowed.

In view of the foregoing, it becomes unnecessary to determine what the effect of the amendment of section 9 by the act dated June 5, 1920 (41 Stat. 977, c. 241), may be upon this portion of complainant's claim.

A decree may be taken subjecting the property of both defendants to be sold as upon execution, the claim to be first made out of the property of the husband as far as can be, because he was primarily, and as between the husband and wife, liable for the children's and wife's support.

PHILADELPHIA RUBBER WORKS CO. v. UNITED STATES RUBBER RECLAIMING WORKS et al.

(District Court, W. D. New York. October 8, 1920. On Settlement of Decree, December 23, 1920.)

1. **Patents ⇐319(1, 3)—Rule for recovery for infringement stated.**
In equity the rule for recovering for infringement is that where the net profits earned by reason of the infringement do not sufficiently compensate the owner of the patent for its infringement, there may, in a proper case, be awarded damages in addition to the ascertained net profits, and punitive damages may be awarded in the court's discretion, but, ordinarily, the pecuniary gains arising from sales of an infringing article disclose the usefulness and commercial value of the thing invented, as well as its disadvantages, and may well constitute a guide to the true measure of damages.

2. **Patents ⇐318(3)—Rule of recovery for process infringement stated.**
In suit for infringement of patent for process for reclaiming rubber from vulcanized rubber waste, defendants would be required to account for profits made from the use of the invention, less the cost of production, such profits being ascertainable on comparison with any other method of obtaining substantially similar results which were either in public use at the time of the infringement or available to defendants.

3. **Patents ⇐318(3)—Patented processes, not available to defendants, not proper standard of comparison to ascertain defendant's profits.**
In suit for infringement of patent for a process, patented processes used by other manufacturers, not open to the public nor available to defendants, could not be used as a standard of comparison in ascertaining defendant's profits from infringement.

4. **Patents ⇐318(3)—Substitute process, not complete prior to date of infringement, not available standard of comparison to ascertain profits.**
In suit for infringement of patent for a process, a process temporarily adopted by defendants when plaintiff's process was held infringed by the courts, could not be used as a standard of comparison to ascertain defendant's profits from infringement, where it was not shown to have been a completed process prior to the date of the infringement, for an infringer cannot avail himself, to mitigate the damages, of devices developed either by himself or others after the infringement.

5. **Patents ⇐318(3)—Accounting limited to the precise advantage derived.**
In suit for infringement of a patent for a process, the accounting must be limited to the precise advantage derived, and, if another process is

available to an infringer which produces substantially the same result, but not so efficiently, then the advantage ordinarily is found in the increase of efficiency.

6. Patents ⊂=318(3)—Increased value of product dependent on process infringement held profits to be accounted for.

In suit for infringement of patent for a process for reclaiming rubber from vulcanized rubber waste, where defendants contended that a large part of their profits from rubber treated by plaintiff's process were attributable to their special treatment of the rubber after devulcanization, by adding compounds to impart greater abrasive resistance and tensile strength to it, and that such treatment was an operation separate from the devulcanizing process, while plaintiff claimed that the special treatment was made possible solely by the appropriation of its devulcanizing process, and it appeared that upon devulcanization certain physical properties were imparted to the material, such as plasticity and an ability to absorb compounds, and that it was necessary to the salability of defendants' article that it should possess such special characteristics, which could only be acquired by the infringing process without regard to the subsequent addition of compounds, the principle applied that when the commercial value of an article is due to a patented improvement the owner of the patent may recover the total profits derived from its sale.

7. Patents ⊂=318(6)—Deduction from infringement profits of extra payments to officers not allowed.

In suit for infringement of patent for a process, payments made to officers of defendant corporations beyond their regular salaries could not be deducted from the profits to be accounted for, it not appearing that defendants received any consideration for such expenditures.

8. Patents ⊂=318(6)—Deduction from infringement profits of legal and reorganization expenses not allowed.

In suit for infringement of patent for a process, amounts paid by defendants to attorneys for conducting the litigation and for reorganization of defendants' business *held* not deductible from the profits to be accounted for.

9. Patents ⊂=318(6)—Apportioning general expenses measurably discretionary.

In suit for infringement of patent for process for reclaiming rubber from vulcanized rubber waste, *held* that there was reasonable fairness in apportioning the general expenses equally between two mills of defendants, one using the infringing and the other a noninfringing process, under the rule that where the evidence is meager or where the existing circumstances seem to require a reasonable division of the total expenses of conducting a business, the court will exercise a reasonable discretion.

10. Patents ⊂=318(6)—Interest on capital invested to be deducted from profits.

In suit for infringement of patent for a process, interest on the capital invested would be allowed as a credit to defendants, such invested capital including, not merely plant investment, but also cash on hand, accounts receivable and bills receivable.

11. Patents ⊂=319(3)—Infringement held not willful and wanton.

In suit for infringement of patent for a process, where the validity of the patent was debatable, and one district judge had held it invalid, *held* that willful and wanton infringement could not be successfully urged, nor could malicious infringement, even though there was a continuance of infringement after decision by the lower court holding the patent valid and infringed, where, upon affirmance of the decree, the defendants at once ceased using the infringing process.

---

12. **Patents ⟸312(1)—Defendant infringers have burden of showing separable profits.**

In suit for infringement of patent for process for reclaiming rubber from vulcanized rubber waste, where defendants claimed deduction from profits because of gains from skillful services in the business and special treatment involving factory secrets unconnected with the process, defendants had the burden of proving that the gains were attributable to some other things used by it.

13. **Patents ⟸318(5)—Interest allowed from date of decree awarding profits.**

Where infringement was not wanton or malicious, interest would be allowed, not from the date of affirmance of interlocutory decree, but from the date of the decree awarding profits.

On Second Supplemental Bill.

14. **Corporations ⟸590(4)—Patents ⟸287, 290—Successor of defendant purchasing its assets and assuming its debts pending accounting for infringement of patent could be joined as defendant.**

In suit for infringement of patent for a process, where it appeared that another company had, while accounting proceeding was pending and with knowledge thereof, bought the assets and assumed the liabilities of a defendant company, plaintiff could, under rule 26 (198 Fed. xxv, 115 C. C. A. xxv), have the successor corporation included as a defendant, by supplemental bill, even though the patent in suit had expired before the successor company came into existence, for the assets acquired from the predecessor constitute a trust fund for the payment of the latter's debts.

In Equity. Suit by the Philadelphia Rubber Works Company against the United States Rubber Reclaiming Works, in which the defendant's successor, the United States Rubber Reclaiming Company, Inc., was brought in as defendant, and later the Madison Tire & Rubber Company, Inc., was also brought in as defendant. On accounting in patent suit. Decree directed in accordance with opinion.

See, also, 276 Fed. 613.

Charles Neave, William G. McKnight, and Alan N. Mann, all of New York City, for plaintiff.

Hans V. Briesen, of New York City, and Simon Fleischmann, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. The plaintiff sued the United States Rubber Reclaiming Works in equity for infringement of letters patent No. 635,141 of October 17, 1899, issued to Arthur H. Marks for a process "for reclaiming rubber from vulcanized rubber waste," and consisting of an alkali process adaptable to reclaiming rubber scrap of boots and shoes, and the more highly vulcanized rubber mechanical goods scrap, hose, air brake hose, and tires, especially such as are used on automobiles.

It is shown that the Diamond Rubber Company acquired the letters patent in issue from the inventor, and afterwards, with the B. F. Goodrich Company, merged into the Alkali Rubber Company, which company, in January, 1910, merged with plaintiff's predecessor, the Philadelphia Rubber Company, which theretofore was engaged mainly

in reclaiming rubber boots and shoes by means of an acid process described in the prior patent to Mitchell, No. 395,987 of January 8, 1899. At the time of the merger the latter company acquired the patent in suit—a patent that was afterwards held by this court to be valid and infringed in the year 1915 by the defendant, United States Rubber Reclaiming Works, and also, after affirmance of the decree, by its successor, the United States Rubber Reclaiming Company, Inc., which was brought into this case by supplemental bill and answer. The opinions on the interlocutory decree and affirmance will be found in (D. C.) 225 Fed. 789 and (C. C. A.) 229 Fed. 150, respectively, and their correctness is not now challenged.

A reference was had to a master in chancery to take an account of the profits and damages sustained as a result of the infringements, but the master, William Macomber, Esq., after listening to the entire evidence on both sides, died before making his report to the court. The parties then stipulated that the evidence taken in the accounting proceeding and the arguments of counsel thereon be submitted to this court for adjudication. A hearing has now been had, and full and complete briefs, comprehensively setting forth the claims, concessions, and contentions of the respective parties, have been considered. As the present proceeding does not arise on exceptions to any master's report, the issues are not specifically narrowed or defined. The general claim of plaintiff on the evidence is that profits and damages are recoverable herein on several theories, or, as counsel stated orally, each element relating to profits and damages bears upon the other without the damages and profits, however, being added together; that plaintiff has the legal right to show both profits and damages, and then "to take whichever is the larger," and if the evidence is deemed insufficient to show any pecuniary gains and profits, or an inadequate amount, then under the proofs the court may compute actual damages on an established or reasonable royalty or on loss of sales. Hence it is understood that both profits and damages are not sought herein.

[1, 2] The rule for recovering in equity for infringement of a patent is that where the net profits earned by reason of the infringement do not sufficiently compensate the owner of the patent for its infringement, there may, in a proper case, be awarded damages in addition to the ascertained net profits. Birdsall v. Coolidge, 93 U. S. 64, 23 L. Ed. 802. And punitive damages may be awarded in the discretion of the court. Malleable Iron Range Co. v. Lee (C. C. A.) 265 Fed. 896. But ordinarily the pecuniary gains arising from sales of an infringing article disclose the usefulness and commercial value of the thing invented as well as its advantages, and may well constitute a guide to the true measure of damages. In Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860, the Supreme Court substantially said that the question to be determined in cases of infringement of a patent is what advantage was derived by the infringer from using the "invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result." In Philp v. Nock, 84 U. S. (17 Wall.) 460, 21 L. Ed. 679, it was held that where damages were sought in infringement suits in the form of

a royalty paid by licensees, the amount to be recovered would be regulated by that standard unless peculiar circumstances required another standard, and that, if the test of the amount paid for royalties could not be applied, the plaintiff would be entitled to an amount which would compensate him for the injury to which he had been subjected; and, further, that profits earned by defendant and those lost by plaintiff were among the elements that might be considered. In Tilghman v. Proctor, 125 U. S. 146, 8 Sup. Ct. 894, 31 L. Ed. 664, the Supreme Court, speaking of profits for which an infringer may be required to account, substantially said that a court of equity would not require the party injured to proceed at law to recover damages, but as an equivalent or substitute for legal damages would make compensation computed and measured by the same rule that courts of equity apply in cases of trustees for improper use of the trust property; "in other words [quoting from the opinion] the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result." Under such a rule the defendants would be required to account for profits made from the use of the invention, less the cost of producing the article, such profits being ascertainable on comparison with any other method of obtaining substantially similar results which were either in public use at the time of the infringement or available to defendants.

Rubber scrap was admittedly reclaimed by an acid process by both plaintiff and the defendant U. S. Rubber Reclaiming Works under expired patents, many years before the invention in suit, but such prior processes were limited to successfully reclaiming lightly vulcanized waste or worn rubber boots and shoes; highly vulcanized waste such as automobile tires could not be efficiently reclaimed by it. Indeed, according to the evidence, it was not only impracticable for economic reasons to adapt the known acid process to mechanical goods scrap, but the product was not commercially marketable. Neither before the issuance of the Marks patent, nor during its use by defendants was there open to the public use, or to the defendants, any process which compared with plaintiff's process in the production of beneficial results. Plaintiff claims that the reclaiming of automobile tires or highly vulcanized rubber scrap by defendants (the old and new company) for upwards of five years, from 1911 to December 3, 1915, inclusive, was entirely due to the invention of the patentee; that no standard of comparison existed at the date of the infringement which was available to defendants. But this broad claim is challenged as being unsupported by the evidence.

In the former opinion by this court it was held that mechanical scrap rubber consisting of a highly vulcanized material was not efficiently devulcanized by any known acid process, but that in its use an inferior article was produced. In this proceeding it is shown that efforts to adapt its beneficial use to commercial purposes were repeatedly made at a considerable expense, but without the procurement of the desired results. I find that highly vulcanized rubber scrap reclaimed by the known acid process would not age properly and be-

came oxidized. The comparatively small quantity of sulphur in the waste, and the varying physical properties possessed by the more highly vulcanized material, tended to limit, and in fact did limit, the use of the acid process to the lesser vulcanized material. The expert witnesses are not in agreement as to this, but I think the unadaptableness of the known acid process for devulcanizing highly vulcanized rubber waste is fairly proven. It could not compete with the product of the patent in suit, and hence affords no standard of comparison for ascertaining the recoverable damages herein. The defendant United States Rubber Reclaiming Works began reclaiming mechanical scrap rubber, including automobile tires, in its sawmill No. 2 on February 1, 1911, by the alkali process in suit, and presumably selected it in preference to any other means because of the beneficial results that were known to follow, and in addition because they believed the Marks patent invalid. Infringement was discontinued only upon affirmance of the decision holding the patent valid and infringed. The defendants then adopted a noninfringing two-step alkali process—one more expensive—in place of plaintiff's one-step process, but resumed the latter immediately on the expiration of the Marks patent.

[3-5] The first question is, Should the concededly noninfringing process be considered the standard of comparison for ascertaining the recoverable profits, or should certain other processes owned by others, accomplishing the same result, be so considered? Rubber waste consisting of automobile tires could be reclaimed by various methods used by manufacturers, but such methods and processes were patented. They were not open to the public or available to defendants, and they are therefore not believed to be a basis for recovery herein. American Pneumatic Co. v. Snyder (D. C.) 241 Fed. 274. The case stands no differently with reference to the specific process temporarily adopted by defendants, for the reason that it is not proven to have been a completed process prior to the date of the infringement in question. In Expanded Metal Co. v. General Fireproofing Co. (D. C.) 247 Fed. 899, it was correctly decided, I think, that an infringer of a patent could not avail himself of devices developed either by himself or others after the infringement, to mitigate the damages. It is also the law that the accounting must be limited to the precise advantage derived. Westinghouse v. Wagner, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222. If another process is available to the infringer which produces substantially the same result, but not so efficiently, then the advantage ordinarily is found in the increase of efficiency. Columbia Wire Co. v. Kokomo, 194 Fed. 108, 114 C. C. A. 186. The noninfringing alkali process later adopted by defendants, and known to them since 1906, is not shown to have been advantageously used at any time before the infringement. In its adaptation in 1915 it may fairly be assumed that information was acquired by defendants enabling them to develop or modify the Marks process, and any modified process was not, in my opinion, a proper standard of comparison.

The evidence in its entirety shows that defendants' product essentially derived its marketability and value from the unlawful appropriation of the process in litigation. This brings me to a consideration of

the profits earned by the defendants during the five years in which they admittedly used the infringing process, to wit, the years 1911, six months of 1912, and to December 15, 1915, inclusive. The proofs show that during such time they bought mechanical goods scrap amounting to $2,500,000 which was treated by them in mill No. 2 in accordance with the Marks process. The reclaimed rubber was afterwards sold for $4,160,000. The net profits, according to plaintiff's corrected table of computation, are $582,555.91, after allowing for total cost of production. Different adjustments leaving certain items in dispute for addition to the profits or subtraction therefrom are concretely shown in the following table submitted by plaintiff and defendant as a basis for determining the conclusions of the court:

	Plaintiff.		Defendant.
	$610,581.66		$610,581.66
Add improper deductions:			
Special expenses	21,507.30		
Legal expenses	21,004.18		
Reorganization expenses	3,461.73		
	$656,554.87		
Deduct:			
Interest on capital	84,981.44		215,391.22
	$571,573.43		$395,190.44
Deduct:			
Eliminating losses in 1911 and part of 1912 of	10,982.48		
	$582,555.91		
Change in apportioning expenses		$122,932.57	
Profits on compounds		179,309.24	
Profits on other operations		75,949.16	378,190.97
			$16,999.47

In the total are included profits derived from mill No. 2 from all sources, viz. devulcanization of scrap, compounds, purchase of scrap, profits from laboratory research, etc. According to Defendants' Exhibit (Schedule A, page 830 of Record) the profits were $16,989.47. What deductions, if any, should be made from the above table, showing a net profit of $582,555.91? Defendants claim a material deduction on the ground that the asserted profits are largely the result of treatment and services after devulcanizing the waste, and that the accountants adopted a wrong method.

[6] In Defendants' Exhibit 210 it is shown that many pounds (1,558,130) of ingredients, costing $129,449.78, were introduced into the rubber after devulcanization to impart greater abrasive resistance and tensile strength to it; that by such treatment to which a large part of the profits, as claimed by defendants, are attributable, there was realized $179,309.24 as shown by Exhibit 210 (Schedule B). Defendants' position is that the compounding of ingredients was a separate operation from the devulcanizing process, while plaintiff insists that the introduction of the compounds was made possible solely because of the appropriation of its process. It satisfactorily appears from the evi-

dence that upon devulcanizing the rubber waste certain physical properties are imparted to the material such as plasticity and ability to absorb compounds—characteristics differing from those imparted by the acid process. As stated in plaintiff's brief:

"These characteristics result in a new product which could be attained only by depolymerizing the waste or breaking down the rubber molecules formed during vulcanization."

In my opinion it was necessary to the salability of defendants' article that it should possess such special characteristics which could only be acquired by the infringing process without regard to the subsequent addition of compounds. The principle enunciated in Carborundum Co. v. Electric Smelting Co., 203 Fed. 976, 122 C. C. A. 276, wherein it is held that when the commercial value of an article or mechanism is due to a patented improvement the owner of the patent may recover the total profits derived from its sale, is thought to apply.

[7] Special Expense.—Payments amounting to $21,507.30, made to officers of the defendants beyond their regular salaries, should be added to the profits, since it does not appear that defendants received any consideration for such expenditures. Lee v. Malleable Co. (D. C.) 247 Fed. 975.

[8] Legal and Reorganization Expenses.—The amount of $21,004.18, paid to attorneys for conducting this litigation and $3,461.73, for reorganization of defendants' business, are items unquestioned by defendants, and they should be included in the net profits. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C.) 95 Fed. 991.

[9] Apportioning General Expenses.—The method of apportioning the general expenses of running the two mills and making division to the infringing business is questioned. The evidence shows that defendants operated jointly mill No. 1 using in its operation the acid process, and mill No. 2 of later construction, the infringing process. There existed a joint bookkeeping arrangement which obviously required an effort to fairly apportion the total expenses to both mills. The accountants distributed the general selling expenses between both mills upon the basis of the percentage that the product of each mill bore to the total of both mills, while the general administration expenses and labor were divided upon the basis of the percentage that the rubber scrap reclaimed by each mill bore to the total produced by both mills. Defendants oppose this method on the ground that an equal division would be more fair and proper. In its books an equal division was made, which, if applied on the accounting herein, increases the expenses of the alkali mill by $122,932.57, and correspondingly lessens the asserted net profits. There was evidence tending to show that for the years 1911 and 1914 the overhead expense of the infringing mill was approximately 90 per cent. of the total expense of both mills, and in the subsequent years approximately 75 per cent.

The testimony on this point is criticized by plaintiff on the ground that defendants' witnesses Low and Brewster merely gave estimates

based upon their recollection after the lapse of a number of years. I am persuaded, however, that there was reasonable fairness in apportioning the expense equally between the mills, and the accountants should have distributed the expenses accordingly. The alkali mill no doubt entailed a far greater expense than the acid mill, even more perhaps than upon the adopted plan of bookkeeping of an equal division. In a case like this the court must often exercise a fair and reasonable discretion, since there is no positive rule of damages or for estimating profits. Especially is this true when the evidence is meager, or where the existing circumstances seem to require a reasonable division of the total expenses of conducting a business. Such apparently was the rule adopted in Dowagiac Mfg. Co. v. Minn. Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398. The contention that defendants have benefited by the infringement beyond the assessable net profits, by enhancing their other branches of business, or at least by reducing the overhead expense thereof, is purely conjectural and speculative, and in my judgment is insufficient reason for differently apportioning the expenses of the mills. This item increases the expense of the mill, and should be deducted from plaintiff's statement of profits.

[10] As to interest on the investment: That interest on the capital, when ascertained, must be allowed as a credit to the infringer, under the authority of Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 C. C. A. 578, is undoubted, especially since in that case the Circuit Court of Appeals said that such a rule accords with business practice and common sense. There is a wide disparity between the different figures submitted as to the total interest on capital invested in defendants' business during the infringing period, plaintiff urging that the true amount is $84,981.44, which includes interest on property value, i. e., the real estate, building, and machinery, but excludes the elements of cash on hand, accounts receivable, and bills receivable upon which the total interest amounts to $215,391.22. In the Oehring Case interest was allowed on the capital invested, including accounts and bills receivable. It was urged in opposition that such items were not proper credits, but the learned court said in its opinion:

"The items which constitute the investment in the case at bar are (broadly classified) land, buildings, machinery, fixtures, light and power plant, accounts, and bills receivable. These all go to make up the capital which defendant had invested in the various departments of its business, and while a list of these items may be called an inventory, that inventory shows the investment."

It would seem therefore that interest on all the elements that go to make up the capital invested is to be credited to the infringer. It is pointed out that the court refused to consider the specific objection to the inclusion of bills and accounts receivable as credits because the record did not disclose an exception to the calculation of the master. The refusal, however, as I read the opinion, was based upon the ground that an appellate court would not "examine the correctness of the constituent items entering into the final calculation as found by the trial court, where error was not assigned." This does not to my mind imply a failure to consider the question of credits to be given an infringer for interest on the specified elements constituting the capital actually in-

vested in the business. In requiring a deduction from the net profits for interest on the capital actually invested, including money in bank, bills and accounts receivable, it should be borne in mind that money, and accounts and bills convertible into money in the main were used to purchase material and supplies of all kinds for the purpose of operating the infringing process. True such capital, or a large part thereof, was received from sales of the infringing product, but since it was continuously used to finance the enterprise, the interest thereon did not in fact operate to reduce the gains and profits. Although an infringer has been said to be a trustee for the owner of the patent, and must account for the pecuniary gains made by its appropriation, yet if money had been borrowed to conduct the business, concededly credit therefor to the infringer would be required. So I think that the fact that the receipts were deposited in the bank and applied to paying the debts and obligations of the concern entitled defendants to credit for the interest amounting to $215,391.22 as shown by Defendants' Exhibit 210.

[11] I am unable to sustain plaintiff's claim that the infringement in question was wanton and willful. The validity of the Marks patent, from the outset to the final decision by the Circuit Court of Appeals, was debatable, and defendants, by their counsel, in good faith interposed defenses attacking its validity and denying the infringement, and indeed, Mr. Justice Clark, then District Judge of the Northern District of Ohio, and now Justice of the Supreme Court, in an action brought by plaintiff against the Portage Rubber Co., 227 Fed. 623, had held it invalid. Therefore malicious infringement cannot be successfully urged, even though there was a continuance of infringement after the decision by this court holding the patent valid and infringed because upon affirmance of the decree the defendants at once ceased using the infringing process. Fairbank v. Windsor, 124 Fed. 200, 61 C. C. A. 233; Brown Bag Filling Machine Co. v. Drohen, 175 Fed. 576, 99 C. C. A. 192.

[12] Profits on Other Operations.—This item, amounting to $75,949.16, taken from plaintiff's statement (see Defendants' Exhibit 210, Schedule A) of gains and profits, relates to various details of operating the infringing process, and rendering the devulcanized rubber marketable. Defendants contend for a deduction from the earnings amounting to $92,948.63, on the ground that in the main the item relates to unpatented features after the reclaiming operation, viz.: skillful services in the business and special treatment involving factory secrets unconnected with the process and which absorbed 81.71 per cent. of the entire manufacturing expense. Upon this phase of the controversy the burden is upon the defendants to prove that the gains are attributable to some other things used by it. Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 614, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653. There is testimony that some advantage was realized from skillful purchases of rubber scrap, laboratory research for making different grades of rubber, the use of various kinds of rubber scrap in combination for making a specialty tire, additional treatment after the

devulcanized waste is in a plasticized condition, and washing or cutting the devulcanized rubber into sheets or forms. It is claimed that such labor and treatment produced additional profits, and therefore that the patent in suit created only a part of the net profits of the entire business, viz. $16,999.49, or 18.29 per cent. of the gains; that as plaintiff gave no evidence to show what amount was attributable to the patent, and what amount attributable to the additional services and treatment, there can be no recovery of the entire profits. But since it has been proven, as hereinbefore pointed out, that the gains realized on sales of the mechanical scrap rubber were wholly attributable to the use of the infringing process, there will be no deduction made on this ground. This is not a case where the plaintiff is required to separate the profits owing to the part use only of its process to achieve the result, and, even though a portion of the gains were due to the specified additional treatment and labor, the defendants are not relieved, for, as said in Carborundum Co. v. Electric Smelting Co., supra, it was subsidiary or incidental to the sale of the product. And as said in Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653:

"On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee, and by judicial decree repeal the provision of Rev. Stat. § 4921, which declares that in case of infringement the complainant shall be entitled to recover the 'profits to be accounted for by the defendant.'"

There is dispute as to the value of the ground upon which mill No. 2 was erected. On the books of the defendants the value of the land for both mills was given at $69,000, and the accountants believed $35,000 to be a fair value of the ground upon which mill No. 2 was erected. The estimate of the witness Stagg apparently was based mainly on an appraisal of the entire land made in 1913 by the American Appraisal Company at $69,156. It is quite believable that there was a subsequent increase in value as testified by defendants' witnesses, beginning July 1, 1910, from which time interest upon the investment should be allowed, and not from April 1, 1911, when the infringement began. The value of the land as given in Defendants' Exhibit 210 is $64,350 to June, 1912, and $65,850 to December 31, 1915, respectively, and the interest thereon must be credited. No allowance is made, however, for using other buildings aside from mill No. 2 to operate the process; the evidence in relation to such use being indefinite and uncertain.

A summary of the total profits and deductions to which plaintiff and defendants are respectively entitled is as follows: The net profits amounting (corrected figure) to $582,555.91 (including the special expenses amounting to $45,973.21), from which total gains and profits, however, there should be deducted interest on the investment as here-

in determined, amounting to $215,391.22, instead of $84,981.44, and $122,932.57 additional costs and expenses, leaving a balance of $244,232.12, subject, however, to a deduction of the increased land values and interest thereon as herein determined, the precise amount to be provided for in the decree.

[13] Interest on Judgment for Profits.—Inasmuch as I believe that the infringement was not wanton or malicious, I incline to the view that I ought not to allow interest on the recovery from the date of the affirmance of the interlocutory decree, but, following the decision in B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 C. C. A. 611, I deem it fair to allow interest from the date of the decree awarding plaintiff profits herein. It is unnecessary to pass upon any other questions argued at the bar or to specifically treat of recovery of damages from loss of sales or on the theory of a reasonable royalty. A decree may be entered stating the amount of gains and profits in accordance with this opinion, with costs.

On Second Supplemental Bill.

[14] A second supplemental bill has been filed herein to include the Madison Tire & Rubber Company, Inc., as a defendant on the ground that it has bought the assets and assumed the liabilities of its predecessor, the defendant United States Rubber Reclaiming Company, Inc. The transfer and assumption of liabilities is admitted. The purchase was made with knowledge of the pendency of this accounting proceeding. Under such circumstances I think that the transferee is liable to the full amount of the judgment, and plaintiff has the legal right to have it included as a defendant. Under rule 26 (198 Fed. xxv, 115 C. C. A. xxv) of the new equity rules, different causes of action may be joined, the only restriction on plaintiff being that the causes shall be cognizable in equity and relate to rights belonging to him.

Defendant opposes plaintiff's motion, asserting that the patent in suit expired in 1916, and the Madison Company only recently came into existence, and not having wronged plaintiff, should not be sued by way of supplemental bill; indeed, that the transferee is in the position of surety for the liquidated amount of plaintiff's claim, and when judgment is entered herein it will have the right to have decreed a lien against defendant's assets unless the judgment is paid. I think that as the transferee knowingly acquired the assets of its predecessor and took over the business while an infringement was pending, and in addition assumed any liability arising therefrom, it may be brought into the case at the instance of plaintiff by supplemental bill. Certainly there existed a liability, and an original suit could be entered; but, since the parties are practically the same by reason of the assumption of liability by the successor company, and the subject-matter is the same, I can see no sound reason for striking out the supplemental bill. See Hibernia Insurance Co. v. St. L. & M. O. Trans. Co. (C. C.) 13 Fed. 516; Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 127 C. C. A. 184; Okmulgee Glass Co. v. Frink, 260 Fed. 159, 171 C. C. A. 195. Although the adjudications cited do not expressly decide that a

transferee of the property and business of an infringer may, during the pendency of the infringement suit, where the patent has expired, be made a defendant by supplemental bill, yet the principle therein stated would seem to permit bringing into the case the successor company, for the assets acquired from the predecessor, after all, constitute a trust fund for the payment of the latter's debts. So ordered.

On Settlement of Decree.

Both sides agree that certain matters of computation and of fact set forth in the original opinion filed in this case October 8, 1920, should be corrected. On investigation corrections therein are made in the following particulars:

1. On page 6 thereof (see 276 Fed. 606), stating that the infringement continued during "the years 1911, six months of 1912, and to December 15, 1915, inclusive," should read, "the years 1911 to December 3, 1915, inclusive."

2. On page 8 (see 276 Fed. 607) it is said that defendant was not entitled to deduct special expenses, legal and reorganization expenses amounting to $45,973.21, which were accordingly added to the aggregate profits, but I am now advised that the accountants applied only a part of the amount of $45,973.21 to running mill No. 2, and that the part so used only should be added to the profits, thus increasing them by $22,986.60 instead of $45,973.21.

3. In the third last paragraph of the original opinion I referred to interest on the increased value of defendant's land. Such interest, however, appears to have been included in the total figures of $215,391.22 as per Defendant's Exhibit 210. It is also stated by me that no allowance would be made for using other buildings except mill No. 2. The value of such other buildings appears in column 2 of Exhibit 210, and the interest thereon at 6 per cent. for the periods in question is stipulated at $18,370.50, which amount, upon deduction from $215,391.20, leaves $197,020.70 as the total amount of interest on investment allowed.

4. The summary set forth in the second paragraph is revised to read as follows:

The net gains and profits amount to $610,581.66, from which there must be deducted $197,020.72, interest on the investment, and the sum of $122,232.57, additional costs and expenses, leaving a balance of $290,628.57 subject, however, to the addition of the losses in 1911 and part of 1912, amounting to $10,982.48 and 50 per cent. of the item for special legal and reorganization expenses, to wit, $22,986.61, making a total of $324,597.46, the amount which plaintiff is entitled to recover herein.

A rehearing was suggested by counsel for defendants upon the point relating to the noninfringing process known to defendants in 1906 on the ground that the court acted upon an assumption that in using the said process in 1915 after the affirmance by the Circuit Court of Appeals of the decision holding the patent valid and infringed defendants had obtained information during the period of infringement which

enabled them to develop or modify the Marks process in suit. When I wrote the opinion on the question of recovery of profits it was my view that the 1906 process could not have been used for reclaiming automobile tires; it had not been used for such purposes. The testimony of Brewster was inadequate on the point. True he testified that after ceasing to use the Marks alkali process he adopted a process the source of which was from his own knowledge and experience, and the knowledge and experience of coemployees. The testimony does not disclose just when this new process first became known to the defendants. Neither the process of 1906 nor that used in 1915 by defendants is described, and it seemed to me that the evidence was wholly insufficient to prove that the noninfringing process was in existence and open to public use in its completed form at the time when the defendants first began infringement of the process in suit. I retain this view after further reflection.

The amount recovered it is true is very large, and if the evidence permitted awarding a more conservative amount by applying a different rule for the recovery of damages I would adopt it; but the proper rule on the evidence for measuring the compensation is, I think, as pointed out before, that relating to recovery of the gains and profits earned by the defendants during the time of the infringement.

I will withhold signing the decree submitted by the plaintiff until January 3, 1921, to afford an opportunity to defendants to perfect their appeal. So ordered.

PHILADELPHIA RUBBER WORKS CO. v. UNITED STATES RUBBER RECLAIMING WORKS et al.

(District Court, W. D. New York. December 23, 1920.)

Eq. A-24.

1. **Corporations ⟸590(4)—Patents ⟸287—Pleading ⟸8(8)—Successor of defendant pending accounting for infringement of patent liable notwithstanding denial of obligation.**

   Where, pending accounting for patent infringement, a successor company bought the assets and business of a defendant, agreeing to "assume and pay all debts, obligations and liabilities whatsoever" of the selling company, and was joined as defendant in the infringement suit, it was properly made liable by the decree in that suit for the recoverable profits, although it denied in its answer any obligation to pay the judgment recovered against its predecessor, that being a mere legal conclusion, and though the debt or liability was unliquidated, the language of assumption being sufficiently comprehensive to include plaintiff's claim, and though it paid a full consideration for the property transferred to it.

2. **Contracts ⟸187(4)—Party assuming grantor's liabilities may be proceeded against by creditor of grantor.**

   If a grantee has agreed with a grantor to be primarily liable for the grantor's obligations to a creditor, the creditor is entitled in equity to be substituted in the place of the grantor and to sue the grantee the same as the grantor might have sued him; it being immaterial whether the contract was made and intended for the benefit of the grantor or the creditor.

In Equity. Suit by the Philadelphia Rubber Works Company against the United States Rubber Reclaiming Works, in which the defendant's successor, the United States Rubber Reclaiming Company, Inc., was brought in as defendant, and later the Madison Tire & Rubber Company, Inc., was also brought in as party defendant by supplemental bill. On motion for decree on bill and answer. Decree ordered in accordance with opinion.

See, also, 276 Fed. 600.

Fish, Richardson & Neave, of New York City (Charles Neave, of New York City, of counsel), for plaintiff.

Briesen & Schrenk, of New York City (Hans v. Briesen, of New York City, and Simon Fleischmann, of Buffalo, N. Y., of counsel), for defendants U. S. Rubber Reclaiming Works and United States Rubber Reclaiming Co., Inc.

Van Vorst, Marshall & Smith, of New York City (Milton Dammann, of New York City, of counsel), for defendant Madison Tire & Rubber Co., Inc.

HAZEL, District Judge. This suit in equity was brought in October, 1912, against the United States Rubber Reclaiming Works for infringement of the Arthur H. Marks patent, No. 635,141, and for an injunction and an accounting. The patent was held valid and infringed, and an accounting directed. 225 Fed. 789, affirmed 229 Fed. 150.

During the accounting before the master the original defendant, United States Rubber Reclaiming Works, was dissolved, and the United States Rubber Reclaiming Company, Inc., which succeeded to all its property, assets, and liabilities, was substituted by supplemental bill and answer in 1917 for the original defendant. In August, 1919, the Madison Tire & Rubber Company, Inc., was incorporated for the express purpose of taking over the assets and property, and continuing the business of the United States Rubber Reclaiming Company, Inc. (herein called the selling company), and in consideration of such transfer it agreed, as appears by the contract of transfer attached to the answer, to "assume and pay all debts, obligations, and liabilities whatsoever" of the selling company, indemnifying and holding its officers, directors, and agents harmless of and from the same. The answer to the supplemental bill denies that it has agreed or contracted to pay plaintiff herein or the selling company for the use and benefit of plaintiff an amount of money decreed by this court to be paid because of the infringement specified in the bill, but avers that it has paid to the selling company the full value of its property, and therefore is not liable upon any judgment entered against the original defendants.

[1, 2] The questions submitted have been examined, and my conclusions are as follows: That the Madison Tire & Rubber Company, Inc., is a proper party defendant, and indeed an indispensable party to the action, since by its contract it assumed all liabilities whatsoever of the selling company, indemnifying it and its officers, directors, and agents from further liability therein. It knew at the time of purchase

of the pendency of this action for infringement, and accounting and proceedings had thereon. Hence its denial in the answer of any obligation to pay the judgment recovered is a legal conclusion, and the averment of the pleadings, aside from the legal conclusions, discloses I think a right of action in equity. In taking over the assets and property, and continuing the business the Madison Tire & Rubber Company, Inc., not only assumed to pay all existing debts and liabilities, but it also became primarily liable to the plaintiff under the contract, while at the same time the selling company became surety. In the circumstances the plaintiff, a creditor, has the right in equity of substitution for the grantor (Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300; [C. C.] 137 Fed. 157, affirmed 144 Fed. 678, 75 C. C. A. 481), and the infringement in question, and the accounting thereon gave plaintiff the right to enforce the contract of transfer in this court and in this action. That the debt or liability is unliquidated in amount is immaterial, since the meaning of the words used to express the liability are sufficiently comprehensive to include plaintiff's claim, arising from the prior infringements by the selling companies. As said in Silver King Coalition Mines Co. v. Silver King Consolidated Mines Co., 204 Fed. 166, at page 176, 122 C. C. A. 402:

"In such a suit it is sufficient that the grantee has agreed with the grantor to be primarily liable for the latter's obligation to the creditor, so that, as between the parties to the agreement, the first is the principal and the second the surety. The creditor of the surety is then entitled in equity to be substituted in his place, and to maintain his suit against the grantee to the same extent as the grantor could have maintained it, and it is immaterial whether the contract was made and intended for the benefit of the creditor, or of the grantor, for the creditor has all the rights of both to enforce the obligation of the grantee."

In view of the facts and circumstances appearing by the bill and answer the plaintiff no doubt would have a right of action at law to recover upon the promise to pay the debts, and be answerable for the liabilities of the selling company to the extent at least of the value of the property sold and transferred, and, since equity has the power to avoid a multiplicity of suits, it follows, I think, that plaintiff may bring into this action as a defendant the Madison Tire & Rubber Company, Inc. Since the liability is based upon the promise of the purchasing company to the selling company to become primarily liable, it makes no difference that a full and adequate consideration for the property transferred has been paid as alleged in paragraph 3 of the answer. A decree may be entered against the defendants, including the Madison Tire & Rubber Company, Inc.

In re GUYTON.

(District Court, N. D. Alabama, S. D. December 6, 1921.)

No. 344–J.

1. **Bankruptcy ⟸288(3)—Referee had jurisdiction in summary proceeding to divest title of trustee under deed of trust where bankrupt in possession.**
   Where a bankrupt who had executed a deed of trust for the benefit of creditors, providing that the trustee might take possession upon nonpayment of a note, was in possession when the petition in bankruptcy was filed, and the trustee in bankruptcy took possession through tenants of the bankrupt, collected rents, and sold growing crops, the referee had jurisdiction in a summary proceeding to divest the title of the trustee under the deed of trust.
2. **Bankruptcy ⟸178(3)—Deed of trust granting extension of time and made subject to first mortgage to one creditor held void as evading Bankruptcy Law.**
   Where a deed of trust for the benefit of the grantor's creditors other than a bank was accompanied by a note for the amount of the creditors' claims due over 10 months thereafter, and provided that it was in consideration of an extension of time, and that it was subject to a first mortgage given to the bank, thereby compelling creditors to grant an extension of time during which the mortgage to the bank would become immune from attack, it was void as given to evade the provisions of the Bankruptcy Law.
3. **Assignments for benefit of creditors ⟸34—Deed accompanied by note reciting extension of time, and subject to mortgage, held void.**
   A deed of trust for the benefit of creditors other than a bank, accompanied by a note due in about 10 months, and providing that it was in consideration of an extension of time, and was made subject to a first mortgage given to the bank, was void as hindering and delaying creditors under the statutes of Alabama, and particularly under Code 1907, § 4294, declaring every such deed of trust fraudulent and void if creditors are required to do any act impairing existing rights before participating therein.

In Bankruptcy. In the matter of J. I. Guyton, doing business under the firm name of Guyton & Co., bankrupt. On review of an order of the referee granting the trustee's petition to divest title out of the trustee under a deed of trust for the benefit of creditors. Petition for review denied, and order affirmed.

The deed of trust was executed January 8, 1921, more than four months before the filing of the petition in bankruptcy, and was accompanied by a promissory note due December 1, 1921, for the amount of the grantor's debts. The deed recites the grantor's desire for an extension of time, and that it is made in consideration of the premises and of such extension, etc. It excepted a bank from the creditors for whose benefit it was made, but provided that it was subject to a first mortgage given to the bank as part of the same transaction, thus, as pointed out by the referee, compelling creditors participating to grant an extension of time during which the mortgage to the bank would become immune from attack under the Bankruptcy Law. It provided that, if the note was not paid, the trustee might then take possession of the property or any part thereof.

Leader & Ullman, of Birmingham, Ala., for trustee.

Weatherly, Birch & Hickman, of Birmingham, Ala., and J. C. Milner, of Vernon, Ala., for intervening creditors.

GRUBB, District Judge. This review coming on to be heard was submitted for decree upon the petition of V. G. Lane, trustee, and others, to review an order of the referee, certificate of review thereunder dated October 28, 1921, by Hon. Emmet O'Neal, referee in bankruptcy, the referee having rendered a decree in said cause on the 24th day of October, 1921, granting the relief prayed for in the petition of the trustee as amended, wherein it was sought to divest title out of V. G. Lane, as trustee, for the benefit of certain creditors under a certain deed of trust executed by the above-named bankrupt and his wife on the 8th day of January, 1921, copy of which is attached to the petition of the trustee filed in the cause on the 19th of August, 1921, as well as for an order of sale of said property.

It appears from the record submitted upon the review that the respondents filed a plea to the jurisdiction of the court to proceed in a summary proceeding, and also filed certain objections and motions to quash and dismiss the petition, the grounds of which are fully set out in the record. The referee having held that the plea to the jurisdiction was not well taken, the respondents filed a petition for review, which was denied by the referee on the ground that the order holding the plea to the jurisdiction insufficient and not well taken was not reviewable at that stage of the proceedings. It appears that thereafter the trustee amended the petition, of which the respondents had notice, as well as of an order of the court setting petition down for final hearing, and the respondents were given five days in which to answer the allegations of said petition. On the 24th of October, 1921, that being the day set for hearing the petition of the trustee, the court proceeded to take the testimony in the absence of the respondents, they having failed to appear and having failed to answer. On the hearing before me it was agreed that the motions, exceptions, and demurrers to the trustee's petition, filed by the respondents, should be considered as having been refiled to the petition as amended, and that likewise the plea to the jurisdiction should be considered as having been refiled to the petition as amended.

[1] Upon consideration of the argument of counsel and the matters and things set forth in the record on review, and it appearing that at the time of filing the petition in bankruptcy the bankrupt was in possession of the property involved in this controversy, and that the trustee took possession thereof through the tenants of the bankrupt, and the trustee collected the rents and sold the growing crops, I am of the opinion that the referee had unquestioned jurisdiction to hear and determine the petition of the trustee in a summary proceeding, and therefore the plea to the jurisdiction was not well taken.

[2, 3] As to the questions of law presented by the motion to dismiss the petition, I am of the opinion that the petition as amended states a cause of action, and if the averments thereof are true, and

from the record in this case it appears from the uncontradicted testimony and the exhibits that they are true, then the deed of trust is in contravention of section 4294 of the Code of Alabama of the year 1907, wherein it is provided that:

"Every deed of trust, mortgage, or other security, made to secure any pre-existing debt, whether such debt is due or not, or absolute, or conditional, is fraudulent and void, as to the creditors of the grantor, when any creditor provided for thereby is required to make any release, or to do any other act impairing his existing rights, before participating in, or receiving the securities therein provided for him."

I am of the opinion that the record in this case discloses a transaction which was entered into for the purpose of evading the provisions of the bankruptcy law. I am also of the opinion that the effect of the transaction as disclosed by the record is undoubtedly to hinder and delay the creditors of the bankrupt, and therefore the same was void under the express mandate of the statutes of Alabama in force at the time the deed of trust was executed.

Decree: It is therefore ordered, adjudged, and decreed that the petition for review filed by V. G. Lane and others in this cause be, and the same is hereby, denied, overruled, and dismissed. It is further ordered, adjudged, and decreed that the decree of October 24, 1921, in this cause by Hon. Emmet O'Neal, referee, be, and the same is hereby, in all things affirmed.

It is further ordered that petitioners for review pay the costs of this review, to be taxed by the clerk, for which execution may issue.

It is further ordered that the respondents may supersede the execution of this decree by giving bond within five days of this date in the sum of $3,000, with the same terms and conditions as is provided in the bond heretofore executed by the petitioners for review to supersede the execution of the decree of the referee.

DAVIS et al. v. TAYLOR et al.

(Court of Appeals of District of Columbia. Submitted October 6, 1921. Decided November 7, 1921.)

No. 3647.

1. **Courts ⇐189(7)—Landlord's statement in municipal court must advise tenant of grounds for relief.**
   Though no formal pleading is required in the municipal court in cases by a landlord to recover possession from the tenant, the landlord is required by Code, § 20, to file a complaint which implies that, however informal, it must be sufficient to state the grounds upon which he asks for relief, and therefore must advise the tenant of the breach claimed by the landlord.
2. **Courts ⇐190(3½)—Ground not alleged in municipal court complaint not available.**
   A landlord cannot in the Supreme Court of the District on appeal from the municipal court in a proceeding to dispossess a tenant rely on a breach of the lease not alleged by him in his complaint in the municipal court.
3. **Landlord and tenant ⇐108(2)—Tender of past-due rent at any time before execution defeats forfeiture.**
   The provisions of a lease for forfeiture for nonpayment of rent are construed to be intended to enforce payment of the rent, so that a tender of the past-due rent with interest by the tenant, made at any time before the execution of judgment dispossessing him, defeats the forfeiture.

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding by F. E. Davis and another against Rose C. Taylor and others. From a judgment of the Supreme Court on appeal from the municipal court, overruling landlords' motion for judgment, the landlords appeal. Affirmed.

W. Gwynn Gardiner, of Washington, D. C., for appellants.

Wilton J. Lambert and William G. Johnson, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. This case is here on a special appeal allowed by the court. It is a contest between the lessors and lessee of the Bellevue Hotel, Washington.

Rose C. Taylor was in possession under a lease made by the lessors with one Peter Taylor, Jr., which by its terms as extended is to expire on October 1, 1922. The rent was to be paid monthly in advance, and, if not paid within ten days after it became due, or if the tenant allowed "process or execution to issue against him in any suit at law or in equity," the lease was to wholly cease and determine, at the option of the lessors. Taylor died in September, 1920, leaving a will by which the appellee, his widow, was made sole beneficiary of his estate, as well as executrix of his will. She accepted the trust and duly qualified as executrix. At the time of his death Taylor was in default with respect to the rent for the months of August and September. For the recovery of this rent action was brought by the landlords, and an at-

tachment was issued and served. Later the rent was paid not only for August and September, but also for October and November. But rent which became due on the 1st of December and payable on or before the 10th was not paid, and in consequence this action was commenced in the municipal court against the appellee individually and as executrix.

In the complaint it was stated as the ground of the action that the landlords desired to exercise their option to declare the conditions of the lease broken by the lessees "by reason of their failure to pay the installment of rent due on the first day of December, 1920, and by reason of their failure to pay the installment of rent for the months of August, September, October and November" when the same became payable, and they claimed forfeiture of the lease "as to each month thereof." When the cause was called for trial in the municipal court on the 4th of January, 1921, the tenant tendered the lessors the full amount of the rent then due, with interest and the costs, and asked that further proceedings be stayed. The tender was refused and thereupon judgment was entered for the lessee. From this judgment the lessors appealed to the Supreme Court and there filed an affidavit of merit under Rule 19 of that court, in which they set up substantially what was embodied in their complaint, and, in addition, the attachment proceedings which we have mentioned. They claimed that the issuance and levy of the attachment worked a forfeiture of the lease and gave them the right to re-enter and take possession of the premises. The tenant's affidavit of defense admitted in effect the allegations of fact made by the lessors in their affidavit of merit, but also stated that while John R. McLean, Mary McLean Ludlow, and Mildred Dewey were the lessors in the lease with Peter Taylor, Jr., the suit in which the attachment was issued was instituted by F. E. Davis and F. H. Bugher, together with Mildred Dewey; that the lessee was not advised of the changes of ownership of the property; that by reason of having been called upon to pay on the 4th of December the entire amount of rent then due, she was not able to raise the money to pay the rent for the month of December, which was payable on or before the 10th of that month; and that this was the sole reason for her default in that respect. She renewed her tender of the rent then due, with interest and costs. The landlords moved for judgment on the ground that the affidavit of defense was not sufficient, but the motion was overruled, and the case comes here for our review, under section 226 of the Code, providing for appeals from interlocutory orders in certain cases.

Two questions are presented by the record: (1) Whether the provision in the lease providing for a forfeiture in case the tenant allowed process or execution to issue against him can be availed of in this suit, and, if it can, whether or not the issuance of the attachment at the instance of the landlords was a violation of the provision; and (2) if not, whether the tender of the rent in the municipal court, which was renewed in the Supreme Court, did not have the effect of removing the forfeiture which resulted from the default in the payment of the rent.

[1, 2] 1. While no formal pleading is required in the municipal

court in cases brought by a landlord to recover possession of the demised premises from the tenant, he is required by the Code (section 20) to file a complaint, which implies that he must place in writing a statement, however informal, of the grounds upon which he asks for relief. The complaint should be sufficient to advise the tenant of the breach which the landlord claims gives him a right to recover possession of the property, and if the complaint states only one ground the landlord must be confined to that ground on appeal to the Supreme Court as well as to this court. Here the landlords in their complaint advised the tenant that by reason of her failure to pay the installments of rent due on certain dates mentioned, her lease was forfeited. It was on this ground, and this ground only, that they sought relief in the court of first instance. When they reached the Supreme Court it was too late for them to assert a new and additional ground. Consequently, they cannot now say that a forfeiture resulted by reason of the tenant's allowing the attachment to be issued and levied. Whether or not the issuance and levy of the attachment constituted a violation of the lease, we do not find it necessary to decide.

[3] 2. Ever since the decision of the Supreme Court of the United States in Sheets v. Selden, 7 Wall. 416, 421, 19 L. Ed. 166, it has been the settled law of all federal jurisdictions, except where controlled by statute, that the payment of the rent due, with interest and costs, or the tender of them, before the execution of the judgment for possession, relieves against the forfeiture resulting from the default in the payment of the rent. In that case the lease provided that all the rights and privileges of the lessee should cease and determine if any rent should remain unpaid for one month from the time it became due, and the lessor was given the power to enter and take possession of the premises. The tenant having defaulted and having refused to yield possession, an action in ejectment was brought against him wherein a judgment for possession was rendered in favor of the lessor. Sometime thereafter the tenant brought a suit in equity to restrain the enforcement of the judgment in the ejectment suit, on the ground that while the ejectment was pending he tendered to the purchaser the amount of the rent then due. Judgment went against him upon a demurrer challenging the sufficiency of the bill, and he brought the case to the Supreme Court for review. The question presented was whether or not the tender removed the forfeiture—the precise question in this case. The court disposing of the point said:

"Both courts of law and of equity have power to give relief in cases of this kind. Courts of law give it upon motion, which may be made before or after judgment. If after judgment, it must be made before the execution is executed. The rent due, with interest and costs, must be paid. Upon this being done, a final stay of proceedings is ordered."

Further on in the opinion we read:

"The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete."

The doctrine of this case is referred to and approved in Prout v. Roby, 15 Wall. 471, 477, 21 L. Ed. 58. Many years afterwards, in Kann v. King, 204 U. S. 43, 54, 27 Sup. Ct. 213, 216 (51 L. Ed. 360), a case arising in this District, the court, distinguishing the Sheets Case from the one then before it, said that it was elementary that a court of equity would "relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee." These decisions are controlling, and settle beyond question the law for this jurisdiction. According to them, the tender of rent, interest, and costs may be made before or after judgment, but, if after judgment, it must be made "before the execution is executed." In the instant case the tender was made before judgment.

We have found no decision modifying the doctrine of the Sheets Case with respect to the point under consideration. Counsel has brought to our attention decisions and texts which say that it is no part of a court's duty to make a contract for the parties—that its power is limited to enforcing the contract as made. This is axiomatic. But before a contract is enforced it must be understood. Its meaning must be sought out and determined. Interpreting the covenant of the lease in question in the light of the law, as we must do, it signifies that since the forfeiture provided for therein has the single purpose of securing the payment of the rent, the moment the rent, interest, and costs are paid or tendered, provided this is done while the tenant is in possession, the forfeiture disappears. The debt having been paid, there is no occasion for resorting to the security. Of course, the tender must be kept good, as it is here.

The action of the court in overruling the motion for judgment is sustained, with costs.

Affirmed.

UNITED STATES ex rel. HARDEN v. FALL, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted October 3, 1921. Decided November 7, 1921.)

No. 3619.

1. **Public lands ⟸29—Entry after relinquishment not permitted on lands withdrawn for reclamation construction.**

   The proviso of Act June 25, 1910, § 5, as amended by Act Aug. 13, 1914, § 10 (Comp. St. § 4714), making lands reserved for irrigation purposes and relinquished from prior entries subject to entry under the Reclamation Act, applies only to lands withdrawn under Reclamation Act June 17, 1902, § 3 (Comp. St. § 4702), as susceptible of irrigation under a proposed project, and not to lands withdrawn under the latter act, as required for the construction of irrigation works.

2. **Public lands ⟸35(1)—Restoration to entry does not validate previous void entry.**

   A homestead entry, which was void when made, because the land was withdrawn as required for reclamation construction, is not validated by a subsequent order of the Secretary of the Interior declaring the land not needed for construction purposes.

3. Public lands ⇐40—Entry on reclamation lands after relinquishment not limited to purchasers of relinquishments.

The right to enter lands withdrawn under the Reclamation Act for purposes of irrigation, if the lands were covered by a prior entry which has since been relinquished, given by Act June 25, 1910, § 5, as amended by Act Aug. 13, 1914, § 10 (Comp. St. § 4714), is not limited to those in privity with the original entryman, through purchase of the relinquishment or otherwise.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of Herbert C. Harden, against Albert B. Fall, as Secretary of the Interior. From a judgment dismissing the petition, relator appeals. Affirmed.

John W. Keener and H. S. Barger, both of Washingon, D. C., and A. R. Honnold, of Scottsbluff, Neb., for appellant.

C. E. Wright, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a judgment of the Supreme Court of the District of Columbia dismissing appellant's petition for a writ of mandamus to compel the Secretary of the Interior to approve petitioner's application for a homestead entry.

The application was filed September 2, 1919. The rejection was upon the ground that the land in question was withdrawn from entry under the first form of withdrawal authorized by the Act of Congress of June 17, 1902, 32 Stat. 388 (Comp. St. §§ 4700–4708), known as the Reclamation Act. Section 3 (section 4702) of the act provides:

"That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works."

It will be observed that this provides for two forms of withdrawal. The first form of withdrawal is of lands required for the construction of irrigation works. This is an absolute withdrawal from any kind of entry. The second form of withdrawal is of lands under said works and subject to irrigation, which may be entered only under the homestead laws.

The second form of withdrawal of the land in question was made on February 11, 1903, and a homestead entry was made thereon by one Trump November 28, 1903. On August 10, 1908, the Secretary of the Interior placed the land in question in a first form withdrawal, holding it to be necessary for the construction work in connection with what is known as "the North Platte project," in the state of Wyoming. Trump's rights, of course, could not be affected by this proceeding. But, on August 6, 1913, Trump relinquished all his rights to the United States. This restored the land to the public domain under the first

form withdrawal. While the land was in this condition, petitioner, on September 2, 1919, sought to make the present homestead entry.

[1] By section 5 of an Act of Congress approved June 25, 1910, 36 Stat. 835, it was provided:

"That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same."

An amendment to this section, not here important to be considered, was made February 18, 1911 (36 Stat. 917), and this, in turn, was amended by section 10 of the Act of Congress approved August 13, 1914, 38 Stat. 686 (Comp. St. § 4714), which provides:

"Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage for entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: Provided, that where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law."

Petitioner rests his case upon the above proviso, namely, that, Trump having relinquished prior to June 25, 1910, he (petitioner) is entitled to enter the land under the provisions of this act. It will be observed that the permit of entry is limited to "lands reserved for irrigation purposes." It is clear that lands under first form withdrawal are not within this class. They are withdrawn for construction purposes. It is inconceivable that Congress should have contemplated that lands withdrawn from the public domain for construction purposes should be subject to entry until it was finally determined that such lands were not so necessary and a declaration by the Secretary to that effect had been made. Otherwise, it would be possible for entrymen to obstruct the construction work by entering lands reserved for that purpose.

This construction has been adopted and followed by the Secretary, and will not be disturbed, if it can be consistently upheld. In the Case of Annie G. Parker, 40 Land Dec. 406, the Secretary, construing the act, said:

"The Department, however, is of the opinion that a careful reading of the section set out above [section 5 of the Act of June 25, 1910, as amended by the Act of February 18, 1911] will disclose that the only logical and reasonable interpretation of the act justifies the decision appealed from. It is to be noted that this section provides: The lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act * * * approved June 17, 1902 (32 Stat. 388). The act referred to is the original Reclamation Act, which provides in section 3 that certain lands required for irrigation works shall be withdrawn from public entry by the Secretary and restored when in his judgment such lands are not required for the purposes of the act. This is what is known as the first form withdrawal, such as embraces the land here involved. It is therefore evident that the section now being construed would not apply to first form withdrawals unless it was specifically so stated. Further, the section under construction clearly deals with land reserved for 'irrigation purposes' and not land reserved for irrigation works, as the former only, being what was known as a second

form withdrawal, was subject to entry under the homestead laws under certain conditions."

[2] The situation is not changed by the order of the Secretary, made some months after petitioner made his entry, declaring that the land was not needed for construction purposes. Petitioner had established no right by his void entry which could attach to the land upon its release from the first form withdrawal. The entry was void when made, and no act of the Secretary could render it legal.

[3] It is urged by counsel for respondent, and so held by the court below, that an entryman under this act must be in privity with the original entryman. In other words, it is insisted that the right of entry was intended to operate only in favor of original entrymen who entered prior to June 25, 1910, and who relinquished in favor of those who claim under them through purchase of the relinquishment, or otherwise. We are not impressed with this contention. To sustain such a construction the court must read into the statute something that is neither expressly nor impliedly there. Nor do we find anything in the debates in Congress, submitted for our consideration, which will justify the assumption that such a limitation was intended.

The judgment is affirmed, with costs.

Affirmed.

PHILLIPS v. SAGER et al.

(Court of Appeals of District of Columbia. Submitted October 6, 1921. Decided November 7, 1921.)

No. 3660.

1. **Injunction ⇐146—Denial of charges of fraud and insolvency not conclusive in determining right to temporary injunction.**

   On application for injunction pendente lite, the denials of the charges of fraud and insolvency are not controlling, but the answer amounts to little more than an affidavit.

2. **Mortgages ⇐338—Temporary injunction granted to prevent sale under trust deed of property affected by fraudulent partnership dissolution.**

   Where the bill alleged that plaintiff was induced by one defendant who was his partner to purchase firm property for cash and notes secured by deed of trust thereon by the fraudulent representations of defendant, who kept the partnership books, that the firm had large assets, whereas it and defendant were insolvent, so that if plaintiff were required to pay the notes he would have no way of recovering them, he is entitled to an injunction pendente lite restraining the sale of the property under trust deed to enforce payment of the notes, since the property was directly involved in the contract of dissolution and should be held in status quo.

3. **Appeal and error ⇐954(1)—Error in denying temporary injunction to preserve status quo may be corrected.**

   While the granting of an injunction pendente lite usually rests in the sound discretion of the court, the appellate court may in its broad power to review in equity correct the error in denying a temporary injunction to preserve the status quo of the property involved and direct accordingly.

4. **Injunction ⇐137(4)—Granted to preserve status quo to avoid irreparable injury to plaintiff though right is not clear.**

   Notwithstanding the rule that a preliminary injunction will not be granted on ex parte affidavits unless in a clear case, it can be granted

where it is intended merely to maintain the status quo until final decree, and where comparatively great injury may result from withholding the injunction and comparatively little can flow from granting it.

5. Injunction ⊂=152—Showing for injunction to preserve status quo need only be sufficient on its face.

All that is required to justify a restraining order to preserve the status quo of the property involved pending determination of the suit is that the showing on its face seem sufficiently meritorious to warrant such relief.

Appeal from the Supreme Court of the District of Columbia.

Suit by William S. Phillips against Charles D. Sager and another. From an order refusing an injunction pendente lite to restrain the sale of certain real estate under a deed of trust, plaintiff appeals. Reversed and remanded, with instructions to grant the injunction.

W. C. Sullivan, of Washington, D. C., for appellant.

G. W. Offutt, Jr., and C. V. Imlay, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This case is here on special appeal granted from an order of the Supreme Court of the District of Columbia refusing an injunction pendente lite to restrain the sale of certain real estate under a deed of trust.

Appellant, plaintiff below, and defendant were partners engaged in the real estate business. As a condition of dissolution of the partnership, plaintiff purchased from defendant his one-half interest in certain property known as "Shadyside," for which he agreed to pay defendant $12,500, represented by notes secured by deed of trust on part of the property. Plaintiff avers in his bill for accounting that the books of the company at the time of the dissolution showed assets aggregating $258,957.60, with but trifling outstanding obligations. It subsequently developed that the total assets in cash, bills, and accounts receivable were less than $5,000, with debts outstanding far in excess of this amount.

Plaintiff in his bill charges that the condition of the business was unknown to him, but that defendant had exclusive supervision and control of the books and was familiar with the actual financial condition of the company, and, by secreting and concealing the true situation, induced plaintiff to enter into the contract of separation under which he paid defendant $12,700 in cash and made a delivery to him of various promissory notes secured by deeds of trust, including those involved in this action. Prior knowledge of these conditions is not expressly denied by defendant.

[1] Averments of fraud and the insolvency of defendant are made in the bill, which are categorically denied. But this is not a matter to be heard on bill and answer; hence, a mere denial is not controlling, since the answer amounts to little more than an affidavit. Webb v. King, 21 App. D. C. 141, 149. Plaintiff also avers that in the accounting he expects to recover a large judgment against defendant, and should he be required to pay these notes to protect his property from

sale, he would be remediless to recover it from defendant in satisfaction of the anticipated judgment in his favor.

Plaintiff, in order to secure the retention of the notes or the proceeds thereof to await the result of the suit for an accounting, in his bill makes the following offer and tenders himself ready to comply therewith:

"The amount of the said note, principal and interest, should be held to await the outcome of the said accounting, whether so held in the hands of the plaintiff, receivers or trustees appointed by the court to hold the same, or in the registry of the court, or covered by an indemnifying or other bond according to the judgment and discretion of the court, or by depositing Liberty Bonds or other security in lieu thereof, or indeed by making payment in cash to the said defendant, without prejudice to the plaintiff's rights, upon the delivery by the defendant to the plaintiff or to some disinterested third party or parties of adequate security for the repaying to the plaintiff of the moneys so advanced; and the plaintiff has offered to pursue any of the courses so suggested, all of which have been declined by the defendant."

[2, 3] The property here sought to be sold by defendant was part of the partnership property and directly involved in the contract of dissolution, and, we think, in the light of the record, should be held in status quo to await the determination of this suit. Little or no injury can flow from such a course, while great injury can result from the failure of the court to interpose a restraining hand. While the granting of an injunction in cases of this sort usually rests in the sound discretion of the trial court and depends upon the circumstances of the particular case, yet, if the court errs in the exercise of its discretion, an appellate court, in its broad power to review in equity, may correct the error and direct accordingly.

[4] The rule as to preliminary injunctions to preserve the status quo is clearly stated in Gring v. Chesapeake & Delaware Canal Co. (C. C.) 129 Fed. 996, 1000, where the court said:

"It is a general, though not universal, rule, repeatedly enforced in this district, that a preliminary injunction will not be granted on ex parte affidavits unless in a clear case. The rule admits of important exceptions. Those exceptions include, among others, cases in which the function of the preliminary injunction is merely to maintain the status quo until final decree, where comparatively great injury may result from the withholding, and comparatively little can flow from the granting, of such injunction. In such cases the court regards with just discrimination the balance of convenience and hardship, and, in the absence of a final determination of right, aims so to resolve for the time being whatever doubt may exist as to do the most good and the least harm."

[5] All that is required to justify the restraining order is that the case on its face seems sufficiently meritorious to warrant the court in preserving the status quo until the controversy can be disposed of on its merits. This is clearly such a case. A review of the record convinces us that equity and justice require the intervention of the court to prevent the sale or disposition of the property in question pending the result of the action for a partnership accounting.

The decree is reversed with costs, and the cause is remanded with instructions to grant the injunction.

Reversed and remanded.

PRICE v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 4, 1921. Decided November 7, 1921.)

No. 3555.

1. **Homicide ⟸300(3)—Charge on self-defense held correct.**
   A charge that, if defendant's situation was such that he honestly believed, and had reasonable grounds to believe, that he could save himself from serious bodily harm only by killing deceased, he had the right to kill him, is a correct and sufficient charge on the right of self-defense, since an honest belief implies reasonable grounds for the existence of such belief.

2. **Criminal law ⟸829(5)—Requested charge on defense of habitation held covered by charge on self-defense.**
   A requested charge that defendant had the right to use necessary force to eject deceased from his house, and, if, in ordering deceased from his house, the deceased approached the defendant so as to give reasonable grounds to believe defendant was in danger, defendant had the right to defend himself, did no more than raise the question of self-defense, where the defendant himself testified that the immediate cause of the shooting was his fear of bodily harm, so that the request was covered by the court's charge on self-defense.

3. **Criminal law ⟸767—Court need not apply law to the facts.**
   In a prosecution for homicide, where court had correctly defined the different degrees of murder and manslaughter, it was unnecessary for him to apply the law to the evidence, since that was the province of counsel, and the court's attempt to do so might have invaded the province of the jury.

4. **Homicide ⟸302—Request to charge on right to have pistol held not required by facts.**
   In a prosecution for homicide, which occurred in defendant's own home, where defendant's right to have a pistol in the house was not in any way questioned, and the issue was whether the killing was justifiable, requests for charges that defendant had a right to have the pistol in his house, and, if necessary, to use it, were properly denied.

Appeal from the Supreme Court of the District of Columbia.

Charles Price, otherwise known as Charles Miller, and otherwise known as William Miller, was convicted of murder in the first degree, and sentenced to be hanged, and he appeals. Affirmed.

James A. O'Shea, of Washington, D. C., for appellant.

John E. Laskey, Major Peyton Gordon, and J. J. O'Leary, all of Washington, D. C., for the United States.

ROBB, Associate Justice. Appellee was convicted in the Supreme Court of the District of murder in the first degree, and sentenced to be hanged. The material facts disclosed by the evidence for the government are as follows:

On the afternoon of Decoration Day, 1918, the deceased, Robert Smith, and three or four other men and several women were at the home of the defendant in this city, where they had obtained and consumed a moderate amount of intoxicating liquor. A controversy arose between Smith and defendant as to whether the former had

handed the latter a dollar and was entitled to change. Finally defendant directed his wife to "go back and get that thing," whereupon she went into an adjoining room and returned with a revolver, which she handed the defendant, who, upon breaking it open, found it was not loaded. Thereupon defendant went into the adjoining room, returned, and asked Smith, "You want your change?" Smith replying in the affirmative, defendant shot him.

James Ashton, who was present "from the beginning of the trouble," testifying for the defendant, said:

"There was an argument took place about a dollar; that Smith gave Price a dollar for a half pint of whisky, and Price didn't give him the change, and didn't give the dollar back, and the argument took place and Price got the gun and shot Smith; * * * that Price did not order Smith out of the house."

The defendant, testifying in his own behalf, said that during the controversy about the dollar the men "got around him," and that he told his wife "to go get that thing"; that he "broke it down, to try to scare them out of the house"; that they would not go; that, as he told Smith to go out, Smith started toward him "with his hand in his hind pocket," and one of the other men "walks up to me [defendant] with a whisky flask, and that time I shot him" (Smith); that "witness had not been drinking that day." On cross-examination he admitted that, when his wife brought him the pistol, "he broke it open, found it unloaded, and went back for the cartridges."

Defendant's wife testified that, after she gave him the revolver, the altercation about the dollar continued, "and they got all around him, so Charlie [defendant] knocked some of them from the door, because they got between him and the door, so Charlie backed, backed, and backed into the room, and loaded the pistol"; that upon his return defendant requested Smith and his companions to leave, whereupon Smith "reached right up in his hind pocket, and at once Charlie shot him."

[1] The first assignment of error to be considered is whether the court properly instructed the jury as to the law of self-defense. The court in his charge said:

"If a person is so circumstanced or so situated that he honestly believes and has reasonable grounds for the belief that he can save himself from death or serious bodily harm only by taking the life of an assailant, he has the right to protect himself. In other words, if you believe from the testimony that Price in this case was in such a situation that he honestly believed, and had reasonable grounds to believe, that he could save himself from serious bodily harm only by killing Smith, then he had the right to kill him."

It is insisted, on behalf of the defendant, that this instruction did not meet every phase of the evidence. We do not understand counsel to contend that this charge was incorrect in point of law, nor do we think such a contention could be sustained. Beard v. U. S., 158 U. S. 550, 564, 15 Sup. Ct. 962, 39 L. Ed. 1086. The latest expression of the Supreme Court, in Brown v. U. S., 256 U. S. —, 41 Sup. Ct. 501, 65 L. Ed. — (May 16, 1921), is that—

"If a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and if he kills him he has not exceeded the bounds of lawful self-defense."

That is substantially the charge in the present case, for it would be legally impossible for a man honestly to believe a thing, unless reasonable grounds existed for the belief; in other words, the law regards as pretense, and not belief, that which has no reasonable basis. We are of the view that, under the charge as given, defendant's counsel was in no way embarrassed in presenting to the jury every phase of the evidence.

[2] The next assignment is based upon the court's refusal to charge "on defense of habitation." A prayer was offered to the effect that defendant had a right to order deceased from his house, and to use such force as was necessary to eject him, and that—

"If, in ordering the deceased from the house, the deceased approached the defendant, so as to give him reasonable ground to believe he was about to inflict serious bodily harm on the defendant, then the defendant had the right to protect himself, and, if need be, kill the deceased."

This proposed prayer did no more than raise the question of self-defense, already covered by the court's charge. The defendant himself testified that the immediate cause of the shooting was his fear of bodily harm.

[3] It next is insisted that the court did not charge "fully and substantially" on second degree murder and manslaughter. The court instructed the jury that there are three degrees of homicide in this District—murder in the first degree, murder in the second degree, and manslaughter—and then carefully and correctly defined each of these crimes. After defining first and second degree murder, the court said:

"So that, if you find in this case that Price deliberately and premeditatedly fired the shot that killed this Robert Smith, he is guilty of murder in the first degree. If you find that he did it without deliberate and premeditated malice—that is, without having used the premeditation and deliberation which is included in the definition of first degree murder—then he would be guilty of murder in the second degree, provided he did the act maliciously, with malice aforethought."

The court then instructed the jury as to the deliberation necessary to constitute first degree murder. The substance of counsel's contentions is that the court, after stating the law as to the different degrees of homicide, should have applied that law to counsel's theories of the facts. But that was the duty of counsel, and, inasmuch as the law was fully and correctly stated to the jury by the court, defendant could suffer no prejudice. Indeed, such a practice as that for which counsel contends might result in serious harm to an accused, through the invasion of the privilege of counsel and the province of the jury.

[4] The last assignment of error relates to the refusal of the court to charge on possession of the pistol. The various prayers offered on behalf of defendant were to the effect that the law permitted him to have a pistol in his house, and that, if necessary to defend

himself or his home, he had the right to use it, even to the extent of killing his assailant. The defendant's right to have a pistol in the house was not questioned or in issue, directly or indirectly. The question, as already pointed out, was whether the killing was justifiable. These prayers, therefore, were not applicable to the situation, and were properly denied.

It is quite evident from the evidence that the jury was justified in concluding that defendant, becoming angry because the deceased insisted on change for a dollar (which even one of defendant's own witnesses testified the deceased had given defendant), deliberately formed the purpose of killing him, sent for his revolver, discovered it was not loaded, went into another room, and loaded the weapon, and then returned to put his purpose into execution. We are convinced that defendant, not only has received a fair and impartial trail, but has been ably and conscientiously defended by counsel. Finding no error in the record, we must affirm the judgment.

Affirmed.

TRI-STATE MOTOR CORPORATION et al. v. STANDARD STEEL CAR CO.

(Court of Appeals of District of Columbia. Submitted October 7, 1921. Decided November 7, 1921.)

No. 3673.

1. **Statutes ⟸159—Rule that in case of conflict later statute repeals earlier seldom applicable when enacted at same time.**
   While there is a rule that, if an irreconcilable conflict exists between two sections of the Code, the later section repeals the prior one, the rule is very seldom applicable, especially where the two sections were enacted at the same time.
2. **Statutes ⟸159—Must be reconciled, if possible, to avoid implied repeal.**
   The conflict between two statutes must be reconciled by construction to avoid implied repeal, if possible, since such repeal is never favored.
3. **Attachment ⟸132—General provision for bonds by parties held not to repeal provision for attachment bond.**
   The provision of Code of Law 1901, § 479a, as added by Act Cong. April 19, 1920, governing bonds required from any party, does not impliedly repeal section 445, making different requirements for an attachment bond under the rule that, where there is a particular enactment and a general one, the particular enactment is operative and the general enactment affects only such cases within its language as are not within the provisions of particular enactment.

Appeal from the Supreme Court of the District of Columbia.

Action by the Standard Steel Car Company, a corporation, against the Tri-State Motor Corporation and another. From an order overruling a motion to dissolve an attachment, defendants appeal. Affirmed.

Levi H. David, of Washington, D. C., for appellants.

Walter C. Clephane, J. Wilmer Latimer, and Gilbert L. Hall, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. From an order overruling a motion to dissolve an attachment the appellants, who were defendants below, bring this appeal by leave of court under section 226 of the Code.

The appellee commenced an action against the appellants and sued out an attachment, which was levied on their goods, giving the bond required by Code, § 445. The appellants say that it should have given the undertaking provided for by Code, § 479a (added by Act Cong. April 19, 1920, 41 Stat. 564), and that its failure to do so rendered the attachment void. This position is bottomed upon the assumption that there is an irreconcilable conflict between sections 445 and 479a, and that as the latter section represents the last expression of the legislative mind, it nullifies section 445.

The last-named section deals exclusively with the matter of attachments. It first enumerates the instances in which an attachment may issue and then says:

"Provided, that the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment."

Section 479a declares that—

"In all cases where, by the provisions of this Code, a bond is required from an executor, administrator, administrator cum testamento annexo, administrator de bonis non, guardian, committee, collector, trustee, receiver, assignee for the benefit of creditors, or any other fiduciary appointed or confirmed by the Supreme Court of the District of Columbia, or any member thereof, *or where a bond is required from any party to a cause or proceeding pending in such court, such bond shall be in the form of an undertaking, under seal, in a maximum amount to be fixed by the court, conditioned as required by law,*" etc.

It will be observed that under section 445 the bond must be in twice the amount of the plaintiff's claim, and approved by the clerk, while section 479a requires the bond to be in the form of an undertaking, under seal, in an amount to be fixed by the Supreme Court of the District. There is, therefore, a marked difference between the requirements of the two sections. No mention is made in section 479a of attachments. Its chief purpose seems to be to deal with the bonds of fiduciaries, such as administrators, guardians, trustees, etc. But appellants point to the general phrase thereof which we have italicized, and say it is broad enough to comprehend attachments and that, since it is, there is an irreconcilable conflict between the two sections. Where such a conflict exists, they urge, the later section repeals the prior one.

[1, 2] It is true there is such a rule, but it is very seldom applicable. Iglehart v. Iglehart, 204 U. S. 478, 484, 27 Sup. Ct. 329, 51 L. Ed. 575; Morris v. Hitchcock, 21 App. D. C. 565, 591. Even where applicable, the conflict must be such as cannot be reconciled by construction. If it can be it is the duty of the court to do it—to harmonize and sustain, not destroy. Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. Ed. 782; Rudolph v. United States ex rel. Gillott, 37 App. D. C. 455, 460; Brotherhood of R. Trainmen v. Groves, 48 App. D.

C. 151, 154. Only when this cannot be done may the court apply the rule which would work a repeal by implication, and such a repeal is never favored. United States v. Mason, 33 App. D. C. 350.

[3] The pivotal question, then, in the case before us, is whether the conflict between sections 445 and 479a is irreconcilable. The answer is found in the following language of the Supreme Court of the United States in United States v. Chase, 135 U. S. 255, 260, 10 Sup. Ct. 756, 757 (34 L. Ed. 117):

"It is an old and familiar rule that, 'where there is in the same statute, a particular enactment, and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' * * * This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

See, also, Atkins v. Disintegrating Co., 18 Wall. 272, 302, 21 L. Ed. 841; Townsend v. Little, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 558, 24 Sup. Ct. 538, 48 L. Ed. 788.

And the reason for it, says Mr. Justice Brewer in the last-named case, is that—

"When the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought."

When the Congress enacted section 445, its attention was specifically directed to the matter of attachments, while it may not have been thinking of attachments at all when it framed section 479a. That which must have been in the mind of the Congress controls that which may not have been although included within the language of 479a. Following this reasoning, we hold that section 479a, being a general statute, does not provide for bonds in attachment proceedings—that subject is governed by section 445.

Believing that the court did not err in overruling the motion to discharge the attachment, its action is affirmed, with costs.

Affirmed.

CHAS. McCAUL CO. et al. v. HARR et al.

(Court of Appeals of District of Columbia. Submitted October 5, 1921. Decided November 7, 1921.)

No. 3633.

1. Appeal and error ⇐71(3)—Interlocutory injunction not appealable, unless it affects possession of property.

Under Code of Law 1901, § 226, allowing appeals from interlocutory orders whereby the possession of property is changed or affected, such as orders granting injunctions, etc., an appeal does not lie as a matter of right from all interlocutory orders granting injunctions, but only from such orders as affirmatively change or affect possession of property.

---

2. **Appeal and error ⇐71(3)—Order restraining payment by third person until rights are established is not appealable.**

An order granting an interlocutory injunction to restrain the Treasury Department from paying a sum of money to the principal defendant pending the determination of plaintiffs' claim of lien thereon for attorney's fees merely preserves the status quo, and does not change or affect possession of the fund, within the meaning of Code of Law 1901, § 226, so that it is not appealable as a matter of right.

3. **Appeal and error ⇐359—Discretionary appeal not permitted to review interlocutory order preventing payment pending determination of right to fund.**

The Court of Appeals will not exercise the discretion granted to it to allow an appeal, when it appears that it will be in the interest of justice to do so, where the order involved merely restrained payment by the Treasury Department of a fund to the principal defendant pending determination of plaintiffs' claim of lien thereon.

Appeal from the Supreme Court of the District of Columbia.

Suit by William R. Harr and another against the Chas. McCaul Company, a corporation, and others. From an order granting an injunction pendente lite to restrain the payment by the Treasury Department of a sum of money to the named defendant, the defendants appeal. Appeal dismissed.

B. E. Hinton, J. H. Bilbrey, and J. E. Laskey, all of Washington, D. C., for appellants.

Charles H. Bates and William C. Prentiss, both of Washington, D. C., for appellees.

ROBB, Associate Justice. This is an appeal from a preliminary injunction in the Supreme Court of the District, preventing pendente lite the payment of about $40,000 by the Treasury Department to the McCaul Company, the principal defendant in the case; the object of the bill filed by the appellees being to enforce as against the fund an equitable lien because of their alleged services as attorneys, rendered under a contract with the McCaul Company.

[1] At the outset the question arises whether appellants were entitled, as matter of right, to prosecute this appeal. Under section 226 of the Code, appeals are allowable to this court—

"from all interlocutory orders of the Supreme Court of the District of Columbia, or by any Justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like."

In Electric Lighting Co. v. Metropolitan Club, 6 App. D. C. 536, an interlocutory order had issued in the court below restraining the lighting company from putting into effect an expressed intent to cut off electric current it had been supplying to the Club in pursuance of a contract. The club moved the dismissal of the appeal, and urged that the case was not within the above provisions of the Code, unless the court was prepared to hold "that appeals may be taken in all cases where injunctions are allowed." The court did not so rule, but was "of opinion that the order in the present case" changed or affected the title to property within the meaning of the law.

In Macfarland v. Railroad Co., 18 App., D. C. 456, an appeal was sustained from an interlocutory order enjoining the execution of an official order by the Commissioners of the District requiring the railroad company to remove an electrical switch and appliances erected by the company in one of the streets of the city. Inasmuch as the question of the right to an appeal was not re-examined, the court merely referring to its previous decision in the Metropolitan Club Case, 6 App. D. C. 536, the ruling in the Macfarland Case should not be given a broader scope than the ruling in the former case.

Turning, now, to the language of the Code, we are enabled therefrom to determine the real intent of Congress in providing for appeals from interlocutory orders, for Congress clearly indicated the character of orders intended when it said:

"Such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like."

The appointment of a receiver is for the express purpose of changing or affecting the possession of property, and hence an order of appointment is made appealable. A writ of attachment changes and affects the possession of property, and yet an interlocutory order refusing to dissolve such a writ is not appealable, because such an order merely preserves the status quo. Hayes v. Conger, 36 App. D. C. 202. It is of a negative and passive character only. This is significant, and goes far toward demonstrating that Congress did not intend that all interlocutory orders granting injunctions should be appealable as matter of right, but only such injunctions as affirmatively changed or affected possession of property.

[2] The order in the present case is purely negative and passive in character, and does no more than preserve the status quo. It is true that the question at issue is the right to possession, but it is equally true that the possession is merely continued in a third party, who is directed to retain it until the rights of the parties may be determined. We do not think that this order either changes or affects the possession of this fund, within the meaning of the statute, and hence that the appeal was improvidently prosecuted.

The situation in the Metropolitan Club Case, 6 App. D. C. 536, was unusual, and, although the injunction in that case was negative in terms, it was affirmative in effect, since it required the lighting company to continue to furnish electric current to the club. This current, which was property, would have passed to and been consumed by one of the parties to the suit, under the court's order. However, in so far as the decision in that case may be in conflict with the views expressed in this, it is overruled, since a mere question of practice is involved.

[3] Congress, after carefully limiting the classes of cases in which appeals are allowable as matter of right, has guarded against the possibility of irreparable injury through an interlocutory order by clothing this court with discretion to grant an appeal whenever it is made to appear "that it will be in the interest of justice to allow such appeal." Our discretion was not invoked in the present case by an application for a special appeal; but, even had it been, there would have been no occasion for its exercise, for the reason that we think

the interest of justice will be better served by deferring the determination of the rights of the parties until the facts are fully developed.

It follows that the appeal must be dismissed, with costs.

Dismissed.

BROWNLOW et al. v. O'DONOGHUE BROS., Inc.

(Court of Appeals of District of Columbia. Submitted October 11, 1921. Decided November 7, 1921.)

No. 3478.

1. **District of Columbia ⟸22—Commissioners of District can regulate, but not prohibit, driveway across sidewalk.**

   The Commissioners of the District can make reasonable regulations for the use of driveways across sidewalks, but the right to regulate does not include the right to prohibit.

2. **District of Columbia ⟸22—Decision of Commissioners in regulating sidewalk use not disturbed, unless arbitrary.**

   The decision of the Commissioners of the District in regulating the use of driveways across a sidewalk will not be disturbed, if it has any reasonable basis in the facts.

3. **Eminent domain ⟸106—Lot owner's right to access across street cannot be taken without compensation.**

   The right of the owner of a lot which faced on two streets to have an entrance, including a driveway across the sidewalk to the street most traveled, is a property right, of which he cannot be deprived without just compensation.

Appeal from the Supreme Court of the District of Columbia.

Suit by O'Donoghue Bros., Inc., against Louis Brownlow and others, as Commissioners of the District of Columbia and personally, to enjoin defendants from closing an entrance to plaintiff's place of business. Decree for plaintiff, and defendants appeal. Affirmed.

F. H. Stephens, of Washington, D. C., for appellants.

George E. Sullivan, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellee corporation is the lessor of a store building and the lot on which it stands, at the corner of Fourteenth and Irving streets, N. W., Washington. Its lease runs for five years from November, 1917, with the right to have it extended for five years. It maintains on the premises a filling station, through which gasoline is conveyed to automobiles, and also sells there other automobile accessories. There are two entrances to the property on Irving street and one on Fourteenth street. The first is a residential street, and the second a business one, upon which there is a great deal of travel. Some time ago a District officer, at the instance of persons residing on Irving street, suggested that the filling station be transferred from the Irving street side to the Fourteenth street side, and it was done. Now it is proposed by the Commissioners to close the Fourteenth street entrance and compel the appellee to use only the Irving street entrance. As the property is situated, an automobile may enter from Fourteenth street and pass out on Irving street, or enter

at one of the Irving street entrances and pass out at the other. The claim of the Commissioners is that the use of the Fourteenth street entrance endangers pedestrians passing to and fro on the sidewalk.

On the other side of Fourteenth street, less than a block away, there is another establishment engaged in the same business as the appellee, which is so situated that all automobiles must enter from Fourteenth street, and, after having received their supply of gasoline, back out to the same street. This is done by permission of the Commissioners, and they have indicated no disposition to interfere with it. The Fourteenth street entrance of the appellee has existed for many years. It is claimed that this entrance is of great value to the appellee, that the entrances on Irving street are not sufficient to accommodate its trade, and that if the Fourteenth street entrance should be closed its business would suffer to a large extent. The court of first instance held that the appellee was entitled to egress from its property on both streets, and enjoined the appellants from closing the Fourteenth street entrance.

It is argued by the Commissioners that the question as to whether or not the entrance should be closed was resolved according to their best judgment concerning what the public safety required, and that the court has no power to review their decision, unless it appears to be an arbitrary one, which it is not. On the other hand, the appellee urges that the right to maintain the Fourteenth street entrance is a valuable incorporeal right attached to the lot, and that the Commissioners cannot take it away without giving just compensation therefor.

[1, 2] No doubt the Commissioners have the right to make reasonable regulations for the use of driveways across sidewalks (Highway Commissioners v. Ely, 54 Mich. 173, 19 N. W. 940; Goodfellow Tire Co. v. Hurlbut, 163 Mich. 249, 128 N. W. 410, 30 L. R. A. [N. S.] 1074), and that their decision in that regard will not be disturbed if it has any reasonable basis in the facts relating to the matter (Richards v. Davison, 45 App. D. C. 395, 401, citing United States ex rel. Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610). But regulation is one thing, and prohibition is another. Here the appellants seek to deprive the appellee of a driveway leading from Fourteenth street. It needs no argument to show that an entrance to a place of business such as appellee conducts from a street over which there is much travel is far more valuable than one from a street where the traffic is light. The latter is not the equivalent of the former.

[3] We find no authority which sustains the position of the Commissioners, but there are many which are against it. Donovan v. Pennsylvania Co., 199 U. S. 279, 302, 26 Sup. Ct. 91, 50 L. Ed. 192; Dillon on Municipal Corporations (4th Ed.) §§ 587b, 656a; Town of Rensselaer v. Leopold, 106 Ind. 29, 31, 5 N. E. 761; In re O'Keefe et al. (City Ct.) 19 N. Y. Supp. 676; Field v. Barling, 149 Ill. 556, 571, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311. It is not necessary, we think, to call specific attention to any of them save Donovan v. Pennsylvania Co. In that case the question was whether or not a railroad company, in prosecuting its business, was entitled to any greater privileges with respect to the use of the sidewalk or street in front

of the main entrance of its station than belonged to the public. The court said that the following, taken from Dillon on Municipal Corporations, supra, is a correct statement of the applicable doctrine:

"For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property."

Again:

"It was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it, and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself."

In the light of this decision, which is binding upon us, we see no escape from the conclusion that the appellee's right to access to and from Fourteenth street is a property right, which, though subject to legitimate regulation, cannot be taken from it without just compensation.

The decree of the lower court is affirmed, with costs.

Affirmed.

ROBERSON v. GORDON et al.

(Court of Appeals of District of Columbia. Submitted October 12, 1921. Decided November 7, 1921.)

No. 3492.

1. **Equity ⟸48—Remedy at law for breach of warranty and of contract to build a house is adequate.**

   A bill whose allegations show that the relief sought by plaintiff was based upon breach by defendant of a special warranty in a deed and of an oral contract to build a house for plaintiff discloses no equity, since the remedy at law for such breaches is adequate.

2. **Trial ⟸11(3)—Where plaintiff might have remedy at law, he can transfer to law side.**

   Where plaintiff's bill disclosed he had no right of action under a written contract set out, but also alleged an oral contract under which he would have a right of action for damages, he will be permitted to apply for a transfer of the case to the law side under law rule 76 of the trial court.

Appeal from the Supreme Court of the District of Columbia.

Suit by James R. Roberson against Fulton R. Gordon and others. From a decree dismissing the bill for want of equity, plaintiff appeals. Decree modified to permit plaintiff to apply for transfer to the law side of the court, and as modified affirmed.

Raymond M. Hudson, of Washington, D. C., for appellant.

A. Coulter Wills, of Washington, D. C., for appellees.

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

SMYTH, Chief Justice. The appellant as plaintiff brought suit against the appellees for the purpose of having set aside certain transactions which he had with them concerning the purchase of a lot and the building of a house. His bill was dismissed for want of equity.

It is not clear upon what he intends to rest his suit. He alleges that the appellee Fulton R. Gordon advertised in one of the local papers that he would "put up a house for you at about $2,000 less than you can buy it ready built, ready May 1st: $1,000 cash and I'll loan you the rest"; that he answered this advertisement, and after some negotiations with appellee Ruby Lee Minar, who was, he alleges, the agent of Gordon, he entered into a written contract with her whereby he agreed to purchase lot 5 in block 1995, in Chevy Chase Grove, paying $800 cash and giving for the balance sixty $20 monthly notes, and one note payable in five years.

The contract is set out, but there is nothing in it with respect to the building of a house. When he inquired about the building of the house, Gordon told him that he would not build it but would help him raise the necessary money through a building and loan association. Later it developed that neither Gordon nor Minar had title to the lot mentioned in the contract. Gordon proposed to convey to him in place of it lot 5 in square 1996, build a house on it to cost not more than $6,500, save appellant $2,000, and have the house completed on May 1, 1920; and added that if appellant would not take the lot he would lose the $800 which he had deposited. Fearing the loss of the $800, and relying upon the representations which had been made to him, appellant accepted a deed for the last-mentioned lot from John M. Minar and Ruby Lee Minar, and executed and delivered sixty monthly notes of $20 each and one five-year note for $600, payable to Ruby Lee Minar and secured by a trust upon the lot. The deed contains a special warranty.

[1] He charges that Gordon has refused to carry out his agreement with respect to the building of the house and that the lot conveyed to him is incumbered by a trust. It is apparent, therefore, that he attempts to set out two contracts, one written and the other oral, without indicating upon which he relies. But however that may be, it is manifest that what he complains of is the breach of an alleged contract to build a house, and the breach of the special warranty. With respect to these breaches the law affords him an ample remedy by an action for damages. Therefore the action of the lower court in holding that the bill did not state a cause for relief in equity was right.

[2] If he is bound by the written contract, he has no cause of action at law for failure to build the house; but if he is not, and can establish that an oral contract, such as may be worked out of the allegations of his bill, was substituted for it, he might have a cause of action. We think he should be given an opportunity to establish what he can do on the law side of the court, and hence that the decree should be modified so as to permit him within ten days from the going down of the mandate to apply for a transfer of the case under law rule 76 of the trial court.

As so modified, the decree is affirmed, and costs are assessed against the appellant.

Affirmed as modified.

MORELAND v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 7, 1921. Decided November 7, 1921.)

No. 3662.

Indictment and information ⟸3—Juvenile court can sentence to hard labor only after indictment.

A sentence to the workhouse at hard labor for six months constituted an infamous punishment and can be imposed, under Const. Amend. 5, only after indictment or presentment by the grand jury, so that such a sentence by the juvenile court without an indictment must be reversed.

Writ of Error to the Juvenile Court of the District of Columbia.

Charles Walter Moreland was convicted by the juvenile court of willfully neglecting or refusing to provide for the maintenance and support of his minor children, and he brings error. Reversed and remanded.

Certiorari granted 256 U. S. ——, 42 Sup. Ct. 169, 66 L. Ed. ——.

Foster Wood, of Washington, D. C., for plaintiff in error.

F. H. Stephens and L. B. Perkins, both of Washington, D. C., for the United States.

ROBB, Associate Justice. This is a writ of error to the juvenile court of the District of Columbia and brings up for review a judgment in that court under which the plaintiff in error, without indictment or presentment by a grand jury, was sentenced to the workhouse at hard labor for six months, for willfully neglecting or refusing to provide for the support and maintenance of his minor children. See 34 Stat. 86. The single question necessary to be considered by us is whether the juvenile court has jurisdiction to impose a sentence involving hard labor where there has been no indictment or presentment by a grand jury, as provided by the Fifth Amendment to the Constitution.

In Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, Wing had been sentenced to the house of correction at hard labor for a period of 60 days, and the court expressly held that imprisonment at hard labor constituted an infamous punishment and that such imprisonment could be imposed only where there had been a compliance with the Constitution. We see no escape from the conclusion that the decision in that case is controlling in this, and we therefore reverse the judgment and remand the case, with directions to dismiss the complaint.

Reversed and remanded.

MILLER v. RUSH et al.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1921.)

No. 3685.

1. **Cancellation of instruments ⟸34(1)—Right to cancellation for fraud lost by failure to use diligence.**
The right to rescission or cancellation of a deed because of fraudulent representations is lost, if the party seeking such relief fails, after discovering the falsity of the statements, to use reasonable diligence to disaffirm it, and notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose.

2. **Deeds ⟸75—Right to cancellation for fraud held lost by ratification.**
After complainant and her husband had conveyed land in Texas to defendants in part consideration of a certificate entitling them to certain land in Mexico, they visited the vicinity of the Mexican land and there found that many of the representations of defendants with respect to the character and value of the land and its nearness to town and market were false, and became convinced that it was worthless and doubtful of defendants' title. After their return, and the death of her husband, complainant for a further consideration executed a new conveyance of the Texas land to one of the defendants, expressly confirming the prior deed. *Held*, that such conveyance was a ratification, which deprived complainant of the right to cancellation of either deed on the ground of the original fraudulent representations.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Suit in equity by Mrs. Kate Miller against J. M. Rush and Claude McCauley. Decree for defendants, and complainant appeals. Affirmed.

George E. Miller, of Fort Worth, Tex., and R. N. Grisham, of Eastland, Tex., for appellant.

J. M. Wagstaff, of Abilene, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a bill in equity filed in March, 1919, by the appellant, Mrs. Kate Miller, praying the cancellation of a deed executed on September 30, 1910, by the appellant and her then husband, J. T. Miller, to the appellees, J. M. Rush and Claude McCauley, conveying 324½ acres of land in Stephens county, Tex., which was community property of the grantors, and of a deed executed in April, 1912, by the appellant individually and as the community administratrix of the community of herself and her then deceased husband to the appellee J. M. Rush, conveying the same land, and expressly confirming the first-mentioned deed.

The basis of the relief sought was alleged false statements and fraudulent representations made by said Rush, acting for himself and his codefendant, McCauley, to the appellant and her husband, whereby the latter were induced to execute the first mentioned deed. The consideration recited in that deed was $6,500. The actual consideration

for the land conveyed by that deed, which was of the value of $3,000 at the time that deed was made, was $1,000 in cash paid to the grantors, the assumption by the grantees of $315 balance of purchase price therefor owing to the state of Texas, and the delivery to the grantors of a land certificate executed by the Rio Cajones Company, entitling the holders of such certificate to a described tract of land, containing 600 acres and constituting a part of block 35 of a large body of land known as the Rio Cajones estate, in the state of Oaxaco, republic of Mexico. The alleged representations included one as to the climatic conditions in that part of Mexico in which the Rio Cajones lands are located, and others to the effect that the tract traded to the appellant and her husband was located within 3½ miles of a thriving town called Bailey, in which were schools and churches, that that tract was fine and fertile, and that there was a good road, a public highway, leading from Bailey to the larger towns and markets situated in Mexico, where products of the lands in that part of the country could be disposed of.

After the filing of an answer to the bill, a special master was appointed to take testimony and to report his conclusions of fact and of law. The master's findings of fact included the following:

"I do find that said Rush led the Millers to believe that there were churches and schools in or near the vicinity of the town of Bailey, but I do not find that said Rush represented the land in block 35 to be of any particular value, nor that the country was good for any particular kind of disease, nor that block 35 was in 3½ miles from the town of Bailey, and I do not find that he agreed with the said Millers that, if they were not satisfied with the said land when they went to Mexico, he would trade back with them and give them $1,000 for the expenses they were out, or that he made any agreement with the Millers to that effect. While I am unable to find from the testimony that defendant Rush made any direct statements as to the lands in block 35, I do find that J. T. Miller and wife were led to believe said lands in block 35 were good lands and fertile, from the statements of said Rush; that he had been to the town of Bailey, and that the lands in that vicinity were rich and fertile.

"I further find in this connection that after complainant and others in company with them went to Bailey and upon the Rio Cajones estate, that they then found that some of the things that Rush had led them to believe were not true and that the complainant afterwards and on April 12, 1912, confirmed the trade and agreed to accept the land in Mexico with the defendant Rush as hereinafter stated in paragraph 23 of these findings. * * *

"I find that complainant and her husband, with their family and a number of other people, moved to the Rio Cajones colony about the 1st of December, 1910, and that complainant and her husband remained there some two months in the town of Bailey, which was about 10 miles from the lands described in the certificate given to complainant and her husband, and that complainant and her husband became dissatisfied with the country and returned to the United States, and to Cisco, Tex., arriving at Cisco about February, 1911.

"I find that the said J. T. Miller and complainant, while in Mexico, became acquainted with the climate of the country, the general character of the Rio Cajones lands, the conditions as to churches, schools, and roads, and that it was a tropical country, and that they became acquainted as to the surface of the country, including the mountains near by and the dense jungles of underbrush on said lands in general, in and around Bailey and on the Rio Cajones estate; and I further find that they did not go to visit the lands called for in that certificate, and that they never saw the same.

"I find that, while J. T. Miller was in Mexico, he was informed as to the probable character and quality of the land in block 36. I find that, upon

what complainant and her husband could see from the town of Bailey, they were put on notice of the fact that the land called for in said certificate was probably rough and rolling, and not easily accessible, and not suitable for farming as American farmers farmed; although I find that the land would produce coffee and other products raised in Mexico, that it was covered with valuable timber, and I do not find that the land is worthless.

"I find that on arrival of the said Millers at Cisco, on their return to Texas, that they were dissatisfied with the trade they had made, and expressed their dissatisfaction to J. M. Rush and McCauley, and negotiations were had between the parties for settlement of their differences, but no agreement was arrived at before the death of J. T. Miller, who died about April, 1911.

"I find that, after the said Miller died, the said McCauley and Rush, after negotiating with Mrs. Miller, about June, 1911, agreed to deed her back the land in Stephens county for the sum of $1,500, with no cash consideration, but for six vendors' lien notes on said land, each for $250, running from one to six years, with 10 per cent. interest, the said McCauley and Rush had theretofore paid to the Millers on the trade for the land $1,000, and in case Mrs. Miller accepted this deed and executed the notes, this would be the final settlement between the parties, the defendants to have the Mexico lands and personal property turned over to them at the time of the trade; and I find that the said McCauley and Rush executed a good and valid deed to Mrs. Kate Miller on the above premises and tendered to her, but Mrs. Miller declined to accept the deed and execute the notes.

"I further find that the parties continued to negotiate settlements of the matter, and arrived at a settlement of the matter about April 12, 1912, by the terms of which agreement J. M. Rush, who then owned the entire interest in the land, paid to Mrs. Miller $440 in money and personal property, and Mrs. Miller, in order to make full settlement of the matter, was appointed community administratrix of the estate of J. T. Miller, deceased, and herself, and she then, after such appointment and qualification, accepted said money and personal property, and conveyed to J. M. Rush the land in controversy, as shown by deed from Mrs. Miller, dated the 16th day of April, 1912, filed for record in the county clerk's office of Stephens county, Tex., on the 28th day of January, 1914, and in said deed it was provided that said Rush would convey to the said Mrs. Miller the land called for in her certificate, given at the time of the original trade, within 9 months from said date. And I find that the parties on each side fully agreed to this as a full and final settlement of the matters in controversy, and that no fraudulent representations were made by defendant at the time to induce complainant to make the deed. * * *

"I find that J. T. Miller and complainant went to Mexico and lived there some two months, in 1910 and in the early part of 1911, and lived within 9 or 10 miles of the land in controversy, and by the use of reasonable diligence they could have found out the character of the land and its value and the title to the land, and she could have done this within 6 months after the original trade in September, 1910, and that while she was in Mexico she came to the conclusion that the land was worthless and that defendants had no title to the same, as shown by her testimony.

"I find that complainant, from her own testimony, at the time she made settlement with J. M. Rush in the spring of 1912, did not believe that Rush could make her a title to the land in Mexico, and that she believed Rush did not have title to the land in Mexico, and that he could never make title to the land in Mexico, and that the lands of the Rio Cajones estate were unfit for white persons to reside upon, and that the land covered by her certificate was practically worthless. * * *

"I find that oil was discovered about six miles from this land about the first of the year 1917, and the Ranger field was discovered in October, 1917, which is about 30 miles from this land, and that thereafter the land in controversy arose in value very rapidly and that said land is now worth $1,500 an acre; that there has been no special change in value from the time defendants purchased the land until the discovery of oil."

The land called for in the certificate delivered to the appellant and her husband is about 10 miles west of Bailey, and is rough and mountainous. The following are extracts from the testimony of the appellant:

"There was no town at Bailey. There was one little store, but no town. * * * There were no churches or schoolhouses at Bailey. The country lying west of the town of Bailey was just mountains and rocks and timber on it, and hilly and jungles, and vines, and no one could go through it without cutting their way. There were no roads where we were at all. * * * When we got down there, we found that land Rush was giving us was 10 or 15 miles away from Bailey. Mr. Rush told us it was 3 miles. * * * The ants and insects in that country were so bad that it was not fit for a nigger to live in; a person could not live there. I knew that when I left Mexico, and that is why we left. We could not stay there. I knew there were no school or churches at Bailey, and no roads. I did not know it till I went down there. I found out down there in Mexico that everything McCauley and Rush had told me was untrue, except as to the title of the land, and we found it was not so, what they told us, and I had a sort of idea that they didn't have any title to the land. We had a pretty good idea when we got back that they didn't have any land down there. That was my judgment at that time. * * * I understand that this land about which we are bringing this suit lies 9 or 10 miles west from the town of Bailey. I did not go out to that land, and could not have done so, had I tried, because of the mountains and hills and jungles and rocks. * * * No one told me before this suit was brought that this land was worthless. Of course, if Rush had told us that that Mexico land was all covered with brush and jungles and rocks and mountains, etc., and was such land as I understand it is, I would never have agreed to the trade. In 1912, when I made that land trade, I thought then that I might be able to make some disposition of that land. * * * When I was in Mexico the 2 months I found that nothing was like Rush and McCauley said it was. I saw the mountains west of us, and knew they claimed our land was west of us. * * * When I left Mexico, I thought that land down there was not fit for anything, and I think that yet. It would not have been any account to live on, if it had been level. When we came back, I thought maybe Rush could give us a good title to the land; he said he could. I believed everything he told me about the land was false."

The above-mentioned deed, executed by the appellant in April, 1912, contained, after a recital of the receipt by the appellant of $440 in cash and in property at reasonable cash value, and immediately following the granting and habendum clauses of the deed, the following:

"It is expressly understood and stipulated that this deed is made for the purpose of vesting the title of the above tracts of land in said J. M. Rush absolutely, for the consideration hereinbefore stated, and in full confirmation of a deed made by the said J. T. Miller and myself as the wife of said J. T. Miller to said Claude McCauley and J. M. Rush, conveying to them said land on September 26, 1910."

[1] The right to a rescission or cancellation of a deed or contract because of fraudulent representations is lost, if the party seeking such relief fails, after discovering the falsity of the statements whereby he was influenced to enter into the transaction, to use reasonable diligence to disaffirm it; and notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Grymes v. Sanders, 93 U.

S. 55, 23 L. Ed. 798; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Rugan v. Sabin, 53 Fed. 415, 3 C. C. A. 578; Scheftel v. Hays, 58 Fed. 457, 7 C. C. A. 308.

[2] The appellant, while in Mexico, not only was fully apprised of the falsity of most of the representations by which she claims that she and her husband were influenced to execute the deed of September 30, 1910, but acquired knowledge of facts plainly indicating that the land in Mexico which they were to get in the trade was not of the character and quality corresponding with the alleged representations in that regard. She saw enough to suggest to a person of ordinary prudence and intelligence that that land was such as it turned out to be. She learned that it was located in a rough, mountainous region. It well may be inferred that a reasonably diligent inquiry made at that time would have led to an ascertainment of the actual character and quality of that land—of all the circumstances affecting its value or desirability.

It is apparent from the appellant's own testimony that when she returned from Mexico she did not believe that that land in any material respect was such as she claimed it had been represented to be. Her testimony discloses that, when she executed the deed of April 6, 1912, she had ceased to believe in the truth of any of the above-mentioned representations claimed to have been relied on when the previous deed was executed. The later deed, which was supported by a new valuable consideration, was a conveyance of the same land and a confirmation of the previous one. It evidenced the appellant's election not to rescind the first deed. Unless the last deed is voidable, the execution of it left the appellant without any legal or equitable interest in, or claim to the land.

It is not claimed that the appellant was induced or influenced to make it by any fraudulent representation made after the execution of the earlier deed. The last deed is not subject to be cancelled because of the alleged misrepresentation as to the character and quality of the land, whereby it is claimed that the appellant and her husband were influenced to make the first deed, as the appellant's own testimony convincingly shows that, when she executed the last deed, she did not believe that those representations were true, and was not influenced or induced thereby to change her condition. A transaction is not subject to attack because of representations which the complaining party did not believe, and upon which he did not rely when that transaction was entered into. Ming v. Woolfolk, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740.

The evidence adduced fully warranted the conclusion that the appellant's deed of April 6, 1912, was such a ratification of the transaction evidenced by the previously executed deed of herself and her husband as had the effect of depriving the appellant of any right to have either of those transactions cancelled on any ground now urged against them.

It follows that the decree appealed from should be, and it is, affirmed.

ATLANTIC ICE & COAL CORPORATION v. VAN.

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

No. 3561.

1. **Appeal and error ⟸1003—Weight of evidence not reviewable.**
A judgment based on the verdict of a jury will not be reversed on the weight of the evidence.

2. **Trial ⟸139(1)—Direction of verdict authorized only when evidence would not sustain opposite verdict.**
A court has no authority to direct a verdict where a consideration of all the evidence and the inferences reasonably and justifiably to be drawn therefrom would sustain a verdict for the opposing party.

3. **Master and servant ⟸235(4)—Constant lookout not required of employé.**
While an employé has no right to close his eyes to an obvious danger or to fail to exercise reasonable care for his own safety, there is no absolute rule of law requiring him to be constantly on the lookout for dangerous obstructions, of which he has no knowledge at his working place or in passage ways provided by the employer for his use.

4. **Master and servant ⟸226(1)—Risk of unknown obstruction in way not assumed.**
The assumption by an employé of the risks of his employment does not include risks or dangers arising from the negligence of his employer in the erection and maintenance of an obstruction in a passageway provided for the use of the employé of which he has no knowledge, unless it is so obvious that he is chargeable with knowledge of it.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action at law by Sam Van against the Atlantic Ice & Coal Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error seeks the reversal of a judgment rendered against it in the District Court of the United States for the Eastern District of Tennessee in favor of the defendant in error, Sam Van, for damages for personal injuries sustained by him while in its employ.

The plaintiff in the District Court averred in his declaration that on the 30th day of May, 1917, the defendant was operating an ice factory in the city of Knoxville, Tenn.; that plaintiff at that time and for five or six days prior thereto had been employed by the defendant in loading ice upon its wagons and trucks and assisting in the distribution of the same to defendant's customers; that defendant's office was located near the east corner of its premises, and near and in front of the building in which its ice was stored; that a porch was in front of this office and between it and Cumberland avenue, and that its factory buildings extended a few feet beyond this porch toward Cumberland avenue; that a short flight of steps led from this porch to the ground; that the usual way of going into and from this office was through a door between the office and porch and over the porch and flight of steps, and that such way was continually used by defendant's employés and those going to its office on business; that defendant had fastened a rod to the corner of its factory building and had extended the same in front of and to a point about midway of the steps, the end thereof being fastened in the ground within from one to two feet of the bottom step.

The plaintiff further averred that the defendant was guilty of gross negligence and carelessness in maintaining this rod so situated at a place that was being continually used by employés of defendant and those entering its office and departing therefrom on business, and that the plaintiff was not aware

of the presence of this rod: that on the 30th day of May about half past 3 o'clock in the afternoon, and after plaintiff had completed his work for that day, he was ordered and directed by a superior servant to accompany another truck loaded with ice and assist in delivering the same to customers; that this was pay day, and before leaving the defendant's factory to comply with the orders of his superior he went into defendant's office to receive his pay; that after having obtained his pay he passed out of the door of the office across the porch and descended the flight of steps; that another employé had been directed to accompany plaintiff on this extra trip, and, for the reason that this coemployé was waiting to receive his wages, it was plaintiff's intention when he left the office to notify the driver of the truck, as it passed in front of the steps, that he and his coemployé would pass across a bridge and meet him on Cumberland avenue; that about the time plaintiff reached the bottom of the steps the truck was driven by the employé in charge of the same, rapidly around the end of the building, and, his attention being thus attracted, in making a step he caught his foot beneath the rod located near the bottom of the steps and was thrown upon the ground in front of the truck, which was then so near to him that the driver was unable to stop, and the truck was driven upon the plaintiff causing the injuries complained of. To this declaration the defendant for plea thereto averred that it was not guilty of the matters and things and wrongs and injuries complained of.

Upon the issues so joined the case was tried four times in the District Court. The first trial resulted in a verdict in favor of the plaintiff for $2,095.25. This verdict was set aside by the trial court. The second trial resulted in a disagreement of the jury. The third trial resulted in a verdict for the defendant, which was set aside by the trial court. The fourth and last trial resulted in a verdict in favor of the plaintiff for $1,000. The defendant's motion for a new trial was overruled, and the District Court entered a judgment upon this verdict in favor of the plaintiff and against the defendant.

John W. Green, of Knoxville, Tenn. (Green, Webb & Tate, of Knoxville, Tenn., on the brief), for plaintiff in error.

Harley G. Fowler, of Knoxville, Tenn. (Fowler & Fowler, of Knoxville, Tenn., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] This court has no authority to reverse this judgment upon the weight of the evidence. R. S. § 1011 (Comp. St. § 1672). Penna. Casualty Co. v. Whiteway et al., 210 Fed. 782, 127 C. C. A. 332; Brazil Block Coal Co. v. Hotel, 192 Fed. 108, 112 C. C. A. 448; Railway Co. v. Akre, 200 Fed. 955, 119 C. C. A. 250; Mfg. Co. v. Maslanka, 203 Fed. 465, 121 C. C. A. 589.

No exceptions were taken to the charge of the court or to its ruling upon the admission or rejection of evidence; therefore the only question presented by this record is whether or not the court erred in overruling the motion of the defendant, at the close of all the evidence, for a directed verdict.

[2] A court has no authority to direct a verdict, where a consideration of all the evidence, and the inferences reasonably and justifiably to be drawn therefrom would sustain a verdict for the opposing party. Bramley v. Dilworth (C. C. A.) 274 Fed. 267; Railway Co. v. Lacey, 185 Fed. 225, 107 C. C. A. 331; Railway Co. v. Anderson, 168 Fed. 901, 94 C. C. A. 241.

If the evidence is such that reasonable minds may arrive at different conclusions, then it is the duty of the trial court to submit the issues of fact to a jury. That reasonable minds may reach different conclusions upon the evidence offered in this case is fully shown by its history. Two juries have found in favor of the plaintiff, one jury found for the defendant, and still another jury failed to agree upon a verdict. One verdict in favor of the plaintiff and one verdict in favor of the defendant were set aside by the trial court. The court, however, refused to set aside the second verdict in favor of the plaintiff and rendered judgment thereon and in that connection said:

"There was in my opinion such substantial evidence on behalf of the plaintiff as to require the defendant's motion for a directed verdict to be overruled."

Upon the question of defendant's negligence, the plaintiff offered substantial evidence tending to prove that defendant placed and maintained a rod reaching from the wall of the factory building to the middle of these steps and directly in front of them; that these steps were provided for and intended as a passageway for defendant's employés. It is true that upon these questions there is a serious conflict of evidence, but this conflict affects only the weight of the evidence.

While the burden of proof rests upon the plaintiff to show negligence on the part of the defendant, nevertheless the question of the credibility of witnesses is a question for the jury. If the jury believed the witnesses offered by the plaintiff, as it evidently did, then the plaintiff fully met this burden, and the verdict of the jury, which necessarily includes a finding by it that the defendant erected and maintained this obstruction substantially in manner and form as averred in the declaration, and that under the facts and circumstances of this case this constituted negligence on the part of the defendant, is fully sustained by the evidence.

The presumption obtains that the plaintiff was exercising due care for his own safety. Therefore the defense of contributory negligence must fail unless the jury find from a preponderance of all the evidence that the plaintiff was guilty of negligence contributing to his own injury.

[3] While it was the duty of the defendant to use ordinary care in providing a reasonably safe working place and passageways for its employés, nevertheless, even though the defendant were guilty of negligence in this respect, plaintiff would have no right to close his eyes to an obvious danger, or fail to exercise reasonable care and caution for his own safety. There is, however, no absolute rule of law requiring an employé to be constantly on the lookout for dangerous obstructions, of which he has no knowledge, at his working place or in passageways provided by his employer for his use. It is sufficient if he exercises such ordinary care as a person of ordinary prudence and caution would exercise under the same or similar circumstances.

In this respect the plaintiff testified that he had no knowledge of this obstruction, that he might have seen it had he been looking downward, but that his attention was momentarily diverted from the steps by his effort to attract the attention of the driver of the truck. It there-

fore became a question for the jury whether, under these facts and circumstances, the plaintiff was exercising due care or by his own negligence in failing to keep a constant lookout for dangerous obstructions in this passageway contributed to his injury, notwithstanding the defendant may have been guilty of negligence in placing and maintaining this obstruction in front of a portion of these steps.

[4] While it is the law that an employé assumes the risks incident to his employment—that is to say, risks that inhere in the employment itself and which cannot be obviated or avoided by ordinary care on the part of the employer—yet this assumption of risk does not embrace risks or dangers arising from the negligence of an employer in the erection and maintenance of an obstruction of the character described in plaintiff's petition. Therefore, unless the plaintiff had knowledge or ought to have had knowledge of this obstruction, he did not by his contract of employment or by remaining in this employment assume the risk of injury from the obstruction itself, but only the risks naturally and necessarily incident to the business in which he was engaged. The plaintiff testified that he had no knowledge whatever of this obstruction, nevertheless, if it were so obvious that a reasonably careful man, under the same circumstances and with the same opportunities, would have seen and observed it, then the plaintiff cannot be heard to say that he did not see what he must have seen had he been exercising due care for his own safety. On the contrary, he must be held to have assumed the risk of the existing conditions in and about the place in which he seeks and accepts employment, if he had knowledge, or in the exercise of ordinary care should have had knowledge, of these conditions. Shannon v. Willard, 201 Mass. 377, 87 N. E. 610.

The plaintiff had been in the employ of the defendant for a part of the summer of 1916. He had again entered into the employ of the defendant a few days prior to the date of his injury. He testified that during his last employment he had had no occasion to use these steps prior to the time of his injury. He also testified that he passed these steps while riding on the ice truck at least twice a day; that he was not riding on the driver's seat, but usually on the rear end of the truck, and therefore had no opportunity to observe the steps as the truck approached them. It was therefore a question for the jury to determine from all the facts and circumstances in this case whether the defendant had knowledge, or in the exercise of ordinary care, should have had knowledge, of the obstruction placed and maintained by defendant in front of these steps.

The charge of the court is not copied into this record. The presumption obtains that the court fully and fairly charged the jury upon assumption of risk by an employé, and the conditions and circumstances under which the plaintiff would be held, as a matter of law, to have assumed such risk. This presumption is strengthened by the fact that no exception was taken to the charge.

There can be little or no controversy as to the propositions of law involved in this case or as to the application of that law to the facts necessarily found by this jury, preliminary and essential to a general

verdict in favor of plaintiff. While upon the facts the case is a close one, nevertheless there is sufficient evidence in this record to sustain the verdict of the jury upon every issue of fact submitted to it and vital to a recovery by the plaintiff.

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

EVANS v. WILLIAMS.

In re HITT LUMBER & BOX CO.

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

No. 3480.

1. Bankruptcy ⟸440—Order reviewable by appeal or petition to revise.

An order settling the accounts of a receiver, based on actual receipts and expenditures, is an ordinary administrative order subject to revision only in matter of law under Bankruptcy Act, § 24b (Comp. St. § 9608b); but, where it goes further and adjudges the receiver personally liable for negligence in continuing to conduct the business of the bankrupt at a loss, it is of the nature of a decree made in a plenary suit arising in bankruptcy proceedings and is appealable under section 24a.

2. Bankruptcy ⟸303(3)—Receiver held not liable for loss incurred in operation of manufacturing plant.

Evidence considered, and *held* not to sustain a decree finding that a receiver appointed for a manufacturing company, pending hearing on an involuntary petition in bankruptcy against it, with directions to operate its plant in order to conserve the property as a going concern, and who operated it less than five months, was chargeable with negligence which rendered him personally liable for the loss resulting from such operation in continuing it after he knew, or in the exercise of reasonable diligence should have known, that the loss was substantial and continuing.

Petition to Revise an Order of and Appeal from the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

In the matter of the Hitt Lumber & Box Company, bankrupt; Silas Williams, Trustee. On appeal and petition to revise by H. M. Evans to review an order of the District Court holding him liable for losses incurred in operation of bankrupt's business by him as receiver. Reversed.

Nathaniel H. Maxwell, of Cincinnati, Ohio, and Frank Spurlock, of Chattanooga, Tenn. (James M. Trimble, of Chattanooga, Tenn., on the brief), for petitioner and appellant.

J. W. Thompson, of Chattanooga, Tenn. (Lusk & Thompson and Finlay & Campbell, all of Chattanooga, Tenn., on the brief), for respondent and appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is an appeal from the decree of the United States District Court for the Eastern District of Tennessee, confirming an order of the referee theretofore made, holding H. M.

Evans former receiver of the bankrupt, the Hitt Lumber & Box Company, liable to the bankrupt estate in the sum of $11,758.51, covering losses incurred by him in the operation of the business of the bankrupt after he knew or should have known that the business was being operated at a substantial and continuing loss.

[1] The appellee has filed a motion to dismiss this appeal for the reasons:

(1) The order complained of was "an administrative order in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate."

(2) The order complained of was summary in character and is subject to revision only in matter of law under section 24b of the Bankruptcy Act (Comp. St. § 9608b).

It appears from the record that on July 2, 1917, an involuntary petition in bankruptcy was filed for the purpose of having the Hitt Lumber & Box Company, a going manufacturing corporation, declared a bankrupt. To this petition the Hitt Lumber & Box Company, on the 3d day of July, 1917, filed an answer denying the charge of insolvency and the act of bankruptcy averred in the petition.

On July 7, 1917, and before the adjudication in bankruptcy, H. M. Evans was appointed receiver of the estate of the alleged bankrupt with authority to operate its factory as a going concern.

On January 26, 1918, the receiver submitted to the court his final report as receiver. On April 5, 1918, the Cornelius Lumber Company and other creditors of the bankrupt filed an intervening petition excepting to certain specific items of the receiver's account and also praying that the receiver be held liable for losses occasioned by the operation of the business after he knew or should have known that the business was being operated at a loss.

It is unnecessary at this time to determine whether it was proper for the intervening creditors to incorporate in the same pleading, exceptions to the receiver's account, and a separate cause of action to recover from the receiver personally, damages sustained by the bankrupt estate by reason of his negligence, for the reason that the exceptions to the account were fully heard and determined, and the receiver's account fully settled and adjusted, prior to the final hearing upon this particular issue.

The account of the receiver was necessarily confined to the property and assets coming into his hands and the expenses incurred and the payments made by him in the course of his receivership. The receiver asked for the allowance and approval of his account on the basis of actual receipts and actual disbursements. The order and decree of the court determining the amount of property with which the receiver should be charged and the credits that should be allowed to him for disbursements on behalf of the estate was an administrative order in the ordinary course of a bankruptcy proceeding and subject to revision only in matter of law under section 24b of the Bankruptcy Act.

The cause of action stated in the intervening petition does not relate to specific assets of the bankrupt estate in the possession of the receiver or that ever came into his possession by virtue of the receiver-

ship. It does not ask that he be charged with other property or assets of the bankrupt, in addition to the property and assets shown in his account; nor does it challenge the correctness of specific items of credit asked by the receiver on the ground that such payments were not in fact made or, if made, were extravagant. The exceptions to the account, which exceptions are a separate and distinct part of this intervening petition and constitute no part of the cause of action stated therein, cover all objections of this character.

On the contrary, the cause of action stated in the intervening petition is in the nature of a plenary suit to recover from the receiver, out of his private property, losses sustained by the bankrupt estate by reason of the alleged negligence of the receiver in continuing the operation of this plant, after he knew or in the exercise of ordinary care and diligence should have known that the factory was being operated at a loss.

The issues joined by the answer of the receiver to the allegations contained in the cause of action stated in the intervening petition present a controversy arising in a bankruptcy proceeding. The decree of the court upon these issues is clearly distinguishable from a mere administrative order in the ordinary course of bankruptcy. Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Moody v. Bank, 239 U. S. 374, 36 Sup. Ct. 111, 60 L. Ed. 336; In re Veler, 249 Fed. 633-645, 161 C. C. A. 543; Barnes et al. v. Pampel, 192 Fed. 525, 113 C. C. A. 81.

For the reasons above stated the motion to dismiss the appeal must be overruled.

This case, however, is also here upon a petition to revise this same order and decree of the District Court, so that in any event this court would have jurisdiction, either upon the appeal or upon the petition to revise, to determine the question presented; but in so far as the determination of the weight of the evidence is concerned, it is important to the appellant that the court should consider this question upon the appeal.

[2] As heretofore stated, this case involves but one question, and that is the question of the correctness of the decree of the District Court confirming the order of the referee finding H. M. Evans, former receiver, liable to the bankrupt estate in the sum of $11,758.51, for losses sustained in the operation of the business of the bankrupt after he knew, or in the exercise of reasonable diligence should have known, that the business was being operated at a substantial and continuing loss.

It does appear from the evidence and the admission of counsel that the operation of this business by the receiver from the 7th of July, 1917, until November 30, 1917, when the Hitt Lumber & Box Company was adjudged a bankrupt and a trustee elected, resulted in a substantial loss to the bankrupt's estate. It is insisted. however, that the loss found by the referee is largely in excess of the actual loss sustained for the reason that there was appraised and charged to the receiver at the time he took possession of this property a large amount of stock on hand that was of value to the plant as a going concern but

of little or no value after the discontinuance of operation; that a large amount of this stock was on hand at the time of final appraisement made after the termination of the receivership when the factory was no longer a going concern and, therefore, was not appraised and no credit whatever was given to the receiver therefor. It is further insisted that the finding of the referee is excessive for the reason that the referee, in arriving at the amount named, did not take into consideration interest, insurance, and taxes paid by the receiver, that would necessarily have been expended regardless of whether the factory was operated or not. However, in view of the conclusion this court has reached upon all the evidence in this case, it is unnecessary to determine whether these credits should have been allowed to the receiver by the referee, in the ascertainment of the actual loss.

On the first hearing the referee found that—

"There is no evidence to sustain the second prayer of the petition, to the effect that the receiver be required to account for loss sustained by his operation of the business after he knew or should have known that said business was unprofitable and was being operated at a loss. Said second prayer of the petition is therefore overruled and disallowed."

The District Court, upon petition to review filed by the Cornelius Lumber Company et al., reversed this finding of the referee and remanded the case to the referee for further proceedings to determine the question of such liability in accordance with its opinion. The court in its opinion, which by the express terms of the decree was made controlling upon the referee in his further hearing touching the liability of the receiver and the amount of such liability, in discussing this particular question among other things said:

"The order made by me July 7, 1917, authorizing the receiver to continue the operation of the business of the bankrupt so long as in the opinion of the court it should be proper so to do, specifically provided that the receiver should make monthly reports to the court of the profit and loss in such operation, and that if at any time it should appear that the business was unprofitable and being operated at a loss, he should report such fact to the court, to the end that proper steps might be taken to discontinue such operation and the incurring of further loss. * * * The receiver's first report, filed in the clerk's office August 17, 1917, covering his operations from July 3d to July 31st, showed a net operating loss of $784.78. This report was not, however, called to the attention of the court. The second report, filed in the clerk's office September 18, 1917, showed a net gain of $1,016.04, in the operations for August. This report was likewise not called to the attention of the court. * * * As soon as the receiver in the exercise of reasonable diligence knew or should have known that the business was unprofitable and being operated at a substantial and continuing loss, it was his duty to report this fact to the court, not merely by filing a report showing such loss in the office of the clerk or with the referee (to whom no general reference had been made), but by bringing or causing the same to be brought to the attention of the judge of the court for action thereon."

The referee, in response to the order and decree of the District Court reversing his former order and directing him to proceed in accordance with the opinion filed by the district court, found upon the second hearing that—

First. "Said H. M. Evans is liable to the bankrupt's estate in the sum of $11,758.51, covering losses incurred by him in the operation of the business of

the bankrupt after he knew or in the exercise of reasonable diligence should have known that the business was being operated at a substantial and continuing loss."

This finding of the referee was approved and confirmed by the District Court, and it is this decree of the District Court from which this appeal is taken.

The District Court found upon the petition to authorize the receiver to conduct the business of the alleged bankrupt that—

"It is necessary in and to the best interest of the estate of the said Hitt Lumber & Box Company and all persons interested therein, either as creditors or stockholders, that the business of the said Hitt Lumber & Box Company be conducted by the receiver heretofore appointed by the referee as a going concern, and that it is necessary for the preservation of said estate for the property of the said Hitt Lumber & Box Company to be held by said receiver with full power and authority to conduct and operate his business as a going concern, and that great loss will accrue if the mills and business of the company should remain idle and shut down during the pending of the present proceedings against it."

This finding of the court must not be overlooked in determining the question of the liability of the receiver or in determining the actual loss occurring during the receivership for the reason that a loss in operation may be more than compensated by maintaining the value of the plant as a going concern. If therefore the receiver is liable for the loss in operation, a fortiori, he is entitled to credit for maintaining the value of the plant as a going concern, if in fact the operation of the plant accomplished that result, regardless of whether or not the benefits of maintaining such value were lost to the estate by reason of the delay in the sale of the same after the termination of the receivership.

This phase of the case seems to have been entirely overlooked by the referee both in determining the receiver's liability and in the ascertainment of the actual loss; nor did the District Court make any reference thereto in its opinion approving and confirming this item of the referee's report.

It must also be remembered that the Hitt Lumber & Box Company was not adjudged a bankrupt until the receivership terminated on November 30, 1917, and that for this reason the receiver represented not merely the creditors but also the alleged bankrupt.

The order directing the receiver to operate the mills and factory of the alleged bankrupt directed him to make reports to the court, at least once a month, of all receipts and disbursements and as accurately as may be, the profit or loss in the operation of said mill. On August 17, 1917, the receiver filed in the clerk's office a report covering the July operations. On the 18th of September he filed his second report covering the month of August. This was in direct compliance with the order of the court directing the receiver to make reports to the court at least once a month. The order did not require him to report to the judge of the court, but to the court itself, and the filing of these reports with the clerk of the court was a full compliance with the order. The receiver having complied with this order for these two months cannot be charged with any default on his part merely because

the attention of the court was not called to these reports either by the clerk, the alleged bankrupt, or any of its creditors.

There is some conflict in the evidence as to whether a report was filed in October covering the operations for September. The receiver testified that he filed such a report. The clerk's records do not show that such a report was filed, but neither does the clerk's record show that any report was filed in September covering the month of August. Nevertheless, it is admitted in the brief for appellee that such report wts filed on the 18th of September and the District Court reached the same conclusion. It is certain, however, that such a report was prepared and that the receiver believed in good faith that it had been filed. This is substantially true of the November report covering the October operations, although it does appear that owing to the illness of one counsel and the absence of the other, that report was not actually filed. There is nothing in the evidence to show that either of these reports was purposely withheld by the receiver or that he was not acting in the best of faith and fully believed they had been filed with the clerk of the District Court in accordance with the order of that court. It also appears by the record that the receiver's attention was not called to the fact that he had failed to file a report in October and November, or that any of the interested parties now seeking to hold this receiver liable moved the court to require the receiver to make and file such report. It is therefore apparent that this receiver cannot be held responsible for the losses occurring in the operation of this plant during his receivership solely upon the theory that he failed, neglected, and refused to file monthly reports. The fact, if it is a fact, that he failed to filed a report covering September, and also failed to file a report covering the month of October, can be considered only in connection with other evidence, if any, tending to show negligence on the part of the receiver.

There is no claim on the part of the trustee or of any of these creditors that the receiver was acting in bad faith. On the contrary, counsel for the intervening creditors, upon the hearing before the master, expressly repudiated making any claim as to bad faith, dishonesty, or intentional wrong doing on the part of the receiver. Therefore, if the receiver is liable for the losses that occurred in the operation of this plant, his liability must be based upon his gross and culpable negligence and misconduct in continuing the operations after he knew or ought to have known that by so doing he was not conserving but dissipating the assets of the bankrupt.

As preliminary to the discussion of the evidence relating to this subject, it might be well to call attention to the fact that this is not an inquiry into the business ability of the receiver. That was a question for the court and the interested parties to determine at the time of his appointment. However, by accepting this appointment, coupled with the subsequent authority to operate the plant he did undertake, not only to give to this business, in so far as he was capable of so doing, such reasonable care and attention as an ordinarily prudent business man would give to his own affairs, but also to obey and observe the orders of the court appointing him as such receiver. If he has

done this, he has fully discharged his obligation to the bankrupt and its creditors, regardless of results.

It is claimed that the monthly reports that he prepared, two of which it is admitted he filed with the clerk of the court, show on their face such loss in the operation of this plant as would suggest to an ordinarily prudent business man that further operation should be discontinued, and that therefore it became his duty, by the express terms of the order of the court under which he was acting, to report that fact to the court.

An expert accountant introduced by the intervening petitioners testified that he had analyzed the receiver's several statements and that from his examination and analysis he arrived at the following result:

That the report for July showed a net loss of $748.88. The report for August, a net gain of $1,800.82. The report for September, a net loss of $5,336.81. The report for October showed a net gain for October of $3,329, or a total loss from July 4th to October 31st of $999.77. Keeping in mind that the chief purpose of this operation was to preserve the value of the property and plant as a going concern rather than the actual earning of profit in the operation of the plant, it would not appear that the net loss as shown on the face of these reports, for these four months, was of such proportion as to alarm either the receiver, the court, the bankrupt, or its creditors. In fact, if that were really the true situation of affairs, it is not probable that any one would now be complaining.

The receiver's attitude in reference to these reports is, perhaps, fairly explained by the report prepared by him in October covering the September operation showing an aggregate loss for July, August, and September of $957.68. In this report the receiver stated that the October business showed an increase in sales and that he expected by the close of October to have recouped the September losses and to keep the plant as a going concern without diminution of assets, but that he did not believe it wise to continue the receivership operations indefinitely and submitted to the court and interested parties the advisability of closing the receivership as soon as a trustee in bankruptcy could be selected.

The result as shown by the October report justified, in a measure at least, the receiver's prophecy in reference to that month's business. Had it been filed with the clerk of the court and had it come to the attention of the court and interested parties, it would not have suggested that the operations ought to be discontinued immediately.

Many private corporations and individuals meet with like experience in their private affairs, and yet they seldom or never abandon an enterprise and sacrifice the value of their property as a going concern upon such a showing. It is therefore apparent that all of these reports considered together from the beginning of operations until the 31st of October, inclusive, taken at their face value, were not such as would make the failure of the receiver to apply to the court for an order to discontinue business, culpable negligence on his part.

No claim is made, either in the pleadings or in the evidence, that these reports were manufactured by the receiver for the purpose of de-

ceiving the court or the interested parties. The admission in this record that no claim is made as to bad faith or dishonest purposes on the part of the receiver necessarily includes an admission that he believed, in good faith, that these reports were absolutely correct. Notwithstanding these admissions, however, and but for which it appears by the record that evidence would have been offered tending to establish the good faith and honest purpose of the receiver, it is urged that the testimony of the receiver himself shows an ulterior motive in continuing operation wholly inconsistent with good faith on his part. The receiver testified in substance that he was placed there with instructions to see if the plant could be made a paying investment, and if it could there were men willing to put their money into it, but they wanted to give it a fair trial and did not think two months or three months was a sufficient time. The District Court also referred to this evidence as tending to show bad faith on the part of the receiver. It appears, however, from all the evidence and particularly from the findings of fact by the District Court, as a basis for the order to operate this property, that this was in fact the ultimate purpose of the receivership and that it would have been largely to the advantage of the bankrupt estate and its creditors to secure a purchaser of this plant as a going concern. Certainly an honest purpose on the part of the receiver to make such a business showing as would induce men of means to purchase this property as a going concern could not be reprehensible on his part. It is also apparent that if he did not, in good faith, believe that he could make such a showing as would induce the investment of outside capital in this enterprise, then he must have known that for this purpose, at least, further operations would be useless.

It is also now insisted, notwithstanding the admission in the record to the contrary, that the receiver was not acting in good faith when he directed his bookkeeper to increase his inventory of November 1st by the sum of $3,000 representing money spent during the entire period of his operation for the handling of 2,000,000 feet of lumber; the amount of lumber then on hand being comparatively small in amount. There is some dispute as to when this item was added to the inventory. It is found in the final report of the condition of the business November 30, 1917, filed with the referee January 26, 1918. There is no claim that the receiver did not properly expend this money, but the claim is that it should not have been entered as an asset of the bankrupt estate.

This contention is undoubtedly correct; nevertheless the evidence of the receiver fairly explains why he thought it was proper to take credit for this expenditure in his account. In reference thereto he testified in substance that he discussed it with both Mr. Wert and Mr. Conroy, and that all of them thought it was fair and just, that he called attention to it in his final report, stating why it was deducted, and that he made no effort to conceal it from any one. This inventory clearly shows on its face just exactly what this item covers, so that it is hardly possible it could deceive or mislead the court or any interested party or that it was intended to do so.

The receiver could not, and of course was not expected to, manage a business of this magnitude without expert assistants. He did employ

a competent and experienced man as general manager and another competent and experienced man as bookkeeper. Had he failed to do this, he would have been guilty of gross negligence. While it is suggested that these men purposely falsified the accounts and delivered to him false inventories, nevertheless it is not contended that the receiver had any reason to believe that these inventories and accounts were not correct, other than that from an examination of the accounts themselves the receiver ought to have known they were untrue had he exercised reasonable care and diligence in the control and management of this business.

The referee expressly found that the receiver did exercise proper care and diligence in the employment of competent persons to assist him and upon whom he was reasonably entitled to rely. The District Court did not pass upon this question, but held that it was immaterial whether he had exercised due diligence in selecting subordinates for the reason that he did not file his reports as required by the order of the court, and that he ought to have known from these reports that the operation of this plant by a receiver was a losing venture, and that he should have communicated this knowledge to the court and asked for an order to discontinue further operations. In reference to the question of due diligence by the receiver in the selection of a manager and bookkeeper the court said::

"The receiver should not be held liable for failure to discover the true condition of the business at any time, if by reason of inaccurate information furnished him by his employés, due to faulty bookkeeping methods or incorrect inventories, if any, provided he had exercised due diligence in the employment of competent employés upon whom he was reasonably entitled to rely, and provided that he himself exercised due diligence in making all the material inquiries of them which were reasonably necessary to ascertain the real condition of the business."

This, we think, is a correct and clear declaration of the law upon that subject, and applying that law to the facts admitted or proven in this case, we are unable to find from the evidence that the receiver was guilty of any such negligence as would make him liable for the losses sustained by the operation of this plant during his receivership.

Both the receiver and Wert, the manager, employed by the receiver, testified that Evans did enquire of him in reference to the accuracy of these inventories and accounts. Evans also testified that he discussed each report with Mr. Wert, the manager, and Mr. Conroy, the bookkeeper, and frequently discussed with them the operation of the business and tried to remedy things that they felt were detrimental to the business including getting better prices for the material and saving operation expenses, etc.

A number of business men testified that notwithstanding their business experience they were unable to find any inconsistencies in the reports of the receiver that would challenge the attention of an ordinary business man who was not skilled in bookkeeping. The witness Houston, who in addition to his business experience in plants of similar character is also an expert bookkeeper, carefully compared the accounts for July and August. After making such examination and comparison, he testified:

"There is therefore nothing in the figures or the percentage which would be out of the ordinary from my own personal experience."

It is true that several witnesses have testified that the receiver should have discovered discrepancies and mistakes in these accounts which, in the light of subsequent developments, have now been subjected to a more critical examination and analysis than it appears from the evidence the average business man is in the habit of giving to reports submitted to him by his subordinates in whom he has confidence and who have been employed because of the presumption that they have expert knowledge in reference to the matters over which they are placed in control.

It is also true that a number of witnesses, principally expert accountants, have testified as to the manner in which they would have conducted this business and kept these accounts if either of them had been appointed receiver of this bankrupt estate. Even though it were admitted that the methods suggested by these gentlemen would have been far better than the methods employed by the receiver, nevertheless there is evidence in this record that in the management and control of this business the receiver did employ the same usual and customary care and business methods employed by many successful business men in that locality.

Some of these expert witnesses testified that the receiver should have used the gross profit test in determining the truth or falsity of these reports. On the other hand, other successful business men and expert accountants in that locality testified that they never heard of this test, but that as explained by the witness it would be wholly useless in any business with which they had ever been connected. One of these expert witnesses who testified in favor of the gross profit test also stated in that connection that before such a test can be applied the business must be operated for sufficient length of time to arrive at an accurate estimate of gross profits. The evidence in this case shows that during the years of operation by the bankrupt prior to the commencement of this proceeding, the gross profits covered a very wide range. From this evidence it would appear that the gross profits could not have been determined with even approximate accuracy in the short time the receiver operated this factory, and therefore such a test would have been impossible, even though the receiver had full knowledge of that method. If he had no such knowledge, then, of course, he could not be held liable for lack thereof, first, because it does not appear from all the evidence that the gross profit test was commonly known and applied by business men in that locality, second, because he was not selected as receiver upon the theory that he was an expert accountant, but rather upon the theory that he was honest, intelligent, and experienced to some degree in business affairs.

It is insisted, however, that the receiver was misled by these reports because of his own negligence in not having physical inventories made each month the plant was in operation. Several witnesses testified that good business methods would require him to have done this. Others, apparently as equally successful and credible, testified that they knew of no such practice in that locality. The witness Bowers,

who testified that this was done in his factory, also testifies that it had been done only for the preceding year and that even in that year no physical inventories were taken of the lumber and that the methods employed in his factory are methods developed by a long course of business experience that could not be applied to a business to be conducted for a few months.

However that may be, the evidence shows that of the five inventories taken by the receiver during the operation of this plant, three of them were physical inventories; the inventory of July 31st and of August 31st being estimated by adding to the original physical inventories of July 3d and 4th the amount of goods purchased, and deducting therefrom the amount of goods sold or used. In this connection, taking into consideration the evidence offered on behalf of the receiver as to the delay and expense incident to the taking of a physical inventory, it would seem that the course he pursued as to these two inventories was at least a reasonable one and a method adopted by many successful business men. At all events, it does not disclose such culpable negligence on his part as would make him responsible for the losses occurring during the time he operated this plant. It also further appears that physical inventories were taken October 1st and October 31st, and that these inventories failed to disclose to the receiver the discrepancies in the accounts submitted to him by the manager and the bookkeeper. This would indicate that the failure to take physical inventories on July 31st and August 31st was not the real cause of the trouble, but rather that the servants employed by the receiver upon whose honesty, ability, and integrity he had a right to rely, were either careless in the making of physical inventories and keeping the accounts or actually intended to deceive him, and in either event, if the receiver exercised due care and diligence in the selection of honest, capable, and efficient servants, he is not responsible for results if he did not know or ought not to have known of their carelessness or deceit.

In determining whether the receiver ought to have known from the reports themselves that they did not truthfully report the status of the business at the close of the periods they purported to cover, a court cannot apply the same standards of criticism of his conduct as it would apply to expert accountants, or even to men of long experience and familiarity with this particular class and character of business. True, it is shown by the evidence that this receiver has had a varied experience as vice president and director of a lumber company, president of a university, practicing physician, vice president and director of a bank, medical director of an insurance company, secretary and president of the chamber of commerce, connected with a normal school for two years, and captain in the medical corps of the United States Army. While all these different enterprises may have given him a broad business experience, it certainly did not tend to his development as an expert in either line and especially not as a bookkeeper or as a manager of a manufacturing plant of this character and proportion; yet with this experience and with the aid of a competent manager and an expert bookkeeper and able counsel, he ought to have succeeded fairly well. He was unfortunate, however, in the time in which he was

called upon to operate this plant, in that he was handicapped in several particulars, especially the stopping of practically all building operation by government war activities. He was unfortunate in the selection of his bookkeeper and manager, in that it would now appear that either through lack of ability or fraudulent purpose these employés failed in the proper discharge of their respective duties. He was unfortunate in the selection of counsel because the member of the firm employed, having this particular matter in charge, became so ill that he could give it no further attention, and the other member of the firm abandoned his practice and enlisted in the Army of the United States.

Taking all these facts into consideration in connection with the evidence of reputable and successful business men that it would have required an expert accountant to discover inaccuracies and mistakes in these reports, this court has reached the conclusion that his failure to do so was not such negligence on his part as would entitle the trustee or the creditors to recover from him personally the losses sustained in the operation of this plant during his receivership, and therefore the judgment of the District Court is reversed, and the cause remanded for further proceedings in accord with this opinion.

ROCKY MOUNTAIN FUEL CO. v. CONSOLIDATED COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1921.)

No. 5699.

1. **Appeal and error ⟸254—Ruling on demurrer reviewable without an exception.**
   The ruling of a District Court on demurrer to a complaint is reviewable by the Circuit Court of Appeals without an exception.

2. **Sales ⟸71(4)—Contract held to be for sale and purchase of entire product of coal mine during its term.**
   A contract between a coal mining company and a company dealing in coal construed, and *held* to be one for the sale and purchase of the entire product of a mine during its term, with certain stated exceptions.

3. **Sales ⟸176(1)—Seller held not to have waived right to sue for breach of contract.**
   Under a contract for the sale by plaintiff and the purchase by defendant of the entire product of a coal mine during a term of years, a provision that defendant should, "as nearly as possible," order and take a stated quantity in each of the calendar months of each year, *held* to relate to the manner of performance, and plaintiff *held* not to have waived the right to sue for a breach of the contract because it did not declare a violation at the time defendant first failed to take the quantity specified for a particular month.

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

Action at law by the Consolidated Coal & Coke Company against the Rocky Mountain Fuel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

N. Walter Dixon and Harry S. Silverstein, both of Denver, Colo. (Jesse G. Northcutt, of Denver, Colo., on the brief), for plaintiff in error.

Charles W. Waterman, of Denver, Colo. (William A. Jackson, of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. This was a suit by defendant in error against the plaintiff in error for damages for failure to purchase coal, the output of a mine belonging to defendant in error, according to the terms of a contract entered into between the parties, which contract reads as follows:

"This agreement, made and entered into this 12th day of August, A. D. 1914, by and between the Consolidated Coal & Coke Company, a corporation organized and existing under and by virtue of the laws of the state of Colorado, of the first part, and hereinafter designated the Consolidated Company, and the Rocky Mountain Fuel Company, a corporation organized and existing under and by virtue of the laws of the state of Wyoming, and duly authorized to do business in the state of Colorado, of the second part, and hereinafter designated the Fuel Company, Witnesseth that

"Whereas, the Consolidated Company is now operating and will continue during the term hereof to operate the certain coal mine, known as and called the Baum mine, in the county of Weld and state of Colorado, and is desirous of selling the output of said mine; and

"Whereas, the Fuel Company is engaged in the business of selling coal in the state of Colorado and elsewhere, and is desirous of purchasing the output of said Baum mine:

"Now, therefore, this agreement, and in consideration of the payments, covenants, and agreements to be made, kept, and performed by the respective parties hereto as herein provided, and in consideration of the sum of one dollar ($1.00) in hand paid by the Fuel Company to the Consolidated Company, the receipt whereof is hereby acknowledged, the Consolidated Company covenants and agrees to sell and deliver to the Fuel Company, free on board the railroad cars at said Baum mine, and the Fuel Company covenants and agrees to buy from the Consolidated Company, all of the coal (except as hereinafter provided) produced from the said Baum mine during the period of five (5) years from and after the 15th day of August, A. D. 1914, and to and until the expiration of the 15th day of August, A. D. 1919, upon and subject to the following terms, conditions, covenants, and agreements, to wit:

"1. Of the coal mined and produced from said Baum mine during the term hereof, the Consolidated Company covenants and agrees to sell and deliver all thereof to the Fuel Company, at the prices herein specified, except as follows, to wit:

"(A) Such of said coal as said Consolidated Company may use for steam purposes at said Baum mine, and such thereof as it may sell to its employés only at said mine; and

"(B) Such of said coal as said Consolidated Company may be required to deliver to the Post Printing & Publishing Company, under its existing contract to deliver to said Publishing Company such coal as it may require for its trade, which contract, it is understood and agreed, will expire on September 8, A. D. 1914, and for the performance of which contract the Fuel Company shall in no wise be responsible; and

"(C) Such of said coal as said Consolidated Company may be required to deliver to the Denver Gas & Electric Light Company, under its existing contract to deliver to said the Denver Gas & Electric Light Company slack and run of mine coal for its needs, which said contract will expire May 15, A. D.

1916, and for the performance of which contract it is agreed the Fuel Company shall in no wise be responsible. But it is expressly agreed that, if the Fuel Company shall so elect, and if the consent of the Denver Gas & Electric Light Company can be obtained thereto, said Consolidated Company will, upon demand, assign and transfer said contract to the Fuel Company, in which event the said tonnage shall not be excepted from the contract.

"2. The Consolidated Company shall, at all times during the term hereof, operate said Baum mine and produce coal therefrom to the capacity of said mine, to wit, one hundred and twenty-five thousand tons of coal, including slack, lump, and run of mine coal, during each and every current year of the term hereof.

"3. Of the said one hundred and twenty-five thousand (125,000) tons of coal to be by said Consolidated Company produced from said Baum mine during each current year of the term hereof, the Fuel Company shall purchase all thereof, except as provided in paragraph 1 hereof, and shall pay therefor to the Consolidated Company the following prices, to wit:

"(A) Sixty cents (60¢) for each and every ton of 2,000 pounds of slack coal sold and delivered unto it free on board the railroad cars at said Baum mine by said Consolidated Company during the term hereof;

"(B) One dollar and sixty-two and three-fourths cents ($1.6275) for each and every ton of 2,000 pounds of run of mine coal, and two dollars and seventeen and one-half cents ($2.175) for each and every ton of 2,000 pounds of lump coal, sold and delivered unto it free on board the railroad cars at said Baum mine by said Consolidated Company during the period from and after the date hereof and to and until the 15th day of May, A. D. 1916; and

"(C) One dollar and sixty-four and one-half cents ($1.645) for each and every ton of run of mine coal, and two dollars and twenty cents ($2.20) for each and every ton of lump coal, sold and delivered unto it free on board the railroad cars at said Baum mine by said Consolidated Company during the period from and after the 15th day of May, A. D. 1916, and to and until the expiration of the 15th day of August, A. D. 1919.

"In the event, however, that said Consolidated Company shall mine and produce from said Baum mine more than said 125,000 tons of coal, including slack, lump, and run of mine, during any current year of the term hereof, it shall, if said Fuel Company shall have a market therefor and shall order the same, sell and deliver to the Fuel Company such additional tonnage, at the respective prices above mentioned; but if said Fuel Company shall not order the same, as hereinafter more particularly provided, said Consolidated Company shall then sell and deliver said additional tonnage to the Fuel Company, and said Fuel Company shall purchase the same from said Consolidated Company, at the following prices per ton of 2,000 pounds for slack, lump, and run of mine coal, to wit:

"Thirty cents (30¢) for slack, one dollar and ten cents (1.10) for lump, and eighty-five cents (85¢) for run of mine.

"It is expressly agreed, however, that in the event the cost of producing coal in the Northern Colorado coal fields be either increased or decreased by reason of an increase or a decrease in the scale of wages now paid at the mines, made by and affecting both the Fuel Company and the Consolidated Company at their mines in the Northern Colorado coal fields and ———, then and in any such an event, the respective prices to be paid by the Fuel Company to the Consolidated Company for coal as above provided shall either be increased or decreased, as the case may be, according as such increase or decrease in the scale of wages shall, by computations arrived at as nearly as may be possible, either increase or decrease the cost per ton of producing coal in the said Northern Colorado coal fields.

"And it is also stipulated and agreed that the Consolidated Company shall not be required hereunder to deliver to the Fuel Company any run of mine coal until after June 1, A. D. 1916, unless it shall elect, upon the order of the Fuel Company, so to do.

"4. Of the said 125,000 tons of coal, including slack, lump, and run of mine, to be by the said Consolidated Company mined and produced from said

Baum mine during each and every current year of the term hereof, and all of which, except as provided in paragraph 1 hereof, said Consolidated Company shall sell and deliver to the Fuel Company as herein provided, the Fuel Company shall not be required hereunder to receive and purchase more thereof during any current month of the term hereof than as follows, to wit:

During August of any year not more than	4,500	tons
During September of any year not more than	9,500	"
During October of any year not more than	16,000	"
During November of any year not more than	18,000	"
During December of any year not more than	17,000	"
During January of any year not more than	17,500	"
During February of any year not more than	13,500	"
During March of any year not more than	13,500	"
During April of any year not more than	6,250	"
During May of any year not more than	4,000	"
During June of any year not more than	2,500	"
During July of any year not more than	2,750	"

"5. The coal to be purchased hereunder by the Fuel Company from the Consolidated Company shall be loaded, shipped, and consigned by the Consolidated Company only upon the order of the Fuel Company and in the manner as by it directed, but the Fuel Company agrees that it will, as nearly as possible, purchase coal each calendar month as above specified, and will use its best endeavors to order coal, in a sufficient amount every day (except Sundays and holidays) of each current month, so as, as nearly as possible, to permit said Consolidated Company to deliver the tonnage of coal mentioned in paragraph 4 hereof, during each current month of the term hereof (it being expressly understood and agreed, however, that the tonnage of coal used by said Consolidated Company at its said Baum mine for steam purposes, and sold by it to its employés only, and delivered by it under the particular contracts, as provided in paragraph 1 hereof, shall be included as a part of the said stipulated monthly tonnages); and the Fuel Company further agrees that it will use its best endeavors to market said coal to be produced from said Baum mine in the monthly proportions above stated, during the entire twelve months of each current year of the term hereof. It is understood, however, that the greatest demand for lignite coal of the kind produced from said Baum mine occurs during the months of October, November, December, and January of each year. The Consolidated Company therefore agrees that if the Fuel Company shall require a larger amount of coal during any one of the said months, or during other month than is specified in paragraph 4 hereof, it will, if said Fuel Company shall order same, and notwithstanding the capacity of said Baum mine does not exceed 125,000 tons per year, use its best efforts to produce, if possible, such greater tonnage, and if mined will deliver same to the Fuel Company on its orders to meet such demand. The Fuel Company further agrees that it will, on each and every day of the life of this contract (Sundays and holidays excepted), notify said Consolidated Company of the amount of coal the Fuel Company will require from said Baum mine for the following day, and that it will also instruct said Consolidated Company concerning the consigning and billing thereof, and the Consolidated Company agrees that it will furnish to the Fuel Company each and every day during the life of this contract a statement or duplicate copies, as the Fuel Company may require, of the billing of the said coal shipped from said Baum mine at the orders and directions of the Fuel Company.

"6. The Consolidated Company agrees that the coal delivered by it under this contract shall be carefully mined, and shall be reasonably free from dirt, slate, 'bone coal,' and other impurities, and shall be merchantable and marketable, and that the slack coal to be delivered hereunder shall be the usual, regular, and entire unselected product of the said Baum mine, which shall pass through shaking screens with holes therein not less than two inches in diameter, and that the lump coal to be furnished hereunder shall be the usual, regular, and entire unselected product of the said Baum mine, which shall

pass over shaking screens with holes therein not less than two inches in diameter, unless otherwise agreed by the parties hereto, and that the run of mine coal to be delivered hereunder shall be the usual, regular, and entire unselected product of said Baum mine. It is understood that the Fuel Company is purchasing said coal for the purpose of reselling it to its various customers, either at wholesale or retail, and hence, in all disputes arising out of claims, made by the customers of the Fuel Company on account of any of said coal containing an unreasonable amount of dirt, slate, 'bone coal,' or other impurities, or on account of the preparation of said coal, the Fuel Company shall adjust all such claims upon the best terms it may be able to arrange, and, if practicable, shall notify the Consolidated Company thereof, in order that it may be made a party to any such adjustment, and thereafter adjustments on account of any such claim shall be made between the parties hereto.

"7. The Fuel Company shall well and truly pay said Consolidated Company on the first day of each calendar month for all coal sold and delivered unto it pursuant hereto during the first fifteen days of the preceding calendar month, and on the fifteenth day of each calendar month for all coal sold and delivered unto it pursuant hereto during the period from the sixteenth day to the last day (both days inclusive) of the preceding month, unless either the first or the fifteenth day of any calendar month falls on a Sunday or a holiday, in which event the required payment shall become due on the day following such Sunday or holiday.

"8. In all settlements for coal sold by said Consolidated Company, and purchased by said Fuel Company pursuant hereto, the weights of coal as made at the mine under the supervision of the Western Weighing and Inspection Bureau weighmaster shall govern for all coal so weighed, and for all coal not weighed at the mine railroad weights shall govern.

"9. Any demurrage accruing upon any car or cars of coal ordered and directed to be loaded by the Fuel Company under this agreement shall be paid by the Fuel Company, but any demurrage accruing upon any car or cars of coal not specifically ordered to be loaded by the Fuel Company shall be paid by the Consolidated Company.

"10. If, during the life of this contract, the Consolidated Company shall be unable to furnish coal hereunder because of a strike or strikes of the laborers employed at said mine, or by reason of fires in, at, or about such mine, or for other causes beyond the reasonable control of said Consolidated Company, or by reason of a strike or strikes of any of the employés of the railroad or railroads engaged in transporting the product of said Baum mine therefrom, or by reason of any order issued by the United States government or by any official of the state of Colorado preventing said Consolidated Company from hiring men, or if at any time during the life of this contract the Fuel Company shall be unable to receive the coal from said Baum mine on account of a strike or strikes of any of the employés of the railroad or railroads engaged in transporting said coal therefrom, then, or in any such event, this contract shall stand suspended during any such time; and for such part of any current year of the term hereof during which any such conditions shall exist the Consolidated Fuel Company shall not be required to furnish, and the Fuel Company shall not be required to receive and purchase, any coal hereunder, any provision of this contract to the contrary notwithstanding.

"This agreement and the terms and conditions hereof shall result and inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and assigns.

"In witness whereof the parties hereto have caused these presents to be duly executed in duplicate the day and year first written above.

"The Consolidated Coal & Coke Company,

"[Seal.] By C. L. Baum, President.

"Attest: S. C. Dimm, Secretary.

"The Rocky Mountain Fuel Company,

"[Seal.] By D. W. Brown, President.

"Attest: J. V. Sickman, Secretary."

Upon written stipulation signed by the parties the case was tried to the court without the intervention of a jury. Judgment was rendered for defendant in error.

[1] Prior to the submission of the cause in this court defendant in error moved to dismiss the cause for the failure on the part of plaintiff in error to comply with rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi). The motion was denied, but the court ruled that there was no question open for consideration but the ruling on the demurrer to the complaint, which ruling could be considered without an exception, under the authority of Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439, and Board of County Commissioners of the City and County of Denver v. Home Savings Bank, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. Ed. 485.

[2] The only question, then, is whether the contract set out in the complaint is sufficient in its terms to constitute a basis for recovery of damages for the failure of the Fuel Company to purchase coal from the Consolidated Company. The contention of the Fuel Company is, first, that by the terms of the contract it was required to purchase only such an amount of coal as it could sell; and, second, that the failure of the Consolidated Company to declare a violation of the contract at the time of the first monthly failure of the plaintiff in error to take the stipulated amount of coal for that month was a waiver of the right to declare such violation.

The instrument states specifically that the Consolidated Company was at the time operating, and would, during the term of the contract, continue to operate, a certain coal mine, and that it was desirous of selling the output of such mine. This recital is followed by another to the effect that the Fuel Company was engaged in the business of selling coal in the state of Colorado and elsewhere, and was desirous of purchasing the output of the Consolidated Company's mine. The status of producer and purchaser was thus fixed.

The next paragraph of the instrument recites that the Consolidated Company covenants and agrees to sell and deliver to the Fuel Company all of the coal, with certain exceptions, produced from the mine in question during a period of five years from a fixed date. The instrument then proceeds to enumerate the exceptions. It then proceeds as follows:

"The Consolidated Company shall at all times during the term hereof operate said Baum mine and produce coal therefrom to the capacity of said mine, to wit, one hundred and twenty-five thousand tons of coal, including slack, lump, and run of mine coal, during each and every current year of the term hereof."

The Consolidated Company was by this provision required during the term of the contract to operate its mine and produce a certain quantity of coal each year.

[3] The next paragraph provides as follows:

"Of the said one hundred and twenty-five thousand (125,000) tons of coal to be by said Consolidated Company produced from said Baum mine during each current year of the term hereof, the Fuel Company shall purchase all thereof,

except as provided in paragraph 1 hereof, and shall pay therefor to the Consolidated Company the following prices, to wit."

Then follow the prices which should be paid for the coal thus purchased. The terms of the contract down to this point provide for the production and sale of 125,000 tons annually. The paragraph then provides for a production over and above that quantity as follows:

"In the event, however, that said Consolidated Company shall mine and produce from said Baum mine more than said 125,000 tons of coal, including slack, lump, and run of mine, during any current year of the term hereof, it shall, if said Fuel Company shall have a market therefor and shall order the same, sell and deliver to the Fuel Company such additional tonnage, at the respective prices above mentioned, but if said Fuel Company shall not order the same, as hereinafter more particularly provided, said Consolidated Company shall then sell and deliver said additional tonnage to the Fuel Company, and said Fuel Company shall purchase the same from said Consolidated Company, at the following prices per ton of 2,000 pounds for slack, lump and run of mine coal, to wit: Thirty cents (30¢) for slack, one dollar and ten cents ($1.10) for lump, and eighty-five cents (85¢) for run of mine."

The paragraph just quoted provides for the purchase by plaintiff in error of all of the coal produced by defendant in error over 125,000 tons per year, the purchase of said coal to be dependent upon the ability of the Fuel Company to sell the same, and dependent also upon its order. If the Fuel Company ordered said excess, it was to pay the same price therefor that it paid for the 125,000 tons. If the Fuel Company did not order such excess, then the Consolidated Company was required to sell and deliver such excess at the prices named in the paragraph quoted.

The next paragraph of the contract reads as follows:

"The coal to be purchased hereunder by the Fuel Company from the Consolidated Company shall be loaded, shipped, and consigned by the Consolidated Company only upon the order of the Fuel Company and in the manner as by it directed, but the Fuel Company agrees that it will, as nearly as possible, purchase coal each calendar month as above specified, and will use its best endeavors to order coal, in a sufficient amount every day (except Sundays and holidays) of each current month, so as, as nearly as possible, to permit said Consolidated Company to deliver the tonnage of coal mentioned in paragraph 4 hereof, during each current month of the term hereof. * * *"

The portion of the contract last quoted clearly relates to the method of performance of the contract. The object plainly is to secure uniform operation of the mine during the period of the contract, the purpose being that the Consolidated Company might be advised and prepared to produce the required amount of coal and to guard against heavy orders at one period of the year, and no orders, perhaps, at another period of the year. This provision of the contract does not negative the former express provision by which the Consolidated Company, on the one hand, was required to produce coal to a fixed amount each year, and the Fuel Company was required to buy that coal each year.

The allegations of the complaint clearly show a breach of the contract, upon which an action could be maintained by the Consolidated Company. The failure of the Consolidated Company to declare a vio-

lation of the contract sooner than it did do so did not constitute a waiver on its part.

The case should be affirmed. And it is so ordered.

DEMING LADIES' HOSPITAL ASS'N v. PRICE.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1921.)

No. 5866.

1. **Charities ⟸45(2)—Association maintaining hospital as charity not liable for negligence of employés.**
   An association which maintains a hospital as a charity is not liable for the malpractice of the physicians or the negligence of the attendants it employs, but is responsible only for its own want of ordinary care in selecting them, and this though a charge for services rendered is made to those who are able to pay.
2. **Principal and agent ⟸23(1)—Agency cannot be established by declarations of alleged agent.**
   Agency cannot be established by the declarations of the alleged agent to third persons.

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

Action at law by Beatrice H. Price against the Deming Ladies' Hospital Association. Judgment for plaintiff, and defendant brings error. Reversed.

A. B. Renehan, of Santa Fé, N. M. (Renehan & Gilbert, of Santa Fé, N. M., and R. F. Hamilton, of Deming, N. M., on the brief), for plaintiff in error.

H. B. Jamison, of Albuquerque, N. M., for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. The complaint of defendant in error in the court below set out three causes of action for personal injury alleged to have been caused by the negligence of the plaintiff in error. The case went to the jury on the first cause of action. The allegations of negligence are as follows:

"That said plaintiff, on said March 6, was operated upon in said hospital for appendicitis, and during such operation was put under the influence of an anæsthetic, and that after said operation said plaintiff was taken by agents of said association from the operating room where said operation had been performed, and was taken to a room in said hospital, still under the influence of said anæsthetic and totally unconscious, and that while under the influence of said anæsthetic the said Deming Ladies' Hospital Association, through one of its agents, a certain Miss Schilling, whose first name is to the plaintiff unknown, negligently caused and permitted certain metal hot water vessels, which vessels contained water at an exceedingly high temperature, to be placed against the legs and feet of this plaintiff while she was still under the influence of said anæsthetic and totally unconscious, and thereafter permitted said metal hot water vessels to remain in proximity to and against the legs and

feet of said plaintiff for a long time, at all of which times said defendant, by said Miss Schilling, knew that said vessels were, in such a position, dangerous to the life and limbs of said plaintiff.

"That by reason of said acts said plaintiff's legs were frightfully roasted and burned, and that thereby she has suffered continually since said time excruciating mental and physical anguish and torture, and that said act has caused permanent injuries to her legs and feet, and that even now she is unable to walk without the aid of a crutch, and that said injuries have caused a severe permanent shock to her nervous system, all of which is to the damage of the plaintiff in the sum of $20,000."

The answer sets up two defenses: (a) That plaintiff in error was a charitable association; and (b) denies that Miss Schilling was an agent or employé of the hospital association. The court ruled that the fact that the hospital was a charitable association was not a defense. As the case went to the jury, the issue was whether Miss Schilling was an agent or employé of the hospital, and, if so, whether she had been negligent.

The assignments of error may be grouped under four heads:

(1) The refusal of the court to instruct the jury that the hospital was not liable because it was a charitable institution.

(2) Because the court admitted incompetent testimony to prove that Miss Schilling was an agent and employé of the hospital.

(3) That the court erred in refusing to instruct the jury that the testimony was insufficient to show that Miss Schilling was an agent or employé of the hospital.

(4) The refusal of the court to instruct the jury that the agency of Miss Schilling could not be determined by her statements or her conduct.

[1] The defendant in error, in her reply to the answer of the plaintiff in error, admitted that the hospital association was a charitable corporation. At the conclusion of the plaintiff's testimony the attorney for the hospital association offered in evidence its articles of incorporation. This was objected to by the attorney for the plaintiff on the ground that it was admitted by the pleadings that the hospital association was a charitable association. Testimony was introduced by the plaintiff showing that the hospital received pay from such patients as were able to pay, and that particularly it received pay from the plaintiff. The court denied the request of the hospital association to instruct the jury to return a verdict for it, upon the ground that it was not liable by reason of the fact that it was charitable corporation.

The refusal of the court to so instruct was excepted to, and the action of the court is assigned as error. In the case of Union Pacific Railroad Co. v. Artist, 60 Fed. 365–368, in an opinion by Judge Sanborn, the following rule is laid down:

"The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them."

The same rule is laid down in the case of Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372,

in the Circuit Court of Appeals for the First Circuit; also in the case of Paterlini v. Memorial Hospital Association of Monongahela City, Pa., et al., 247 Fed. 639, 160 C. C. A. 49, from the Circuit Court of Appeals of the Third Circuit. In the last case a petition for certiorari was denied by the Supreme Court. 246 U. S. 665, 38 Sup. Ct. 334, 62 L. Ed. 929. The same rule is recognized in the following cases: Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317; Thomas v. German General Benevolent Society, 168 Cal. 183, 141 Pac. 1186; Johnston v. City of Chicago, 258 Ill. 494, 101 N. E. 960, 45 L. R. A. (N. S.) 1167, Ann. Cas. 1914B, 339; University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N. S.) 784, 128 Am. St. Rep. 355; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141; Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486; Duncan v. Nebraska Sanitarium & Benevolent Association, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913E, 1127; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581; Barden v. Atlantic Coast Line Railway Co., 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801; Taylor v. Protestant Hospital Association, 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. (N. S.) 427; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; Gitzhoffen v. Sisters of Holy Cross Hospital Association, 32 Utah, 46, 88 Pac. 691, 8 L. R. A. (N. S.) 1161; Wharton v. Warner, 75 Wash. 470, 135 Pac. 235. The same cases sustain the proposition that payment for services rendered in such a hospital by those that are able to pay does not constitute an exception to the rule.

The court erred in refusing the request based upon the fact that the hospital association was a charitable corporation.

[2] As before stated, the case went to the jury upon the issue whether Miss Schilling was an agent or employé of the hospital. That agency was sought to be established by what Miss Schilling herself had said and done. The husband of the plaintiff was called as a witness in plaintiff's behalf. He was permitted by the court to answer certain questions with reference to what Miss Schilling did in connection with the operation on his wife, and the fact that she attended during the operation in the operating room and afterwards attended the wife in her own room after the operation was over. Then, with reference to Miss Schilling, this question was asked the witness Price:

"Did she say anything to you or you to her?"

The attorney for the hospital made the following objection:

"I object to any declaration between Miss Schilling and Mr. Price at this time, on the ground it is immaterial, irrelevant, and incompetent, and not a direct declaration called for by her in court, but to a third person. It is not, therefore, such declaration of an alleged agent as is admissible."

To that the attorney for the plaintiff made this statement:

"We desire to state that this declaration by Miss Schilling at or about this time is admissible as an agent, it occurring at the time, to show what she was

doing about the hospital, and agency may be proved by circumstantial evidence as well as direct. And the fact that she made this remark to explain what she was doing is competent testimony in this case, and, taken in connection with her acts was in the scope of her authority, was within the scope of her duties and connected with her duties, and therefore admissible."

Attorney for defendant then made this statement to the court:

"We object on the further ground, after hearing the argument of counsel, that no agency has been established, and it is an attempt to establish agency by a declaration of the alleged agent to a third person, and is not the declaration of the agent made to a witness in court, for instance, and is hearsay, because agency cannot be established by the declaration of the agent to a third person."

The question was withdrawn. Then the following questions and answers were made:

"Q. Mr. Price, did you or Mrs. Price ever employ Miss Schilling as a nurse? A. No.
"Q. Did you ever receive a bill from her for services? A. No, sir.
"Q. Now, then, what did she say to you, or you to her?
"Mr. Renehan: Same objection.
"The Court: Overruled.
"Mr. Renehan: Exception.
"A. I saw her working in the operating room, and I thought it was—
"Mr. Renehan: I object to what he thought.
"The Court: Objection sustained.
"A. I said, 'You seem to be pretty busy—have lots to do;' and she said, 'Yes; I am on general, and it keeps me busy.'"

On redirect examination the same witness was by the attorney for the plaintiff asked this question:

"Did you learn afterwards, from observation and experience, what 'on general' in a hospital meant?"

Attorney for defendant then made this objection:

"Objected to on the ground that it is hearsay testimony, as he appears, by this question, to be expected to say that he had learned what 'on general' meant from some other source, and he does not know except by communication."

The objection was overruled and exception taken. Then this question was asked by attorney for plaintiff.

"What does it mean?
"Mr. Renehan: Same objection.
"The Court: Same ruling.
"Mr. Renehan: Exception.
"A. Taking care of patients and doing the little jobs about the hospital—taking care of patients after they are well enough to do without their own regular or special nurse."

The objections to this question should have been sustained. The rule with regard to the proof of agency is stated in volume 22 of Corpus Juris, 376, as follows:

"Unless the agency is already apparent or is admitted, or unless the statement has been ratified, the relation of agency between the declarant and the person against whom it is sought to use his admission must be established by affirmative evidence other than the declarations or statements of the alleged agent."

This rule is sustained by the authorities. In the instant case the agency of Miss Schilling was not apparent. It was not only not admitted, but it was denied. The statement of Miss Schilling is not shown to have been ratified.

Moreover, we think that the testimony thus introduced, even if it had been admissible, would not have been sufficient to warrant the inference on the part of a jury that Miss Schilling was an agent or employé of the hospital. We think, also, in any view of the case, that the court should have given to the jury the instruction requested on behalf of the Hospital Association that the agency of Miss Schilling could not be determined by her statements and her conduct.

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

DAVIS et al. v. WILSON.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1921.)

No. 5784.

1. **Fraud ⟸3—Elements stated.**
To constitute actionable "fraud," it must appear that the defendant made a material representation; that it was false; that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth as a positive assertion, with the intention that it should be acted upon; and that plaintiff acted in reliance upon it to his injury.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

2. **Fraud ⟸58(1)—Evidence held not to show fraud in sale of mineral land.**
In action for fraud in the selling of real estate, evidence *held* to show that no intentional misrepresentation was made by defendants in their sale of "placer mining claims" to plaintiff as to the nature of their title, and that plaintiff was not deceived.

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

Action by Leonard A. Wilson against Charles W. Davis and others. Judgment for plaintiff and defendant named, and defendants Goering and Emmons bring error. Reversed and remanded for new trial.

C. M. Botts, of Albuquerque, N. M. (H. C. Denny, of Gallup, N. M., and John F. Simms, of Albuquerque, N. M., on the brief), for plaintiffs in error.

A. T. Hannett, of Gallup, N. M. (Bert D. Richards, of Gallup, N. M., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. This was a suit by defendant in error against ten defendants in the court below. Four of the defendants were served with process. The suit was dismissed against one of these four, leaving three defendants below, Charles W. Davis, L. R.

Goehring, and John J. Emmons. A written stipulation was filed waiving a jury. Judgment was rendered against Davis, Goehring, and Emmons, and they bring error. The complaint alleged fraud and deceit in the selling of certain real estate; the fraud as charged being that the plaintiffs in error represented to defendant in error Wilson, plaintiff below, that they owned the fee-simple title to a certain tract of land in McKinley county, N. M., that they did not in fact own the fee-simple title to said land, that plaintiff believed the representations made to him, and acting thereon purchased the land from the plaintiffs in error and paid them the purchase price therefor. The testimony shows that each of the plaintiffs in error made a power of attorney to one G. S. Willhoite. These separate powers of attorney were the same as to the terms. That of Davis reads as follows:

"Know all men by these presents, that I, Charles W. Davis, do hereby nominate, constitute and appoint G. S. Willhoite of the county of McKinley my true and lawful attorney in fact for me and in my place and stead, to locate for me and in my name, placer or oil claims upon the public domain of the United States of America in the county of McKinley, and upon the location of such claims to enter into contracts of lease or sale of the same, and in my name to execute good and sufficient instruments of lease or conveyance of the same and to do everything requisite or necessary in and about the handling of said oil locations as my attorney in fact may seem meet, hereby ratifying and confirming everything my said attorney in fact may or can do in the premises, with full power of substitution and revocation."

The testimony also shows that certain representations were made to Wilson by a Mr. Brown and a Mr. Smith and G. S. Willhoite. It appears from the testimony that Willhoite acting for himself and certain persons who had given him powers of attorney, including the three plaintiffs in error, had located certain placer or oil claims upon the public lands in McKinley county, N. M. Brown and Smith had entered into an agreement with Willhoite to purchase these claims. Brown and Smith became acquainted with Wilson and began negotations to sell him the claims. Brown and Smith had contracted to buy the claims at $3 per acre, and in their negotiations with Wilson they agreed to sell him the same claims at $10 per acre. Wilson's testimony shows that he knew that the property was a placer claim and that the title was in the United States. Wilson testified as follows:

"Q. What was said by Smith relative to the ownership of this land, that is, relative to who owned it and who had the right to sell it? A. Mr. Smith told me that the land was owned by Mr. Willhoite and at that time they would not be able to give me a warranty deed which I asked for, but that they had an absolutely good title to the land. * * *

"Q. Relate to the court what happened after the price was quoted relative to closing the deal; how was that done? A. After the price was made to me of $10 an acre, and after he showed me geological reports, he told me that the well had been tested, and he showed me a telegram to that effect, that it was making 72 barrels a day. * * * He said that since the land had been priced to me at $10 an acre and the well had been tested and was a better well than they had expected, that the price had jumped to $20.

"The Court: Was this well on this particular piece of land? A. It was not, but supposed to be near it. He told me that it affected the price, but he would go ahead and give me the deed since we had started transactions, and that he considered it a very good buy. He was familiar with the field,

but he would give me a placer claim title. I told him I did not understand that and before I would turn over my money I would have to be guaranteed a title. * * *

"Q. When you first had the conversation relative to the property the purchase of it in the hotel were both Brown and Smith present? A. Mr. Brown told me Smith would be in in a day or two and he would explain fully the status of the placer filing; he was connected with the Carter Oil Company. When he did arrive, we went up to the room, and he explained about placer claims being subject to good faith, just as good as a man would want.

"Q. What did he say as to the title; did he describe it in any way about any interest that the government might have in the land? A. He said that they had relinquished—that the government had—to Mr. Willhoite, and that the only reason he didn't have a patent to the land was there was a certain time had to pass before it would be issued; but that's all it depended on and then he would get a patent; that the title he would give me would be just as good as required; that the Carter Oil Company had several and that a placer title is just as good as a school lease. I told him I didn't understand it and would want a recommendation from a bank, a strong bank, as to the veracity of these men who were selling the land; that if they could recommend them and give me a certificate of title we would talk business."

Wilson himself then sent the following telegram to the Gallup State Bank, Gallup, N. M.: "Wire opinion of placer filings as sold by G. S. Willhoite." Wilson received the following reply to that telegram from the Gallup State Bank: "It is our opinion that Placer locations as sold by Willhoite are as represented. Seven Lakes field from present reports looks promising." It is thus seen that the representation made by Smith and Brown to Wilson was that the land was a placer claim; that the title was in the United States; that Wilson in his telegram made inquiries about "placer filings," and received a reply with reference to "placer locations." The deed executed by Willhoite in his own name and in the names of those whom he represented by powers of attorney contained this paragraph:

"It being understood by the said party of the second part, that this quitclaim is to lands that have been located in Seven Lakes mining district as placer mining claims under the laws of the state of New Mexico and of the United States of America, and are subject to the conditions and provisions relating to said placer mining claims and are taken with full knowledge of locater's rights to enter and dispose of same and are accepted as such and not otherwise."

Plaintiff also introduced a certificate of title made by one Perry E. Coon. That certificate contained the following statement:

"I hereby certify that I am an abstractor in and for the above county and that I have examined the records in the office of the register of deeds, etc., covering the following described land, in said county and state, to wit:

"The north half (½) and southwest quarter (¼) sec. 10, T. 19 N., R. 11 W.

"Section 10, township 19, range 11, containing 480 acres more or less and find the fee-simple title to said land to be in G. S. Willhoite, et al., placer mining claims."

Plaintiffs in error contend that the defendant in error could have had this certificate at the time of the delivery of the deed. Under the finding of the court based on the testimony of the plaintiff in error, it must be taken that he had this certificate in his hand at the time the deed was delivered.

Coon, the man who made the certificate, was called by Wilson and testified with reference to the making of the certificate. On cross-examination he testified as follows:

"Q. When did you make this certificate? A. It must have been made on October 20th.
"Q. Did you postdate it or antedate it? A. No, sir.
"Q. Did you make it on the date upon which it purports to have been made? A. Yes, sir.
"Q. How did you happen to certify that that was a fee-simple title? A. It must have been an oversight; I didn't know that I wrote that.
"Q. You did state it was a placer oil location? A. Yes, sir.
"Q. Did you intentionally make that certificate?
"Mr. Hannett: Objected to as immaterial.
"The Court: Overruled.
"A. I did not.
"Q. In what particular way were you well acquainted with the oil filings in that locality? A. I had just completed a map of the Seven Lakes district showing all the locations.
"Q. You are a surveyor? A. No, sir.
"Q. How did you make this map? A. From the records of the county clerk's office and superintendent's office.
"Q. And had just completed that map? A. Yes, sir.
"Q. What kind of an abstract did Mr. Willhoite ask you to make? A. He asked me to look over the records and see that there was no prior locations other than his on this particular tract of land.
"Q. Did he ask you to certify that it was a fee-simple title in him?
"Mr. Hannett: Objected to as being hearsay and not in the presence or binding upon the plaintiff.
"The Court: Overruled.
"A. No, sir.
"Q. You just overlooked scratching that out of the printed form?
"Mr. Hannett: Objected to as immaterial; he has already testified to that.
"The Court: Objection overruled.
"A. Yes, sir."

The certificate contained a contradictory statement, in that it states that the abstractor finds the fee-simple title in said land to be in G. S. Willhoite et al. placer mining claims. The words "fee-simple" have a distinct meaning. The words "placer mining claims" also have a distinct meaning.

[1, 2] It further appears from the testimony that after Wilson had received his deed he secured other placer locations in the same vicinity. It afterwards developed that the land upon which all of the placer locations had been made had been withdrawn from entry by order of the President dated May 18, 1911. The testimony clearly shows that no intentional misrepresentation was made to Wilson and that he was not deceived as to the title his grantor claimed to have. It did turn out that the particular entries constituting the lands sold to him had been withdrawn from entry, but it does not appear that this fact was known at the time to the plaintiffs in error.

The essentials necessary to make out a case of fraud and deceit are as follows:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he

made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. A maxim announced in an early English case and ever since recognized as correct is that fraud without damage or damage without fraud is not actionable, but that where both concur an action of deceit will lie." 20 Cyc. 13.

It fully appears that Wilson received nothing for the money and property that he paid for the land. He may have a good cause of action for the value of the property and the money that he transferred in payment for these placer mining claims, against some one or more of the parties to the transaction. About this, however, we express no opinion. The findings made by the court were not warranted by the testimony.

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

MAJESTIC ELECTRIC DEVELOPMENT CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

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

Nos. 3616, 3618.

1. **Patents ⊜28—Design patent must disclose invention.**
   It requires exercise of the inventive faculty in a design, as in a utility patent, to insure validity, and the test of invention is the same.

2. **Patents ⊜71—Rule as to anticipation applies to design patents.**
   The rule of law respecting anticipation in utility patents must apply as well to design patents and with like effect.

3. **Patents ⊜28—Æsthetic effect is test of validity of design patent.**
   A design which is the subject of patent appeals to the eye, and the test is the æsthetic effect to the ordinary observer.

4. **Patents ⊜328—51,043, for design for electric heater, held not infringed.**
   The Brown design patent, No. 51,043, for design for electric heater, *held* not infringed.

5. **Patents ⊜328—51,253, for design for electric heater, held void for anticipation and lack of originality.**
   The Brown design patent, No. 51,253, for design for electric heater, *held* void for anticipation and lack of invention.

6. **Patents ⊜35—Extensive use determinative of invention only in doubtful cases.**
   Extensive use of a patented article is sufficient to turn the scale in favor of invention only in doubtful cases.

7. **Courts ⊜354—Decree entered pursuant to order of trial judge, but signed by succeeding judge, held valid.**
   Where a District Judge, sitting in another district by designation, heard and determined a cause and ordered that a decree be signed, filed, and entered accordingly, a decree conforming to such order, signed and entered after the term of his designation expired by the succeeding judge, *held* in effect a nunc pro tunc decree and valid.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Frank S. Dietrich, Judge.

Suit in equity by the Majestic Electric Development Company against the Westinghouse Electric & Manufacturing Company (two cases). Decrees for defendant, and complainant appeals. Affirmed.

John H. Miller, of San Francisco, Cal., for appellant.

Wesley G. Carr, of East Pittsburgh, Pa., and David L. Levy and Walter Shelton, both of San Francisco, Cal., for appellee.

Nathan Heard, of Boston, Mass., and Samuel Knight, of San Francisco, Cal. (Knight, Boland, Hutchinson & Christin, of San Francisco, Cal., of counsel), amici curiæ.

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

WOLVERTON, District Judge. In these cases are involved the validity of two design patents, numbered respectively 51,043 and 51,253, and, if valid, whether infringed by the defendant's device. The first comprises a front and rear perspective view of plaintiff's Exhibit 2, in case No. 492, and Exhibit 5, in 544, as designated in the lower court; and the second, a front and side perspective view of plaintiff's Exhibit 2 in case No. 544. The first of these contains the annular flange as shown in the utility patent No. 1,245,084, produced in case No. 3617, (276 Fed. 682), which is at this time decided, but by separate opinion. Reference is made thereto for a more particular description of the patented device.

[1] Let us inquire briefly respecting the legal terminology of design patents. The right to acquire such a patent is extended (section 9475, U. S. Comp. Stat. 1918) to "any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof." Generally speaking, the law relating to such patents does not materially differ from that which governs as to mechanical patents, and all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries are made applicable to patents for designs. Section 9481, Comp. Stat. As is said by the Supreme Court in Smith v. Whitman Saddle Company, 148 U. S. 674, 679, 13 Sup. Ct. 768, 37 L. Ed. 606, adopting the language of Mr. Justice Brown, while District Judge, in Northrup v. Adams, 12 O. G. 430, and 2 Ban. & A. 567, 568, Fed. Cas. No. 10,328:

"To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand."

It requires the exercise of inventive faculty equally in a design as in a utility patent to insure validity, and the test of invention is the

same. Hammond v. Stockton Combined Harvester & Agr. Works, 70 Fed. 716, 17 C. C. A. 356; Myers v. Sternheim, 97 Fed. 625, 38 C. C. A. 345; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co. (D. C.) 201 Fed. 926 (affirmed 208 Fed. 564, 125 C. C. A. 566); Strause Gas & Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 C. C. A. 620.

[2] The very terms of the act and their implication render anticipation inimical to the validity of the patent, for the invention must be new, original, and ornamental, not known or used by others, and not patented or described in any printed publication. If so known, used, patented, or described, of course, there is anticipation. So that the rule of law respecting anticipation in utility patents must apply as well to design patents and with like effect. The result obtained must not only be new, as in utility patents, but it must be also original, that is, having its primary conception in the mind of the inventor; and, further, it must be ornamental. This means it must possess the elements of beauty and attractiveness; and in all this there must be invention of design, which reaches beyond the exercise of mere mechanical skill. H. D. Smith & Co. v. Peck, Stow & Wilcox Co. (C. C. A.) 262 Fed. 415.

[3] The design which is the subject of patent appeals to the eye. The quest is for the beautiful and attractive, as well as the ornamental, and the test is the æsthetic effect. Bolte & Weyer Co. v. Knight Light Co., 180 Fed. 412, 103 C. C. A. 558.

"It must exhibit something which appeals to the æsthetic faculty of the observer." Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., supra.

Further in comparison, for the purpose of ascertaining and determining the sameness of effect upon the eye of the observer, the viewpoint of the expert is inapplicable. The test is the effect that the design produces visualized by the ordinary observer, "giving such attention as a purchaser usually gives." Gorham Co. v. White, 14 Wall. 511, 528, 20 L. Ed. 731; Bolte & Weyer Co. v. Knight Light Co., supra.

The dry utility incident to a mechanical patent cannot be made the subject of a design patent. It is that utility which imparts a pleasing effect to the eye and appeals to the æsthetic emotions, to the sense of the beautiful, which is essential to the patentability of design. So that the attempt to patent a mechanical function under cover of a design would lead to a perversion of the purposes of the statute. Rowe v. Blodgett & Clapp Co., 112 Fed. 61, 50 C. C. A. 120; Marvel Co. v. Pearl et al. (C. C.) 114 Fed. 946; Weisgerber v. Clowney (C. C.) 131 Fed. 477.

[4] Having adverted to the legal principles as thus ascertained, let us turn to the issues propounded. The design covered by patent 51,043 shows by its front perspective the wide marginal flange, the concavo-convex reflector, with the superadded element to provide for the dead air space, which does not change the appearance of the convex surface of the reflector, the heating unit disposed transversely to the reflector, the hood or wire cage, and the supporting pedestal; and by its rear perspective, the wide annular flange, the convex form of the reflector, the wire protector, and the pedestal. The defendant's utility

has somewhat the same appearance, save the wide annular flange, and the heating unit, which is disposed axially with the reflector. Both are of copper, and the glow of each is practically the same. The patent, of course, does not show the glow, but the eye of the observer would catch it, and it affords an element for consideration respecting infringement.

Plaintiff's design is not without attractiveness and symmetry, nor altogether devoid of decorative merit. As a piece of furniture, it is attended with a bit of charm and elegance. We have not been advised of anything in the art that in resemblance is its exact prototype. But we are impressed that the defendant's device does not infringe, and this for the reason that the wide annular flange and the particular disposition of the heating unit are so characteristic of plaintiff's device as to differentiate it instantly, even by casual observance, from that of defendant. The test, as we have seen, is the impression made upon the ordinary observer, giving such attention to the object visualized as a purchaser usually gives. This means the exercise of intelligence, with a view to discrimination.

Some testimony has been offered in support of plaintiff's contention that the similarity is so complete as to produce a sameness of appearance.

Mrs. Labatt was familiar with the Majestic heater. While passing on the street, she saw a Westinghouse heater. It struck her that it was a Majestic, but she turned back and examined it more closely, and found it to be a Westinghouse. The thing that attracted her attention, and made her doubt that it was a Majestic, was what she thought to be a change in the element, alluding to the heating element. So it is apparent that one of the very features that most potently discriminate the one design from the other is what caught her eye and caused her to look more closely. As a purchaser, she would not have been deceived.

Hiller testifies he was shown two heaters of the Westinghouse type, by a man who mistook them for the Majestic, remarking, after some discussion, "It looks very much like it." The witness proceeded:

"I showed him there was a slight difference in the element, and one thing and another, but in general appearance they were the same. I presume he purchased them on the strength of that."

Witness tells of another instance where a person told him he had bought a Westinghouse supposing it to be a Majestic. The testimony is not assuring, for if such purchases had been made under mistake as to identity, the testimony of the purchasers themselves would have been the best evidence.

Wentworth gave his clerk orders to buy a heater, without telling him the kind wanted. One was brought in and set up, and witness paid no further attention to it until Hiller called his attention to the fact some time after that he had a Westinghouse heater.

Judge Coxe's allusion to the real test, "Having seen the complainant's design in a show case or shop window, the ordinary buyer would be very likely to mistake the defendants' design for it if seen in similar

environment" (Graff, Washbourne & Dunn v. Webster, 195 Fed. 522, 115 C. C. A. 432), is apt. The assertion presupposes, however, familiarity in the first instance with the article desired to be purchased. Having such familiarity, would the purchaser be likely to be misled into purchasing an article of similar design? The testimony at the trial does not satisfactorily answer the question in the affirmative. An apt illustration is afforded by the case of Grelle v. City of Eugene, 221 Fed. 68, 137 C. C. A. 18, decided by this court. The design in controversy was for a lamp post, having a round base and column, both fluted, carrying five lamps, one at the top and four pendent. The alleged infringing device was of a post with a square paneled base and round column, severely plain, carrying five lamps similarly disposed. The dominating features which distinguished the one post from the other were the round fluted base of the one as against the square paneled base of the other, and the round fluted column of the one as contradistinguished from the plain cylindrical column of the other. These were the characteristic points of difference that induced the court to decide that there was no infringement. The distinguishing features pointed out above between the patent in suit and the defendant's device are as conspicuous and potent as those in the Grelle Case, and to our minds dominate the conclusion to be reached.

A word as to the case of Geo. Borgfeldt & Co. v. Weiss (C. C. A.) 265 Fed. 268. Plaintiff's patent was of a design for dolls. The design shows both front and side perspective. It represents a doll in bathing costume, sitting with feet bare, knees drawn up, elbows resting on the knees, and chin resting on closed hands. The defendant's design, which was aimed, no doubt, to get as near infringement as possible and miss it, has the same general features, but with cap or hood removed, with painted or imitation hair, and painted slippers. The postures of the arms and legs are somewhat varied. It was held that there was infringement because there was such close resemblance that there was a likelihood of one being mistaken for the other by the ordinary observer. The doctrine of equivalents was applied, and it was said:

"The figure shown is clearly included within the claim of the patent, whether the doll is provided with painted hair, real hair, bathing cap, military or naval cap, or any other standard form of head dress, since all of these were well-known equivalents in the actual art to which this patent relates."

In the case at bar, it can hardly be said that the rim of the defendant's device and the position of the heating unit, as presented to the eye of the observer, are the equivalents of the broad annular rim and the transected posture of the heating unit of plaintiff's design. These in combination mark the distinction.

[5] This leaves the patented design No. 51,253 to be considered. As to this, we are persuaded there is anticipation. But if not, the device represented by the design is so plainly simple, and composed of such simple and previously known elements, as to render it a subject not fit for a design patent. This design is almost a counterpart of defendant's device with the wire hood attached, the only apparent difference being as it respects the position of the heat unit.

The resemblance of the Taylor patent is so conspicuous as to render it almost a prototype. But this aside, as counsel claim it is not an exhibit in this particular case.

The Shoenberg patent, No. 1,109,551, is suggestive in appearance, although the concavo-convex reflector is modified; and, as said by the learned trial judge:

"In its more conspicuous features the plaintiff's design also closely resembles the Warner device, the parabolic 'Simplex,' and the 'Ferranti Fires.'"

These are all significant, and denote substantial anticipation.

But the elements which go to make up the design are all simple and well known in the art: The bowl or concavo-convex reflector, the heating unit, the wire hood, and the pedestal. They present nothing new in the utility art, and much less in the decorative art, and it would be a palpable perversion of the statute if it were permitted to forestall the use of these simple elements, either singly or in combination, by the potency of a design patent covering the combination. Soehner v. Favorite Stove & Range Co., 84 Fed. 182, 28 C. C. A. 317; Kruttschnitt v. Simmons (C. C.) 118 Fed. 851 (affirmed on appeal 122 Fed. 1020, 58 C. C. A. 111); Zidell v. Dexter (C. C. A.) 262 Fed. 145.

[6] It is insisted that widespread use supplanting previous devices, of alleged similar character, in support of which there is pertinent evidence in the present controversy, ought to turn the scales in favor of the validity of the patents. Such facts are always important, and are entitled to great weight; but it is only in doubtful cases that they are alone sufficient to turn the scale in favor of invention. Keystone Manufacturing Co. v. Adams, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Morton v. Llewellyn, 164 Fed. 693, 697, 90 C. C. A. 514.

The principle is without applicability here as it respects patent No. 51,043, as the case turns ultimately upon the question of infringement. As to the other design, it is plain that it lacks invention.

[7] A query is suggested whether there was a mistrial. This court's attention has been called to the following state of the proceedings had in the lower court: Judge Dietrich, of the District Court of Idaho, was authorized by the presiding Circuit Judge to hold the district court for the Northern District of California during the months of August and September, 1920. Within the time, these cases, with another decided contemporaneously herewith, were tried before Judge Dietrich, and duly submitted within the time of his authorization to sit. His opinion, which declares that "the bills must be dismissed," seems to have been filed with the clerk of the court October 4, 1920. Later, and during the time Judge Bean, of the Oregon District Court, was authorized to hold court in the Northern District of California, the following decree was entered:

"This cause came on to be heard before the Honorable Frank S. Dietrich, United States District Judge, at the July, 1920, term of court, on the 25th day of August, 1920, and thereupon was thereafter tried from day to day until and including the second day of September, 1920, upon the introduction of evidence, oral and documentary, by each party hereto, and upon the argument of counsel; and thereupon after consideration thereof it was, on the 4th day

of September, 1920, ordered that the bill of complaint be dismissed with costs to defendant, and that a decree be signed, filed and entered accordingly.

"Now, therefore, it is hereby adjudged and decreed that said bill of complaint be and the same is hereby dismissed, with costs to defendant to be taxed.

"Dated November 1, 1920.

"R. S. Bean, United States District Judge."

Upon this record it is suggested that three questions arise:

(1) Had Judge Dietrich power to act in the case at all while he was in Idaho, and not within the Northern District of California?

(2) Had he the power to act in the matter after the expiration of the term for which he was designated to hold court in the Northern District of California?

(3) Can another judge, who did not try the case, sign the decree?

The brief professes to submit the inquiry without argument. No suggestion of objection or protest against the succeeding judge's entering or signing the decree appears in the record, and it is debatable whether the questions propounded are not merely moot questions, which the court will not answer because it would decide nothing relevant to the case.

However this may be, the face of the decree entered by Judge Bean being considered, it is in effect a nunc pro tunc decree, and one which he was duly authorized to make.

Affirmed.

MAJESTIC ELECTRIC DEVELOPMENT CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

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

No. 3617.

Patents ⊂=328—1,245,084, for electric heater, held not infringed.

The Brown patent, No. 1,245,084, for an electric heater, *held* not infringed.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Frank S. Dietrich, Judge.

Suit in equity by the Majestic Electric Development Company against the Westinghouse Electric & Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

"This is a suit to restrain alleged infringement of the appellant's patent No. 1,245,084, which is for improvement in electric heaters. The invention, as the patentee declares, "relates to electric heaters in which the heat waves are generated by a resistance coil or heating unit and are then reflected from a highly polished surface." He further declares: "One of the main purposes of my invention is to provide an electric heater or radiator in which the highly heated portions are inclosed by protecting members, but one readily accessible for examination or repair." The radiator is comprised of a concavo-convex reflector and a heating unit consisting of a resistance coil supported in spaced relation with the reflector, preferably at the focus of the curved

surface; also, a casing spaced outwardly from the convex surface of the reflector affording a dead air space between the casing and the reflector. The casing is provided with a marginal annular flange which is "to prevent the outer exposed edge of the heater from being heated." A protective cage, convex in form, composed of wire, is so attached to the outer extremity of the annular flange as to cover the face of the heater.

The inventor makes four claims, but only the first is relied upon as having been infringed. It reads:

"An electric heater, comprising a concavo-convex reflector, a heating unit supported at substantially the focus of said reflector, an annular member extending outwardly from the margin of said reflector, and a protective cage having guard wires arched between opposite sides of said annular member."

The appeal is from a decree dismissing the complaint.

John H. Miller, of San Francisco, Cal., for appellant.

Wesley G. Carr, of East Pittsburg, Pa., and David L. Levy and Walter Shelton, both of San Francisco, Cal., for appellee.

Nathan Heard, of Boston, Mass., and Samuel Knight, of San Francisco, Cal. (Knight, Boland, Hutchinson & Christin, of San Francisco, Cal., of counsel), amici curiæ.

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

WOLVERTON, District Judge (after stating the facts as above). Counsel for complainant claims for the invention a broad construction, on the postulate that the patentee was the first discoverer of what he terms the "radiant energy beam," and that the invention is suited to the producing of such a manifestation of radiant energy. The postulate comprises a reflector, parabolic in form, with a generator of heat rays at the focus, which, theoretically at least, would reflect the radiant energy in a beam or cylindrical shaft, which would become localized upon the object in its path and impart warmth thereto. It is not claimed for the invention that such will be the perfect result, because of the impracticability of disposing the heating unit at the very focus of the parabola; but, notwithstanding, that the great mass of the radiant energy will be cast forward in a beam or cylindrical shaft, and that the substantial result is obtained.

If the patentee was, in reality, the discoverer of this principle, he has made no claim to it, either in the specifications or in the claims of his patent. The only elements from which the inference may be drawn that the reflector is in the form of a parabola are that the drawing would seem to be of that type, and the claim that the heating unit is to be at the focus, or substantially so; there is no suggestion respecting its effect in physics, in casting a cylindrical shaft of radiant energy from a heat-producing unit so positioned as indicated by the claim.

It is significant that Brown, the assignor of the complainant, put upon the market his device, known commercially as No. 7, in 1916, long before he applied for a patent thereon. Inferentially, he must have considered himself protected by a prior patent, in which he was interested, issued to Shoenberg September 1, 1914. In this the specifications state, amongst other things, that—

"The reflector consists preferably of a highly polished metal shell *1*, which is somewhat hemispherical or dome-shaped and serves to reflect the heat waves received from the heater and direct them outwardly from its inner concave surface."

Among the claims is found: "An electric radiator, comprising a polished metallic reflector," etc., there being no suggestion, either in the specifications or in the claims, of the production of a radiant energy beam, in form a cylindrical shaft, thrown forward from the reflector. The incident is indicative, at least, that the broader concept had not then occurred to the inventor; nor did it at the time of filing his application for the patent in suit. Otherwise we must assume he would have been sufficiently specific to enunciate it with much greater clarity.

As the beam, which it is thought would be cast by parabolic reflector with the resistance coil disposed at its focus, would be a result or function of the radiator, it is not a subject of claim. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 554, et seq., 18 Sup. Ct. 707, 42 L. Ed. 1136.

But, while this is true, one would expect the patentee to make allusion to that which was uppermost in his mind, and which is the central function to be secured by his invention, in his specifications. Not having done so, the dominant inference is that his concept at the time was the narrower one, embracing reflection from any type of concavo-convex reflector. But his claim is broad enough to embrace also the broader idea, as suggested by counsel, and in this the patentee builded better than he knew. However this may be, and whatever may have been the concept as to the function to be secured, the device, in either sense, is not one that is new in the art. The Shoenberg itself is an exemplar, in which the reflector is described as somewhat hemispherical or dome-shaped. It partakes of both elements, with a flat surface at the base, and sides extending outward, spherical in contour, the whole representing a flat-bottomed dish, the functional concept being to reflect the radiant energy outwardly; and the claim is broad enough to embrace either a parabolic or a hemispherical reflector.

The Morse patent, of date March 3, 1908, embodies a reflector hemispherical in form, with an electric light bulb adjusted approximately at its focus. While the use sought to be made of the device was not the same as the use to be made of the one in suit, the concept of reflecting radiating energy in defined and limited space is there perfectly.

The Ferranti Electric Fire (defendant's Exhibits 1, 11, and 12) is a good illustration of the reflector device, and is an anticipation of the concept. The description of this device is instructive:

"A circular bowl of polished copper, which concentrates and reflects the heat rays. Like the Bastian heater, the greater part of the energy is given out as convected heat, but there is considerable radiant energy, and owing to the reflecting properties of the bowl, this can distinctly be felt at a distance of many feet."

While the heat is produced largely by convection, the idea of confining the rays in limited space, so that the radiant energy may be thrown forward with greater effect, is one of the dominant features.

The English Simplex (defendant's Exhibit 8, patent issued Septem-

ber 4, 1914) affords more than a superficial, if not a complete, disclosure of the dominant idea. In the provisional specifications the inventor states the object to be to provide "an apparatus of convenient form in which the radiant heat issues in the form of a condensed beam of rays, divergent, approximately parallel or convergent, as the case may be, and adapted to be pointed in any desired direction, horizontally or vertically."

Again, in the description, it is said the reflector may be "in whole or in part of parabolic or the like contour." And the claims are made to comprise " a conical or parabolic reflector," and a heating element arranged "so as to lie on the axis of the said reflector." While the drawings attending this patent show a conical form of reflector, that is only incidental. It may be parabolic, as declared. The functional element is the production of a circumscribed beam of radiant energy.

In physics the laws pertaining to the reflection of heat and light are the same. An electric light reflector is well illustrated by the vitreous enameled steel reflector (defendant's Exhibit 3) and the indirect lighting lamp (Exhibit 11). Familiar types of reflectors, involving the same idea, are the headlights of engines and those used on automobiles. In view of these illustrations, there is clear anticipation of Brown's reflector, correlating the idea of a radiant energy beam.

The best effect in radiation of both light and heat is obtained by disposing the unit of generation approximately at the focus of the reflector. This must be admitted, and the idea was not new with Brown.

The protecting cage in itself is not new, and if it has novelty at all, it is in the fact of connecting it with the outer rim of the annular member.

There would seem to be novelty as it respects the annular member in combination with the reflector. Its purpose and function are to protect against contact with the heated reflector. But to determine whether defendant's device infringes, it is well to note particularly the language of the claim, which is: "An annular member extending outwardly from the margin of said reflector." Looking to the specifications, the member is described as a "marginal annular flange." The drawing shows an extended flange. The specifications may be read in connection with the claim for the purpose of giving construction to the latter. The claim is, however, broader than the specification, and will embrace any member of the sort extending outwardly. The proportion to which it shall extend is suggested by the function which it is designed to subserve; that is to say, it is to protect against contact with the heat induced by the reflector. However, the invention is subject to a narrow construction. Flanges are of common use, but none of which we are aware suited to the particular purpose. Complainant's model shows a flange about the outer rim of the reflector. The annular member is really superimposed on this primary flange, but extends outwardly from it.

Now, it is contended that the defendant's design is an infringement of this annular member. The design shows a turning over of the outer rim of the reflector in the shape of a curve forming a semicircle, or a segment thereof. Its particular function appears to be to give

added strength to the reflector at the rim, and to improve its appearance. It performs substantially the same function as complainant's primary flange, but not the broader function of the annular member, designed as a protection against contact with the heated reflector. In this defendant's device does not infringe, and it follows that the bill of complaint must be dismissed.

Two other questions have been presented: One respecting the evidentiary effect that should be given the alleged widespread use of complainant's device, to the extent of supplanting all others; and the other pertaining to the regularity of the entry of the final decree dismissing the suit with costs to defendant. We have answered these propositions in a separate opinion at this time, rendered in cases Nos. 3616 and 3618. The answer is applicable here, and reference is made thereto for supplementing this opinion in that respect.

Affirmed.

SINCLAIR REFINING CO. v. FEDERAL TRADE COMMISSION.*

(Circuit Court of Appeals, Seventh Circuit. September 8, 1921.)

No. 2838.

Monopolies ⇐17(1)—Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Leasing containers for gasoline purchased from lessor for nominal rental held not "unfair method of competition."

The leasing by a dealer in gasoline for a nominal rental to retail dealers of pumps and tanks to be used solely for the storage and handling of gasoline purchased from the lessor does not constitute an unfair method of competition within Clayton Act Oct. 15, 1914, § 3 (Comp. St. § 8835c), or within Federal Trade Commission Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), and, where there is no attempt by the contract to limit the right of lessees to buy or handle the product of competitors, the Federal Trade Commission has no authority to prohibit such practice.

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

Petition to Review Order of Federal Trade Commission.

Petition by the Sinclair Refining Company to review order of Federal Trade Commission. Order set aside.

Ray T. Osborn, of Chicago, Ill., for petitioner.

Eugene W. Burr, of Washington, D. C., for respondent.

Before BAKER, EVAN A. EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is an original petition against Federal Trade Commission, hereafter called respondent, to review an order made in a proceeding wherein it had filed its complaint against Sinclair Refining Company, hereinafter called petitioner, the substance of which complaint was that petitioner, being engaged in the business of purchasing and selling oil and gasoline and the leasing and loaning of oil pumps, storage tanks, or containers and their equipment, leased, for a nominal consideration, said oil pumps, storage tanks, or con-

---

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

*Certiorari granted 256 U. S. —, 42 Sup. Ct. 183, 66 L. Ed. —.

tainers and their equipment to persons who purchased oil from petitioner, with the understanding that the same should not be used by the lessees of the pumps and other equipment to hold or pump the oil of any competitor. It was also charged that the leases were made on consideration that lessees should not purchase or deal in the products of a competitor.

In answer to that complaint, petitioner set out the contract, which was found by the Federal Trade Commission to be the uniform contract by which such equipment was leased, the portions of which material here are:

"1. The above-described equipment shall be used by party of the second part [purchaser of gasoline] for the sole purpose of storing and handling the gasoline supplied by party of the first part. * * *

"6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of ——— months from the date hereof, * * * provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of $———."

After the findings of fact were made, the order to cease and desist, here complained of, was entered.

The question, plainly stated, is: Does the leasing, under the terms of the contract in evidence, at a nominal charge, of containers and pumps by petitioner to purchasers of its gasoline constitute an "unfair method of competition," as those words are used in section 5 of the Federal Trade Commission Act of September 26, 1914 (Comp. St. § 8836), or may the effect of such leasing be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products in violation of section 3 of the Clayton Act (Comp. St. § 8835b)?

This identical matter was recently decided by the Court of Appeals in the Second Circuit in Texas Co. v. Federal Trade Commission, and Standard Oil Co. of New York v. Federal Trade Commission, 273 Fed. 478, adversely to the respondent's contention here.

1. "Unfair methods of competition" have been discussed by this court in the opinion in Kinney-Rome Co. v. Federal Trade Commission, 275 Fed. 665, just filed.

Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise they do not, in our opinion, as we said in the Kinney-Rome Case, supra, amount to an unfair method of competition.

In addition to the reasons upon which the decision was based in the Texas Company Case, supra, we are of opinion that petitioner had the undoubted right to furnish any and every purchaser such containers and conveniences to aid him in delivering the gasoline into the possession of the consumer as it might see fit, and at such cost as it might see fit. The right to fix prices is not given to the Federal Trade Commission. The only cases where the question of price has come into consideration have been those wherein the making of a price—

in some cases high, in others low—has been used as an element in some fraudulent scheme of oppression. The price which one may put upon that which he has to sell or lease is a matter wholly his own. United States v. Freight Ass'n, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007; Sears, Roebuck & Co. v. Federal Trade Com., 258 Fed. 307, 312, 169 C. C. A. 323, 6 A. L. R. 358.

Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said:

"Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise, you may and must buy them."

In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different nor unfair. If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what is too fast a pace for some and to compel others to slow up; in other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practices from business in interstate commerce.

2. We are of opinion that there was no violation of section 3 of the Clayton Act. The complaint under that section is that petitioner made leases for the container and pump and fixed the price therefor "on the condition, understanding, and agreement that the lessees thereof shall not purchase or deal in the products of a competitor or competitors, of respondent" (petitioner). There is nothing in the evidence nor in the findings of fact by the Federal Trade Commission that supports any such charge. The finding is that there was a uniform contract. There is no word there about purchasing from competitors. The only limitation is that—

"The above-described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part."

But there are other findings, that, taken in connection with the order to cease and desist, very clearly indicate what the Commission deemed the real trouble which it desired to reach was, viz.:

"That the monetary considerations received by respondent [petitioner] do not represent reasonable returns upon the investment in such devices and equipment, and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same."

And again:

"That only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does, as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition," etc.

There are two paragraphs of the order to cease and desist, and they are substantially as follows: The substance of the first is that petitioner shall not lease the equipment in question at a rental which will not yield to it a reasonable profit, and the substance of the second is that petitioner shall not enter into or continue to operate under contracts whereby dealers agree that, in consideration for the leasing to them of such equipment, the same shall be used only for storage or handling the product of petitioner.

The necessary conclusion from the above findings and the orders entered is: First, that the Commission deemed it lawful and proper for it to condemn certain rentals and also to fix and regulate the rentals on the equipment, because the furnishing of such equipment required a large capital investment and because many competitors of respondents were financially unable to do that same sort of thing. As we have hereinbefore said, Congress did not bestow upon respondent any power to regulate or fix prices (Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 312, 169 C. C. A. 323, 6 A. L. R. 358); nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of another competitor; nor do we find anything that authorizes respondent to regulate competition for that reason. Section 3 does not make it unlawful to make sales or leases, but does make it unlawful to make sales or leases on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, etc., of a competitor where the effect of such lease, condition, agreement, or understanding may be to substantially lessen competition, etc. The above provisions of section 3 were the substance of the unproven charge in respondent's complaint against petitioner, referred to above. It is perfectly clear that that which the Commission found was "the uniform contract used by respondent for leasing such devices" contained no provision comparable with or equivalent to the thing pro-

hibited in section 3. We are of opinion that there is nothing in the section that could be construed as preventing petitioner, under the circumstances shown in this case, from putting a limitation upon the use of the thing leased. It has long been a practice in real estate leases to include limitations upon the use of the property, and the reasons for doing so are obvious. Such has likewise been the practice in the leasing or hiring of personal property. The reasons for such limitations are even more obvious than those for the placing of them in real estate leases. Some of the reasons are pointed out in the opinion in the Texas Company Case, supra.

3. In this case, as in the Fruit Growers' Express Case, 274 Fed. 205, decided by this court, opinion filed June 16, 1921, if an order to cease and desist is to stand, the effect of the action of the Federal Trade Commission seems to have been to terminate and destroy the contractual rights of persons not parties to the proceeding.

The order to cease and desist is annulled and set aside.

UNITED STATES v. NEW RIVER COLLIERIES CO.

(Circuit Court of Appeals, Third Circuit. December 7, 1921.)

No. 2736.

War ⇐14—Market price, notwithstanding abnormal conditions, held "just compensation" for coal requisitioned.

Under Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), entitling owner of goods requisitioned by the United States government to "just compensation" therefor, and in view of Const. Amend. 5, providing that no private property can be taken for public use without "just compensation," a coal dealer engaged largely in export trade could recover from the government, for coal requisitioned by it, the price he could have received therefor in the export market, and was not limited to cost plus reasonable profit, notwithstanding the abnormal market caused by war conditions and governmental restrictions.

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

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Suit by the New River Collieries Company against the United States. Judgment for plaintiff, and defendant brings error. Affirmed.

Elmer H. Geran, U. S. Atty., of Trenton, N. J., and F. M. P. Pearse, Asst. U. S. Atty., of Newark, N. J. (Howard W. Ameli, of counsel), for plaintiff in error.

Ira J. Williams and Charles L. Guerin, both of Philadelphia, Pa., and F. R. Foraker, of New York City (Brown & Williams, of Philadelphia, Pa., of counsel), for defendant in error.

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

WOOLLEY, Circuit Judge. This writ brings here for review a judgment of the District Court entered upon the verdict of a jury in favor of the New River Collieries Company in several suits brought to recover from the United States just compensation for private property taken for a public use. The sole question is the measure of compensation.

The parties, in their conduct, followed strictly the provisions of the Act of Congress commonly known as the Lever Act (approved August 10, 1917, 40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛l–3115⅛r]). The United States, through the Navy Department, requisitioned a large tonnage of coal belonging to the Collieries Company, at Hampton Roads, Virginia, at different times during a period commencing in September, 1919, and ending in February, 1921, and tendered payment at a price named by the Navy Department. The Collieries Company, being dissatisfied with the tender, declined it, and brought these actions under the section of the Act which gave the District Courts of the United States jurisdiction to hear and determine claims for just compensation for property taken by the Government in the exercise of its power of requisition. Section 10 (section 3115⅛ii).

At the trial, both parties offered evidence in support of what they respectively regarded as the true measure of compensation, fully realizing that in providing that compensation be made for private property taken for public use the Congress intended compensation of a character that would conform with the "just compensation" prescribed, in like event, by the Fifth Amendment to the Constitution. United States v. Cohen Grocery Co., 255 U. S. 88, 41 Sup. Ct. 298, 65 L. Ed. ——.

The plaintiff introduced evidence which, not being disputed, proved that at the place and during the time the Government took the plaintiff's coal there were two markets for coal, a domestic market and an export market, the latter being the higher; that both markets were affected by war conditions still prevailing and by government restrictions still in force, though in both markets supply and demand were the controlling factors; that the business of the plaintiff was chiefly in the export trade; that the export demand during the time and at the place in question was such that, but for the action of the Government in requisitioning its coal, it could have sold its coal for export at prices prevailing for spot deliveries. On this evidence the plaintiff took the position that "just compensation" means the fair market price of the property at the time and place of the taking, if a market exists and a price is shown.

The United States advanced the proposition that just compensation is to be determined by the value of the property; that market price, while evidence of value, is not conclusive, Johnson-Brinkman Commission Co. v. Wabash R. R. Co., 64 Mo. App. 590, 595; United States v. Nahant, 153 Fed. 520, 82 C. C. A. 470; therefore other evidence of value is admissible. The other evidence which the Government offered in proof of value was the cost of the coal to the plaintiff, reckoned on figures supplied by the Federal Trade Commission, plus what the Navy Department regarded as a reasonable profit; also the prices for

contract coal in the domestic market which were lower than prices for spot coal for export. In addition the Government contended that both markets for coal at Hampton Roads during the period in question were, because of war conditions, purely speculative, and that prices there current in no way reflected the reasonable value of the coal itself. Ruling that the plaintiff was entitled to recover the fair market price for its coal according as the jury might determine its value from the evidence, which, not being controverted, showed an export market with going quotations, the court refused to admit the testimony offered by the Government. On the exception noted this writ was founded, raising squarely the question of the rule of just compensation in such case.

Reading into the Lever Act the words of the Fifth Amendment to the Constitution—"Nor shall private property be taken for public use, without just compensation"—it is evident that the Congress intended that for property taken, whether real or personal, "the compensation must be a full and perfect equivalent." Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Kanakanui v. United States, 244 Fed. 923, 157 C. C. A. 273. Such an equivalent is not the value of the property to the Government for its particular use but is its fair market value for all available uses. United States v. Chandler-Dunbar Co., 229 U. S. 53, 80, 33 Sup. Ct. 667, 57 L. Ed. 1063; Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; United States v. Bank (D. C.) 250 Fed. 299, Ann. Cas. 1918E, 36. No one, we imagine, questions this rule. The difficulty, however, is in finding the fair market value, a difficulty which depends largely on the character of the property taken, whether realty or personalty. If it be land, varied considerations enter, as shown by cases cited in the briefs, not here applicable. If it be a commodity, the task is less complex, yet fraught with more or less difficulty according as the commodity is or is not readily saleable and as there is or is not a market where like commodities are openly traded in. If, further, the commodity be a staple, which, like coal, is produced for sale and consumption, not for retention and long use, the difficulty is again reduced, for in such instance the first—and sometimes the last—inquiry to be made in reckoning its value is its worth as an article of sale. If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.

But the Government contends that the coal market in question, being still under war influences and still restricted by government regulations, was not a market from whose prices a fair market value of the commodity traded in could be validly determined, citing cases in which courts have held, quite properly, that market value is not to be determined by market prices brought about by some peculiar accidental circumstance, or some sudden or temporary turn in the trade, or influenced by some pressing necessity of seller or buyer, producing prices out of all proportion to the value of the articles and beyond what

anyone else, not thus affected, was willing to pay. Johnson-Brinkman Commission Co. v. Wabash R. R. Co., 64 Mo. App. 590; Lawrence v. Boston, 119 Mass. 126, 128. While this is the law, we think it does not apply to this case. Admittedly, the coal market at Hampton Roads was affected by war conditions and government restrictions. The market there was abnormal in the sense of being different from the market before the war. While war did produce a condition where the demand greatly exceeded the supply, it was not a condition prevailing on particular days at the particular place at which the Government requisitioned the plaintiff's coal, but was a general condition prevailing wherever coal was bought and sold. War did not destroy the coal market; it made a market of another kind, which, though abnormal in comparison with the peace market, was firmly established and long continued. The prices at which coal was regularly sold and bought in such a market under its vicissitudes constituted, we think, valid evidence of its fair market value. But there were at Hampton Roads two markets for coal, domestic and export. We are further of opinion that the plaintiff, in seeking evidence of the fair market price for coal to prove the fair market value of its coal, was entitled to avail itself of the price in that market in which, but for the action of the Government, it could, and according to the habit of its business it probably would, have sold its coal. That was the price in the export market. It follows therefore that the Government's evidence of a value for the plaintiff's coal fixed by the Navy Department on a basis of cost plus a reasonable profit and of prices in the domestic market for contract coal, would not, if admitted, have reduced the valuation of the plaintiff's coal under the rule here found applicable and would not, in consequence, have served any evidential purpose. The court's rejection of the evidence, therefore, was not error.

The judgment below is affirmed.

VESELY v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3707.

1. Criminal law ⟸619—Cases held properly consolidated.

Where two informations were filed, one of which charged sale of intoxicating liquor, and maintenance of a place where such liquor was sold, and the other charged unlawful transportation of liquor, they were properly consolidated for trial, under Rev. St. § 1024 (Comp. St. § 1690), and National Prohibition Act, tit. 2, § 32, especially where there was no verdict against the accused under the second information.

2. Criminal law ⟸1166½ (6)—No complaint of court's excusing juror.

Accused cannot complain that the court, during the selection of a jury, excused one of the veniremen on his own motion, because he was of the opinion that his answers disclosed that he would not be an impartial juror; it appearing that a duly qualified jury was readily secured and was accepted by both parties without objection.

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

*Rehearing denied February 20, 1922.

3. **Intoxicating liquors ⟸213—Information for unlawful maintenance of place for sale held sufficient.**

A count of an information charging that defendant knowingly, willfully, and unlawfully maintained a room, building, and place, to wit, the M. Buffet, Seventh and F streets, in the city named, where intoxicating liquor, namely, whisky, containing alcohol in excess of one-half of 1 per cent., was kept and sold, *held* sufficient to state an offense.

4. **Intoxicating liquors ⟸236(4)—One selling intoxicating liquor held properly prosecuted as principal, maintaining a place for sale.**

Where there was evidence showing that defendant sold whisky at a buffet on a number of days to a certain person, he was properly prosecuted and convicted as a principal under an information charging him with the unlawful maintenance of a place for the sale of intoxicating liquors, though he was not shown to be the "proprietor" of the place where he sold the liquor.

In Error to the District Court of the United States, for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Al. Vesely was convicted of unlawful sale of intoxicating liquors, and of maintaining a place for the sale thereof, and brings error. Affirmed.

Two informations were filed by the government in the court below against the plaintiff in error, the first of which contained two counts—one charging that on or about October 9, 1920, at the city of San Diego, Vesely unlawfully sold to one Kinney certain intoxicating liquor, namely, whisky, for beverage purposes, at and for an agreed price of 50 cents a drink, lawful money of the United States; and the second count charged that on or about October 9, 1920, at the city of San Diego, the defendant to the information knowingly, willfully, and unlawfully maintained a room, building, and place, to wit, the Maryland Buffet, Seventh and F streets, in the city named, where intoxicating liquor, namely, whisky, containing alcohol in excess of one-half of 1 per cent. was kept and sold.

The second information charged that on or about February 8, 1921, in the city of San Diego, Vesely knowingly and unlawfully transported for beverage purposes one pint of whisky, containing alcohol in excess of one-half of 1 per cent.

The two informations were consolidated for trial in the court below, resulting in a verdict of guilty under both counts in the first information, and no verdict respecting the second one—the jury being unable to agree as to that charge.

L. E. Dadmun, of San Diego, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] We see no merit whatever in either of the points made on behalf of the plaintiff in error. The contention that the cases did not admit of consolidation is sufficiently answered, first, by section 1024 of the Revised Statutes (Comp. St. § 1690), and section 32 of title 2 of the National Prohibition Act, by the first of which it is declared that—

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which

may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

And section 32, tit. 2, of the Prohibition Act provides, among other things, that—

"In any affidavit, information, or indictment for violation of this act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed."

Moreover, there was no verdict against the plaintiff in error under the second information.

[2] The record shows that during the selection of a jury the court was of the opinion that the answers of one of the veniremen disclosed that he would not be an impartial juror, and for that reason of its own motion excused him. Complaint is made of that action by the plaintiff in error, to which it is enough to say that it appears that a duly qualified jury was readily secured and was accepted by both parties without objection. It is needless to cite the numerous cases to the effect that under such circumstances there is no valid ground of complaint, regardless of whether or not there was sufficient ground for the excusing of the juror referred to.

[3] The sufficiency of the second count of the first information, to which objection is made, is shown by the decision of this court in the case of Young v. United States (C. C. A.) 272 Fed. 967.

[4] It is contended that the conviction under that count cannot be sustained, for the reason that it was not shown that the plaintiff in error was the "proprietor" of the place where he sold the liquor. The answer to that is that there was evidence going to show that he sold whisky in the place to one Kinney on the 5th, 6th, 7th, 8th, and 9th days of October, 1920, and thereby aided and abetted the maintenance of the place for that purpose. Plaintiff in error was therefore properly prosecuted and convicted as a principal. See Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230, and cases there cited.

It is further contended on the part of the plaintiff in error that the whisky sold by him was not intoxicating. Respecting that matter we insert this interesting excerpt from the opinion of Judge Delaney in the case of United States v. Ash (D. C.) 75 Fed. 651:

"Upon this question there is an extraordinary diversity of opinion among the judges of the courts in this country. In one of the earliest decisions upon this question in the state of New York, wherein the opinion of the court was delivered by Chancellor Walworth, one of the most learned and eminent judges this country has produced, the court, in a most exhaustive opinion, declared its judicial knowledge as to what was an intoxicating drink in that state, and also went into further details concerning intoxicating liquors in other countries of the globe, and in the remotest times. In later years there seems to have been a disposition to deny or ignore judicial knowledge as to what constitutes intoxicating liquors, and the courts have manifested a desire to disavow any judicial knowledge on the subject. At the same time some of the courts have not hesitated to impute to juries an extensive knowledge and information in this regard. This court, however, will follow the precedent established by the decision of Chancellor Walworth upon this subject, and will assume judicial knowledge concerning intoxicating liquors.

The rule laid down in New York appears to be the better one, and has met with the support of the courts of last resort in many of the other states of the Union. In a trial in the state of Wisconsin, where this question arose in 1883, the trial judge declared that a man must be almost a driveling idiot who did not know what beer was, and that it was not necessary to prove it to be an intoxicating liquor. Later the Supreme Court of that state, in passing on the charge of the trial judge, declared that his rulings in the case upon this question were not only clearly correct, but, if his peculiar manner gave them force and emphasis, it was not only proper, but commendable. This court, therefore, will neither stultify itself nor impeach its own veracity by telling you that it has not judicial knowledge that the liquor commonly known as 'whisky' is an intoxicating liquor, or that the drink commonly called a 'whisky cocktail' is an intoxicating drink. On the contrary, the court assumes judicial knowledge that both are intoxicating."

It is not necessary for us to express any opinion upon that question, for the reason that the evidence introduced in the present case showed various circumstances from which the jury was clearly justified in finding affirmatively, in effect, as it did.

The judgment is affirmed.

NATIONAL SAFETY LIFT CO., Inc., v. ANDERSON.

(Circuit Court of Appeals, First Circuit. November 29, 1921.)

No. 1524.

1. **Patents ⇐328—849,357, for passenger elevator, held void for lack of invention.**

   The Ballard patent, No. 849,357, for improvement in passenger elevators, consisting of a hinged portion in the roof to prevent injury from the dropping of the car while a passenger is entering or leaving it, *held* void for lack of patentable invention.

2. **Patents ⇐17—Test of "invention."**

   In order to be a patentable invention, a thing must be a discovery, a work of the inventive and creative faculty, and not merely the exercise of reason and experience, or the act of a mechanic skilled in the art.

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

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by the National Safety Lift Company, Inc., against Isabel Anderson. Decree for defendant, and complainant appeals. Affirmed.

Everett E. Kent, of Boston, Mass., for appellant.

Rupert L. Mapplebeck, of Boston, Mass. (Gaston, Snow, Saltonstall & Hunt, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and HALE, District Judge.

HALE, District Judge. This suit in equity involves the consideration of United States patent No. 849,357, issued on April 9, 1907, to Edward L. Ballard, relating to a passenger elevator. The case is now

before us on an appeal from the decree of the District Court of Massachusetts, finding that the patent had not been infringed by the defendant, and dismissing the bill.

[1] The specifications of the patent begin with this statement:

"This invention relates to passenger elevators, and has for its object the prevention of injury to persons entering or leaving the car where such injuries are caused either by a premature starting movement of the car or through loss of control of the power mechanism operating the car."

The purpose of the alleged invention is thus stated:

"In accordance with my invention a car is provided having at one end thereof an open portion extending inwardly from the door opening, this open portion being normally closed by a movable closure or section mounted to yield under pressure, so as to prevent injury to a person caught between the same and a landing or like fixed part."

The invention consists substantially in making a displaceable roof section over the entrance to a passenger car, which may be so hinged that, if a passenger is caught by a sudden downward starting of the car, while partly on the car and partly on the landing, the door to the landing being in front of him, the displaceable roof section, the hinged part of the roof, will fly up, thus avoiding serious injury to the passenger. The five claims of the patent present "a displaceable roof section," or "a roof provided with an open portion extending inwardly from the door opening," and in claim 4 "a roof opening" combined with a "yieldable hinged closure for said opening."

Does this patent disclose an invention? Does the cutting away of the part of the roof of an elevator car over the entrance, making such part displaceable, and providing it with hinges, involve such use of the creative or inventive faculty as entitles the author of it to be called an inventor, and to be entitled to a monopoly under the United States patent law?

The Patent Office has issued the patent, and has thereby created a presumption in its favor, both as to novelty and utility. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 274, 138 C. C. A. 23.

In construing the patent we derive no assistance from the prior art, patented or unpatented. It does not appear that any one has exploited in the field of displaceable roof sections to elevator cars. No one appears to have challenged the patentability of the invention. In Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 71, 72, 73, 5 Sup. Ct. 717, 723 (28 L. Ed. 901), the Supreme Court had before it a device unquestionably new, in the sense that it had not been anticipated by any previous invention. The plain question in that case, as in the case at bar, was the construction of a patent without the aid of anything in the prior art. The court described the alleged invention as relating to a certain stamp, and showed that the question turned on that feature whereby a removable part of the stamp, the contents of which identify it with the stub, after the stamp has been attached, can be so removed as to retain its own integrity, but mutilates and thereby cancels the stamp by its removal. In speaking for the court, Mr. Justice Matthews said:

"This is what we ascertain to be the precise idea embodied in the invention described and claimed in the patent, and which, although we find to be new in the sense that it had not been anticipated by any previous invention, of which it could therefore be declared to be an infringement, yet is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention. * * * All that remains to constitute the invention, seems to us not to spring from that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal. * * * It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

[2] It would be difficult to find the question of invention put more clearly than it is here presented by the Supreme Court. In order to be an invention, a thing must be a discovery, a work of the inventive and creative faculty, and not merely the exercise of reason and experience, or the act of a mechanic skilled in the art. Walker on Patents, second chapter; Thompson v. Boisselier, 114 U. S. 1, 12, 5 Sup. Ct. 1042, 29 L. Ed. 76; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200.

It must be said, of course, that what appear to be simple devices often are found to have great merit, and that, now that a thing has succeeded, "it may seem very plain to any one that he could have done it as well." Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177. But, in the cases which we have already cited, and in many others, the courts have held that, in passing upon the question of invention, we must be governed by matters of common knowledge, and by attempting to distinguish between mere mechanical devices and those which appeal to an intuitive and creative faculty of the mind.

It seems to us that any man of ordinary mechanical skill would see at once that the dangers of an inflexible roof over the entrance to a descending elevator may be avoided by displacing a portion of the roof, and, if need be, by attaching hinges to the displaced portion, and that so removing the roof section does not involve anything more than the act of an observant mechanic skilled in the art.

We must find that the patent in question is void for want of patentability. In reaching this conclusion we have allowed its due weight to the presumption in favor of the validity of the patent arising from the action of the Patent Office in granting it. But such action does not excuse us from a careful examination of the character and nature of the matter upon which the patent is sought to be sustained.

Having found that the patent is invalid for want of invention, it is not necessary to pass upon the question of infringement, although it was upon this question that the District Court based its decree.

The decree of the District Court, dismissing the bill in equity, is affirmed; the defendant appellee recovers costs in this court.

LANIER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1921.)

No. 3709.

1. **Larceny ⇐40(4)—Stealing goods moving in interstate commerce; diversion of shipment immaterial.**
   In a prosecution for stealing from a railroad car goods moving in interstate commerce, where the evidence showed that, when stolen, the goods were still in possession of the carrier, in course of transportation from one state into another, the fact that, after reaching the state of destination, the point of destination had been changed from that alleged in the indictment to another point in the same state, *held* not to constitute a variance.

2. **Criminal law ⇐730(10)—Improper remarks of prosecuting attorney held not ground of reversal.**
   Improper comment by an assistant district attorney in argument, in the fact that defendant did not take the stand, *held* not ground for reversal, where the court sustained an objection and fully instructed the jury as to defendant's privilege, and that the remark was improper and should not be considered.

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 Roy Lanier. Judgment of conviction, and defendant brings error. Affirmed.

Jed. C. Adams and W. B. Harrell, both of Dallas, Tex., for plaintiff in error.

Henry Zweifel, U. S. Atty., and Will C. Austin, both of Fort Worth, Tex., for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Roy Lanier, with four others, was indicted in the United States District Court for the Northern District of Texas for conspiring to steal, and stealing, on January 19, 1920, in Wichita county, Tex., a quantity of iron well pipe or casing moving in interstate commerce in a car marked "Big Four, No. 35405." The indictment contained three counts. The first charged a conspiracy to steal, and alleged the stealing as the overt act. The second count charged the stealing of said pipe from said car. The third count charged that the said pipe was stolen by persons unknown; that the defendants on said January 19, 1920, unlawfully and fraudulently had said pipe in their possession with intent to fraudulently appropriate and convert to his and their own use said property so acquired, defendant knowing at the time of such reception that said pipe had been stolen.

[1] Each count alleged that the pipe constituted a part of and a shipment of interstate commerce and was in the possession of the Fort Worth & Denver Railroad Company. The second and third count charged it was consigned by the National Supply Company, of Casper, Wyo., to F. P. Williams, at Strawn, Tex. It is contended that the proof in this case failed to show that at the time of the commission of

the offense charged the property was still in interstate commerce, because of the proof that its destination had been changed from Strawn to Seymour, Tex., and therefore that the property had ceased to be an interstate shipment.

As to the interstate character of the freight, it was proved that it was shipped from Casper, Wyo., and was transported as far as Wichita Falls, Tex., en route to Strawn, Tex. It is claimed that at Wichita Falls its destination was changed to Seymour, Tex. The only evidence of such change is that a railroad report of cars on hand on January 19, 1920, was introduced, giving Seymour as the destination, then marked on the car, instead of Strawn. No direction from any person to make the change is shown. Even if it be assumed that this change of destination was properly made, this would not of itself alter the nature of the shipment. No change of consignee was shown. It was still in the possession of the Fort Worth & Denver Railroad Company, which brought it to Wichita Falls.

There is no evidence that its movement to Seymour was otherwise than as a part of the entire interstate movement; Seymour being substituted for Strawn as the destination. No delivery had been made by the interstate carrier at Wichita Falls to the consignee or to another carrier. There is no proof of any intrastate contract having been made for the movement of the freight out of Wichita Falls. It is quite evident that the original interstate shipment had not been completed when the car reached Wichita Falls, and there is no reason to doubt but that it would have continued beyond Wichita Falls had the property, being so conveyed, not been stolen or converted. The jury was well warranted in holding that the property was at the time of the commission of the alleged crime being transported in interstate commerce. Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Ohio R. R. Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 586.

There is no complaint of any error committed by the court in his charge to the jury as to the necessity of their finding that the pipe was, when stolen, a shipment of interstate commerce. The record discloses no error therein.

We think the evidence was sufficient to warrant the verdict under either of the counts, especially under the third. That Seymour may have been substituted for Strawn at Wichita Falls as the destination of this car would not alter the fact that, when shipped, the car was consigned by National Supply Company to F. P. Williams as consignee at Strawn, Tex. This was but a part of the description of the carload of pipe and was a correct description of the shipment. That subsequently Seymour was substituted as the destination would not constitute a variance between the proof offered and the indictment.

The stealing of this particular car load was shown without contradiction. The agreement of the defendant Lanier to dispose of it and to receive one-fourth of the proceeds was shown. His knowledge of the relation of the parties to the railroad and his conversation, testified to by McCauley indicating that he knew they were not the owners of

the pipe, and that it was stolen was also clearly shown. The proof clearly shows a purpose to fraudulently convert this property, then moving in interstate commerce, to the use of these parties; Lanier to have a one-fourth part or his share of the proceeds. We think the evidence fully sustains the verdict.

[2] Error is assigned, in that the District Court did not of its own motion withdraw the case from the jury on account of a remark of the assistant district attorney. After rehearsing the proof offered by the prosecution, the assistant district attorney alluded to the evidence offered by the defendant, stating it was only evidence of good character offered by witnesses, who knew nothing of the transactions charged, "and the defendant did not take the stand." At this point defendant's counsel objected to the remarks as being prejudicial, and an improper reference to the defendant's privilege, about which no one was permitted to comment or refer to. The court sustained the objection, and he and the district attorney both stopped the assistant, and the court fully instructed the jury as to the defendant's privilege, and that they should not consider said remarks for any purpose, that the failure of defendant to take the stand was not even a circumstance to be considered by the jury, and did all that could be done to cure the improper remark of said assistant district attorney. No motion for a withdrawal of the case from the jury appears to have been made, and, in our opinion, the action of the court in dealing with the situation seems to have been a proper exercise of his discretion and duty.

The evidence in the case fully warranted the verdict, and there is nothing to indicate any prejudice suffered by the defendant. Gilmore v. United States (C. C. A.) 268 Fed. 719, 721.

The judgment of the District Court is therefore affirmed.

COCHRAN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1921.)

No. 5599.

Indians ⊂=27(5)—United States may maintain replevin for personal property held in trust for Indian.

Where the Indian Department, from money awarded to a Cherokee Indian in lieu of an allotment of land, pursuant to Act April 26, 1906, §§ 2, 17, and the regulations of the Secretary of the Interior, made thereunder, and held in trust for the Indian, purchased a team of mules, taking a bill of sale to the United States, reciting that the property was held for the Indian, the United States *held* to have title, which would support an action of replevin for the team against a purchaser from the Indian.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Robert L. Williams, Judge.

Action at law by the United States against W. G. Cochran. Judgment for the United States, and defendant brings error. Affirmed.

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

Alvin F. Molony, of Wagoner, Okl., for plaintiff in error.

C. W. Miller, U. S. Atty., of Muskogee, Okl., and L. K. Pounders, Sp. Asst. U. S. Atty., of Bristow, Okl.

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

MUNGER, District Judge. This proceeding in error challenges a judgment in favor of the plaintiff below in an action of replevin. A written stipulation waived trial by jury and set forth the agreed facts. The property involved is a team of mules. The questions as to the ownership and right of possession arise in this way:

Eliza Wolfe was a full-blood Cherokee Indian, duly enrolled. She had not received an allotment from the tribal lands, although she was entitled to one, because there was not sufficient land belonging to the tribe to give an allotment of land to each member. By section 2 of the Act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), it is provided:

"If any citizen of the Cherokee Tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient."

In November, 1911, there was set aside and apportioned to Eliza Wolfe out of the tribal funds, and in lieu of her allotment of lands, the sum of $651.21, an amount equal to twice the appraised value of an allotment of Cherokee land. In compliance with rules and regulations made by the Secretary of the Interior, this sum of money was then deposited with the United States Indian superintendent to the credit of Eliza Wolfe, for payment and disbursement according to law and the rules and regulations of the Interior Department.

In June, 1916, the Secretary of the Interior, acting through the Indian superintendent and other proper officers of the Indian Department, used the sum of $225 out of these funds in the purchase of this team from Frank Jones. At the time of the sale Jones executed a written bill of sale of the team, by which he sold and transferred them to "the United States of America, for Eliza Wolfe, a restricted Cherokee Indian, and her heirs," and delivered it to the proper officers of the Interior Department. The mules were then delivered into the possession of Eliza Wolfe. This bill of sale had a certificate attached reading as follows:

"Certificate of Notice.

"Department of the Interior, United States Indian Service, Five Civilized Tribes.

"Salina, Okla., Dec. 2, 1916.

"I hereby certify that in accordance with the regulations of the Interior Department, approved April 23, 1913, the above-described property was purchased for Eliza Wolfe, a restricted Cherokee Indian, with funds held in trust for him by the United States; that said property had been branded "U. S. I. D." (signifying that the purchase was made and the property is held by the United States through the Indian Department); and that the sale, mortgage, or other disposition of said property to be valid must be made in accordance with said regulations.

"[Signed] O. K. Chandler, F. C.[Official Title.]"

The bill of sale was duly filed for record. Afterwards, in November, 1918, the defendant purchased the mules from Eliza Wolfe for value and took possession of them. The claim made on behalf of the defendant is that the purchase of this personal property and the delivery of it to Eliza Wolfe vested in her the title to the property free from restrictions, and that there was no authority of law for the officers of the Indian Department to take a bill of sale, wherein the United States was named as purchaser, because of the language contained in section 2 of the Act of Congress of April 26, 1906, which has heretofore been quoted. This section does not fix a time when the Cherokee citizen was to be paid in money, except that the payment is to be made out of tribal funds. Section 17 of the same Act of Congress further treats of the subject in these words:

"That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior."

The Secretary of the Interior adopted rules and regulations by which sums of money exceeding $50 due to Indians, such as Eliza Wolfe, should be deposited with the Indian superintendent as individual moneys to the credit of such Indian, to be disbursed under the direction of the Secretary of the Interior in accordance with the district agent system, and these rules were in force when the purchase of these mules was made. The United States was therefore holding this money in trust for Eliza Wolfe, and when the purchase was made it paid out these moneys as trust funds. It is not material to this inquiry whether the United States could have been compelled to relinquish the trust and to pay the money to Eliza Wolfe. It had not done so. The seller transferred his legal title by the bill of sale to the United States, as trustee for the use of Eliza Wolfe. In this action of replevin it was shown that the United States had the legal title, and therefore had the right of possession of the property. Bohlen v. Arthurs, 115 U. S. 482, 485, 6 Sup. Ct. 114, 29 L. Ed. 454; Dixwell v. Jones, 2 Dill. 184, Fed. Cas. No. 3,937, 34 Cyc. 1389. The decision in McCurdy v. United States, 246 U. S. 263, 38 Sup. Ct. 289, 62 L. Ed. 706, does not govern this case, because the money which in that case stood to the credit of the Osage Indian was paid for land which was not conveyed to the United States in trust for the Indian, but which was conveyed to a third person as trustee for the Indian, and it was not shown that any restriction of alienation was contained in that deed. David v. Youngken, 250 Fed. 208, 162 C. C. A. 344; United States v. Law, 250 Fed. 225, 226, 162 C. C. A. 354.

The judgment will be affirmed.

In re ROSENSTEIN.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 38.

Bankruptcy ⟸217(3)—Order vacating stay of action in state court held proper.

Where, in action in state court against bankrupt prior to his adjudication, his property was attached, and released on a surety company's undertaking, and, on his adjudication, the bankruptcy court made an order staying the entry of judgment in the action, such order *held* properly vacated by the bankruptcy court on a showing that the surety company had no property belonging to the bankrupt, nor collateral for the undertaking, and that the undertaking did not require the issuance of execution against the bankrupt, and that the surety company was liable on the mere entry of judgment, so that it appeared that no prejudice was created against the bankrupt's estate, nor would loss be occasioned to it if judgment were recovered against the surety company: for Bankruptcy Act, § 11 (Comp. St. § 9595), is permissive, not mandatory, and is addressed to the discretion of the trial judge.

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

In the matter of Harris Rosenstein, bankrupt. The bankrupt petitions to revise an order vacating a previous order staying an action in the state court. Order affirmed.

Isaac Steinhaus, of New York City, for petitioner.

Isidor E. Schlesinger, of New York City, for respondents.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. A voluntary petition in bankruptcy was filed by the bankrupt on December 31, 1920, and there was an adjudication in bankruptcy on the same day. The firm of Lederer & Wincorn on October 25, 1920, instituted an action in the state Supreme Court against the bankrupt for the recovery of $2,165.85, based upon a trade acceptance which was accepted by the bankrupt and was dishonored at maturity. A writ of attachment against the property of the bankrupt was issued in the state Supreme Court. On October 30, 1920, the property so attached was released upon the filing of an undertaking executed by the Maryland Surety Company wherein and whereby it undertook and covenanted to pay any judgment not exceeding $2,500, which the plaintiffs in the Supreme Court action may recover. On the day of the adjudication in bankruptcy, the District Court entered an order staying the entry of judgment in the Supreme Court action to 12 months after December 31, 1920, unless the bankrupt should previous to that time apply for a discharge, and in that event until the question of such discharge should be determined.

On the 21st of March, 1921, on an affidavit of one of the plaintiffs in the Supreme Court action, and upon notice to the bankrupt and the attorneys for the trustee, an order was entered vacating the stay in the action in the state Supreme Court. This order vacating such stay

recites that the attorneys for the trustee consented in open court to the granting of the motion, but the attorneys for the bankrupt opposed it. When the bond of indemnity was issued and approved, no deposit as collateral security was made by the bankrupt, nor has any collateral been deposited with the Maryland Surety Company. The petitioner makes no claim that the Maryland Surety Company has in its possession any property belonging to the bankrupt or that it has any collateral for this undertaking. The petition for the vacation of the stay prayed that judgment might be entered to compel the payment by the Maryland Surety Company, and it is alleged that payment by it will in no wise prejudice the bankrupt or the estate of the bankrupt. It also appears that the undertaking of the Maryland Surety Company does not require the issuance of execution against the bankrupt and liability is visited upon the casualty company upon the mere entry of the judgment.

It thus appears that no prejudice is created against the bankrupt's estate, nor will loss be sustained by it, if a judgment be recovered against the Maryland Surety Company. Plaintiff, in the suit in the state court, has the right to proceed to judgment in that court, and may collect on the judgment against the surety. The question of whether a prejudice is thus created against the bankrupt's estate, or loss will be sustained by it, is a question to be determined by the bankruptcy court, and not by the state court; but the state court has full cognizance of the action to the entry of judgment against the surety company. Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403. The trustee of this bankrupt has no interest whatever in the claim against the surety company. The creditors' rights and equities are questions which should be disposed of by the state court. In re Mercedes Import Co., 166 Fed. 427, 92 C. C. A. 179.

Where the practice of the state court permitted a special judgment to be entered against the bankrupt, with a perpetual stay of execution to enable the creditor to recover against the sureties, the judgment of that court, refusing leave to the bankrupt defendant to file a plea setting up his discharge, was affirmed by the Supreme Court in Hill v. Harding, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083.

The state court has refused to let the bankrupt amend his answer, so as to set up his discharge, and thus prevent the plaintiff from obtaining a judgment on which to enforce the liability of the surety on a bond to dissolve an attachment, and also subsequently refused to vacate the attachment, although the levy was made within four months of the filing of the petition. This was done in order to give an opportunity to the creditor to recover against the sureties. King v. Block Co., 125 App. Div. 922, 109 N. Y. Supp. 1151; 126 App. Div. 48, 111 N. Y. Supp. 102, affirmed 193 N. Y. 608, 86 N. E. 1126.

Section 11 of the Bankruptcy Act (Comp. St. § 9595) is not mandatory, and does not require the District Judge to grant a stay. It is permissive only, and is therefore addressed to the wise discretion of the District Judge. It appearing that the estate of the bankrupt will not be affected, either by property being taken therefrom, or the estate

enhanced by the entry of judgment in the Supreme (state) Court action, we hold the District Court properly exercised its discretion in vacating the stay.

Order affirmed.

UNITED STATES v. NELSON et al.

THE CITY OF OMAHA.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3687.

1. **Salvage ⟸13—Towing steamship vessel into port held salvage service of low order.**

   Where a steamship valued at $1,920,000, with a cargo worth $606,475, while at a point in the open sea about 151 miles from San Blas and 243 miles from Manzanillo, which was directly in the path of vessels en route between the United States ports and the Canal Zone, was unable to proceed because the boilers failed entirely, and had to be towed into port by another steamship, the service rendered was a salvage service, although of low order.

2. **Salvage ⟸34—Award for salvage service sustained.**

   Where a disabled steamship was towed for 2½ days, causing the towing vessel to lose that much time, and involving an extra consumption of 550 barrels of fuel oil and 10 gallons of engine oil, and provisions and wages for the crew covering 2½ days, the weather being fair, so that the towing vessel was at no time in danger, an award of two months' pay, on a libel for salvage filed by the first, second, and third mates and 24 members of the crew of the towing vessel, will not be disturbed.

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

Libel by R. J. Nelson and others against the United States to recover for salvage services rendered the steamship City of Omaha. Decree for libelants, and the United States appeals. Affirmed.

John T. Williams, U. S. Atty., and Frederick Milverton, Sp. Asst. U. S. Atty. in Admiralty, both of San Francisco, Cal.

H. W. Hutton, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The steamship City of Omaha, belonging to the United States, of the approximate value of $1,920,000, and with a cargo of the value of about $606,475, while on a voyage from Baltimore, Md., to Yokohama and Kobe, Japan, had boiler and engine trouble before reaching Colon, and also after passing through the Canal, on the way to San Francisco, finding it necessary to put into the inner harbor of Salina Cruz, remaining there until May 17, 1920, while her boilers were undergoing repairs. On that day she left that harbor and proceeded on her way, having further trouble, necessitating the stopping of her engines while boiler repairs were made at sea.

May 23 her master wirelessed the agents of the vessel at San Francisco for advice as to what should be done in the event that the boilers failed entirely, and on May 26 he again wirelessed the agents that the vessel was making very poor headway, and that the situation seemed to be getting worse, and asked for suggestions. In reply the agents wirelessed him that the United States Shipping Board had wirelessed the steamship Cockaponset and the steamship Diablo, also belonging to the United States, instructing the nearest of those vessels to proceed to Magdalena Bay and tow the City of Omaha to San Francisco, and directing the City of Omaha to call upon the navy for assistance, if necessary. That last-mentioned message was overheard by the Cockaponset, whereupon her master directed her wireless operator to call up the City of Omaha and ask if any assistance was required. This was done, and resulted in an affirmative reply.

The vessels were then about 20 miles apart, the Cockaponset arriving at the City of Omaha at noon May 29, 1920. At that time all of the boilers of the latter were out of commission, and she was steered by her aft hand gear. The Cockaponset then took the City of Omaha in tow and proceeded with her to San Pedro, Cal., where her towline was cast off at 6:30 a. m. of June 5, 1920. For two days, namely, May 31 and June 1, the City of Omaha was steered by steam, but during the remainder of the time her hand steering gear had to be used. During the time in question the Cockaponset was bound for San Francisco from Panama, and the approximate time she lost was about 2½ days, and involved only an extra consumption of 550 barrels of fuel oil and 10 gallons of engine oil, and provisions and wages for the crew covering 2½ days. She lost a log line and rotator because of the poor steering of the City of Omaha, but, the weather being at all of the time fair, the Cockaponset was at no time in danger. The towing lines were furnished by the City of Omaha and were passed by her crew to the Cockaponset. The disabled vessel was almost directly in the path of vessels en route between United States ports and the Canal Zone, and although when her boilers were out of commission she could not be lighted by electricity, yet she had oil lamps available. When the City of Omaha was reached by the Cockaponset, she was in the open sea 151.65 miles from San Blas, and 243.7 miles from Manzanillo, with a sound hull and with wireless on board.

The libel was filed by the first, second, and third mate and 24 members of the crew of the Cockaponset, each of whom was awarded two months' pay by the decree appealed from.

[1, 2] It is clear, we think, that the service rendered the City of Omaha was a salvage service, although of low order, and under the ruling of this court in the case of Steamer Avalon Co. v. Hubbard S. S. Co., 255 Fed. 854, 856, 167 C. C. A. 182, we do not think we would be justified in interfering with the award. It has often been said that appellate courts are reluctant to disturb the decision of a trial court in the matter of an award in a salvage case, there being no exact criterion by which such an award can be fixed.

The decree is affirmed.

NORTH TEXAS OIL CO. v. FULLER, REASER & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1921.)

No. 3658.

1. **Brokers ⟸52—Delivery of acceptance by telegram to a telegraph company, the agreed transmitting agent, held sufficient under option contract, so as to entitle broker to commissions.**

   Where the parties to an option contract for sale of oil leases agreed that notice of intention to exercise the option should be transmitted by telegram, the delivery by the option holder to the telegraph company for transmission to vendor before expiration of the option was sufficient to make the contract binding, so as to entitle brokers to commissions though vendor did not receive the message until after expiration of prescribed time.

2. **Brokers ⟸52—Transmission of option acceptance to vendor's broker held sufficient to entitle brokers to commissions.**

   Where the holder of an option for the purchase of oil leases transmitted to brokers, with whom the vendor had listed the property for sale, notice of its intention to exercise the option before the expiration of the option period, such notice was in effect notice to the vendor, and makes the contract binding, so as to entitle the brokers to commissions, though the brokers did not deliver notice to vendor until after expiration of the option period.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action by Fuller, Reaser & Co. and others against the North Texas Oil Company to recover commissions for the sale of property. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. T. Montgomery, of Austin, Tex., for plaintiff in error.

Henry F. Turner, of Wickliffe, Ky., and W. E. Fitzgerald, of Wichita Falls, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This suit was brought by Fuller, Reaser & Co. and M. T. Killion & Co., two copartnerships (hereinafter styled plaintiffs), against the North Texas Oil Company (hereinafter styled defendant), to recover commissions amounting to $5,000 alleged to be due them from the North Texas Oil Company for negotiating a sale for it of an oil lease on property near Wichita Falls, Tex. The facts were that the defendant had listed with plaintiffs said oil lease for sale at $75,000, all sums over that to be a commission to plaintiffs for selling the property.

Plaintiffs, on February 8, 1920, negotiated a tentative sale to one Newberry for $80,000. Newberry was not quite resolved on completing the sale, because he was considering the purchase of some property in Fort Worth, Tex. The proposed sale was reported to the defendant, who agreed that Newberry should have until 12 o'clock noon on February 9th to signify his acceptance. Newberry went to Fort Worth, and on February 9th, at 11:20 a. m., filed a telegram with the

telegraph company, at Fort Worth, addressed to plaintiff Killion & Co. at Wichita Falls. It was received in Wichita Falls at 11:35 a. m., and delivered a few minutes thereafter at Killion & Co.'s office. Killion states he received it a little before 12 o'clock noon. Notice of it was given to Haynes, the defendant's agent, who had authorized the brokers to give the option, about 1:30 p. m.

The defendant's agent refused to carry out the sale, because he claimed the acceptance came too late. The plaintiffs proved that Newberry was ready and able to complete the purchase, and that the refusal of the defendant to convey the lease alone had prevented the consummation of the sale. A verdict was returned for the plaintiffs.

The points made in plaintiff in error's brief and argued in this court involve the single question whether the agreement between the proposing vendor and vendee was that the vendee should accept the option by telegram sent before 12 o'clock on February 9, 1920, or whether he must have communicated the acceptance to the vendor at Wichita Falls before 12 o'clock.

[1] This issue was submitted by the court to the jury, and the error assigned is that under the proof the court should have directed a verdict for the defendant. It is not disputed that, if the telegraph company was agreed on by the parties as the medium for giving notice of acceptance, the time of filing the telegram with it would be the time of acceptance, and such filing would be the required notice of acceptance to the vendor. Bowen v. Speer (Tex. Civ. App.) 166 S. W. 1183; Western Union Telegraph Co. v. E. F. Connell Land Co., 61 Tex. Civ. App. 168, 128 S. W. 1162; 6 R. C. L. p. 615; 13 Corp. Jur. p. 300.

The charge of the court left it to the jury to say whether the agreement was that the option should be accepted by telegram, or whether the acceptance must be communicated at Wichita Falls to the vendor, in order to be binding. The proof fully warranted the jury in finding that the sending of a telegram was agreed upon as the method of acceptance, and that the filing of said telegram with the telegraph company was its delivery to the other party.

[2] But in this case the evidence was undisputed that the telegram reached Wichita Falls at 11:35 a. m., and was received in Killion's office in a few minutes thereafter. Killion himself testified that he received it a few minutes before 12 o'clock. Killion was one of the agents of the vendor, with whom it had listed the property for sale, and the delivery of the telegram to Killion was a delivery to the vendor.

The judgment of the District Court is affirmed.

UNITED STATES v. BIGHORN SHEEP CO. et al.

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

No. 5353.

1. **Appeal and error ⟸76(1)—"Final decree," reviewable by appeal, defined.**
Under Judicial Code, § 128, as amended (Comp. St. § 1120), giving the Circuit Courts of Appeals jurisdiction to review final decisions of the District Courts, a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. **Appeal and error ⟸80(6)—Order dismissing one or more of several causes of action not appealable.**
An order of a District Court, dismissing one or more of several causes of action alleged in a bill, but leaving a cause or causes of action pending, is not a final decision between the parties, from which complainant may appeal.

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

Suit in equity by the United States against the Bighorn Sheep Company and others. From an order of the District Court, the United States appeals. Appeal dismissed.

Charles L. Rigdon, U. S. Atty., and David J. Howell, Asst. U. S. Atty., both of Cheyenne, Wyo.

William A. Riner, of Cheyenne, Wyo., for appellees.

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

MUNGER, District Judge. This appeal is prosecuted from an order sustaining a motion to dismiss portions of the plaintiff's bill. The object of the suit is the cancellation of a large number of patents to public lands, alleged to have been procured from the United States by fraud of the entrymen. It embraces 98 entries, made under the laws relating to the disposition of homesteads, desert lands, timber and stone, and isolated tracts. Each entry is separately described, and the facts relating to it are set out, with the object of making a case for cancellation of the particular patent covering it. The bill alleges that the several entries were not made in good faith, and that the several entrymen did not intend to comply with the requirements of the law, and that each entry was made for the benefit of and pursuant to an agreement with the present holder of the title, the Bighorn Sheep Company, or its predecessor in interest, that the title would be conveyed to it as soon as the patent was issued, and that it was so conveyed. Other averments are intended to allege notice of the inculpatory facts by the several defendants and to excuse the delay in commencing this suit.

The defendant corporation, who is alleged to be the present holder of the title, and other defendants, who are alleged to have made the

immediate conveyance to it, filed motions to dismiss portions of the bill because they stated no ground for relief, because any cause of action stated therein was barred by the special statute of limitation applying to such suits, and because the plaintiff was guilty of inexcusable laches. The court sustained the motion as to the plaintiff's allegations relating to 34 of the 98 entries of land, and overruled it as to the allegations relating to the other entries. From this order this appeal was taken.

[1] Under the statutes conferring jurisdiction upon the courts of appeal of the United States, an appeal can only be taken from a final decree, unless the acts of Congress have made exceptions. A decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. St. L., I. M. & S. R. R. Co. v. Southern Express Co., 108 U. S. 24, 28, 2 Sup. Ct. 6, 27 L. Ed. 638; Bank of Rondout v. Smith, 156 U. S. 330, 333, 15 Sup. Ct. 358, 39 L. Ed. 441; Heike v. United States, 217 U. S. 423, 429, 30 Sup. Ct. 539, 54 L. Ed. 821; Carmichael v. City of Texarkana, 116 Fed. 845, 847, 54 C. C. A. 179, 58 L. R. A. 911.

[2] A dismissal of one of several causes of action, or of portions of a petition at law, or of a bill in equity, but leaving a cause of action pending, is not a final judgment between these parties, from which the plaintiff can appeal. Holcombe v. McKusick, 20 How. 552, 554; Ex parte National Enameling Co., 201 U. S. 156, 160, 26 Sup. Ct. 404, 50 L. Ed. 707; Marden v. Campbell Printing-Press & Mfg. Co., 67 Fed. 809, 812, 15 C. C. A. 26; Western Electric Co. v. Williams-Abbott Electric Co., 108 Fed. 952, 957, 48 C. C. A. 159; Sheppy v. Stevens, 200 Fed. 946, 948, 119 C. C. A. 330; Gladys Belle Oil Co. v. Mackey, 216 Fed. 129, 131, 132 C. C. A. 373; Wuerpel v. Canal-Louisiana Bank & Trust Co., 231 Fed. 934, 936, 146 C. C. A. 130; 3 Corp. Jur. 483, 502.

The order of the court disposed of only a part of the issues involved between the plaintiff and the defendants who made the motion of dismissal, leaving a suit pending between them for the cancellation to other entries, and therefore was not a final decree. The appeal must therefore be dismissed, as prematurely taken from this order of the court.

HEALEY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 4, 1921.)

No. 2698.

Criminal law ⇐980(1)—Intoxicating liquors ⇐210—Information held to charge transportation; sentence held not authorized under information.

An information charging that defendant did "unlawfully transport in a Buick automobile certain intoxicating liquor" charges the offense specifically described in National Prohibition Act Oct. 28, 1919, tit. 2, § 3, for which the punishment prescribed by section 29 is a fine of not more than $500 for a first offense, and on a plea of guilty defendant cannot

lawfully be sentenced to imprisonment for maintaining a common nuisance by keeping liquor in a vehicle in violation of section 21.

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 Thomas Healey. From the judgment defendant brings error. Reversed.

Andrew Hourigan, of Wilkes-Barre, Pa., and F. A. Witmer and J. P. Carpenter, both of Sunbury, Pa., for plaintiff in error.

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

MORRIS, District Judge. Healey pleaded guilty to an information charging that at a specified time he did "unlawfully transport, in a Buick automobile, certain intoxicating liquor," in violation of "Title 2 of the act of Congress of October 28, 1919," commonly known as the Volstead Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305). The trial court being of the opinion that the defendant thereby stood convicted of "maintaining, for the time being, a common nuisance," in violation of section 21 of the act, imposed a sentence of both fine and imprisonment in conformity with that section, which provides that—

"Any * * * vehicle * * * where intoxicating liquor is * * * kept * * * in violation of this title * * * is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both."

Thereupon the defendant, denying the legality of the sentence, sued out this writ of error. He relies upon sections 3 and 29 of title 2 of the act. Those sections, so far as here pertinent, are:

"Sec. 3. No person shall * * * transport * * * intoxicating liquor except as authorized in this act. * * *" (No special penalty is prescribed for this offense.)

"Sec. 29. * * * Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500."

As the defendant pleaded guilty only to the offense of which he stood charged by the information and as he could be legally sentenced only for the offense of which he stood convicted by his plea, the sole question involved, as we see it, is: With what offense does the defendant stand charged by the information? That instrument expressly alleges that the defendant did "unlawfully transport * * * intoxicating liquor," the offense proscribed by section 3 of the act. The further allegation that the transporting was done "in a Buick automobile" merely specified the particular transportation with which the defendant was charged or the manner of its commission and did not, we think, convert the offense charged from that of transporting under section 3 into one that the defendant "kept," in violation of the act, intoxicating liquor in a "vehicle" and thereby maintained "a common nuisance" contrary to the provisions of section 21. The information uses the language of section 3, but does not in any particular use the language

of section 21. To be construed as stating an offense under the latter section the information would have to be aided by intendment. This may not be done. United States v. Post (D. C.) 113 Fed. 852, 854; United States v. Cruikshank, 92 U. S. 542, 557, 558, 23 L. Ed. 588; 14 R. C. L. 173. The information did not apprise the defendant that he stood charged under section 21. We think the defendant's position is well taken. Furthermore, the government did not appear at the argument in this court and does not now attempt to support its contention adopted by the court below.

Not being called upon in this case to do so, we do not express any opinion as to whether proof that a person in violation of the act transported intoxicating liquor in a vehicle from place to place will support an information or indictment for maintaining a common nuisance under section 21 of the act.

As the penalty prescribed for the offense with which the defendant is charged and to which he has pleaded guilty does not include imprisonment, the judgment below is reversed.

DALEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 4, 1921.)

No. 2722.

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 Elmer Daley and John Letcher. From the judgment, defendants bring error. Reversed.

Andrew Hourigan, of Wilkes-Barre, Pa., for plaintiffs in error.

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

PER CURIAM. The questions here presented are the same as those in Healey v. U. S., 276 Fed. 711.

For the reasons stated in the opinion rendered in that case, the judgment below is reversed.

FELMUN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 4, 1921.)

No. 2723.

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 Jack Felmun. From the judgment, defendant brings error. Reversed.

Andrew Hourigan, of Wilkes-Barre, Pa., for plaintiff in error.

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

PER CURIAM. The questions here presented are the same as those in Healey v. U. S., 276 Fed. 711.

For the reasons stated in the opinion rendered in that case, the judgment below is reversed.

ROSENTHAL v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)
No. 3669.

Criminal law ⊜878(4)—Verdict of guilty on one count and not guilty on another embracing the first held inconsistent.

Where a count charging that defendant bought and received stolen property with knowledge that it was stolen, in violation of Act Feb. 13, 1913 (Comp. St. § 8603, 8604), and a count charging him with having the same property in his possession with like knowledge, were based on the same transaction, and the evidence showed only one transaction, a verdict finding defendant not guilty on the first count, but guilty on the second count, was wholly inconsistent, and required a reversal.

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

Joseph Rosenthal was convicted of having stolen property in his possession with knowledge that it was stolen, etc., and he brings error. Reversed and remanded.

The plaintiff in error was, together with Morris Rosenthal and Arthur F. Fitch, indicted in two counts, by the first of which they were in effect charged with having, at a certain time and place within the jurisdiction of the court below, willfully and feloniously bought and received 39 cases of certain described cigarettes, containing 5,000 each, of the approximate value of $1,462.20, which had theretofore been stolen from a certain described car of the Southern Pacific Company, at the time constituting a part of a shipment of freight in interstate commerce; the defendants well knowing that the cigarettes had theretofore been so stolen.

The second count in effect charged the defendants with having at the same time and place the same cigarettes in their possession under like circumstances and with like knowledge.

The trial resulted in a verdict of not guilty under the first count as to all of the defendants, and not guilty under the second count as to the defendants Morris Rosenthal and Fitch, but finding the plaintiff in error guilty under the second.

Joseph E. Bien, of San Francisco, Cal., for plaintiff in error.

John T. Williams, U. S. Atty., and Thomas J. Sheridan, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). As will be seen from the foregoing statement, the plaintiff in error was by the jury found not guilty of having bought and received the cigarettes, but guilty of having them in his possession at the same identical time and place, and with the like knowledge in each instance of their having been stolen goods. The act of Congress upon which the indictment was based makes criminal the "buying, receiving or having in possession" stolen property, with knowledge of its stolen character. 37 Stat. p. 670 (Comp. St. §§ 8603, 8604).

It was practically conceded at the trial that the cigarettes were stolen from the railroad company by two of its employees. The evidence

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

*Rehearing denied February 20, 1922.

showed without conflict that the plaintiff in error was the active agent of the elder Rosenthal, who was his father, and conducted the transaction in question on his behalf with the thieves; and there was ample evidence given to sustain the verdict of guilty against the plaintiff in error under the second count. The difficulty is that there was but one transaction involved in the two counts of the indictment, which was based upon the statute mentioned, and, according to the evidence, but one transaction between the plaintiff in error and the thieves. By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial. See Morgan v. Devine, 237 U. S. 632, 639, 640, 35 Sup. Ct. 712, 59 L. Ed. 1153; Sections 1052, 1062, Bishop's Criminal Law (8th Ed.).

Judgment reversed, and case remanded for a new trial.

MILLER, Alien Property Custodian, v. ROUSE et al.

(District Court, S. D. New York. November 22, 1921.)

1. **War ⇐12—Alien Property Custodian may recover property determined by him to belong to alien enemy.**
   A determination by the Alien Property Custodian that a demand against an estate is a debt owing to an alien enemy is conclusive for the purpose of a proceeding to enforce his demand for the payment of such claim to him.

2. **War ⇐12—A demand by the Alien Property Custodian for a legacy as due to an alien enemy only substitutes him in place of the legatee.**
   A demand by the Alien Property Custodian on the executors of an estate for a legacy as bequeathed to an alien enemy is not a determination by him that the legacy is presently payable, but merely substitutes him to the rights of the legatee, and does not entitle him to a summary order for its payment.

3. **War ⇐33—Demand for property by Alien Property Custodian served after declaration of peace held ineffective.**
   A demand by the Alien Property Custodian for property, signed before, but not served until after, the declaration of peace with Germany, July 2, 1921, *held* ineffective to vest title to the property in the Custodian.

Petition by Thomas W. Miller, Alien Property Custodian, against Harry G. Rouse and Mortimer Rouse, as executors of Callman Rouse, deceased. On motion for summary order. Granted in part.

Motion on petition by the Alien Property Custodian to compel the summary payment by the executors of Callman Rouse of certain claims alleged to be due from Ruth Marcuse, formerly an alien enemy. One was for $4,500, found by the Custodian to have been due as a debt, and the other, $10,000, found to be due as a legacy.

George Winship Taylor, of Baltimore, Md., for Alien Property Custodian.

John M. Stoddard, of New York City, for executors.

LEARNED HAND, District Judge. [1] Two demands were made on the executors on September 23, 1919. One of these determined that there was a "certain obligation and indebtedness represented by a certain indebtedness in the sum of $4,500," which the Alien Property Custodian thereupon demanded. The respondents object that this debt of $4,500 was an unexecuted gift. Perhaps so, but the Custodian has determined that it was a debt, and his determination is conclusive for the purposes of this motion. Central Trust Co. v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. ——. Section 5 of the resolution of July 2, 1921, preserves the right of the United States to such property, and this proceeding is merely to enforce the capture so made. So much of the motion is granted.

[2] To the legacy of $10,000 different considerations apply. The other demand made on the 23d day of September, 1919, determined that the alien, Ruth Marcuse, had "a certain right, title, and interest as a beneficiary under the will of Callman Rouse," and this was duly demanded, the demand operating as a capture, just as did the other of even date. However, this capture did no more than substitute the Custodian in the place of the beneficiary; it did not profess to determine what her rights were as such, and in the absence of such determination there is no specified fund or obligation on which the capture can operate. The capture has put the Custodian in the place of Ruth Marcuse, but he must work out his rights in accordance with the determination; he becomes entitled to all rights which she had as beneficiary under the will of Callman Rouse and no more. Kahn v. Garvan (D. C.) 263 Fed. 909, 912. No summary order can go on that demand; the Custodian is merely a legatee under the will.

[3] Still a third demand was served on the executors, this one on July 5, 1921, three days after the declaration of peace as now promulgated by the President's recent proclamation. This demand was signed before July 2, 1921, and determined that a "certain obligation and indebtedness, consisting of a bequest of $10,000 * * * is by you owing" Ruth Marcuse. I may assume that, as this determined that a legacy was "owing," it meant immediately owing, and that it was the equivalent of deciding that there was a debt due from executors. If the demand was valid when made, an order should go upon it, and the question therefore is presented whether the Custodian had that right on July 5, 1921.

The case therefore comes down to this: Was the capture completed by the signing of the demand or must it be served? The word "demand" does not appear in the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½a et seq.) at all, which uses the word "require" in its stead. Section 7 (c), (d). The executive regulations define "require" as equivalent to "demand," but provide (section 2) for not only a "demand," but for a "notice," to be served on the person who holds the property. Normally a "demand" should include the communica-

tion of the claim to the person against whom it is directed. Probably in section 2 of the executive order this is not its meaning; it is to be treated as a completed "demand" when once drawn up. Yet under section 2 (c) it is only after notice that the property vests in the Alien Property Custodian. Therefore it is apparent that under the executive orders the capture is made to depend upon the service of the demand, and this conforms with the meaning of "require" in the act itself.

The Custodian, however, argues that, as the peace resolution (section 5) reserved to the United States all property which "has been the subject of a demand," the mere signing of the demand is enough. I am clearly of another opinion. The property does not become the "subject" of a demand till those acts are done which would vest the property in the United States, and that, as I have said, even under the executive orders themselves, is only when the demand is served. It would perhaps be hazardous to assume that Congress could not make the mere determination of the Custodian, though never served, the equivalent of a capture, but I should have to have the clearest possible evidence of intention to suppose that it had done so. Normally, capture is seizure, and seizure is an act of forcible taking. Of course, under this statute no forcible taking is necessary; a demand is enough, just as a defendant in ordinary actions is to-day merely served with notice of the suit. No capias is necessary; if a capias could have been executed, the notice is held an equivalent. In the case of choses in action, where the property cannot be forcibly taken, notice is all that can be given, unless the enemy's debtor is himself to be seized. The analogy of garnishment is directly in point.

This is certainly the procedure which the statute intended to be used, and the word "require" admits of no other reasonable understanding. Similarly property does not become "subject" to a "demand" till its possessor or the obligor of a chose in action has had notice of it. That alone is a symbolic capture. The conclusion necessarily follows that the service on July 5, 1921, was too late, and that the capture was never made. As to this claim the petition is denied.

REISS v. NATIONAL QUOTATION BUREAU, Inc.

(District Court, S. D. New York. November 15, 1921.)

Copyrights ⊜5—Cable code book held subject of copyright; "writing of an author."

A code book containing a large number of coined words having no known meaning, but adapted to be given an agreed meaning for the purpose of cable correspondence, *held* the writing of an author, within article 1, § 8, of the Constitution, and a proper subject of copyright, under Act March 4, 1909 (Comp. St. § 9517 et seq.).

In Equity. Suit by Edward W. Reiss against the National Quotation Bureau, Inc. On motion to dismiss bill. Denied.

This is a motion under the equity rules to dismiss a bill of complaint upon a copyright. The only question raised is of the validity of the copyright,

which was for a book called " 'Simplix' Pocket Blank Code." It contained a title page not alleged to be infringed, and its contents consisted of nothing but 6,325 coined words of 5 letters each, numbered consecutively from 38,495 to 44,819, inclusive. The words had no meaning, but were all susceptible of pronunciation. They were carefully prepared in accordance with the requirements of the cable companies to serve as a cable code, and the book was sold to those who might make out of it a private code, by agreeing upon meanings to be given to as many of the coined words as they chose. The publisher could also use the words as the basis for codes made up by himself.

Alan N. Mann, of New York City, for the motion.
George H. Gilman, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). Section 4 of the Copyright Act of 1909 (Comp. St. § 9520) enacts that copyrightable works "shall include all the writings of an author," and section 5 (section 9521) especially provides against taking the enumeration which it contains as exclusive. The act must therefore be understood as meaning to cover all those compositions which, under the Constitution, can be copyrighted at all. The defendants place themselves, as indeed they must, squarely upon the meaning of section 8 of article 1. If a series of coined words such as this is not the "writing" of an "author," as the Constitution uses that word, then the motion succeeds; if not, it fails.

If the defendants' point is good, it can only be because, to be within the Constitution, the "writing" must already have a meaning. These words have a prospective meaning, but as yet they have not received, it, like an empty pitcher. Suppose some one devised a set of words or symbols to form a new abstract speech, with inflections, but as yet with no meaning, a kind of blank Esperanto. The case would be approaching the plaintiff's, though not there, because the words would, indeed, express relationship. Mathematics has its symbols, indeed a language of its own, Peanese, understood by only a few people in the world. Suppose a mathematician were to devise a new set of compressed and more abstract symbols, and left them for some conventional meaning to be filled in. Still we should not be quite at the plaintiff's words, but again we should not be far away. The distinction is real, but for practical purposes seems to me irrelevant.

Not all words communicate ideas; some are mere spontaneous ejaculations. Some are used for their sound alone, like nursery jingles, or the rhymes of children in their play. Might not some one, with a gift for catching syllables, devise others? There has of late been prose written, avowedly senseless, but designd by its sound alone to produce an emotion. Conceivably there may arise a poet who strings together words without rational sequence—perhaps even coined syllables—through whose beauty, cadence, meter, and rhyme he may seek to make poetry. Music is not normally a representative art, yet it is a "writing." There are meaningless rhymes—e. g., "Barbara celarent" which boys use in their logic, or to remember their paradigms or the rules of grammar.

Works of plastic art need not be pictorial. They may be merely patterns, or designs, and yet they are within the statute. A pat-

tern or an ornamental design depicts nothing; it merely pleases the eye. If such models or paintings are "writings," I can see no reason why words should not be such because they communicate nothing. They may have their uses for all that, æsthetic or practical, and they may be the productions of high ingenuity, or even genius. Therefore, on principle, there appears to me no reason to limit the Constitution in any such way as the defendants require.

I can find nothing in the American reports remotely relevant. Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841, is too foreign to the case at bar to deserve comment. Higgins v. Keuffel, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470, turns on quite another point. In National etc., Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, there was no composition whatever. In Ager v. Collingsridge, 2 Times L. R. 291, however, the point was squarely decided in the plaintiff's favor, though without comment. In Ager v. P. & O. S. S. Co., L. R. 26 Ch. Div. 637, it appears not even to have been argued by the defendant. Now it is argued that these cases are distinguishable, because they arose under an act of Parliament which was not limited by any Constitution. So, indeed, they were, and if our Constitution embalms inflexibly the habits of 1789 there may be something in the point. But it does not; its grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise thereafter. Of course, the new subject-matter must have some relation to the grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.

The motion is denied.

THE ANSALDO SAVOIA.

THE RIPOGENUS.

(District Court, E. D. Virginia. December 9, 1921.)

1. **Collision ⇐82(2)—Vessel holding speed in fog held at fault for collision with vessel signaling.**
   Master's failure to stop engines during heavy fog on hearing fog signals *held* to render vessel at fault for collision with vessel signaling.

2. **Collision ⇐84—Vessel giving signal indicating stop, but continuing, held to have burden of proving fault did not cause collision.**
   Sounding signal in fog indicating that vessel had stopped, when still making considerable headway, in violation of International Rules, art. 15 (Comp. St. § 7853), *held* to render the vessel at fault, in absence of a showing that such fault could not have been one of the collision causes; the vessel having the burden of showing, not merely that such fault might not have been one of the collision causes, but that it could not have been.

3. **Collision ⇐85—Evidence held to show operation of vessel at immoderate speed in fog.**
   In libel for damages sustained in collision in fog, evidence *held* to show operation of vessel at an immoderate rate of speed, in violation of International Rules, art. 16 (Comp. St. § 7854).

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

4. Collision ⊂⊃82(2)—Vessel which failed to stop on hearing fog signals of other vessel held at fault.

In libel for damages sustained in collision in fog, vessel which failed to stop in dense fog, when fog signals of other vessel were heard, or should have been heard, in view of frequency with which such signals were sounded, *held* at fault for collision, though other vessel gave signal indicating that it had stopped, where there were no visible objects nor well-defined paths by which the one vessel might conclusively find the location or direction of the other.

In Admiralty. Libel by one Revello, master of the steamship Ansaldo Savoia, against the steamship Ripogenus, with cross-bill by the master of the steamship Ripogenus against the steamship Ansaldo Savoia. Decree finding both vessels at fault.

Hughes, Little & Seawell and Henry H. Little, all of Norfolk, Va., for the Savoia.

Hughes, Vandeventer & Eggleston and Braden Vandeventer, all of Norfolk, Va., and Blodgett, Jones, Burnham & Bingham and E. E. Blodgett, all of Boston, Mass., for the Ripogenus.

GRONER, District Judge. Cross-libels were filed by the respective vessels, each claiming fault against the other causing the collision.

The Savoia, a steel vessel of 5,228 gross tons, light, was on a voyage from Genoa to Galveston, via Hampton Roads. The Ripogenus, a wooden steamer, 2,278 gross tons, was on a voyage from Norfolk to Searsport, Me., with a cargo of 2,513 tons of coal. The vessels collided in a dense fog in the immediate neighborhood of No. 2 Buoy, located about 4½ to 5 miles nearly due east from Cape Henry Light. The moment of impact is stated by the crew of the Ripogenus to have been 8:40 a. m.; by the crew of the Savoia, 8:45 a. m.

The Ripogenus left Hampton Roads shortly before midnight, April 7th, but encountering a thick fog, anchored a short distance inside the Capes. The fog having lifted somewhat, she got under way about 6:45 o'clock the next morning, and proceeded under slow speed—about four knots an hour—passing Cape Henry at 8:02 a. m., steering east by south, three-quarters south, for No. 2 Buoy. The captain of the Ripogenus, who was then on duty in the pilot house, with a quartermaster at the wheel, a lookoutsman and boatswain on the forecastle head, and the mate on the bridge, first heard the signals of an approaching vessel two points on his starboard bow about 8:30 a. m. The other vessel then appeared to him to be from a mile to a mile and a half away. He continued to hear the fog whistle of the approaching vessel about every two minutes until 8:36, when he stopped his engines, and at 8:37, while the vessel was still under way, blew two long blasts of his whistle. At 8:38 he reversed his engines and gave two more long blasts of his whistle. At 8:39, or 8:39½, he saw the approaching vessel come out of the fog, heading right on him, about two lengths away, and within a few seconds thereafter the collision occurred; the bow of the Ripogenus striking the port side of the Savoia and damaging both vessels.

The Savoia had been running at slow speed in the thick fog since 2 o'clock of the night before the collision. At about 7 a. m. of the day of the collision she got her position from Cape Henry and Hog Island stations, and at 7:50 she made 2 CB Buoy, located nearly due east from Virginia Beach and distant southeastwardly about 5½ miles from No. 2 Buoy, and thence steered a course which would have brought her a little to the southward and eastward of the last-mentioned buoy. The captain of the Savoia testifies that the fog was dense (thicker than he had ever seen it before in the United States) and that he sounded his fog whistles at regular intervals as he approached this buoy; that between 8:40 and 8:45 he heard two long whistles forward, on his port side, and that he ported his helm and answered by one whistle; that a moment or two later he heard two more whistles and ported more, and answered again with one whistle; and that almost immediately thereafter he saw the approaching steamer coming out of the fog, less than a ship's length away, and moving, as he estimated, at half speed. On cross-examination the master of the Savoia fixes the time of the collision at 8:45, and places the speed of his ship between the two buoys at anywhere from 3½ to 4½ miles; and he indicates the point of collision, on the chart, as south and a little east of Buoy No. 2, and about one mile away. The evidence for the Savoia shows that, in addition to the master, there were on the bridge four other officers, with a man at the wheel and a lookout on the forecastle.

The negligence charged against the Ripogenus is: (a) That she violated article 16 of the International Rules (Comp. St. § 7854) in running at an immoderate speed in the fog; and (b) that she violated article 15 of the International Rules (section 7853), in that, while still having way upon her, she sounded two prolonged blasts of her whistle, indicating that she had stopped, when in fact she had not. The negligence charged against the Savoia is: (a) The violation, likewise, of article 16 in running at an immoderate rate of speed in a fog; (b) in failing to stop her engines and navigate with caution when she first heard the fog signal of the Ripogenus forward of her beam; and (c) in not sooner hearing the fog signals of the Ripogenus.

[1] Admittedly, the master of the Ripogenus heard the fog signals of the Savoia as early as 8:30, or at least 10 minutes before the vessels collided. He answered the signals by repeated blasts of his whistle, but did not stop his engines until 6 minutes later, when it was apparent to him that the proximity and course of the approaching vessel was such as to render it dangerous to continue to run even at slow speed. At 8:36 he stopped his engines, and at 8:37 he blew a signal indicating to the other vessel that he was stopped and had no way on, when the fact is that, even with his engines stopped, his ship was making around three or four miles an hour. It is true that a minute later he reversed his engines, and I think it is equally true that at the moment of the impact the Ripogenus was practically stationary; but, even if this be conceded, it cannot be fairly insisted that her disregard of the rules in the respects mentioned did not materially contribute to the collision.

It is not enough to say that there was no reason for stopping when the fog whistle of the approaching vessel was first heard, because she then appeared to be a mile or a mile and a half away. There was no certainty of her position or distance, and experience has shown that nothing is more difficult than to determine either, in weather conditions such as existed on the morning of the collision. Due regard for the rule imposed upon her master the duty to stop her engines when the first fog whistle was heard. If she had done so, and the collision had occurred nevertheless, she would have been without fault. As it is, her disregard of the rule put her in a position directly in the path of the approaching vessel, and it is not possible now to say that her fault might not have been, or probably was not, one of the causes leading to the collision.

[2] What is said above in criticism of the failure of the master of the Ripogenus to stop his engines at 8:30 applies to his misleading signal at 8:37. It is true that at the time of this signal his engines had been stopped a full minute; but it is equally true, according to his own admission, that he was still making considerable headway. The signal, however well intended, was misleading. What effect it had upon the collision is difficult to determine, but in any aspect of the matter it casts upon the offending vessel the burden of showing, not merely that such fault might not have been one of the collision causes, but that it could not have been, and this burden is not met by any evidence offered on her behalf, from which it follows that the Ripogenus must be held at fault.

[3] Was she, however, solely to blame? The Savoia, as has already been shown, was headed on a northwest course from Buoy 2 CB to a point which would have put her in the ship channel at the entrance to Cape Henry. She had recently been in dry dock, her bottom was clean, the tide was favorable, and her engines were making, according to her crew, 20 revolutions, which the captain estimates produced a speed of from 3½ to 4½ miles an hour. He had out no log line, and his estimate of the rate of speed was necessarily wholly conjectural. He made Buoy 2 CB, at 7:50 and, according to his own statement, had reached a point within a mile of Buoy No. 2 when the collision occurred at 8:45. This distance is approximately 4½ miles, and if the point of collision as given by the master and crew of the Ripogenus is correct the distance was at least 5½ miles. Striking an average, which is, perhaps, as nearly correct as is possible under the circumstances, the distance between the two points would be approximately 5 miles, and the running time approximately 55 minutes, which would make the speed of the vessel between 5 and 5½ miles an hour.

I think it is perfectly fair to conclude that this is reasonably correct. For the first 3 or 4 miles the evidence is that no fog whistles of other vessels were heard. If this be true, it cannot be said that the speed of 5 miles an hour was excessive; but the Savoia was approaching a frequented path of commerce. Buoy 2, off Cape Henry, is in the track of vessels incoming and outgoing, coastwise and foreign, and around the date of this collision there was scarcely an hour of the day when at least two or three vessels bound in or out of Norfolk,

Baltimore, or Newport News were not in sight. As she approached this danger zone, in a fog so dense that a vessel could not have been seen a ship's length away, common prudence demanded diminished speed. The lowest speed, consistent with steerageway, would have been suggested by good seamanship, and probably was required under the exact terms of the rules, for it has been so frequently held as not to require citation that only such speed is allowable in a fog as will enable the vessel to be stopped in time to avoid a collision after the approaching vessel comes in sight, provided such approaching vessel is herself going at moderate speed. In the dense fog prevailing on the morning of this collision a literal compliance with this rule would have been, perhaps, impossible, for in the density of the fog objects were only visible a few hundred feet away, and the slightest movement forward of the ship would have carried her this distance before she could be stopped. Hence the safer course would have been to anchor and lie to until the fog had lifted. If this had been done, it is obvious the collision would not have occurred.

[4] But there remains yet another fault to be considered. The evidence on behalf of the Ripogenus is that her fog whistle was sounded every 40 seconds for an hour before the collision. I am satisfied that this is true, and in the weather conditions then prevailing it is inexplicable to me that those on board the Savoia should not have heard it sooner than they admit they did; and I am convinced that either they did hear it, at least a mile and a half away, or that their failure to hear it was inexcusable neglect. If they did hear it, applying the concluding paragraph of article 16, the positive duty was imposed on her master of stopping the engines of his vessel and navigating with caution until the danger of collision was over. This he did not do, but justifies his neglect of the rule upon the theory that, relying upon the two-blast whistle of the Ripogenus, he had a right to guess her position, and, having determined that to his satisfaction, to continue his course and speed, and in support of this position counsel relies upon the opinion of Judge Hale in The Pemaquid (D. C.) 255 Fed. 709–717, in which it is said:

"The rule cannot mean, then, that it is necessary for those upon a steamer to see an approaching steamer in order to 'ascertain' her position. Such ascertainment must be by other means than by sight."

It is unnecessary, in my view of the essentially different conditions in this case and that from which the quotation is taken, to determine whether the quoted paragraph correctly states the law or not. Doubtless, circumstances may exist in which the exact position of an approaching vessel may be ascertained by other means than sight, and if the "ascertainment," however made, be positive and certain, the rule will have been complied with, and the vessel may thereafter continue, without fault, on her course. But that this is not the case here must be admitted.

The vessels here were in the open sea; there were no physical objects nor well-defined paths by which the one might conclusively define the location or direction of the other. In the nature of things, the navigator of the Savoia did not, and could not, know whether the

vessel, whose whistle he had twice heard according to his own admission, and which, in my view of the case, he should have many times heard, was approaching any given point, or had reached and was stationary at any given point. He could not know whether she was headed north or headed south. He could not even be certain whether she was headed in or out of the Capes. Such conclusions as were possible were at best only guesswork, which could only be confirmed by careful and prudent navigation until all danger was passed. He should immediately have stopped his engines, and thereafter so controlled his own vessel that her speed, when the other vessel came in sight, could have been checked and the collision prevented.

Instead of this he continued, at a dangerous speed, porting his helm from time to time, showing thereby his uncertainty as to the location of the vessel ahead of him, until a collision was inevitable, and in this respect he was to blame, and a decree finding both vessels at fault will be entered.

In re DUKES et al.

In re GREENE.

(District Court, D. Delaware. December 3, 1921.)

1. **Attachment ⟸61—Debt or chose in action not attachable at common law.**
   At common law a debt or chose in action could not be attached.
2. **Attachment ⟸1—Proceedings statutory.**
   In Delaware the sole proceeding of attachment, whether on original or execution process, though having its origin in the customs of London, is regulated by statute.
3. **Attachment ⟸177—Attachment fi. fa. binds property from time laid.**
   The effect of an attachment under process of attachment fi. fa. is to bind the property of defendant so attached from the time of laying the attachment if the proceedings be perfected by judgment against the garnishee.
4. **Bankruptcy ⟸200(3)—Judgment in garnishment held "lien" within Bankruptcy Act.**
   Where a creditor obtained judgment in garnishment against a debtor of the insolvent within four months prior to the filing of the petition in bankruptcy, after obtaining a writ of attachment fi. fa. under Rev. Code Del. 1915, §§ 4124, 4127, 4145, 4388, relating to attachment and garnishment, *held*, that such garnishment proceedings gave the creditor a "lien" on the debt due by the garnishee to the insolvent within the meaning of Bankruptcy Act, § 67f (Comp. St. § 9651).

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

In Bankruptcy. In the matter of Ollie E. Dukes and another, trading under the firm name of Dukes & Melson, and Ollie E. Dukes and another, in their individual and personal capacity. Petition by Henry K. Greene to review an order of the referee directing petitioner to assign to the trustee in bankruptcy a judgment obtained by petitioner within four months prior to the filing of the petition in bankruptcy. Order affirmed.

James I. Boyce, of Wilmington, Del., for petitioner.
William S. Hilles, of Wilmington, Del., for trustee.

MORRIS, District Judge. This is a petition to review an order of the referee based upon section 67f of the Bankruptcy Act (Comp. St. § 9651) directing Henry K. Greene to assign to the trustee in bankruptcy of Ollie E. Dukes and Frankie Melson, trading as Dukes & Melson, a judgment obtained by Greene against Reading Mutual Fire Insurance Company within four months prior to the filing of the petition in bankruptcy against Dukes & Melson. The judgment in question followed a judgment obtained by Greene against Dukes & Melson for $1,000, and a writ of attachment fi. fa., containing an order for the summoning of garnishees, issued thereon. Pursuant to that order Reading Mutual Fire Insurance Company was summoned as garnishee, and, after due proceedings had, the judgment in question for a like sum was entered against the garnishee. The bankrupts were insolvent at the time the writ of attachment fi. fa. was issued (which was within the four months period), and also at the time the subsequent judgment against the garnishee was entered. Greene contends that the order of the referee was erroneous in that section 67f of the Bankruptcy Act applies only to liens, that the judgment against the garnishee is not a lien upon any of its assets, and that it is not a lien upon any property of the bankrupts. The trustee, on the other hand, contends that the attachment and subsequent judgment against the garnishee created a lien upon the debt due to the bankrupts by the garnishee, and, further, that section 67f of the Bankruptcy Act applies not only to liens, but to any advantage obtained by a creditor through legal proceedings during the four months period.

[1, 2] For the purposes of this case I shall assume that section 67f is expressly confined to liens obtained through legal proceedings; that legal proceedings not creating or resulting in liens are not affected by that section; that an advantage, not a lien, obtained by a creditor during the four months period is not affected by section 67f, even though such advantage was acquired through legal proceedings; and that the answer to the question whether a lien was obtained by Greene through the attachment fi. fa. and subsequent proceedings terminating in the judgment against the insurance company depends upon the law of the state of Delaware. In ascertaining the answer to that question, our inquiry must be directed more particularly to the effect of the attachment fi. fa. and of its service upon the garnishee than to the judgment against it. In fact, in ascertaining the existence or nonexistence of a lien, we are little concerned with that judgment save as it perfects and consummates the inchoate rights established by the service of the attachment fi. fa. upon the insurance company as garnishee. At common law a debt or chose in action could not be attached. In this state the whole proceeding of attachment, whether on original or execution process, though having its origin in the customs of London, is regulated by statute. Reynolds v. Howell, 1 Marv. (Del.) 52, 59, 31 Atl. 875; Penna. Steel Co. v. N. J. S. R. R. Co., 4 Houst. (Del.) 572, 578; Woolley on Delaware Practice, § 1149. The right of the plaintiff

to issue the attachment fi. fa. was conferred by section 4388 of the Revised Code of Delaware of 1915. That section provides:

"The plaintiff in any judgment in a court of record * * * may cause an attachment, as well as any other execution, to be issued thereon, containing an order for the summoning of garnishees, to be proceeded upon and returned as in cases of foreign attachment."

Section 4145 of the Code provides that the writ of foreign attachment shall be framed, directed, executed, and returned, and like proceedings had, as in the case of a domestic attachment (subject only to an exception not here pertinent), and that every plaintiff in a foreign attachment shall have the benefit of his own discovery, and, after judgment, may proceed, by order of sale, fieri facias, capias ad satisfaciendum, or otherwise, as on other judgments. Section 4124 of the Delaware Code, dealing with a writ of domestic attachment, directs that the sheriff or other officers shall under such writ—

"attach all the defendant's property real and personal, and his rights and credits that can be found; and shall take possession of the said personal property, rights and credits, and have them inventoried and appraised, and shall be answerable therefor; but if he cannot have actual possession thereof, he shall notify the person in whose hands, or possession, they are supposed to be, that he attaches the same at the plaintiff's suit, for the use of all the defendant's creditors, and that he doth summon him, as a garnishee, to appear and answer as commanded by the writ; from and after which answer, the personal property, chattels and effects, so attached, shall be delivered to the sheriff, unless the garnishee will give security for the same."

Section 4127 provides for the entry of judgment against the garnishee upon its appearing or being found that the garnishee had any moneys, goods, chattels, or effects of the defendant in his hands or possession at the time he was notified of the attachment or at any time after and before his plea is pleaded.

[3] The effect of an attachment under process of attachment fi. fa. is to bind the property of the defendant so attached from the time of laying the attachment if the proceedings be perfected by judgment against the garnishee. Reynolds v. Howell, 1 Marv. (Del.) 52, 31 Atl. 875; Woolley on Delaware Practice, § 1165. As said by the court in Ex parte Joselyne, L. R. 8 Ch. Div. 327, 333:

"As soon as the order attaching a debt is served, all is practically done that can be done by the judgment creditor as against the judgment debtor. Of course, if the garnishee does not pay the debt to him, he can go on to obtain execution against the goods of the garnishee; but, as regards the debt itself, he can do nothing more than charge it by means of the order of attachment."

Or as expressed by Kent, C. J., in Embree and Collins v. Hanna, 5 Johns. (N. Y.) 101:

"The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard."

True, the statement there made by the eminent Chief Justice that the attaching creditors acquired a lien was not a decision based upon the attachment statutes of the state of Delaware, but it was based upon laws

differing therefrom in no material particular so far as the present question is concerned, and, except that the nature and scope of the lien was not there defined by him, his language is substantially identical with the statement made in Parker v. Farr, 2 Browne (Pa.) 332, quoted with approval by the Court of Errors and Appeals of the state of Delaware in Reynolds v. Howell, 1 Marv. (Del.) 52, 61, 31 Atl. 875, 876. It was there said:

"A foreign attachment gives the attaching creditor a lien on a debt due by the garnishee to the defendant, so far as to restrain the garnishee from paying it over to his creditors, but no further."

The Court of Errors and Appeals, in its opinion in that case, by many statements either expressly recognized or virtually assumed that a lien exists upon the debt due to the judgment debtor after the summoning of the garnishee. One of such statements, 1 Marv. 60, 31 Atl. 876, is:

"The attachment proceedings must be perfected by judgment; otherwise the lien existing by attachment of property or summoning garnishees is dissolved."

Attachment, in Delaware, as I understand the cases decided in the state courts, and particularly Reynolds v. Howell, supra, is a proceeding to create and enforce a lien. It is a remedy for the collection of a debt by preliminary levy upon property of the debtor to conserve it for the eventual execution after the lien shall have been perfected by judgment. Waples on Attachment and Garnishment, § 1. The fact that in the form of attachment known as garnishment the debt due by the garnishee to the judgment debtor is not of such a nature as to be specifically seized by virtue of an execution issued upon the judgment against the garnishee, and the further incidental fact that the judgment creditor, in the event of nonpayment of such judgment by the garnishee, must resort to execution upon the goods and chattels of the garnishee in order to make his lien effective and obtain payment, do not, as I see it, constitute a denial that a lien is created upon the chose in action (that is, property) or debt of the judgment debtor by summoning the garnishee, or that the lien so created continues to exist after it is perfected by judgment.

[4] I am of the opinion that the garnishment proceedings instituted and perfected by Greene gave to him a lien on the debt due by the insurance company to Dukes & Melson.

Even if the lien obtained by Greene was effective only to restrain the garnishee from paying the debt over to Dukes & Melson, but no further, that fact is immaterial. The operation of section 67f is not restricted to liens of a particular nature or character. That section nullifies all liens, whatever be their character, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of the petition in bankruptcy against him, in case he is adjudged a bankrupt.

The lien of Greene, whatever its nature, is nullified by that section, save as the lien may be preserved for the benefit of the bankrupt estate. But if the lien upon the debt of Dukes & Melson, created by the

summoning of the insurance company as garnishee, be nullified, the judgment against the garnishee supported only by that lien must also fall. Frankel v. Satterfield, 9 Houst. (Del.) 201, 19 Atl. 898.

For the foregoing reasons, I am of the opinion that the order of the referee should be affirmed.

DOHERTY et al. v. McDOWELL et al.

(District Court, D. Maine. December 1, 1921.)

No. 814.

1. **Process ⟸164(4)—Return and amendment held to show service by deputy marshal.**

   Where the original return showed service by the marshal "by N., deputy," but was defective and was sent back for amendment, and the amended return showed service by the marshal by N. without stating he was deputy, the two returns together are sufficient to show service by a deputy marshal.

2. **Courts ⟸344—Attested copy of order is "certified copy."**

   A copy of an order for service on defendant outside of district under Judicial Code, § 57 (Comp. St. § 1039), which was attested by the court, was a "certified copy" within the meaning of that section, since to "certify" means to attest authoritatively, and any form which affirms the fact in writing is sufficient (quoting Words and Phrases, Certified Copy).

3. **Courts ⟸344—Shares of stock have situs within state of organization for purpose of acquiring jurisdiction over nonresident defendants.**

   Shares of stock in a corporation have a situs as property within the state in which the corporation is organized, though it has no other property and transacts no business therein except to hold its annual meeting, and a suit for the specific recovery of such stock can be brought within that district and service had under Judicial Code, § 57 (Comp. St. § 1039), on defendants residing elsewhere.

4. **Courts ⟸344—Bill held to allege equitable claim to specific property for purpose of serving process on nonresident defendants.**

   A bill alleging that plaintiffs delivered certain stock to the principal defendant, who was an employé, in return for his services, but thereafter discovered he had defrauded them of large amounts, so that plaintiffs were equitably entitled to the stock, states a claim for the specific recovery of stock which can be brought in the district where the stock is located, and defendants residing outside of the district can be served under Judicial Code, § 57 (Comp. St. § 1039).

5. **Courts ⟸344—Jurisdiction does not depend on statute allowing service on defendants outside of district.**

   The jurisdiction of the court of a suit to recover specific property situated within the district depends on diversity of citizenship or other ground of jurisdiction, not on Judicial Code, § 57 (Comp. St. § 1039), which merely permits service in such a suit on defendants not residing within the district.

6. **Equity ⟸363—Doubtful issue on merits not decided on motion to dismiss.**

   Where the bill raises a doubtful question on the merits, such question will not be determined on summary hearing on motion to dismiss the bill, but will be reserved for determination after answer and full hearing.

In Equity. Bill by Henry L. Doherty and another, doing business under the firm name of Henry L. Doherty & Co., against Jesse C.

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

McDowell and others. On motion to vacate the order of service and dismiss the bill. Motion denied.

Frueauff, Robinson & Sloan, of New York City, and Verrill, Hale, Booth & Ives, of Portland, Me., for plaintiffs.

Philip G. Clifford, of Portland, Me., for defendant Doherty Securities Co.

Thomas L. Talbot, of Portland, Me., specially, for defendants.

HALE, District Judge. This case comes before the court upon defendants' motion to vacate the order of service and dismiss the bill, for the reason that the court has no jurisdiction over the defendants, because:

(1) A certified copy of the order of notice was not served on Horace H. McDowell.

(2) The Doherty Securities Company, one of the defendants, has no property in Maine. All its corporate business is transacted outside of Maine except the annual meeting of stockholders.

(3) All the certificates of stock of the Doherty Securities Company owned by the defendants are held and owned by them within the Western district of Pennsylvania and the Southern district of Texas.

Section 57 of the Judicial Code (Comp. St. § 1039), provides, among other things, that when a suit is commenced in a District Court of the United States to enforce any legal or equitable claim upon, or claim to, or to remove any lien or cloud upon the title to real or personal property within the district where the suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing the absent defendant to appear and plead, answer, or demur by a day certain, which order shall be served upon such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of such property. I have briefly stated that part of the section which is material to the consideration of the questions involved in this motion.

The plaintiff's bill is brought to establish a claim to and upon certain shares of stock of the Doherty Securities Company. The bill shows that the corporation is a Maine corporation; that the plaintiffs are residents of New York state; that the three individual defendants in whose name the shares are alleged to stand are residents of Pennsylvania and Texas; that the defendant Jesse C. McDowell was the agent and employé of the plaintiffs, and that it was part of his duty, as such agent, to negotiate transactions for the purchase of property; that he took advantage of this to add large amounts to the alleged purchase price, and, having obtained from the plaintiffs payment of these large amounts, he had such payment turned over to himself. A specific case is alleged in the bill in detail, in which transaction McDowell is alleged to have obtained $250,000. There is another allegation that McDowell, during the term of his employment, defrauded the plaintiffs in the same way, receiving thereby a large amount of money;

that the knowledge of these transactions was concealed from the plaintiffs, and that they were unable, at the time the bill was drawn, to describe them in detail. The bill further alleges that the specific shares of stock in the Doherty Securities Company were delivered by the plaintiffs to the defendant McDowell, as further consideration for his services, which at that time were supposed to be in good faith, loyal, honest, and faithful; and that, having since learned that, instead of having rendered such services, he had defrauded them, they now claim that the title to the specific shares of stock set out in the bill never passed to McDowell, and that he got possession of them by fraud; the equitable title still remaining in the plaintiffs, who are entitled to a return of this property which McDowell had obtained by fraud. Their claim, then, is substantially a proceeding in rem against the property, namely, against the shares of stock to which they claim to have an equitable title and an equitable lien. They are seeking to enforce this lien by this bill. The bill further alleges that certain of these shares were transferred to the defendant Caroline H. McDowell and Horace H. McDowell without consideration; that they were really held for the benefit of Jesse C. McDowell; and that therefore they are subject to the same equitable lien as those shares which McDowell still holds.

[1] 1. The court directed service of a certified copy of the order of notice of the suit upon the individual defendants. The motion urges that this order was not complied with, because the order served upon the defendant Horace H. McDowell was not a certified copy, but was merely a copy attested by George C. Wheeler, clerk. The first return of service on Horace H. McDowell is rather illegible. It was brought to me in court at the hearing and appears to have been signed by "O. F. Wolff, U. S. Marshal, by Ed. Carr, Deputy." It appears that this return was sent back for amendment. An amended return was filed which shows that the officer "served the annexed order of court on the therein named Horace H. McDowell, by handing to and leaving a true and certified copy thereof with Horace H. McDowell, at Victoria, Tex., in said district, on February 4, 1921." This latter return was signed, "O. F. Wolff, U. S. Marshal, by Ed. Carr." I permitted the amendment to the return. This amendment brings fairly before the court the two returns. From an examination of the two returns it appears clear that Ed. Carr described himself to be a deputy of the United States marshal. A deputy marshal, then, has made the return that he served a certified copy of the order on the defendant in question.

[2] It is urged that, from a copy which is brought before the court, it may be inferred that the copy which was actually served was an attested copy, and not a certified copy. I think it must be held that a copy duly attested by the court is a certified copy within the meaning of the court order. One of the dictionary meanings of "certify" is "to verify; to attest authoritatively." In 2 Words and Phrases, First Series, 1033, it is said:

"The term 'to certify' as used with reference to legal documents, means to testify to a thing in writing; and in the absence of statutory provision de-

claring the particular form of certification, any form which affirms the fact in writing is sufficient."

It appears clear that the intention of the court order was to provide for a true copy of the order to be served on the individual defendant. I think this intention of the court was substantially carried out.

The defendants' motion to vacate the order is denied.

[3] 2. The defendants urge, further, that the Doherty Securities Company, one of the defendants, has no property in Maine, and that therefore the seizure of its shares does not give the court jurisdiction.

The record shows that this is a Maine corporation. The shares in it are property, regardless of the place where the corporation conducts its business, or where its assets are located, or where the certificates of stock owned by the individual defendants are kept. In this state shares of stock in a corporation are distinctly recognized as personal property. I do not need to cite the various Maine statutes which provide for the attachment of such shares and for the assessment of inheritance tax on them, although owned by deceased nonresidents. The cases in the federal court hold that the stock of a corporation organized under the laws of a state has its situs in such state, and is property within a federal judicial district in the state. See 1 U. S. Compiled Statutes (1916) Annotated, p. 1167; Hudson Co. v. Murray (D. C.) 236 Fed. 419. In Hutchins v. State Bank, 12 Metc. (Mass.) 421, 426, Chief Justice Shaw held that the share of a bank corporation was in the nature of a chose in action, and that the certificates of stock are simply evidences of the holders' title.

In Jellenik v. Huron Copper Mining Company, 177 U. S. 1, 13, 14, 20 Sup. Ct. 559, 563 (44 L. Ed. 647), in speaking for the court, Mr. Justice Harlan said:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another state, at which a book showing the transfers of stock may be kept. * * * The corporation being brought into court by personal service of process in Michigan, and a copy of the order of court being served upon the defendants charged with wrongfully holding certificates of the stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court. We think the Circuit Court may rightfully proceed under the act of 1875, for the purpose of determining such ownership."

I find that the shares of stock described by the plaintiffs, and sought to be held by them as their property, constitute property within the state of Maine.

[4] 3. The defendants, by their motion, urge that the bill states no equitable case. Let us examine the basis of the bill. It does not attempt to establish a claim for damages; nor does it seek to collect damages out of the shares of stock of the Doherty Securities Company, as if those shares had been attached. I have already stated briefly the sub-

stance of the bill. It is the plaintiffs' contention that they hold the equitable title to the shares of stock in question; that Jesse C. McDowell acquired the shares by fraud; and that, having discovered the fraud, the plaintiffs are entitled to the return of these specific shares which they have described. Their proceeding is against the property itself. The cases brought to my attention by the learned counsel for the defendants are not proceedings against specific property, as in the case at bar. Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 13, 14, 20 Sup. Ct. 559, 44 L. Ed. 647, already cited, seems to me to be decisive of the case before me.

[5] The jurisdiction of the court does not depend upon section 57 of the statute. The jurisdiction of the court is obtained by plaintiffs, by stating a diversity of citizenship of the parties, by stating property within the jurisdiction of the court, and a claim by the plaintiffs on that property. Section 57 of the Code is for the purpose, not of conferring jurisdiction, but of providing machinery for enforcing a claim on property within the jurisdiction, even though certain defendants are absent. It provides a process for bringing nonresident defendants before the court. Since that statute was passed the court has just the same power to decide the real controversy as it would have if all the defendants were residents of the district. The bill before the court appears to state a case in equity. By invoking section 57 of the Code, it seeks to bring absent defendants into court.

[6] In York County Savings Bank v. Abbott (C. C.) 131 Fed. 980, 982, Judge Putnam had before him a case in which the defendant filed a motion to dismiss, on the ground that the court had no jurisdiction. In that case the defendants said that the merits of the case, as stated in the bill, gave no jurisdiction to the court. Judge Putnam said:

"On a motion to dismiss for want of jurisdiction it is not to be expected that the court will ordinarily enter on a discussion of the merits. If the case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, it behooves the court to pass on the merits on a formal plea, demurrer, or answer, rather than summarily on a motion to dismiss. * * * As it is apparent that the complainant, in good faith, seeks to proceed in a controversy which it in good faith regards as within our jurisdiction, we feel authorized, on a motion to dismiss for want of jurisdiction, to decline any discussion of the merits so far as it is possible for us so to do. Not only is this the more convenient practice, but it protects against a hasty adjudication on a summary proceeding with reference to substantial questions."

In Ralston Steel Car Co. v. National Dump Car Co. (D. C.) 222 Fed. 590, this court held that, under our practice, the federal courts are inclined to allow a case in equity, involving important questions, to proceed to answer and proofs where a doubtful question is raised by the pleadings, and that it has been the practice to overrule a demurrer unless it is founded upon an absolutely clear proposition; that, taking the allegations to be true, the bill must be dismissed at the hearing.

Upon examination of the bill I find that the attack upon the jurisdiction of the court cannot be sustained. The motion to dismiss is denied.

NEW JERSEY ZINC CO. v. AMERICAN ZINC, LEAD & SMELTING CO. et al.

(District Court, D. Maine. November 30, 1921.)

No. 804.

1. **Patents ⟸18—Simplicity of device is not argument against invention.**
   The simplicity of the device covered by the patent is not an argument against invention.
2. **Patents ⟸16—No exact test to determine invention.**
   No test has been formulated by which a satisfactory line can be drawn between the products of the inventor's intuition and the results of the mechanic's skill, but that question must always be left to a careful exercise of the judgment, guided by the established rules of law.
3. **Patents ⟸328—931,815, for improved ore-roasting furnace, held not to disclose invention.**
   The Tucker patent, No. 931,815, for improvements in an ore-roasting furnace which consisted only in lengthening the handles of the controls for certain machinery so that they all could be operated by one man instead of requiring two as theretofore, *held* not to disclose invention and to be invalid.
4. **Patents ⟸36—Advance and improvement in art not invention in themselves.**
   Substantial advance and marked improvement which are progressive steps in an art, however beneficial, are not in themselves evidence of invention.

In Equity. Suit by the New Jersey Zinc Company against the American Zinc, Lead & Smelting Company and another. Decree directed dismissing the bill.

Pennie, Davis, Marvin & Edmonds, of New York City, and Woodman & Whitehouse, of Portland, Me., for plaintiff.

Coolidge & Hight and Emery, Booth, Janney & Varney, all of Boston, Mass., for defendants.

HALE, District Judge. This suit in equity involves the construction of United States patent No. 931,815, August 24, 1909. The first question to be considered is the validity of the patent.

The art to which it relates is that of roasting zinc sulphide ores for the manufacture of metallic zinc, or slab zinc, and commercial zinc oxide. The native oxidized ores are available for subsequent smelting operations for the production of slab zinc. The sulphide ores, on the other hand, must be freed of sulphur before they are available for subsequent smelting operations. To effect this the roasting operation is necessary and is conducted in a furnace wherein the ore is heated, in the presence of air, to a red heat, at which temperature the sulphur has a greater affinity for the oxygen of the air and unites with it to form sulphur dioxide gas.

It is claimed that the invention was made by Allen Tucker of Mineral Point, Wis. It involves certain improvements relating to an ore-

roasting furnace generally known as the Hegeler furnace, invented by one Edward C. Hegeler—United States patent No. 303,571, August 12, 1884.

I follow substantially the plaintiff's description of the Hegeler furnace: This Hegeler furnace comprises a central brick structure about 80 feet in length, about 25 feet in height, and about 18 feet in width, divided longitudinally into two parts by a central vertical wall, on each side of which there is built a tier of superposed ovens or hearths, each hearth being about 6 feet in width and about 1½ feet in height. Beneath each of the three lower hearths is a gas flue through which hot gases are passed to assist in maintaining the ore at the necessary temperature during the last stages of the roasting operation.

At each end of the furnace proper is a structural framework about 80 feet in length, generally called the rod alley and upon which is mounted appropriate machinery for mechanically drawing rakes through the ore during its roasting and thereby stirring the ore and progressively moving the ore along the hearths. In the furnaces considered in this suit, this machinery comprises (for each hearth) a pair of sprocket wheels, mounted at opposite ends of the structural framework, carrying an endless chain to which is secured an iron rod or bar about 100 feet in length and about 1½ inches in diameter for the support of which appropriate guide pulleys are provided. By means of sliding gears or clutches, one of the sprocket wheels of each chain may at will be connected to a main shaft driven by a reversible electric motor provided with a controller by means of which its direction of rotation can be determined and its speed regulated. The sliding gears or clutches and the controller, with such means as cables, chains, extensions, etc., as are required to effect manipulation at a distance of these instrumentalities, constitute the control devices or control mechanism for the rake moving machinery. A turntable is arranged at each end of the brick structure, between that structure and the adjacent end of the structural framework for the rake moving machinery—frequently called the rake reciprocating mechanism. Each turntable has seven superposed shelves corresponding in height with the seven hearths of the furnace; its function is to support the rakes during their idle periods and, by rotation through 180 degrees, to transfer the rakes as withdrawn from one tier of hearths into position for appropriately entering the other tier of hearths.

The ore to be roasted is periodically charged in appropriate amount into one end of the top hearth of one tier where it is stirred, and an appropriate amount worked towards the opposite end of the hearth, by means of a mechanically drawn rake. From the top hearth, an appropriate amount of ore drops through a slot or "drop hole" in that hearth. upon the hearth below; the ore on the latter hearth is then stirred and an appropriate amount worked towards the other end of that hearth and dropped through a slot therein upon the hearth below; and so on until the roasted ore is finally discharged from the bottom hearth. Since the hearths are generally about 80 feet in length, the ore travels a total distance of about 560 feet in passing through the seven hearths of each tier of the furnace. Each hearth is at all times covered with

a layer of ore and there is usually from 150 to 200 tons of ore in the furnace at all times.

The ore is progressively moved forward on the hearths by rakes which are pulled through the hearths by the rake moving machinery—rake reciprocating mechanism—located at each end of the furnace. The rakes are large iron structures weighing some 1,200 to 1,500 pounds each. The plaintiff says that, prior to the invention of the Tucker patent in suit, two men were required at each end of the furnace for the raking operation. One man, called the "machine man" or "floor man," concentrated his attention wholly upon the operation of the mechanism or machinery for mechanically moving the rakes. Everything that had movement or which controlled selection or direction was in the hands of that man. His operating station was on the ground or floor adjacent to the head frame of the rake reciprocating mechanism, and here he manipulated the control devices. The other man, called the "hooker" or "platform man," attended to the hooking and unhooking of the rakes and the guiding of the rods and rakes into the hearths. Since his operating station was at various heights or levels, appropriate platforms were provided at each end of the furnace, and on each side thereof, upon which the hooker stood in the performance of his duties. This prior art arrangement is referred to as the "two men control," by which is meant two men at each end, or four men for the furnace. The plaintiff says that the patent in suit involves an improvement in the arrangement of the control devices for the rake moving machinery, and that such improvements aim to accomplish two things: (1) Easy and immediate control of the rake moving machinery with consequent improved operation, and (2) economy in labor required.

The Tucker patent states at the outset:

"This invention relates to furnaces in which a rake is reciprocated for the purpose of stirring the contents of the furnace, and is particularly applicable to that class of furnaces in which ore is roasted, such as zinc and other ores. The invention resides in mechanism for operating the rakes of such furnaces so that the movement of the same will always be under easy and immediate control, and whereby the number of men necessary to operate such furnaces is reduced."

Only claims 1 and 2 are involved in this inquiry. They are as follows:

"1. The combination with a furnace having a plurality of tiers of ovens, a pivoted transfer table located at each end of the furnace and adapted to move into position opposite the end of each tier, and having shelves located on a level with each oven, operators' platforms located adjacent said transfer tables at the end of each tier of ovens; a series of rakes adapted to pass through both tiers of ovens, mechanism for reciprocating said rakes, and controlling mechanism for said reciprocating mechanism having their ends located at said operators' platforms.

"2. The combination with a furnace having two tiers of ovens, a turntable located at each end of the furnace, and pivoted centrally between the tiers so as to move into position opposite the end of each tier, shelves carried by said turntable on a level with each oven, operators' platforms located at each side of said turntable adjacent the ends of each tier of ovens, a series of rakes adapted to pass through both tiers of ovens, mechanism for reciprocating said rakes, controlling means for starting and stopping said mechanism, means for

controlling the direction of motion thereof, said controlling means having ends terminating at said operators' platforms."

It is said by the plaintiff that the gist of the alleged invention is found in the last clause of claim 1:

"Controlling mechanism for said reciprocating mechanism having their ends located at the operators' platforms."

An expert introduced by the plaintiff says that the invention had two general uses; the securing of an easy and immediate control for improved operation and the reduction in labor force. He claims that the patentee effected this result by such a rearrangement of parts as concentrates in the hands of the hooker the duties of two men, and makes the actual labor less than the sum of the two men's labors; and that, in order to carry out this conception, he places, at the proper point, at different levels, the motor control handles which this one man may always find convenient for his use.

Plaintiff says that Tucker thus decentralized the control connections in the hands of the floor man and carried them to the seven platform positions which the hooker successively occupied during the raking process.

Did Allen Tucker make a patentable invention when he ran the control lines to the platforms instead of running them to the floor?

There is some testimony that when the Hegeler patent of 1884 had expired the Illinois Zinc Company built furnaces of the Hegeler type, using the two tiers of hearths, the pivoted transfer tables, the rake and rake rods as used by Hegeler; but using chains, for reciprocating the rods, instead of the rolls used by Hegeler, and stationary platforms for the hookers to stand on; and that more than two years prior to the filing of the application for the patent the plaintiff was using at Mineral Point, Wis., a furnace provided with the above mechanism. But the defendant claims that there was one important difference; that the friction clutches or shifting belts for determining the direction of movement of the rake rods were done away with and a reversing electric motor was substituted; and that this motor was not the invention of Tucker.

It is urged by the plaintiff that the Tucker invention aims, not only to reduce the force of men necessary to operate the furnace, but to greatly improve the operation of the furnace. The testimony fails to convince me of any great improvement in the operation of the furnace effected by Tucker's contribution to the art. I am of the opinion that the only substantial thing which he contributed, or sought to contribute, to the art was the convenience and economy obtained by reducing the number of men necessary to operate the kiln. There is some testimony tending to show that the possibility of the platform control had been considered years prior to Tucker; but had been discarded as then mechanically of no advantage; but that later it was found that, after the great war had produced a shortage of men and increase of wages, the saving of platform men became of sufficient consequence to justify its adoption by plaintiff and by the defendant.

[1] The contribution of Tucker did not involve any great change in machinery. It passed the lines from the floor man to the several platforms where the hooker could operate them. The simplicity of the device is not of course an argument against it. About all that can be said effectually on this subject is said in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. When a thing has succeeded, it is very likely to seem plain to anyone. The wonderfully useful result, obtained in that case, of making a loom produce 50 yards a day when it had never before produced more than 40, was evidently the controlling matter in the mind of the court.

My attention has been called to a classic on this subject by William Phillips in his treatise on patents:

"The very simplicity of an invention, which leads the inexperienced to infer little merit or application in the inventor, is most commonly the sequel of complications, which in succession have been contrived by him, and in succession been rejected. Indeed, who that ever cast a glance of intelligent observation upon our manufactures, or that has ever been struck with the combined simplicity and efficacy of the means employed, can do otherwise than infer that any one of the means that he admires must have been selected for superiority, when perhaps a thousand others have been rejected?"

[2] Most of the cases brought to my attention by the learned counsel for the plaintiff are cases wherein certain parts of a machine were changed in location, thus producing an improved automatic action of the machine, and where the human element in the conduct of the machine was not present. The learned counsel for the plaintiff has, however, brought to my attention some late cases which are very close and very suggestive upon the point at issue. In Burdett Rowntree Mfg. Co. v. Standard Plunger Elevator Co. (C. C.) 196 Fed. 43, the invention related to the one point control of electric elevators. The patent offered a system in which every movement of the car was controlled by one person only and at one place only, namely, by the motor attendant and at the motor itself. The court found that the only question in the case was whether the patented device was a true combination or a mere aggregation of elements. Every element was old. The question was whether the combination produced a new and useful result. The court drew the line between a combination and an aggregation and concluded that the case came within the "twilight zone"; but the balance of the judgment of the court was in favor of the patent. The court found that the patent did not do much more than "move signals from one place to another without changing their function." But the court found, that, in making this change, each part had been made more effective to accomplish the common object, and that the increased efficiency was due to the new relation of each part to the others.

My attention is also called to Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 C. C. A. 369, in which case the patent discloses an improvement in arrangement of enunciators and the line jacks and answering jacks of a multiple switch board telephone system. The essence of the invention was found to be the convenient and uniform grouping of the enunciators and their corresponding answering jacks

relatively to each other. Utility was not denied; but it was said that it was not patentable because any mechanic skilled in the art could have produced it without any creative genius.

In Star Brass Works Co. v. General Electric Co., 111 Fed. 398, 49 C. C. A. 409, the court rested its result upon the Loom Company Case. It found that the safety and efficiency of the machine had been greatly enhanced and that the profits resulting from its operation had been greatly increased.

See, also, National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544; Smith v. Vulcanite Co., 93 U. S. 486, 495, 23 L. Ed. 952; Keystone Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103; Topliff v. Topliff, 145 U. S. 156, 164, 12 Sup. Ct. 825, 36 L. Ed. 658. No court has ever been able to formulate a test by which a satisfactory line can be drawn between the products of the inventor's intuition and the results of the mechanic's skill. That question must always be left for determination to a careful exercise of the judgment, guided by the established rules of law. There is often great difficulty in determining whether a case is within the reasoning of Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, or of Atlantic Works v. Brady, 107 U. S. 200, 2 Sup. Ct. 225, 27 L. Ed. 438.

[3] In the case before me the electric controllers and the clutch-throwing instrumentalities were placed in different locations from those of the prior art; so that they could be conveniently operated by the hooker-man on the platforms instead of by the machine operators on the ground. No new organization was made; no substantial change in the machinery was effected; the instrumentalities included in the claims in suit are in nature and function precisely what they were before; they are arranged in the same combination. The lengths of the controls are changed; but the new length gave them no new use. It is difficult to see how a new and useful result was obtained by the change. I cannot find that the controls were made more effective to accomplish the common object; nor that there was any new relation of each part to the others which gave a new and useful result, or that the total efficiency was greatly improved, as it was in the Burdett Rowntree Case. Nor can I find that glaring evils were removed and greatly increased operative power provided, as in the Kinloch Telephone Co. Case. It is not shown that the product was greatly enlarged and that thus the commercial value of the machine was greatly enhanced. While the case was on trial I pointed to the window shade cord at the side of the courtroom, ordinarily managed by the court officer, and asked whether it would be invention to change the length of the cord, so that it might be extended to the court's desk, and thus enable the court to manage the cord. I cannot now see that there was a much greater use of the inventive faculty in the patent at bar than in the instance which I thus casually noted.

In Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 C. C. A. 534. decided in the Second Circuit, in speaking for the court, Judge Coxe said:

"Mechanical skill is not converted into invention because it is applied to a structure showing the highest degree of inventive genius. If the problem be to construct a key for a lock, it can make no difference whether the lock be attached to a typewriter or an ice box. * * *

"The problem is one which is continually presented where it is desirable to bring an operating part nearer to the hand of the operator. Similar expedients have been constantly resorted to. If a door be closed by a spring lock operated from the inside and the inmate of the room desires to open it to a visitor without rising from his desk, he naturally rigs up a connection by cords and pulleys and releases the lock by pulling on the cords. If it be desired to open or close a transom or a window which cannot be reached by hand, nothing is more common than the resort to pulleys and cords, cranks and levers. Such methods have been in vogue for years. The patentee conceived the idea that it would be more convenient to have the operating key located where it could be seen and reached by the operator while seated, and he therefore placed it in the keyboard connecting it by a well-known train of mechanism with the line-lock stop. It did not require an exercise of 'the intuitive faculty of the mind' to do this."

In prepayment Car Sales Co. v. Orange County Traction Co. (D. C.) 214 Fed. 402, the patent in suit was directed to a passenger car of the "pay as you enter" type, wherein the door controlling means was located at the most convenient place for a car of that type. The court pointed out that the location of the control handle is arrived at by considerations of convenience and that there was no patentable invention in the location of the door controlling means upon the platform in accordance with the mere convenience of the person who was to operate it; that, wherever located, its function is the same; and that a change in its location involves ordinary mechanical skill and not inventive faculty. The decision was affirmed on appeal. 214 Fed. 576, 131 C. C. A. 156.

See, also, Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co. (C. C.) 34 Fed. 130; Aron v. Manhattan Ry. Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272. In the case cited, in speaking for the court, Mr. Justice Blatchford said:

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

[4] The courts have often pointed out that substantial advance, marked improvement, progressive steps in an art, however beneficial, are not in themselves evidences of invention. As industry proceeds more engineering skill is developed, more mechanical progress is made, more skill of the mechanic is expected. Hansen v. Slick, 230 Fed. 627, 145 C. C. A. 37; Lord & Burnham Co. v. Payne (C. C.) 190 Fed. 172;

Sloan Filter Co. v. Portland Gold Mining Co., 139 Fed. 23, 71 C. C. A. 460; Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 432, 38 Sup. Ct. 547, 62 L. Ed. 1196; Richards v. Chase Elevator Co., 158 U. S. 299, 302, 15 Sup. Ct. 831, 39 L. Ed. 991; Voigtmann v. Weis & Ridge Cornice Co., 148 Fed. 848, 853, 78 C. C. A. 538.

In the case at bar, I think every instrumentality enumerated in the patent is shown by the proofs to be old and well known long prior to Tucker; and no single instrumentality enumerated in the patent has been endowed with any new use; each performance has the same function it had before. Tucker arranged his lines so that one man was required to do the hooking and to operate the controls, which were lengthened for that purpose; but no new instrumentalities are involved; no mechanically new use of an existing instrumentality is involved. It seems to be a combination of old elements and old results, with no new function, evolved from the combination. Each element performs some old and well-known function; the result is not a patentable combination, but an aggregation of elements as in Richards v. Chase Elevator Co., 158 U. S. 299, 302, 15 Sup. Ct. 831, 39 L. Ed. 991, cited supra.

The result is that the patent is found not to present a patentable invention, and is therefore invalid.

A decree may be presented, dismissing the bill, with costs.

MURRAY et al. v. HODO.

(District Court, N. D. Texas, at Dallas. September 12, 1921.)

No. 2839–95.

1. **Patents ⟸328—1,086,204, for cotton gin, claim 80, held not infringed.**
   The Murray patent, No. 1,086,204, for improvement in cotton gins consisting of a suction device for removing lint from the gin saws, is not for a pioneer invention, but for an improvement only, and must be narrowly construed and limited to the combination of essential parts described and shown in the specification and drawings. As so construed, claim 80 *held* not infringed by a gin constructed in accordance with the Hodo patents, Nos. 1,203,739 and 1,230,298.

2. **Patents ⟸174—Claims for improvements not broadly construed.**
   Where a patent does not embody a primary invention but only an improvement on the prior art, the claims cannot have such a liberal construction as applied to pioneer inventions.

3. **Patents ⟸167(1)—Claims must be limited by specifications and drawings.**
   The claims of a patent must be limited in their scope to the invention as shown in the drawings and described in the specifications.

In Equity. Suit by Stephen D. Murray and the Murray Company against Wesley A. J. Hodo. Decree for defendant.

Oliver Mitchell, of Boston, Mass., and J. J. Eckford, of Dallas, Tex., for plaintiffs.

A. L. Jackson, of Fort Worth, Tex., for defendant.

MEEK, District Judge. This is a suit by Stephen D. Murray, of Dallas, Tex., and the Murray Company, a Texas corporation, based upon the alleged infringement of United States letters patent No. 1,086,204, dated February 3, 1914, issued to said Stephen D. Murray, under which patent the other plaintiff, the Murray Company, is exclusive licensee by grant from Murray. The patent relates to cotton gins, and the objects of the same are to provide novel means for the removing of lint cotton from the teeth of the gin in an expeditious and reliable manner.

The bill avers that the defendant is infringing the plaintiff's right under said letters patent and threatens and intends to continue such infringement, and prays for an injunction to prevent such infringement and for an account.

The defendant Wesley A. J. Hodo, of Fort Worth, Tex., alleges in his answer, among other defenses, the following:

Paragraph 8: "The defendant charges that alleged letters patent are so limited in scope by the prior art that it is entitled to only the narrowest possible construction, and that when so limited the defendant is not infringing said alleged letters patent, and cites patents in the prior art as follows: Patent No. 552,382, Dec. 31, 1895, saw cotton gin to Lumpkin et al.; Patent No. 632,685, Sept. 5, 1899, cotton gin, to Thomas; Patent No. 568,610, Sept. 29, 1896, cotton gin, to Graber; Patent No. 700,347, May 20, 1902, cotton gin, to Lumpkin—as anticipating the invention claimed in said alleged patent to Murray."

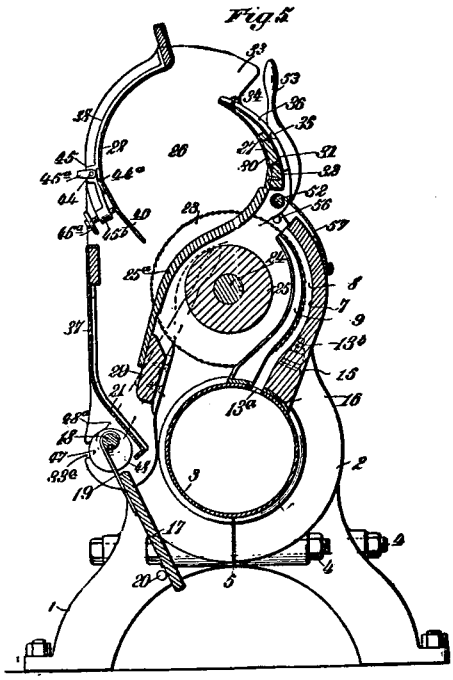
Paragraph 11: "The defendant denies that he is making, selling, or using, or that he ever has made, sold, or used the construction shown in said alleged patent, and declares that he is manufacturing, selling, and using the inventions shown in letters patent granted to him as follows: Patent No. 1,203,739, dated November 7, 1916, for cotton ginning, cleaning, and bleaching mechanism, and patent No. 1,230,298 process of ginning, cleaning, and bleaching mechanism, dated June 19, 1917."

The patentee, Murray, gives what he terms the "salient feature of his invention" on page 1, lines 48 to 79 of his patent, as follows:

"The salient feature of the invention is, however, a tubular member longitudinally disposed in the body of the gin and laying along the ginning mechanism, and, as will be hereinafter noted, this tubular member will also prominently and effectively serve to connect the legs of the gin frame as shown assembled in operative relation to the gin saws, to the teeth of which air currents of high velocity are practically and continuously applied and with substantially undiminished action during a considerable portion of the revolution of the saws, the air currents being caused to travel in a path coincident with the path traveled by the saw teeth and encompassed narrowly about the ginning teeth to conserve the force of the air current for removing the lint and reduce the amount of air and power that has heretofore been necessarily employed in removing lint from gin teeth. The use of this tubular member is not confined to this particular application of air, nor with the special form of gin which will be hereinafter particularly described, but is equally well adapted for use in connection with other gins, particularly to perform two of its most important functions, and which are to connect the legs of the gin frame and act as a conduit for receiving the lint cotton from the saws or ginning apparatus and conducting it away from the gin."

The following is figure 5 taken from the Murray patent, No. 1,086,-204. This is an enlarged view in cross-section of one of the gins:

Page 2 of patent, line 32 to line 94, of specification:



"The numeral 7 indicates a concave at the rear side of the gin which, as shown, embraces a large portion of the gin saws, it being shown in the present instance as embracing about one-third of the periphery of said saws. The concave forms one wall of a channel or channels 8, the opposite wall of the channels being formed by partitions 9 when saws are used in the gin, and by the body of the gin cylinder, when the machine is constructed as shown in Figs. 8, 9 and 12 of the drawings. Partitions 9 have attached strips 9a of a felt or other similar material, said strips serving the purpose of keeping external air from entering the channel at the side of the saws. The cross sectional area of the channel is reduced to a minimum consistent with the efficient operation of the machine, and by so doing the quantity of air required and consequently the size of the current producing apparatus and the amount of power is reduced. The cross sectional area of the channel is substantially the same throughout its length to maintain substantially the same velocity and lint-removing action throughout the length of the channel. The concave together with the features of construction explained in connection therewith constitutes a preferred form of nozzle between the ginning saws or devices and the tube or hollow member 3 for conveying the lint cotton from the saws to the said tube.

"Within the scope of the invention the nozzle may, however, be modified, as the essential feature of this part of the invention consists of a nozzle or tubular conveying means between the saws or ginning devices and the tube or hollow member 3 irrespective of exact details of construction.

"The currents of air are induced by a suction apparatus. * * * The suction apparatus causes the air to pass into and through the channel 8 along the concave and through the slot 13a into the tube, and from the tube to the pipe 12 into the suction fan, and from the latter by the discharge blast pipe 13 to any desired point. The current of air impinges against and passes around the teeth of the gin saws over a large portion of the periphery of the latter, thus disengaging the lint from the saw teeth. The lint is then drawn down through the slot 13a into the tube 3, and from the latter by the pipe 12 into the suction fan and is discharged through the blast pipe 13."

The Murray patent has a total of 82 claims. Only one of them is here in suit; this is claim 80, which is as follows:

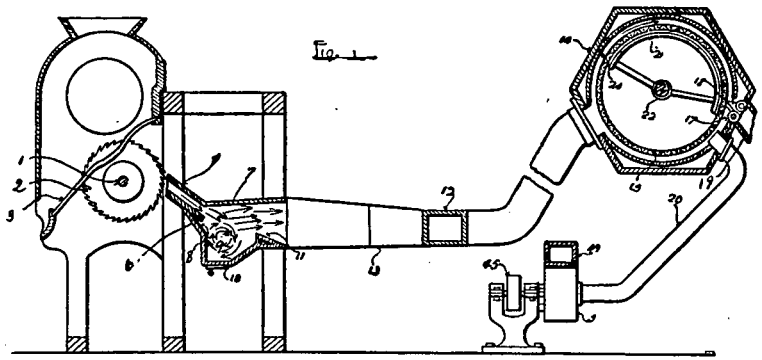
"In a gin saw employing suction currents of air for removing cotton from the saws, the combination of a series of saws, a suction nozzle having its opening disposed adjacent the saw teeth, and a suction chamber in communication with the suction nozzle."

Wesley A. J. Hodo filed application April 18, 1916, and was granted a patent on November 7, 1916, for a "cotton ginning, cleaning and bleaching mechanism." This is the alleged infringing machine.

From the specification, I copy from page 1, line 9 to line 27:

"This invention relates to cotton gins and the objects of the same are to provide means for removing lint from the gin saw teeth in a positive and practical and highly efficient manner; to provide means for treating the cotton with air after it leaves the gin saw teeth for the purpose of cleaning and bleaching the cotton, and to provide efficient means for taking care of the cotton after it leaves the saw teeth. It is old in the art to strip the lint cotton from the saw teeth with either a blast or a suction draft, but so far as I know there is no gin which successfully strips the lint cotton from the saw by a suction draft of air."

The following is Figure 1 taken from the Hodo patent 1,203,739, and shows a vertical section of a gin frame and the air suction attachment and a section of the condenser:



Page 1 of the patent from line 76 to and including line 1 at the top of page 2 of patent:

"A part of a gin frame is shown in Fig. 1, in which is mounted a shaft *1*, on which is mounted a gang of saws *2*, of the usual construction; *3* indicates the usual ribs of gin. The means for removing the lint cotton from the gin saw teeth consists of a nozzle *4*, which communicates with a suction fan *5*; the nozzle *4* terminates in close proximity to the saw teeth, being just far enough away from the saw teeth to prevent the saw teeth from striking the nozzle. The nozzle *4*, as shown in Fig. 1, illustrates a device which has been successfully used in carrying out the objects above set forth. The position of the nozzle is preferably not lower than the shaft 1 of the gang of saws; the nozzle *4* consists of a hollow structure rectangular in cross-section and having the upper and lower walls thereof parallel to each other. The lower wall of the nozzle has a projection *6*, terminating within the space adjacent to the cleaning and bleaching chamber 7. The object of this wall *6* projecting into space, is to produce a vacuum or dead air space along a line across the entire nozzle substantially at the point *8*. The enlarged space in the chamber 7 causes an eddying of the air as it leaves the nozzle and this eddying is cyclonic in effect, producing a whirling motion of the lint which has been stripped from the saw teeth. In the lower part of the chamber, substantially about the space *9*, there will be a dead air space in which dust and dirt and shale will fall on the bottom *10*, so that such trash, dirt and shale may be removed."

Henry W. Graber filed application April 20, 1896, and was granted letters patent No. 568,610 on September 29, 1896. His invention was for new and useful improvements in cotton gins. This patent is before the court bearing upon the prior art.

From the Graber patent, page 1, line 60 to line 89:

"The air-blast system for driving lint cotton from the teeth of gin saws is objectionable, although the gin-flue is constructed without angles, bends, or curves, in that the air-blasts cannot practicably expel dead air and move the large mass of lint-cotton with sufficient rapidity to entirely avoid packing and choking the flue, and therefore the prior system referred to does not secure the high perfection required at this day in the art of ginning and handling cotton.

"The objects of my invention are to avoid the objections stated, to improve and simplify cotton gins or linters, to dispense with gin-brushes, and to avoid choking of the gin-flue, which occurs, where cotton is blown or driven by air-blasts off the saw teeth into a gin flue leading to a condenser or a suitable receptacle.

"To accomplish these objects, my invention consists, among other things, in the combination, with a cotton gin, of an air-suction apparatus arranged in operative connection with the gin and acting to suck the lint cotton directly from the rear portions of the saw teeth independently of and without a brush, and an apparatus for preventing the withdrawn lint cotton from passing into and through the air-suction apparatus."

"The air-suction acts directly upon the teeth of the saws, and the natural induced draft is obviously upon and in juxtaposition to the uppermost teeth of the gin-saws, or those teeth emerging from between the gin-ribs during the operation of the gin. The suction created in the manner described and shown instantly draws or sucks off the lint cotton from the saw teeth as, or immediately after, the teeth bearing the lint cotton emerge from between the ribs. This lint cotton is swiftly exhausted from the interior of the casing or hood Y through the suction-flue into the chamber of the condensing apparatus and is deposited on the foraminous condenser-cylinder."

The following is Figure 1 taken from the Graber patent, No. 568,610, and is a broken vertical sectional view of a cotton ginning apparatus or linter embodying Graber's invention:

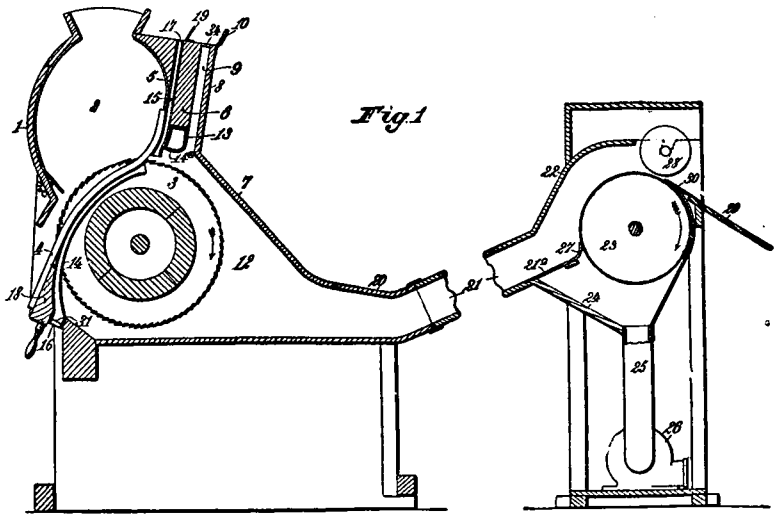


Fig. 1

From the Graber patent, page 2, line 15 to and including line 44:

"The numeral *1* indicates the gin-breast; *2*, the roll-box; *3*, the saws, and *4* the gin-ribs of a cotton gin. The rear upper circular or curved part is lined,

as usual, with sheet metal or other material, as at *5*, and a transverse beam or timber *6*, forming a part of the gin-frame, is arranged above the saws and in rear of the upper ends of the gin-ribs. In the example shown in the drawings the rear portion of the gin-frame is provided with a funnel or hood-shaped casing *7*, wholly inclosing the rear portion of the gin-saws and extending forward under the same to provide a clear space between the forward extension of the bottom wall of the casing or hood and the lower-most saw teeth. The top wall of the casing or hood projects upwardly, as at *8*, in such proximity to the transverse beam or timber *6* as to create or provide a comparatively narrow air conduit or inlet *9*, comprising a transverse passage which extends the full width of the gin, or approximately so.

"The outer or air-receiving end portion of the air-conduit *9* communicates with the atmosphere and may be closed or opened by a valve *10*, or any suitable construction. The lower end of the conduit is in communication with the air-suction chamber *12*, formed in the rear of and about the saws, through the medium of the casing or hood *7*."

On the final hearing of this cause on the merits, the plaintiffs offered in evidence the patent in suit and evidence that the Murray Company is exclusive licensee by grant from Murray. The plaintiffs offered in evidence the Hodo patents and also a copy of a catalogue published by the Hodo Cotton Gin Company. They offered the deposition of a mechanical expert, and the defendant offered the cross-examination of this witness. The defendant introduced in evidence copies of patents set up in his answer on the prior art in ginning cotton. He offered no further evidence.

The mechanical expert whose deposition is before the court testified as a witness for the complainant, and his facts, premises, and conclusions reached generally favor the complainants' viewpoint. The defendant offers the cross-examination of the expert, but no further evidence of any character either lay or expert; therefore the court has been called upon to feel its way step by step to what it believes to be a conclusion which reflects the respective rights of the parties before it.

[1] I have studied the Murray patent here in suit, also the Hodo patents, and also the patents before the court offered by the defendant showing the art of ginning cotton at the time Murray filed his application for the patent here in suit.

It is my view that Hodo in his invention makes use of the same principle that is used in the Murray gin. However, at the time Murray filed his application on March 23, 1904, the art of ginning cotton then showed cotton gins employing suction currents of air for removing cotton from the saw teeth and the combination of a series of saws, devices having openings close to the saw teeth and suction chambers in direct physical connection with the devices arranged to suck the lint cotton from the saw teeth.

[2] Considering the patents before the court showing the prior art, the Murray gin does not embody a primary invention. It is only an improvement of the "prior art." His claim 80 here in issue is couched in very broad and comprehensive terms but cannot have the liberal construction to which it would be entitled were his the first machine to use the principle of suction of air in combination with saws for ginning or linting cotton. Two or three inventors before

Murray, copies of whose patents are now before the court, had used the well-known principle of suction of air in machines invented to lint cotton.

The Murray specifications and descriptions of his invention and the six sheets of the Murray drawings in the light of the explanation of said drawings in the specification, I find that the inventive concept of Murray is illustrated in figure 5 above, and that his preferred form of nozzle there illustrated is in his specifications and claims described and claimed variously as "means having an arcuate contour," "conduit having an opening," "casing," "concave," and "nozzle."

Both complainants and defendant have made much use of the word "nozzle" in their specifications and claims. It is but a word after all, and in the court's view does not very well describe the part of the machine referred to in either of the patents. A "nozzle" recalls to the mind the long narrow device, for instance, that attached to the free end of the fire hose. Such a thing is open on the end only, not on its side as well, as is the case with the so-called tubular "Murray nozzle." This word is equally far from closely defining the short and very broad air inlet parallelogram in shape of the Hodo gin.

The principle used and developed by the inventors in their several machines for ginning cotton by use of suction current of air is as follows: The tendency of the rapidly entering air is to free the lint cotton held by the teeth of the revolving saw and carry such lint along with it as it flows onward through the chamber, of whatever size and shape, that lies between the above-mentioned narrow space and the suction fan.

The chamber into which the fast moving air enters after passing through the narrow space described in Murray's device, relatively long compared with—that is, its nozzle shape—while in the case of Graber the width is greater for the same length; but the principle is the same in each case, i. e., the fast moving air passing through a narrow orifice frees the lint cotton from the saw teeth and carries it into a chamber beyond. The shape and relative size of such chamber is immaterial.

The term "nozzle" may or may not be descriptive of the shape of such chamber and in my view is immaterial to the principle here involved.

[3] As I have said above in view of the ideas and conceptions that had appeared and been embodied in cotton gins and been patented before Murray's application for a patent was filed, I must hold that his inventive concept and the patent issued to him is not a pioneer patent. The claims of his patent must be limited in their scope to the actual combination of essential parts as shown in his drawings and described in his specifications and cannot be construed and held to cover other combinations of elements of different construction and arrangement. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; Auto Piano Co. v. Amphion Co., 186 Fed. 159, 108 C. C. A. 291.

The situation which is present in this case has frequently come before the courts, and the governing rule has been clearly expressed by Judge Colt, speaking for the Court of Appeals for the First Circuit. In Mossberg v. Nutter, 135 Fed. 95, 99, 68 C. C. A. 257, 261, Judge Colt said:

"In approaching a patent, we are to look primarily at the thing which the inventor conceived and described in his patent, and the claims are to be interpreted with this particular thing ever before our eyes. In confining our attention too exclusively to a critical examination of the claims, we are apt to look at them as separate and independent entities, and to lose sight of the important consideration that the real invention is to be found in the specification and drawings, and that the language of the claims is to be construed in the light of what is there shown and described."

On the oral argument of this cause before the court at Dallas and also in their briefs, the attorneys for the plaintiffs admit that the defendant Hodo had added a new and novel element in a "cyclonic cleaning chamber" and also a nozzle specifically different in shape from the nozzle shown in the Murray machine.

To permit the patentee Murray to include the defendant Hodo's nozzle under claim 80 of his patent would be to permit him to claim something that does not emerge from his description and drawings. This should not be permitted.

A decree will be entered dismissing the plaintiffs' bill because of noninfringement, and the costs will be adjudged against them.

WESER BROS., Inc., v. PAUL.

(District Court, S. D. New York. October 17, 1921.)

No. 18145.

1. **Patents ⊜328—923,225, for player piano, held valid and infringed.**
   The Weser patent, No. 923,225, for player piano, *held* not anticipated and valid, and claims 1, 2, 4, 5, and 26 infringed.
2. **Patents ⊜178—Description of preferred construction not limitation.**
   The description in a specification or drawings, or even in a claim of the form or construction of a mechanical element, when that form or construction is not essential to the invention, is to be taken merely as a preferred form or construction, and not as a limitation which excludes mechanical equivalents.

In Equity. Suit by Weser Bros., Inc., against Charles W. Paul. Decree for complainant.

Edmonds & Peck, of New York City (Philip C. Peck, of New York City, of counsel), for plaintiff.

Otto Munk, of New York City (Latimer P. Smith and Robert M. Barr, both of Philadelphia, Pa., of counsel), for defendant.

KNOX, District Judge. [1] Plaintiff is the owner of United States letters patent No. 923,225, issued June 1, 1909, to John A. Weser, now deceased, for a mechanical musical instrument.

Referring to the specifications, and taking some liberties therewith, it is seen that the patent relates generally to automatic pianos or other musical instruments in which power for operating the various mechanical parts of the instrument is derived from feeder bellows. Particularly it is concerned with the devices by which expression—that is, a variation in tone—is controlled, either directly or indirectly, and with the connections therefor.

The feeder bellows of instruments of this general character have been operated in some instances by electric motors; in others by foot power. Weser desired to combine both the motor-operated bellows and the foot-power bellows, inasmuch as the use of the latter in supplement of the former would enable the matter of expression to be better controlled. He also wished to make the action of the foot-power bellows to a certain extent independent of the action of the motor-operated bellows, so that the function of the foot-power bellows, as an expression device, could be fully realized.

To do this Weser took a piano in which the exhaust or vacuum pressure is created in the main bellows by feeders operated by pedal mechanism, and installed therein a motor-operated means of creating exhaust or vacuum pressure. Such means consisted of a series of small or supplementary feeder bellows operated by a crank shaft, pulleys, and a belt from an electric motor.

The supplementary bellows were connected by a suitable windway with the wind chest, and, through that and its connections, with the playing devices of the mechanism. At a convenient point between the motor-operated bellows and the connection to the wind chest he provided a check valve, comprising a simple flap valve, co-operating with the end of the windway, and opening towards the motor-operated bellows. The effect of this was that the motor-operated bellows would be in operative connection with the rest of the mechanism only when its exhaust or vacuum pressure was greater than that in the windchest, while, if the exhaust or vacuum pressure produced by the foot-operated bellows should be greater than that produced by the motor-operated bellows, the check valve above referred to would immediately close and cut off the motor-operated bellows, and the foot-operated bellows would draw no air therefrom. Thus the full effect of a strong or powerful action of the foot-operated bellows in accenting certain notes or in performing fortissimo passages would be unimpaired.

After proceeding at considerable length to disclose the other features of his invention, Weser embodied the same in 29 claims, 5 of which, to wit, Nos. 1, 2, 4, 5, and 26, are said to be infringed.

A summary statement of the claims here involved is:

Claim 1: (a) Playing devices; (b) foot-operated bellows in operative relation therewith; (c) independent motor-operated bellows, also in operative relation with playing devices, whereby notes may be accented by the foot-operated bellows, while the instrument is operated by the motor-operated bellows.

Claim 2: (a) Playing devices; (b) foot-operated bellows in operative relation therewith; (c) motor-operated bellows, also in operative relation with playing devices; and (d) means to cut off com-

munication between (b) and (c) when the working force of (b) exceeds that of (c).

Claims 4 and 5 embody the matter set forth in claims 1 and 2, respectively, with the addition that each includes a wind chest interposed between the playing devices of the piano, and in operative relation therewith, and also in operative relation with both the foot-operated bellows and the motor-operated bellows.

Claim 26 differs from claim 5 in that it includes as a separate element a "main or reservoir bellows" in operative relation with both foot-operated bellows and the independent motor-operated bellows.

The basis of plaintiff's claim of infringement is that defendant accomplishes the purpose served by Weser's invention through the medium of what is called "the Aerex player piano power plant." It consists of a motor which operates at high speed a centrifugal suction fan horizontally disposed in the upper portion of the motor housing. The function of this is that it draws air from the bellows and wind chest of the piano, and thence through the motor, in such fashion as to create a normal air tension, which actuates the playing devices of the instrument. By reason of this, plaintiff asserts, it may properly be said to be the "motor-operated exhaust or vacuum pressure-creating means" of the Weser patent; that is, the exhaust fan of the Aerex motor serves a purpose identical in function and result with that of Weser's series of small or supplementary bellows, operated through the medium of a crank shaft, pulleys, and belt from an electric motor.

Another alleged point of similarity of the Aerex motor to Weser's device, and so close thereto as to amount to infringement, is the valve contained in the housing of the Aerex motor. This consists of a leather disc positioned at the mouth of the motor housing and just below the end of the windway through which the revolving fans draw air from the wind chest and bellows. Under defendant's construction, as shown in Plaintiff's Exhibit 9, the windway consists of a piece of rubber hose.

The valve just mentioned is so constructed that when the exhaust or vacuum pressure created by the operation of the foot-operated bellows of the piano is greater than that created by defendant's revolving fans it will be drawn up against the end of the windway, and thus prevent any air being sucked from the motor housing. During the period that the valve responds to the pressure of the foot-pedaled bellows the latter is to a certain extent independent of the action of the motor-operated bellows, and the function of the foot-operated bellows, as an expression device, can be fully realized. Once, however, the person at the piano ceases to pedal, or otherwise lightens the exhaust or vacuum pressure of the foot-operated bellows to a point less than that created by defendant's fans the valve at the mouth of the motor housing drops down, and the normal air tension attributable to the fans again comes into action. So again, says plaintiff, there is a demonstration of infringement, for the valve "constitutes the means to cut off communication between the foot-operated bellows and motor-operated bellows when the working force of the former exceeds that of the latter," and that the Aerex motor is "in

operative relation with the playing devices," "the wind chest" and the "main or reservoir bellows" of the Weser combination.

In view of the identity of purpose, function, and result served by the devices of the respective parties the main question to be determined is whether the separate Aerex suction fan is the mechanical equivalent of Weser's "independent motor-operated bellows" set out in the claims here involved.

Defendant does not deny that a fan is a mechanical equivalent of a bellows when each is considered as a separate unit, and, further, it is not denied that a fan is the equivalent of a bellows where each forms a part of a combination of elements, assembled and functioning in the manner of the devices here in suit. What would ordinarily be the logical result of the practical admissions thus made is sought to be avoided upon the ground that the discloure of Weser is of a secondary character, and, as such, the elements entering into his combination should not be accorded a broad range of equivalents. In this connection attention is called to the fact that the language of the claims of the Weser combination is limited to a "foot-operated bellows" and to a "motor-operated bellows," and that there is nothing in the patent whereby it can be suggested that he ever contemplated the possibility of any other construction.

It is further argued that, should the court apply to the claims of Weser's patent the doctrine of equivalents, the result would be to so widen their scope as to render them invalid under the patent to Fuller, No. 601,318, March 29, 1898, and also under the alleged prior use of the Bougher organ.

Giving attention first to the question as to whether Weser had in mind any other structure of a motor-operated exhaust or vacuum pressure-creating means, it will be seen that he used in his specifications this language:

"In addition to the exhaust or vacuum pressure-creating means to be operated by the performer there is also provided a motor-operated exhaust or vacuum pressure-creating means represented in the present instance by a series of small or supplementary feeder bellows operated through the medium of a crank shaft, pulleys, and belt from an electric motor."

When drafting his claims and in describing the device just referred to, Weser used the words "motor-operated bellows;" none the less, he undoubtedly was aware that the same function and result might be obtained by means of an exhaust fan. He was familiar with the organ art, and exhaust fans had long before been used as a means of creating air tension in pipe organs. In saying that the pressure-creating means was "represented in the present instance by a series of small or supplementary feeder bellows" he probably meant that he preferred the bellows type of means, and did not intend to exclude equivalent means.

[2] At this point it is to be borne in mind that the description in a specification or drawing of a form or construction of a mechanical element when that form or construction is not essential to the combination or improvement claimed is a mere pointing out of the best mode in which the patentee contemplated applying the principle

of his invention under section 4888, Revised Statutes (Comp. St. § 9432), and does not deprive him of protection against mechanical equivalents, nor indicate that he gave up all other modes of application. J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561.

And in Vrooman v. Penhollow, 179 Fed. 296, 102 C. C. A. 484, it was held that, where a claim of a patent contains a description of only one form of a thing which would perform the same office in other forms, the court will apply the general rule that the description covers all equivalent forms, and the form described will be treated only as the one preferred.

Conceding now, as must be done, that Weser's patent was not revolutionary in character, it is not, for such reason, to be deprived of the right of a fair range of equivalents. The Supreme Court expressly held in Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, that the doctrine of equivalents may be invoked for all patents, and not merely for pioneer ones, and that the range of equivalents depends upon and varies with the degree of the invention.

While Weser did not make a great invention, he did succeed in taking a forward step. Apparently his application encountered no serious obstacles in going through the Patent Office. The file wrapper not being in evidence, it is impossible to say just what it contains. I am, however, justified in assuming that, if the file wrapper contains any evidence of Weser's having been compelled to limit or qualify his original claims in any material respect, such fact would have been called to my attention.

In addition, it is established that since 1907 plaintiff has made and sold 489 player actions equipped with Weser's patented improvement, and involving about $143,000. Not a particularly large number of instruments, to be sure, but sufficiently large to entitle the business to reasonable protection.

Having come to the foregoing conclusions, it is necessary to say definitely whether defendant's Aerex motor power plant is the equivalent of complainant's series of small motor-driven bellows. That the two devices perform the same function and achieve the same result must be conceded. In order to find equivalency it remains to be decided if they function in substantially the same manner. Benbow-Brammer Mfg. Co. v. Straus, 166 Fed. 114, 92 C. C. A. 98. The means in each instance is that of the creation of vacuum pressure, and at the time of Weser's patent the creation of such pressure by a motor-driven exhaust fan and in a musical instrument was well known and understood. See patent to Fuller, No. 601,318, March 29, 1898. I hold, therefore, that defendant's device is the mechanical equivalent of Weser's improvement.

Are, then, the claims in suit invalid or to be limited by reason of the patent to Fuller and the alleged prior use of the Bougher organ?

As to the alleged prior use of the organ mentioned, it is to be admitted that the valves in its windway, and their apparent mode of operation, are not unlike those called for by Weser. Nevertheless I

am unable to understand how it was, if the organ was connected with a one horse power motor, a person of ordinary strength could overcome the air tension thus created by the operation of an organ's foot bellows. From this fact I am inclined to believe that, when Mr. Bougher used only the foot bellows in playing the organ, he must have so manually manipulated the check valve as to shut off the air tension created by the fan. Indeed, Mr. Anchor, who first installed the organ, says that the foot bellows could be used for accenting notes only "if that [the foot bellows] develops more power by foot than the motor gives." Further, if there was an anticipation of Weser in the use of this organ, proof of the fact should not depend upon the somewhat meager testimony now in the case as to how the organ's note-accenting capacity was utilized. The organ was built by the "Clough-Warren" people of Adrian, Ohio. This concern is now in the player piano business, and if, in the organ trade formerly carried on, it developed all that Weser claims to have accomplished, indisputable evidence thereof would probably be available. It is possible, of course, that the witness who testified that the organ was equipped with a one horse power motor may be mistaken. In view, however of the testimony of Winfield S. Weser that he could not play the organ with its foot pedals while the motor at present attached to the organ was operating, I am not disposed to find the alleged prior use of the organ to be established.

Referring now to the Fuller patent of March 29, 1898, for a regulator for organs having electrical air pumps, it is to be marked that this patent is in the case not as an anticipation, but merely as showing the state of the art, and to aid in construing the claims of the Weser patent. It cannot, therefore, invalidate any of the claims on the ground of want of novelty. Grier v. Wilt, 120 U. S. 412, 419, 7 Sup. Ct. 718, 30 L. Ed. 712.

Fuller recites:

"Heretofore organs, both reed and pipe, have been operated to produce music by an air-forcing pump consisting of a rotary fan blower, the fan of which has been driven by direct connection with an electric motor, and reed organs have been operated by an exhaust or suction pump wherein an exhausting fan blower has been driven by direct connection with an electric motor. In such cases the wind conductor, in which the fan blower is located, has been connected with the wind chest or vacuum air chamber of the organ."

The object of the invention was "to control, at the will of the organist, the volume of the air current created by the fan blower between the air chamber of the organ and the mouth of the wind conductor in which the fan blower is located, in order that the air current may be properly regulated in accordance with the varying musical requirements of the organ, and also in order that the consumption of electrical power may be proportioned to the volume of tone actually produced."

When the improvement should be in use, Fuller contemplated that the electric current to the motor should always be turned on to drive the motor at its maximum speed, and the regulation was to be entirely controlled by his manual mechanical regulator. By simply mov-

ing the regulator the volume of the air current might be regulated to meet the musical requirements of the organ, and at the same time the "load" upon the motor would be lightened to a point beneath its maximum "carry" and the consumption of electrical energy thereby proportioned to the work done.

As I understand this paraphrase of a portion of Fuller's specifications, it means that he had in mind the lessening of air tension, not an increase thereof. He does, however, go on to say:

"When the bellows, *B*, is used alone, the wind conductor, *E*, is closed by the regulator. The bellows, *B*, it may be remarked, can be used simultaneously with the air pump."

Notwithstanding this statement, I have difficulty in finding that Fuller had in mind such an operative relation between the various elements of his combination as would permit of an accenting of notes by means of the foot bellows while the instrument was being operated by the motor-driven fan. I would think that before the foot-operated bellows could be fully utilized as an accenting device it would be necessary to entirely close the wind conductor by the hand-operated regulator; otherwise the foot bellows, being in operative connection with the windway, would tend to minimize the air tension being created by the motor-driven fan; that is, a counter suction would be set up. That such would be the effect seems to be indicated by what Weser says upon this subject at lines 20 to 25 on page 2 of his patent.

For these reasons, I shall not limit Weser's claims upon anything found in the patent to Fuller, and will hold the claims in suit to be valid and infringed.

UNITED STATES v. WURTZBARGER.

(District Court, D. Oregon. November 14, 1921.)

No. 9453.

Indians ⊂=38(2)—United States has jurisdiction of offenses committed on site of Indian school.

Under Const. art. 1, § 8, providing that Congress shall have power to exercise exclusive legislation "over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts * * * and other needful buildings," the United States *held* to have jurisdiction of criminal offenses committed on the site of an Indian school, to the purchase of which by the government the Legislature of the state assented by joint resolution.

Criminal prosecution by the United States against Alma Louise Wurtzbarger. On demurrer to indictment. Overruled.

Lester W. Humphreys, U. S. Atty., of Portland, Or.

Joseph, Haney & Littlefield, of Portland, Or., for defendant.

WOLVERTON, District Judge. The defendant is indicted for murder committed upon the lands and premises occupied by the United States for the maintenance of an Indian school, commonly known as

the Chemawa Indian School, in Marion county, Or. The defendant has interposed a demurrer to the indictment, whereby its sufficiency is challenged on the ground that there has been no complete cession of the lands upon which the Chemawa Indian School is being maintained to the United States by the state of Oregon, and no congressional acceptance of the same, as required by section 8, art. 1, of the federal Constitution. This is the only question presented for decision.

Under the section alluded to, Congress, among other things, is empowered—

"to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

The argument of counsel is that, under this clause of the Constitution read in its entirety, there must be both a cession by the state and an acceptance by Congress before the general government can acquire exclusive jurisdiction over the lands involved. The argument, however, overlooks the grammatical construction of the clause, which recites two contingencies under which the general government may acquire exclusive jurisdiction, the latter of which is that Congress shall have power "to exercise like authority over all places purchased by the consent of the Legislature of the state * * * for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." The first of the contingencies relates to the seat of government of the United States, and the second to the acquirement of places for the erection of forts, magazines, and the like. As to these latter, when the title is acquired by purchase by consent of the Legislature of the state, the federal jurisdiction is exclusive of all state authority. "This follows," says the Supreme Court in Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 532, 5 Sup. Ct. 995, 29 L. Ed. 264, "from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.'"

This is in accord with previous judicial thought upon the subject. The Attorney General, as far back as June 24, 1854, reviews the authorities upon the subject, among which are United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14867, Commonwealth v. Clary, 8 Mass. 72, and Mitchell v. Tibbetts, 17 Pick. 298, all of which are cited and discussed in the Ft. Leavenworth R. R. Co. Case, supra, and comes deliberately to the conclusion, and so advised, that a purchase by the general government, by the consent of the state, devolves upon the general government exclusive legislative authority over the domains so purchased. He says:

"The constitutional conditions, be it observed, are two—purchase by the United States, and consent of the Legislature of the state. By that consent, the state voluntarily and knowingly parts with its jurisdiction." 6 Op. Attys. Gen. 577.

See, also, 7 Op. Attys. Gen. 571.

"Purchased by the consent of the Legislature of the state," says the court, in United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14867, is the condition of the Constitution. So it is said:

"It is only after the state has parted with its jurisdiction, which may be either by a formal cession thereof to the United States, or simply by assenting to the acquisition of the land by the latter, that Congress becomes invested with authority thus to legislate." 14 Op. Attys. Gen. 557, 559.

A like conclusion has been reached by the District Court of the Western District of Kentucky. United States v. Tucker (D. C.) 122 Fed. 518.

It will hardly be disputed that "exclusive legislation" signifies exclusive jurisdiction; and, as we have seen, the general government acquires such jurisdiction by purchase and the consent of the state, which, the conditions being performed, vests by declaration of the Constitution.

The consent of the state in the instant case was by Senate concurrent resolution. The resolution describes certain lands near Forest Grove, in Oregon, but consent is given to the purchase of such lands, or "any other suitable tract that may be selected by the honorable Secretary of the Interior for the permanent location of said school" (Indian training school). Laws of Oregon 1885, p. 488. The consent is attended with no conditions whatsoever.

It has been the policy of the general government for many years to establish and maintain training schools and educational institutions for the Indians, who are the wards of the government, and for such purposes it has acquired lands, with appurtenances, upon which to maintain such institutions, and it seems indisputable that they come within the category of "other needful buildings," the language of the clause of the Constitution under discussion.

It needs no citation of authority to prove that a joint resolution, solemnly adopted in accord with approved parliamentary usages, is as effective for giving consent to the purchase as an act of the Legislature.

The demurrer will be overruled.

KEELER BROS. v. SCHOOL DIST. NO. 25 OF GILLIAM COUNTY, OR., et al.

(District Court, D. Oregon. December 12, 1921.)

No. L-8618.

1. **Banks and banking ⟸145—Bank certifying check entitled to disregard subsequent conditional indorsement.**

Under Or. L. § 7831, providing that, when an indorsement is conditional, a party required to pay may disregard the condition, but one to whom the instrument is negotiated holds it or its proceeds subject to the rights of the person indorsing conditionally, where the drawer of a check procured its certification and thereafter indorsed it conditionally, the bank, having paid the check, was not liable to the drawer, though the condition had not been performed.

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

2. Banks and banking ⇐145—Conditional indorsement of check inferred, subsequent to certification, when contrary not alleged.

Where one drawing a check to its own order, procuring its certification, and subsequently negotiating it under a conditional indorsement, sued to recover its amount from the bank, which had paid it, and the complaint does not allege that the conditional indorsement was prior to the certification, it must be inferred that the indorsement was subsequent to the certification, and that the bank did not become a party to the indorsement.

At Law. Action by Keeler Bros. against School District No. 25 of Gilliam County, Or., and others. On demurrer to the complaint. Demurrer sustained.

McCamant & Thompson, of Portland, Or., for plaintiffs.

Platt, Platt, Montgomery & Fales, of Portland, Or., for defendant United States Nat. Bank.

Jay Bowerman and John W. Kaste, both of Portland, Or., for remaining defendants.

WOLVERTON, District Judge. [1] Keeler Bros., on September 30, 1919, drew its check for $5,000, payable to itself, on the United States National Bank, procured its certification by the bank, and indorsed it as follows:

"Pay to Gilliam County, S. D., #25, in accordance with our bid for legal bonds, when approved by attorney and attached hereto.

"Keeler Brothers."

The check, so drawn, certified, and indorsed, was delivered to school district No. 25. Later it was indorsed by the school district, and in course of negotiation through two other banks was presented to the United States National for payment, and paid by it to the holder. Keeler Bros. now seek to recover against the bank the amount of the check, although the bank has previously paid it to the holder. Its right so to recover is challenged by the bank.

I take it that the check was indorsed by Keeler Bros. after Keeler Bros. had obtained its certification by the bank. Such would be the natural course that would be pursued in the transaction, and the complaint nowhere declares to the contrary. The question involved depends upon the proper construction of section 7831 of Olson's Oregon Laws, which reads:

"Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not; but any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally."

There can be no mistaking the plain letter of the statute. The party required to pay may disregard the condition, and make payment to the indorsee. The statute authorizes him to do this. Having been authorized by the statute so to act, does the law merchant, notwithstanding, subject him to a second payment of the obligation at the behest of the drawer?

Counsel for plaintiff cite authorities under the old law to the effect that—

"The acceptor is bound to take notice of the condition annexed to an indorsement, for when a person accepts a bill after a conditional indorsement, and pays it to an indorsee of this conditional indorsee while the condition of the first indorsement is unfulfilled, he is liable in second payment to the first indorser, being bound to look at the conditional indorsement as a limitation ex facie of the bill, in the title of the party claiming payment." Daniel on Negotiable Instruments (3d Ed.) § 697, p. 622.

Such is the doctrine of the case of Robertson v. Kensington et al., 4 Taunt. 30, 128 Eng. Reports (Reprint) 238. This is apparent from the argument of counsel for plaintiff, which was, in effect, that defendants, by subsequently accepting the bill, that is, after the indorsement had been made, had become parties to the conditional transfer, and, as the condition had never been performed, the transfer had been defeated, and they became liable.

[2] Such is not the present case. The indorsement here was made, as we must infer from a fair construction of the complaint, after the certification, and the bank in no way became a party to the indorsement. There seems to be a dearth of authority on the particular question here presented, perhaps because the statute is so plain that there has been no occasion for its judicial interpretation.

It is suggested by counsel for the bank that the word "may" is susceptible of being construed as "shall," or "must"; but that question does not arise here, for it is sufficient that the law permits the bank to make such payment. That is reason enough to protect the bank against a second payment to the drawer of the check.

Demurrer sustained.

Petition of FRANCE FOUNDRY & MACHINE CO. et al.

In re DETROIT TRANSP. TRUCK CO.

(District Court, E. D. Michigan, S. D. December 8, 1921.)

No. 5029.

Bankruptcy ⟸60—Application for receiver by insolvent corporation held an "act of bankruptcy."

Application by an insolvent corporation to have trust mortgage declared void and a cloud upon the corporation's title, to enjoin defendant, who claimed to act as trustee under such mortgage, from proceeding as such, for an accounting by such defendant to the corporation, and for the appointment of a receiver to hold property covered by mortgage for preservation thereof pending determination of the case on the merits, *held* an "act of bankruptcy," under Bankruptcy Act, § 3a (Comp. St. § 9587), making an application by an insolvent person for a receiver or trustee for his property an act of bankruptcy, though the corporation's application for the receiver did not arise from and was not based on its insolvency, and though the application was for a temporary rather than a permanent receiver.

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

In Bankruptcy. In the matter of the petition of the France Foundry & Machine Company and others to have the Detroit Transportation Truck Company adjudged bankrupt. Petition granted.

Fixel & Fixel, of Detroit, Mich., for petitioning creditors.

Oxtoby, Robison & Hull, of Detroit, Mich., for bankrupt.

TUTTLE, District Judge. This bankruptcy proceeding is before the court on the involuntary petition, the answer of the bankrupt thereto, and a stipulation of facts, entered into between the parties hereto.

It is alleged in said petition, among other things, and in addition to the necessary jurisdictional averments, that the bankrupt is insolvent, and that, while insolvent and within the period of four months next preceding the date of the petition, said bankrupt committed an act of bankruptcy, in that, during such period and being so insolvent, it applied to the circuit court for the county of Wayne in chancery (one of the courts of record of the state of Michigan) for the appointment of a receiver of its property, by filing a bill of complaint in a certain cause referred to in such petition. In the stipulation of facts just mentioned it is recited that the bankrupt was insolvent at the date of the filing of the involuntary petition herein, and also that it filed the said bill of complaint at the time alleged. It is, however, denied by the bankrupt that its act in so filing such bill of complaint constituted an act of bankruptcy.

Section 3a of the Bankruptcy Act (Comp. St. § 9587) contains the following provision:

"Acts of bankruptcy by a person shall consist of his having, * * * being insolvent, applied for a receiver or trustee for his property."

It appears from the bill of complaint in question, copy of which is attached to the stipulation of facts, and it is undisputed, that the purpose thereof was to have a certain alleged trust mortgage mentioned therein declared void and a cloud upon the title of the bankrupt, and of enjoining the defendant therein, who claimed to be acting as trustee under said mortgage, from exercising any rights of sale, control, or disposition of the property claimed by him to be subject to said mortgage. The bill also sought an accounting by said defendant to the plaintiff touching his dealings with such property in his claimed capacity of trustee under such alleged void trust mortgage. The final paragraph of the prayers for relief in such bill was as follows:

"That pending the hearing of this cause, for the purpose of preserving the assets for the benefit of said plaintiff and its creditors, a receiver be appointed to hold said assets intact, and to dispose of them in accordance with the future order of the court herein, said receiver to give such bond as to this court shall seem advisable, and that upon the appointment of said receiver, said defendant, Fred Conley, be by the order of this court directed to turn over such of said assets covered by said alleged mortgage as are now in his possession to said receiver."

Under the plain provision of the Bankruptcy Act hereinbefore quoted, it cannot be doubted that by thus applying for a receiver for its property while insolvent and during the statutory four months

period the bankrupt committed the act of bankruptcy referred to in the language of section 3a just referred to and charged in the petition herein. Hill v. Western Electric Co. (C. C. A. 6) 214 Fed. 243, 130 C. C. A. 613; Hinrichs v. Mississippi Valley Trust Co. (C. C. A. 6), 223 Fed. 991, 139 C. C. A. 371. The contention that in order to constitute an act of bankruptcy an application for a receiver must arise from, and be based upon, insolvency, was held to be without merit by the Court of Appeals for this circuit in the case first cited. The material facts in that case were substantially the same as those here, and the language there used by the court is so directly applicable and controlling in the instant case as to render further discussion of this question unnecessary.

Nor is the effect of the application for the receiver which was made by the bankrupt herein affected by the fact that such application was for a temporary rather than a permanent receiver, this being an incidental and immaterial detail. In re Wm. S. Butler & Co., Inc. (C. C. A. 1) 207 Fed. 705, 125 C. C. A. 223.

Petitioning creditors having thus established one of the acts of bankruptcy charged in the involuntary petition, it becomes unnecessary to decide or consider whether the bankrupt is guilty of any of the other acts of bankruptcy alleged therein.

An order for adjudication will be entered.

OHIO SAVINGS & TRUST CO. v. HARMAN et al.

(District Court, E. D. Pennsylvania. December 9, 1921.)

No. 8576.

1. Action ⟸25(4)—In action on note, defendant may set up equitable defense.

In a suit against makers of a promissory note, defendants may set up an equitable defense, and pray for cancellation of the note, under Judicial Code, § 274b (Comp. St. § 1251b), and Practice Act Pa. 1915 (P. L. 483) § 14 (Pa. St. 1920, § 17194).

2. Dismissal and nonsuit ⟸43(4)—Pleading ⟸268—Affidavit of defense, though not indorsed, held to entitle defendant to reinstatement after discontinuance.

Failure to indorse an affidavit of defense, setting up an equitable defense, with the required notice to the plaintiff provided by Practice Act Pa. 1915, § 15 (Pa. St. 1920, § 17195), while imperative, is a matter of practice, which is not necessarily fatal, and an order of discontinuance entered may be stricken, and leave be given defendants to indorse their affidavit and to serve a copy on the plaintiff.

In Equity. Suit by the Ohio Savings & Trust Company against William H. Harman and another. On motion by defendant to amend order of discontinuance. Order stricken on condition.

Theodore S. Paul and George W. Pepper, both of Philadelphia, Pa., for plaintiff.

Frank A. Moorshead, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. [1] This was a suit brought by the holder against the makers of a promissory note. The affidavit of defense sets up an equitable defense, the sufficiency of which is not properly before the court for consideration upon the present motion. It contains a prayer for cancellation of the note. Section 274b of the Judicial Code (Comp. Stat. § 1251b; Act March 3, 1915, c. 90, 38 Stat. 956) provides as follows:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

By the Pennsylvania Practice Act of 1915 (P. L. 483, § 14; Pa. St. 1920, § 17194) it is provided:

"If in any case in which the defendant sets up a counterclaim, the action of the plaintiff is discontinued, dismissed, or a voluntary nonsuit suffered, the counterclaim, nevertheless, may be proceeded with."

If the defense set up is sufficient as against the plaintiff, the defendants may proceed to establish the affirmative relief prayed for. Counsel for the plaintiff agreed at bar that, if the court held that the defendants' motion should be allowed, the order to discontinue might be stricken off.

[2] The defendants, however, have not complied with the provisions of section 15 of the Practice Act of 1915 (Pa. St. 1920, § 17195), in that they have failed to indorse the affidavit of defense with the required notice to the plaintiff. If the affidavit of defense had been so indorsed, the clerk would not have entered the order to discontinue without leave of court. The situation, therefore, is due to the defendants' failure to comply with the statute.

As this, however, is a matter of practice, which, while imperative, is not necessarily fatal, an order may be entered, striking off the order of discontinuance, giving the defendants leave to indorse their affidavit of defense in accordance with the Practice Act of 1915 (Pa. St. 1920, §§ 17181–17204), and to serve a copy thereof upon the plaintiff or its attorney; the plaintiff to have 15 days from the service thereof to file a reply.

McHENRY v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted October 3, 1921. Decided November 7, 1921.)

No. 3540.

1. **Criminal law ⟸1155—Court has discretion to permit separation of jury in capital cases.**
   The trial court has discretion to permit the separation of the jury pending the trial even of a capital case, and its permission of separation is not subject to review, unless it appears affirmatively that prejudice resulted to the defendant.

2. **Criminal law ⟸1144(15)—Not presumed jurors allowed to separate saw objectionable headline.**
   In a prosecution for murder, where the jurors were allowed to separate after being cautioned not to read accounts of the trial, in the course of which caution the trial justice said that they could tell from the headlines whether the article referred to the trial, it will not be presumed that jurors saw a headline to which objection was made, but the burden is on accused to show prejudice by affirmative proof that such headline was seen by the jurors.

3. **Criminal law ⟸1144(15)—Newspaper headline held not to require reversal, if seen by jurors.**
   In a prosecution for murder, where the jurors were allowed to separate, a newspaper headline published during the trial, which stated that the prosecution charged defendant had killed a man in another state, would not require reversal of the conviction, even if seen by the jurors, since it will not be presumed they would give any weight to such a statement.

4. **Criminal law ⟸371(12)—Evidence of previous robbery and killing admissible to show motive for killing officer.**
   In a prosecution for murder of a policeman, when he was attempting to arrest defendant for a robbery and murder committed a few hours before, evidence of the previous robbery and murder was admissible to show defendant's motive for killing the policeman.

5. **Criminal law ⟸374—Evidence as to previous offense held not objectionable as giving details.**
   In a prosecution for murder of a policeman, evidence of a previous robbery and murder committed by defendant, admissible to show motive, was not objectionable as giving the details of the previous events, where the witness merely stated that defendant held up a store, and that as the witness left the store he heard a shot, and on returning found his employer lying on a blanket groaning.

6. **Homicide ⟸166(1)—Court has considerable latitude in admitting evidence to show motive.**
   In homicide cases, the trial court is allowed considerable latitude in admitting evidence on the question of motive.

7. **Criminal law ⟸409—Offer to admit held not sufficient to exclude testimony as to motive.**
   In a prosecution for murder of a policeman, defendant's offer to admit that he was suspected of having committed a felony, and that the policeman had a right to attempt to arrest him, was insufficient to require the exclusion of evidence of the previous robbery and murder, for which the arrest was attempted, since the offer did not disclose, as did the evidence, defendant's motive for resisting arrest.

---

8. **Criminal law ⟸1169(5)—Statement relating to defendant's prison record held not prejudicial.**

In a prosecution for homicide, testimony on the issue of defendant's sanity, given by a warden of a prison in another state, in which he referred to defendant's record, was not prejudicial to defendant, where it was limited by the court to the issue of sanity.

9. **Witnesses ⟸255(4)—Can refresh recollection by letter of another used in conversation with accused.**

A witness, testifying as to the sanity of accused at the time of a conversation, can refresh his recollection as to the questions he then asked accused by referring to a letter which he had at that time, and on which he based his questions, though that letter was written by another.

10. **Criminal law ⟸1169(5)—Testimony as to previous offense, admitted to show sanity, held not reversible.**

In prosecution for murder, where the defendant's sanity was in issue, testimony by a witness as to a conversation with accused, in which he asked defendant if, when a certain house was searched, he did not cover the officers with revolvers and make his escape, does not require reversal, where the court told the jury such statement was not to be considered as establishing any offense by defendant, but merely as bearing on his mental condition.

11. **Homicide ⟸304—Evidence held not to require instruction on accidental shooting.**

In a prosecution for murder of a policeman, evidence that the policeman was shot several times while grappling with defendant, and defendant's testimony that he shot several times, did not require the giving of a requested charge that, if defendant's revolver was accidentally discharged, he was guilty only of manslaughter.

12. **Criminal law ⟸729—Improper remark, withdrawn by counsel, held not prejudicial.**

In a prosecution for homicide, a reference by the prosecuting attorney to defendant as a young villain does not require reversal of the conviction, where, upon objection, the court disapproved the remark, and the attorney admitted he should not have made it, and requested the court and jury to disregard it.

Appeal from the Supreme Court of the District of Columbia.

John McHenry was convicted of murder, and he appeals. Affirmed.

S. McC. Hawken and G. F. Havell, both of Washington, D. C., for appellant.

J. E. Laskey, Peyton Gordon, and L. H. Vandoren, all of Washington, D. C., for the United States.

SMYTH, Chief Justice. The defendant was indicted for the murder of a police officer who was attempting to arrest him for a homicide which had been committed about an hour before. He was tried, convicted, and sentenced to be executed. Complaining of the trial court, defendant makes 12 assignments of error, but groups them in argument under five heads. We shall deal with each group separately.

The first relates to the refusal by the court of defendant's request to confine the jury during the trial, and to its action in overruling a motion made by the defendant to withdraw a juror because of a headline which appeared in a city newspaper.

[1] Whether or not the law requires a jury in a homicide case to be confined by themselves during the trial presents a question which has not been passed upon directly by this court. It is conceded that the old common law required jurors in such cases to be confined and that it was the practice to do so in this District until recently. There were many practices of the old common law with respect to the treatment of jurors which were very harsh: They were kept together during the trial, and on submission of the case were placed in charge of a sworn officer, without food, drink, fire, or light, except by permission of the court, and if they did not agree before the court adjourned they were carried around the circuit from place to place in a cart. This was for the purpose of coercing them into agreement, as well as to keep them free from improper influences. Jones v. People, 6 Colo. 452, 45 Am. Rep. 526; State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305; 16 R. C. L. 306. No one will contend, we think, that such treatment would be tolerated in modern times. In that respect the old law has been greatly modified, as is shown by the carefully prepared brief of appellant's counsel. In some jurisdictions the jury in capital cases are required by statute to be kept secluded from all communications with the public during the trial; in others the courts hold that under the common law as understood by them the jurors may be permitted to separate; and in still others the course to be pursued is placed in the sound discretion of the court.

We learn from United States v. Woods, 4 Cranch, C. C. 484, Fed. Cas. No. 16,760, that the judges in this District as early as 1834 were in doubt as to what the law on the subject was. And the question has remained unsettled ever since. In Stout v. State, 76 Md. 317, 330, 25 Atl. 299, 303, a capital case, decided in 1892, Mr. Chief Justice Alvey, speaking for the court, said that it was not error to permit the jury to separate, but added:

"Of course, the separation should only be allowed when attended with those precautions and safeguards necessary to secure entire freedom from approach or external influence of any kind. * * * But each case rests upon its own peculiar circumstances, and is within the sound discretion of the trial court, and is therefore not the subject of appellate review, except where it is affirmatively shown that the party has been prejudiced by the action of the court."

We get our common law immediately from Maryland (Code, § 1), and this decision indicates the view of the highest court of that state as to what the common law is on the point we are considering.

Our attention is called to state decisions and decisions of inferior federal courts on the subject which appear to be in conflict with the holding of the Maryland court, but we need not concern ourselves about them, because, as we see it, the question has been definitely settled by the Supreme Court of the United States in Holt v. United States, 218 U. S. 245, 251, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. In that case Holt was convicted of murder committed within a military reservation which was under the exclusive jurisdiction of the United States, and was sentenced to imprisonment for life. The jury were allowed to separate during the trial, but were cautioned by the court that they must refrain from talking about the case in any

way, and avoid receiving any impressions as to the merits, except from the proceedings in court. The defendant filed an affidavit, which was not denied, that members of the jury had said that they had read the daily papers having articles on the case while the trial was going on, and the articles were set forth. The court remarked that where jurors were permitted to separate it was safe to assume that they saw something of the public press, and the question was whether or not, under this assumption, error had been committed in failing to keep the jury in the custody of the marshal. Disposing of the matter the court said:

"As to his [the judge's] exercise of discretion, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states provide the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day"

—and concluded thus:

"* * * We do not see in the facts before us any conclusive ground for saying that his [the judge's] expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong."

This means that it is in the discretion of the court to permit the jury to separate in a homicide case, and that his action in that respect will not be reviewed, unless it appears affirmatively that prejudice resulted to the defendant.

[2] In this case, immediately after the jury was sworn, the trial justice cautioned them that during their separation they must not discuss the case with any person whatever, or permit any person to come and discuss the case with them, and must not read anything they might see in the press with regard to the case. He said they could tell by the headlines whether or not there was any reference to the case in any paper that might come into their hands. These instructions were to be followed, he urged, so that they could hear the testimony unbiased and as though they had actually been incarcerated. He reminded them that they were men of intelligence, who knew their duty; that they had taken an oath to try the defendant according to the law and the evidence, and that they could not do this if they listened to any outside influence whatever; and, finally, he assured them that he trusted them as men of honor, under oath, to do their duty. No contention is made that any member of the jury violated these instructions, but it is said that the court permitted them to read the headlines, and that, since the following headline, "Prosecution Charges Boy Slayer of Two Here Killed Man Near Boston," appeared in one of the city papers during the trial, there is a presumption that some of the jurors read it, and hence that prejudice resulted to the defendant. There was no proof that any of them had read it. We may assume that they saw something of the public press, as was said in the Holt Case, but not that they saw any particular article in a particular newspaper. The mere opportunity to see it raises no presumption that it was seen.

[3] During the trial the headline was brought to the attention of the trial justice out of the hearing of the jury and a motion was made to

withdraw a juror because of it. The motion was overruled, and we think properly, because, as we have already said, there was no evidence that the headline had been seen by any member of the jury. Even if there was, our holding would be the same. There is nothing in it which would be likely to influence the jury. It does not say that the "Boy Slayer" referred to had killed another man, but that the prosecution charged him with doing it. Intelligent and conscientious jurors, having in mind the strong admonition of the court, would not be influenced in their verdict by such a statement. In Reynolds v. United States, 98 U. S. 145, 155 (25 L. Ed. 244), Mr. Chief Justice Marshall is quoted as having said in Burr's Trial that—

"Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror."

See also United States v. Reid et al., 12 How. 361, 366, 13 L. Ed. 1023; Colt v. United States, 190 Fed. 305, 310, 111 C. C. A. 205; State v. Cucuel, 31 N. J. Law, 249; People v. Leary, 105 Cal. 486, 39 Pac. 24; People v. Gaffney (N. Y.) 14 Abb. Pr. (N. S.) 36.

Testimony was admitted over the objection of the defendant which tended to show that, about an hour before the killing of the officer, the defendant had killed and robbed one Mulcare, a merchant, in his place of business, in this city. For the purpose, as stated, of preventing the details of the crime from getting to the jury, the defendant offered to admit that at the time of the shooting of the officer he was suspected of having committed a felony, that the officer knew it, and that he had a right to arrest him. He also moved to strike out so much of his confession as related to what occurred in the Mulcare store at the time of the robbery. The offer was rejected and the motion overruled. These actions of the court are assigned as the second group of errors.

[4] The testimony objected to was given by an employé of Mulcare. He said that the defendant came into the latter's store and asked to see a pair of gloves; that he then drew a revolver and demanded Mulcare's money; that Mulcare fired at him, and he returned the fire. Witness left the store and as he did so he heard another shot. Later he returned and found Mulcare lying on a blanket. He was surrounded by a lot of people, was very pale, and was groaning, and was subsequently removed to a hospital. The officer who was afterwards killed came to the store, and witness told him what he knew about the shooting of Mulcare. It is admitted that it was proper, though not necessary, for the government to show defendant's motive for killing the officer. Motive may be very important in determining whether or not the accused was actuated by deliberate, premeditated malice. The testimony objected to had a strong tendency to prove that defendant intended to kill the officer, that he might escape arrest for the crime he had committed a short time before. Before the testimony was received the court warned the jury that it must be considered only on the question of motive, and that they must not deduce from the fact that he (the defendant) had shot Mulcare, he was guilty of shooting the officer.

[5] Defendant says the witness should not have been permitted to give the details, but we do not see how he could have said less, and told all that was necessary to show that a crime had been committed. He could not say that Mulcare had been shot, for he did not know; but he could say that a shot had been fired by the defendant, and that when he returned to the store he found Mulcare lying on a blanket groaning. From this the jury could infer what had taken place, that a crime had been committed and probably by the defendant.

[6] "Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors." Thus spoke the Supreme Court of the United States in Moore v. United States, 150 U. S. 57, 60, 14 Sup. Ct. 26, 27 (37 L. Ed. 996) which was a homicide case. With approval the court takes a statement from Hendrickson v. People, 10 N. Y. 13, 31 (61 Am. Dec. 721), that "considerable latitude is allowed on the question of motive"; that is, in proving motive. The testimony here had a legitimate bearing on the question at issue, and there was no error in admitting it. Lomax v. United States, 37 App. D. C. 414; Ambrose v. United States, 45 App. D. C. 112; Ellis v. District of Columbia, 45 App. D. C. 384; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

There is nothing in Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077, much relied upon by defendant, which sustains his contention. In that case the objectionable testimony tended to show that Boyd had committed, or was connected with, several robberies prior to the commission of the homicide with which he was charged. The court said that some of it "had no necessary connection with, and did not, in the slightest degree, elucidate the issue before the jury." It related to five robberies, although the defendant had no connection whatever with three of them. Because of this the court said:

> "If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robbery of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court."

But because of the evidence with respect to the other robberies the case was reversed. A careful consideration of the other cases cited by the defendant upon this point shows that they are widely different from the one before us.

[7] Moreover, the offer to admit, if accepted, would not prove as much as the government was entitled to prove. It would establish that the officer had a right to arrest the defendant, but the government desired to show that the defendant had a motive for killing the officer,

namely, the desire to escape, and the tendered admission had no tendency to establish this. Nor do we think the court erred in refusing to strike out the part of defendant's confession relative to the Mulcare killing. It had, for the reasons just given, a legitimate bearing upon the question of motive.

[8] The next group of assignments also deals with questions relating to the admission of testimony. A Mr. Wheeler, chairman of the Board of Prison Commissioners of Maine, was called to rebut the testimony given on behalf of the defendant that he was of unsound mind at the time he killed the officer. In the course of his testimony he said that the prison warden had handed him a file containing a letter from a prosecuting attorney "relating to the details of the record of this young man," meaning the defendant. Defendant moved to strike out the statement. The court overruled the motion, observing in the hearing of the jury that the record might be a good one. There was ample testimony, unobjected to, which showed that defendant had a prison record. Mr. Wheeler testified that he was then in the penitentiary and had twice sought a parole. We do not think that the defendant was harmed by the statement, especially when we consider the strong caution of the court given with respect to Wheeler's testimony, to be referred to in a moment.

[9] The witness was asked to state the questions he propounded to the defendant on the occasion just referred to and the answers made by him. Without objection he gave a number of them, and then said he would like to refresh his memory by consulting a letter which he used in framing the questions. He was permitted to do so, and in this it is said the court erred. It is true the letter was not written by him, but that made no difference. It was the document upon which he based his questions, and was well calculated to refresh his memory as to what the questions were. A price list, not made by the witness, but which he knows to be correct, may be used by him to aid his memory. Morris & Co. v. Columbian I. W. & D. D. Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851; Wilbur v. Buckingham, 153 Iowa, 194, 132 N. W. 960, Ann. Cas. 1913E, 210.

[10] Wheeler testified that he asked the defendant if, when a certain house was searched, he was not found there, and if he did not cover the officers, who were pursuing him, with revolvers and make his escape. Objection was made to this on the assumption that the witness had no right to consult the letter for the purpose of refreshing his memory as to what questions he had put to the defendant. We have already seen that he had a right to do so. Concerning Wheeler's testimony the court said to the jury:

"* * * This statement which Mr. Wheeler has just given, these statements, are not to be taken by you as statements establishing that they are offenses which the young man, the defendant, admitted he committed. They are simply given in evidence here as bearing upon his mental condition at the time Mr. Wheeler examined him, and whether he was then of sound or unsound mind."

[11] The defendant asked the court to charge the jury that if they found that the defendant drew a pistol which was accidentally dis-

charged in the scuffle which ensued between the defendant and the deceased police officer for the possession of the pistol, etc., they should find him guilty of manslaughter.

The killing took place in the Union Station. One witness said he saw some one start to run towards the main waiting room, and at the same time another person called out a short word that sounded like "Stop." The latter ran after the former, soon caught up with him, and grabbed him. Then he heard a pistol shot. The pursuer seemed to attempt to grasp the defendant around the arms. Then there were two more pistol shots in close succession. At that time the pair had gotten over towards one of the rows of seats, and the pursuer forced the other man down on the seat. Another witness testified that he was attracted to the scene by hearing a shot. At that time it seemed to him that two men were grappled together, and that while they were grappled two other shots were fired. In his confession the defendant said:

"I turned around and said, 'Cut it out!' I then fired two or three shots at Armstrong [the officer], who got hold of my pistol and held me until some one hit me in the head and rendered me unconscious."

There is nothing in the record which would warrant a jury in holding that the revolver was accidentally discharged.

[12] Finally, complaint is made of the misconduct of the Assistant United States Attorney in characterizing the defendant as a "young villain." Upon objection having been made, the court disapproved the remark, and the attorney admitted that he should not have made it, and requested the court and jury to disregard it. While it would have been better if the characterization had not been used (Fields v. United States, 27 App. D. C. 433, 449), yet we think that under all the circumstances no prejudice resulted to the defendant.

We have carefully scrutinized the record, and are satisfied that every contention which could be fairly made in behalf of the defendant was presented with force by his counsel, and that the court guarded jealously his rights throughout the trial. In view of this we see no reason for disturbing the judgment, and it is accordingly affirmed.

Affirmed.

CABIALE et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3679.

1. **Intoxicating liquors ⊂=215—Indictment held not defective for failure to allege sale of liquor for beverage purposes.**
An information charging that the defendants unlawfully, willfully, and knowingly did "sell certain intoxicating liquor, to wit, claret wine, containing one-half of 1 per cent. or more of alcohol by volume, and then and there fit for use for beverage purposes," and that said sale was in violation of Act Cong. Oct. 28, 1919, tit. 2, § 3, *held* not subject to objection that it was not alleged that the wine was sold for beverage purposes.

2. **Intoxicating liquors ⊂=222—Information alleging that sale was in violation of Prohibition Act held to negative sale for legitimate purposes.**
A count in an information alleging a sale of intoxicating liquors, and that the sale was "then and there prohibited and unlawful, and in violation of section 3" of title 2 of the National Prohibition Act, necessarily excludes the idea that the wine was sold for legitimate and not for unlawful beverage purposes.

3. **Intoxicating liquors ⊂=233(1)—In prosecution for violation of National Prohibition Act, admission of tags used in purchase held not error.**
In a prosecution for violation of the National Prohibition Act, where the government agents procured tags used for making purchases, *held*, that there was no error in the admission of the tags in evidence.

4. **Criminal law ⊂=1038(3), 1056(1)—Exception to charge and request for modification below is necessary for hearing objection on appeal.**
Objection to observations contained in the court's charge cannot be heard, where the defendant made no request in the trial court for any modification thereof, nor made any exception thereto.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Louis Cabiale and Andrew Donizello were convicted of violation of the National Prohibition Act, and they bring error. Judgment affirmed.

Chauncey F. Tramutolo, of San Francisco, Cal., for plaintiffs in error.

John T. Williams, U. S. Atty., of San Mateo, Cal., and Thomas J. Sheridan, Asst. U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. In nine counts the plaintiffs in error and seven other persons, their employees, were charged by information with certain violations of the National Prohibition Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305). The ninth count was subsequently withdrawn.

Upon the trial there was a verdict of not guilty as to all of the defendants, except the two plaintiffs in error. Each of them was found guilty by the jury under count 3 of the information, and each of them was found guilty under certain other of the counts, and not guilty as

to certain of them. Count 3 was the only count that under the law admitted of a judgment of imprisonment against the plaintiffs in error, and the judgment here brought for review imposed imprisonment upon them on the verdict of guilty under that count.

The third count is therefore the only one for our consideration, as is practically conceded by the attorneys of the respective parties. It alleges that the plaintiffs in error and their named employees, above referred to, at a certain time and place within the city and county of San Francisco, unlawfully, willfully, and knowingly, in violation of the National Prohibition Act, did—

"sell certain intoxicating liquor, to wit, claret wine, containing one-half of 1 per cent. or more of alcohol by volume, and then and there fit for use for beverage purposes; that the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful, and in violation of section 3 of title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act."

The contentions on the part of the plaintiffs in error are that count 3 of the information does not state facts sufficient to constitute a crime against the government; that as to both of the plaintiffs in error the evidence is insufficient to justify the verdict upon which the judgment is based; that the trial court erred in admitting certain evidence, and in denying the offer of the defendants to introduce certain evidence, and further erred in a portion of its charge to the jury.

[1, 2] The first objection mentioned is based upon the view that the third count does not allege that the wine was sold for beverage purposes. That, we think, is a mistaken view. If a comma had been put after the word "use," immediately preceding the words "for beverage purposes," there would be no ground whatever for the contention; or if, after the word "volume," the word "and" had not been used, but in lieu thereof the words "which wine was" had been inserted, making the latter part of the clause read "which wine was then and there fit for use for beverage purposes," the point made would in that respect be clearly well taken. But as the language of the count actually reads, we think its clear meaning is that the wine alleged to have been sold by the plaintiffs in error was so sold for beverage purposes, and was fit for such use. Furthermore, the count alleges that the sale of the intoxicating liquor so sold "was then and there prohibited and unlawful, and in violation of section 3" of the Prohibition Act. That averment, as said by the attorney for the government, necessarily excludes the idea that the wine was sold for a legitimate purpose.

In the case of Fyke v. United States, 254 Fed. 225, 165 C. C. A. 513, which arose under the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the Circuit Court of Appeals for the Fifth Circuit held that an indictment charging that the defendant sold narcotic drugs in violation of that act was sufficient, and that it was not necessary to therein negative any of the statutory exemptions or exceptions specified in the act—the court saying:

'The third proposition presented by the demurrer is that the indictment does not sufficiently aver that the defendant did not come within one or more of the statutory exceptions or exemptions. Section 8 of the act (Comp. St.

1916, § 6287n) contains this language at the end of it: 'Provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this act; and the burden of proof of any such exemption shall be upon the defendant.'

"There are exceptions and exemptions in section 8, to which the language of the proviso might be referred. The Court of Appeals for the Seventh Circuit has, however, construed it to apply to all exceptions and exemptions, theretofore mentioned in the act, including those in section 2. We cannot agree with the contention that Amend. art. 6, of the federal Constitution, would prevent Congress from so enacting. An indictment, though it failed to exclude defendant from the excepted classes, would sufficiently inform him of the nature of the accusation against him. If, in the light of the proviso of section 8 and the construction given it, there was any necessity resting upon the government to negative the fact that defendant was a member of one of the excluded classes, we think the indictment sufficiently does so. Each count alleges that 'neither the said Billie Brown [the buyer of the drug] nor the sale as aforesaid came under any of the exceptions and exemptions provided for in the act of Congress aforesaid.'

"The criticism is that, while it covers an exemption in favor of the buyer and the sale, it does not exclude the possibility of the exemption of the seller. If the sale was not excepted from the prohibition of the act, as alleged in the indictment, then the seller was necessarily punishable for making it, since the act imposes upon the seller penalties for making any sale made unlawful by its terms. We think the averments of the indictment sufficient in their exclusion of the statutory exceptions and exemptions, which we construe to be synonymous terms, even if a necessity for said averment were held to exist."

See, also, Rothman et al. v. United States (C. C. A.) 270 Fed. 31; Melanson v. United States, 256 Fed. 783, 785, 168 C. C. A. 129; Thurston v. United States, 241 Fed. 335, 154 C. C. A. 215; Wallace v. United States, 243 Fed. 300, 305, 156 C. C. A. 80.

[3] There was ample evidence to sustain the verdict in question, but it is useless to go into its details, although we insert an excerpt from the testimony of the witness Kupser, a prohibition agent of the government, since there appears by it a sufficient answer to the objection made to the introduction of the "tags":

"I was present," said the witness, "on the evening of the 23d of July of this year at the place known as the Gianduja place, where the defendants here conduct their business. During the raid that night of the Gianduja café and restaurant, I was instructed to take a position near the cash register, or where the checks were paid, and there I received the liquors which were taken from the various tables, and took charge of those. I will state in particular that the various liquors that were brought up, the liquors which were seized on the table occupied by Mr. Poultney and his friends that night, those liquors were brought to me by Agent Shurtleff and Agent Shaen, and the liquors seized from that particular table were put in a separate bottle. This bottle now shown me is the bottle containing the liquid that was taken from Agent Poultney's table. The other liquors, which were taken from the other tables, were put in other bottles, but the other liquors which were taken from the other parts of the premises, such as the bar, I had nothing to do with. I believe they were subsequently taken to the government chemist. I recognize the defendant Cabiale, sitting directly back of Mr. Tramutolo, and I also recognize the large gentleman with the mustache. I believe he was in charge of the bar in the saloon premises. I noticed, as the various waiters would come up with their tags, they would have some sort of a tag and produce it at the cashier's, where he registered it, and the amount was rung up according to what appeared on the tag. The tags were then put in the cash register.

I got some of those tags on that evening. These are some of those tags which were in the bundle in the cash register. I did not put any marks on them. I put no identification marks on them. I believe they were turned over to Mr. Shaen; that is, after we arrived back at the agent's office they were put in his desk.

"Thereupon the United States attorney offered the said tags in evidence; the two offered read as follows: 'Gianduja Restaurant, Waiter No. 10, Check No. 24. Number of persons. 2 Café Royal $1. 1 whisky, 74 cents. 2 wine, 50 cents, $2.25. War tax, 10 cents. $2.35.' 'Gianduja Restaurant, Waiter No. 10, check No. 36. Short 25 cents. 2 Café Royal $1. 2 whisky, $1.25. 1 wine 25. Total, $2.50.'

"To the introduction of this evidence counsel for the defendant then and there objected, upon the grounds that there was no means of identifying the said tags and that the same were not taken pursuant to a search warrant.

"The Court: You cannot raise that question here in the middle of the trial. There is a time and place to try that issue. You cannot try it here now."

There was no error in the admission of the tags. See Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; 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. That the tags so admitted were pertinent to the issue is obvious.

[4] It is a sufficient answer to the objection made to some general observations contained in the charge of the court below to say that at the time it was given there was no request on the part of the defendant for any modification thereof, nor was there any exception entered to the charge as given, nor is the giving of the charge even specified as error.

The judgment is affirmed.

SOUTHERN RY. CO. v. McKINNEY et al.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1921.)

No. 3656.

1. **Attorney and client ⇐100—Attorney for next friend held not authorized to collect judgment.**
   Where a next friend is not authorized to receive the amount of a judgment rendered in his favor, his attorney of record cannot receive it, in the absence of a statute expressly so authorizing.

2. **Attorney and client ⇐100—Payment to attorney for next friend held not a satisfaction.**
   Under Code Ga. 1910, § 6307, providing that no prochein ami shall be permitted to receive the proceeds of any personal action in the name and on behalf of an infant until he has given bond to properly account for the same, the payment of a judgment in favor of infants, rendered in an action brought by their next friend, to his attorney, and by him to the next friend, who had not given bond, *held* not to discharge the defendant, except to the extent of the attorney's fee, which was agreed upon and retained by him from the amount paid.

3. **Courts ⇐406(2)—Circuit Court of Appeals may modify judgment of District Court.**
   A Circuit Court of Appeals has power to modify, instead of reversing, a judgment of a District Court.

In Error to the District Court of the United States for the Southern Division of the Northern District of Alabama; William I. Grubb, Judge.

Action at law by Buena Dill McKinney, Nola Dill Shurbet, and Allen Dill, suing for the use of Buena Dill McKinney and Nola Dill Shurbet, against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Modified and affirmed.

J. T. Stokely and R. H. Scrivner, both of Birmingham, Ala., and Sanders McDaniel, of Atlanta, Ga., for plaintiff in error.

W. A. Jenkins, of Birmingham, Ala., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. A suit was brought in a state court of Georgia, by Buena Dill and Nola Dill, minors, by their next friend, Allen Dill, and by Allen Dill individually, jointly, against the Southern Railway Company, for the unlawful death of Clementine Dill, the mother of said minors and wife of said Allen Dill, and removed to the United States Circuit Court for the Northern District of Georgia at Atlanta. The state statute creates a right of action, jointly, in the husband and children. On April 11, 1907, a joint judgment in favor of plaintiffs for $6,500 was recovered. The amount of the judgment was paid to C. T. Ladson, attorney for plaintiffs, who reserved one-fourth thereof as his agreed fee, and paid the balance to Allen Dill, the father and next friend. The law of Georgia provides that—

"No prochein ami shall be permitted to receive the proceeds of any personal action, in the name and behalf of an infant, until such prochein ami shall have entered into sufficient bond to the Governor of the state, for the use of said infant and his representatives, conditioned well and faithfully to account of and concerning his said trust, which bond may be sued by order of the court in the name of the Governor, and for the use of such infant; and such bond shall be approved by the clerk of the court in which the suit may be commenced, and filed in his office." Code of Georgia 1910, § 6307.

This provision has been of force for many years, and was at the time of the bringing of this suit. Code of Georgia 1895, § 5681. The Code of Georgia also provides that, while a father is the natural guardian of his children, the natural guardian cannot demand or receive the property of a child until a guardian's bond is filed and accepted by the ordinary of the county. Code of Georgia 1895, § 2513. Dill had given no bond as either next friend or guardian.

On August 10, 1920, this suit was brought by Buena Dill McKinney and Nola Dill Shurbet, the two minors, through Allen Dill, as their next friend, in the United States District Court for the Northern District of Alabama, at Birmingham, on said judgment, to recover two-thirds of the amount thereof; the complaint admitting the payment to Allen Dill of his share, to wit, one-third, of said judgment. After the commencement of this suit proceedings were had in the United States District Court for the Northern District of Georgia, at Atlanta, against C. T. Ladson, to require him to enter an acknowledgment of a satisfaction of the judgment rendered therein as required by a statute of Georgia, which required:

"In all cases where payment or satisfaction shall be made on any judgment or execution, * * * it shall be the duty of the attorney receiving the same to enter his acknowledgment thereof, and file the same of record in the office of the clerk of the court where such judgment was rendered; and such clerk is required to record such acknowledgment among the other proceedings in the cause, and also to make a note thereof on the docket of judgments opposite the place where such judgment is entered." Code of Georgia 1910, § 6266.

The only parties to this proceeding were the Southern Railway Company and said Ladson. The same ripened into an order reciting that, said attorney having signed a written acknowledgment of the receipt of payment of said judgment, and the costs having been paid, the clerk enter and record said acknowledgment nunc pro tunc. By a subsequent order at the same term it was declared that said order was only intended to then permit and direct the entry by said attorney which should have been made at an earlier date without in any manner adjudicating the effect either of the entry or of the receipt of the money by said attorney. The proof showed the above facts and that Dill received the amount of this judgment, less an agreed fee of 25 per cent., from Ladson as attorney for plaintiffs; that Dill never gave a bond as guardian or next friend of said children.

The defendant insisted that the attorney of plaintiff had under the Georgia law authority to collect this judgment and that his receipt was a sufficient acquittance; also that defendant was in any event entitled to a credit for the 25 per cent. attorney's fee retained by Ladson. The court directed a verdict for the plaintiffs for the two-thirds of said judgment ($4,333.33) sued for, with 7 per cent. interest from April 11, 1907.

The Southern Railway Company insists that the court should have found (a) that the payment to the attorney of record was a good payment and his receipt satisfied said judgment; (b) that it was entitled to a credit of the 25 per cent. attorney's fee retained by Ladson. It is not disputed that no payment to Dill, the next friend, could have been properly made until he gave bond as provided by the Code section above quoted; but it is insisted by defendant that the attorney of record is an officer qualified by law to collect and discharge a personal judgment, and that the payment to him relieved it of further liability.

While he is liable to rule as an officer of court, as other collecting officers are, for failure to properly account to his clients for such collections (Code of Georgia 1910, §§ 5343, 6266), yet there is no statute of Georgia expressly constituting an attorney an officer to collect a judgment. While it is true that under the statute, where an attorney collects a judgment, he must enter a satisfaction thereof, and a failure so to do is a contempt, and unquestionably, where the plaintiff could receipt for the proceeds of a judgment, his attorney is under the decisions of the state of Georgia recognized as authorized to receive the collection and satisfy the judgment, and while he has an interest in the judgment for his fees, which cannot be defeated, he is not given any express statutory authority to collect, but derives his authority from his agency for his client. Here he was employed by the next

friend. His authority in collecting was, as to so much of the judgment as should have been held for the minors, only such as his principal, the next friend, had. Unless the next friend was qualified to himself collect the money, the attorney was not authorized to collect it for him.

[1] While there is some difference in the authorities, we think that as a whole they support the rule that, where a next friend cannot collect a judgment, his attorney of record cannot, in the absence of a statute expressly so authorizing.

"According to the weight of authority, a guardian ad litem or next friend of an infant in whose favor a judgment has been rendered is not authorized to receive the amount, or receipt for, discharge, or enter satisfaction of the judgment, nor can this be done by an attorney employed by the guardian ad litem. Where there is no one authorized to receive the amount of a judgment in favor of an infant, it is proper to direct that the money when collected shall be paid into court, subject to the order of the legally constituted guardian, when such an one shall appear, or to remain in court until the infant arrives at majority." 22 Cyc. 704; Paskewie v. East St. Louis & S. Ry. Co., 281 Ill. 385, 117 N. E. 1035, L. R. A. 1918C, 52; Collins v. Gillespy, 148 Ala. 558, 41 South. 930, 121 Am. St. Rep. 81; Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 11 L. R. A. (N. S.) 913, 118 Am. St. Rep. 89, and note.

New York has a quite similar statute to the Georgia Code requiring a guardian ad litem to give a bond before he can receive the proceeds of a judgment recovered for the benefit of an infant. In a suit by an infant by guardian ad litem against a railroad, the defendant company paid the amount of a judgment recovered therein to the attorney of record. The New York Code expressly authorizes an attorney of record to execute a satisfaction piece on a judgment. The Court of Appeals of New York, holding that such attorney could not collect the judgment and discharge the defendant company, said:

"With much plausibility the learned counsel for the defendant argues that such a construction of section 1260 is incompatible with the true status of the attorney for the infant plaintiff, because it is the infant and not the guardian ad litem whom the law recognizes as the real party to the action. The answer to this argument is that just because the infant is the party he must be represented by a guardian who chooses the attorney, and the latter has and should have no greater authority than the person who appoints him. * * * In such cases the attorney does represent the infant, it is true; but he represents him through the mediation of the guardian from whom he directly receives his appointment and derives his authority." Greenburg v. New York Cent. R. Co., 210 N. Y. 505, 104 N. E. 931.

The cases cited to sustain the view that an attorney of record employed by a prochein ami may receive the sums due on a judgment and satisfy the same under the general authority of an attorney to collect the sums due on a judgment and enter a satisfaction thereof, where under the law of the state the prochein ami could not do so, do not in our judgment support this contention.

In each of these cases the court holds that the prochein ami (or guardian ad litem) had the right to satisfy the judgment. The case of State v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72, while containing language which would sustain the contention made, is not decided on the ground that an attorney would have the authority on general principles where the prochein ami would not, but on the

ground that in that state the prochein ami of an infant who has no guardian would have the authority and therefore the attorney employed by him would have like authority; also that by the statute of the state (Ballinger's Ann. Codes & St. § 4766) an attorney, in addition to his general authority, is expressly authorized "to receive money claimed by his client * * * after judgment upon the payment thereof, and not otherwise, and to discharge the same or acknowledge satisfaction of the judgment," and construes this statute as embracing all judgments for every kind of client.

The case of Baker v. Pere Marquette R. R., 142 Mich. 497, 105 N. W. 1116, 3 L. R. A. (N. S.) 76, 7 Ann. Cas. 605, construes a state statute as conferring on a prochein ami a right to collect a judgment without giving bond, unless required by the court so to do, and that this would authorize his attorney of record to do so.

The case of Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530, decides solely that a prochein ami cannot bind an infant by a settlement out of court, not approved by the court, and that such agreement of settlement cannot be given in evidence against such infant.

Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577, does not deal with the authority of the attorney of record of a prochein ami, but only as to the right of an attorney for a plaintiff to agree upon a judgment and its satisfaction, and on the right of the defendant to treat such attorney as continuing to represent his client, though in fact discharged, where he still alone appears as counsel of record on the docket of the court and the defendant has no notice of his discharge.

The case of Baltimore & Ohio R. R. Co. v. Fitzpatrick, 36 Md. 619, 625, holds that an attorney of record in collecting a judgment exercises the power of the prochein ami holding:

> "Now, seeing that the prochem ami is thus authorized to receive and receipt for the money recovered, why is not the attorney retained by him equally authorized to receive and receipt for the money?"

This supports the view that where the prochein ami, as in the instant case, was not authorized to receive the money, his attorney would be equally without authority. Freeman on Judgments (4th Ed.) § 462, and Black on Judgments (2d Ed.) § 986, assert the disputed doctrine that where the infant has no guardian, in the absence of statutory prohibition, a prochein ami, or guardian ad litem, can receive and receipt for the money due on a judgment in favor of the infant. They do not contravene the doctrine that where the prochein ami has no such authority the attorney likewise has none. 14 R. C. L. p. 288.

The ruling of the Supreme Court of Georgia that the failure of the next friend to give the bond does not prevent the issuance and levy of an execution, where payment has not been made, does not, in our opinion, operate to frustrate the policy of the state, as indicated by the Code sections above quoted, requiring a prochein ami and a natural guardian to give bond before collecting any money due to an infant, that the estate of the infant shall at all times be protected by a bond.

If the defendant wishes to prevent the issuance of an execution he can procure an order of court to pay the amount of the judgment into court, or if execution has issued he can pay it to the sheriff as a collecting officer whose bond, as well as his official liability to rule, will protect the infant. Oxford Knitting Mills v. Sutton, 127 Ga. 162, 56 S. E. 298.

[2] The payment, therefore, of this money to the attorney of the prochein ami, who was not qualified to receive and receipt for it, was not a good payment as against the infants. We do not think, taking the entire record of the proceedings permitting and requiring the entry by the plaintiff's attorney of the receipt of the payment of the amount of the judgment by the Southern Railway Company, that there was any failure to give it full faith and credit. The court expressly ordered that the holding first inserted, "that therefore both the verdict and judgment rendered have been satisfied," be stricken from said order, and declared that the order was "intended to do no more than to direct and permit the attorney * * * to make an entry which under the laws of Georgia he should have made at an earlier date, without in any manner adjudicating the effect either of the entry or the receipt of the money by said attorney." This left such effect to be decided in the present case, which had been instituted before the proceedings to cause such entry to be made were begun, without embarrassment from, or possible conflict with, the order directing such entry to be made.

However, we think that the court erred in not recognizing the right of the Southern Railway Company to a credit for such part of this judgment as represented the fee of the attorney. It is quite clear that he retained this sum by virtue of his contract of employment, and that his fee was contingent on recovery by suit or settlement.

The sum retained was the lowest sum contracted for, and there is no evidence which attacks the reasonableness of the charge in this case. The fee was also presumptively reasonable. Parisian Co. v. Williams, 203 Ala. 378, 83 South. 122, 128. The plaintiffs, therefore, were only entitled to recover so much of the judgment as they had been deprived of by the improper payment to the attorney of record, but not for those portions to which, if properly paid, they would not have been entitled. Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850. Had the prochein ami qualified by giving bond, and had his attorney been collecting for him, he would have had the right to retain his fee. Code of Georgia 1910, § 3364 (1).

[3] As there is no dispute on the facts, exercising the power possessed by this court to modify judgments of the District Court, instead of reversing the same, direction is given that 25 per cent. of the judgment rendered in this case be written off by said District Court, and that, as so modified, the judgment below stand affirmed. Thorpe et al. v. National City Bank of Tampa (C. C. A.) 274 Fed. 200; United States v. Illinois Surety Co., 226 Fed. 653, 664, 141 C. C. A. 409.

BOSTON TOWBOAT CO. v. DARROW-MANN CO.

ADAMS et al. v. SAME.

(Circuit Court of Appeals, First Circuit. November 29, 1921.)

Nos. 1491, 1492.

1. **Shipping ⟸209(3)—Sinking of loaded barge at dock held due to want of attention by master.**
   Findings of the trial court that the sinking of a barge at a dock, some hours after she had been loaded with coal, was due to the failure of her master to remain on board and give attention to her pump, and that the company loading her was not responsible therefor, because the loading was properly done in accordance with the directions of the master, *held* sustained by the evidence.

2. **Shipping ⟸208—Owner held barred by privity from right to limitation of liability for sinking of unattended barge.**
   A finding that the owner of a barge, which sank at a dock because her master left her unattended at night after loading with coal, was not entitled to limitation of liability on the ground that it had knowledge of a custom of its masters to so leave their vessels, though contrary to instructions, *held* supported by the evidence.

3. **Shipping ⟸208—Privity or knowledge of assistant manager of towboat company held that of the company.**
   Privity or knowledge of the assistant manager of a towboat company, who, though not an officer of the company, had the charge and management of its boats, of a custom of its barge masters to leave them unattended at night, while lying loaded in docks, *held* the privity or knowledge of the company.

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Suits in admiralty by the Boston Towboat Company and by Charles F. Adams and others, against the Darrow-Mann Company. Decrees for respondent, and libelants appeal. Affirmed.

For opinion below, see The Bessie J., 268 Fed. 66.

Edward E. Blodgett and Foye M. Murphy, both of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellants.

Harry Le Baron Sampson, of Boston, Mass. (Hutchins & Wheeler, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The first of these actions is a petition for limitation of liability by the Boston Towboat Company, as owner of the barge Bessie J., and the second is a cross-libel by the trustees of the Boston Towboat Company to recover damages occasioned by the improper loading of the barge by the Darrow-Mann Company and its failure to properly care for her after she was loaded.

[1] On the afternoon of March 5, 1917, the Bessie J. was towed to the wharf of the Darrow-Mann Company in Charlestown, Mass., where she was to be loaded by that company with coal, which was

to be carried to the wharf of Batchelder Bros., also in Charlestown. On board of her at that time was a master, Capt. Pendleton, whose duties, as testified by Capt. Nickerson, assistant manager of the Towboat Company, were—

"to take care of his barge, see that she was loaded properly, report any accident, any damage to her in any way and keep his barge in proper shape to take cargo."

The loading of the barge was commenced about 3 o'clock and continued until about 5 o'clock p. m., when about 175 tons had been placed in her two after hatches. Work was then discontinued until the night gang came on and Capt. Pendleton, master of the barge, went to his home in East Boston for the night, leaving no one in charge of the barge, although there was testimony that he was told that the loading would be completed that night. The night crew of the Darrow-Mann Company completed the loading of the barge about 9 o'clock that night, by putting aboard of her about 400 tons of coal, making, with what had been loaded in the afternoon, about 575 tons, which was within her carrying capacity. She lay at the wharf of the Darrow-Mann Company until about 6:30 o'clock the next morning, when she sank stern first. Before she sank, a tug was sent by the Boston Towboat Company to take her in tow, and Capt. Pendleton came over on it. He saw the Bessie J. before she sank, and there was testimony that he said that she was properly loaded and stated that he could see no reason for her sinking. Protest was made to the insurance companies, in which it was stated that the cause of the sinking was unknown. The barge was not raised until the afternoon of May 12, 1917. The cost of raising and repairs is the subject of the suit by the trustees of the Boston Towboat Company, while the obstruction of their dock by the sunken barge is the basis of the claim of the damage claimant, the Darrow-Mann Company.

The District Court found that the proximate cause of the sinking of the barge was the failure of the master, Capt. Pendleton, to stay aboard of her after she was loaded; that she was equipped with a gasoline pump of sufficient capacity to have prevented her sinking, if there had been any one aboard of her to operate it; that the loading was done in accordance with instructions of her master, whose duty it was to have remained aboard his barge while she was being loaded and after the loading was completed; that while the placing of 175 tons of coal in her two after hatches, when her forward hatches were empty, might have strained the barge and caused her to leak, yet, as this was done under instructions of the master, the Darrow-Mann Company was relieved of all liability therefor, and the libel of the trustees was ordered to be dismissed.

There was evidence tending to show that, after Capt. Pendleton left his barge unattended, the night crew of the Darrow-Mann Company completed the loading in accordance with his instructions, by placing no coal in the two forward hatches, which gave her stern the necessary drag to cause water to run to her gasoline pump.

The Bessie J. was originally a schooner built in 1879, and convert-

ed into a barge in 1912. She had been used for some time as an outside barge, and then as a lighter in New York Harbor, and later about Boston Harbor. She had been aground and her whole stern rebuilt. She had also received quite extensive repairs in 1914 and in 1916. There was evidence tending to show that she had leaked badly on several different occasions. She was an old vessel, and when loaded needed watching. Capt. Pendleton had been on her for several years and should have known that it was unsafe to leave her, when loaded, with no one aboard. While the Darrow-Mann Company had a watchman who made the rounds of its wharf every hour, it was no part of his duty to go aboard the Bessie J. and examine her condition. She was loaded deeply, and he testified that there was nothing unusual in her appearance, which attracted his attention, although he saw her only a short time before she sank.

The members of the night gang, who completed the loading of the barge, testified that they saw no evidence of her being in a leaky condition. The dock where she lay was lighted by three electric lights, and her hold, which was continuous, and not separated by divisions into hatches, could be distinctly observed from the dock, by those upon the dock, as well as by the man who was aboard of her when she was being loaded. The leak must have been very gradual, for she did not sink until about 10 hours after the loading had been completed, so that it is not strange that the watchman who patroled the wharf saw nothing unusual in her appearance, and we find nothing in the evidence which made it the duty of the Darrow-Mann Company to place a watchman aboard of her.

The finding of the District Court that the loading of the barge was done under the direction of her master, and that the Darrow-Mann Company was not responsible for it, is sustained by the evidence, as well as the further finding that the proximate cause of her sinking was due to the fact that she was left unattended after being loaded.

[2] Upon the petition for limitation of liability the District Court has found that the barge was seaworthy for the limited purpose for which she was used. The fact of her unexplained sinking, in view of her age and history, raises some doubt as to her seaworthy condition, even for the purpose for which she was used about Boston Harbor; but we concur in this finding, as well as the finding that she should not have been left unattended after being loaded. Whether, when she was so left by Capt. Pendleton, it was without the privity or knowledge of the managing officers of the Boston Towboat Company, is primarily a question of fact, and the finding of the District Court upon this, if not clearly wrong, should not be reversed. Most of the testimony was oral, and the court below had the opportunity of judging the credibility of the witnesses from their appearance.

[3] It is assigned as error that the court erred in finding that the Boston Towboat Company's fleet manager knew or should have known that, notwithstanding instructions to the contrary, its barge captains were likely to leave their vessels at night while in Boston. It is insisted in argument that Capt. Nickerson was not a managing officer of the Boston Towboat Company, and that, even if with his privity and

knowledge the master remained away from his barge overnight, this would not be the privity and knowledge of the Towboat Company.

Edward Page, the vice president of the Towboat Company, testified that he himself was purely an executive officer, and in regard to Capt. Nickerson's duties he testified:

"He had the managing of the entire fleet, the employing of the men, and directing the boats, and watching the upkeep of the boats and doing all the duties that a manager would be supposed to do."

Capt. Nickerson also testified that he was told that he would assume charge of all the floating property of the Towboat Company as assistant manager. The evidence discloses that he was a managing officer of the Towboat Company. Although he was not a corporate officer, his privity or knowledge would be that of the company. Eastern S. S. Corp. v. Great Lakes D. & D. Co., 256 Fed. 497, 168 C. C. A. 3; In re P. Sanford Ross, 204 Fed. 248, 122 C. C. A. 516; The No. 6, 241 Fed. 69, 154 C. C. A. 69; The Benjamin Noble (D. C.) 232 Fed. 382, 397; In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391; In re Old Dominion S. S. Co. (D. C.) 115 Fed. 845, 850.

The evidence discloses that, because of trouble in collecting insurance, Mr. Page gave directions that there should be a master aboard every barge when lying at the dock loaded, and that there was a provision in all of the insurance policies that barges should have a master aboard of them. No extra pay, however, was allowed the masters for performing this duty, and no additional men were hired for this purpose. It appears, also, from the testimony that upon the smaller barges there were no sleeping quarters, and the rule was not enforced as to them. Neither was it enforced when the larger barges were lying at the wharf unloaded; nor when any of the barges, whether loaded or unloaded, were at the wharf of the Towboat Company in East Boston.

Mr. Page, finding that masters could not always be relied upon to remain upon their barges, even when loaded, tried to get the insurance companies to omit this provision from their policies, but had been unable to do so. There was also testimony that Capt. Pendleton upon different occasions, when his barge was loaded and lying at the wharf, had not remained upon it for the night.

Capt. Nickerson testified as follows:

"Q. Whether or not you have ever known of any practice of your men leaving lighters when they were loaded and going home at night?

"A. We rarely have our lighters loaded in any other place, with the exception of our plant at Everett; and when they are loaded there, they are always taken away from there as soon as they are loaded and taken to our East Boston yard. We knock off work at the Everett plant at 5 o'clock. We generally finish up—have our lighters there loaded before that time, so we can bring them down to our own yard. It is hardly ever our lighters go away to load at somebody else's dock."

He also testified that, while the working hours of the masters aboard lighters were from 7 to 5 o'clock, if the loading of the lighter at Everett was not completed at 5 o'clock, he expected the master to stay on the lighter until she was taken down to the East Boston yard. At the East

Boston yard the Towboat Company had a watchman, and when loaded barges were tied up there masters were not accustomed to stay aboard of them, as the watchman on its wharf looked after them.

After the Bessie J. had received 175 tons of coal, there was testimony tending to show that Capt. Pendleton telephoned to the office of the Towboat Company, asking permission to go to his home at East Boston to remain that night, and that he went away, stating that he had received permission to do so.

The master of the tug Peter W. French, belonging to the company, was notified on the afternoon of March 5th that the Bessie J. would be loaded and ready to be moved the next morning, and was directed to get her early in the morning, so that he could get through the bridge over the Mystic river at the 7 o'clock opening of the draw. Capt. Pendleton, the barge master, came over on the tug the next morning; but no explanation was given as to how he was informed that the tug was going after his barge. The tug reached the barge, which was then afloat, but her deck awash, about 6:30 o'clock. Capt. Pendleton had died before the trial; but there was testimony that he stated, on the morning after the sinking, that he had permission to leave his barge. There was no direct testimony that Mr. Page, the vice president, or Capt. Nickerson, the assistant manager, had knowledge that the order to masters to remain aboard barges when they were loaded was not complied with, except when they were at their own yard at East Boston, or that either knew that Capt. Pendleton upon this occasion was not to remain upon the barge after she was loaded. But, from the fact that Capt. Pendleton came over on the Peter W. French in the morning, and that he had telephoned to the office for permission to remain at his home the night before, and that none of the barge masters received extra pay for remaining on their barges over night when loaded, and no additional men were employed for this purpose, that the Towboat Company had no system of following up their masters to see that they did remain aboard their barges, and that the masters did not stay aboard their loaded barges when at the Towboat Company's yard, the learned judge of the District Court drew the inference that Nickerson must have had knowledge that the provision in the insurance policies was not being complied with, nor the instructions given by the vice president, Mr. Page. Whether these instructions were being complied with or not was primarily a question of fact. We cannot say that this inference was not justified by the evidence, nor that it was clearly wrong. The fact that Capt. Pendleton, who had been employed for several years as a barge master, after he had been told that the loading of the Bessie J. was to be completed that night, telephoned for permission to remain at his home, and that he came over on the tug, with no attempt to hide the fact that he had not been aboard the barge, lends strong support to this inference.

The decree of the District Court in both cases is affirmed, with costs to the appellee in this court, and the actions are remanded to the District Court for further proceedings not inconsistent with this opinion.

SOCIÉTÉ ANONYME DES SUCRERIES DE SAINT JEAN v. BULL INSULAR LINE, Inc.*

(Circuit Court of Appeals, First Circuit. November 29, 1921.)

No. 1513.

1. **Shipping ⟸108—Facts held not to relieve party from performance.**
Under a contract for the transportation from San Juan to New York of plaintiff's output of sugar for a term of five years, at an agreed freight, by defendant, by its own steamers or by steamers chartered by it, defendant *held* not relieved from performance by the fact alone that its own steamers were requisitioned by the government for war purposes.

2. **Shipping ⟸108—Contract held not frustrated by temporary inability to perform.**
A contract made in 1916 by defendant to carry plaintiff's output of sugar from Porto Rico to New York for a term of five years, beginning in 1917, provided that, "if by reasons of force majeure either of the parties are unable to carry out this agreement in whole or in part, such inability by either party will not subject such party to any claims for damages, nor will such inability void this agreement." In 1917 defendant's vessels were requisitioned by the government for war purposes and were held for about two years, when they were returned. *Held*, that such temporary inability to perform did not terminate the contract nor relieve defendant from the obligation to perform it during the remainder of the term.

In Error to the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Action at law by Société Anonyme des Sucreries de Saint Jean against the Bull Insular Line, Inc. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Philip N. Jones, of Boston, Mass. (Boyd B. Jones, of Boston, Mass., and Henry G. Molina, of San Juan, Porto Rico, on the brief), for plaintiff in error.

John A. McManus, of New York City (Oscar D. Duncan and Thomas J. Healy, both of New York City, and Charles Hartzell, of San Juan, Porto Rico, on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. The court below sustained a demurrer to the plaintiff's amended complaint, and entered judgment for the defendant. The action is for breach of a written contract made in July, 1916, under which defendant agreed to transport by steamers from San Juan to New York plaintiff's output of sugar for the five crop years 1917/18 to 1921/22, inclusive, at the rate of 24 cents per 100 pounds. The eleventh paragraph of the contract reads as follows:

"If by reasons of force majeure either of the parties are unable to carry out this agreement in whole or part, such inability by either party will not subject such party to any claims for damages, nor will such inability void this agreement."

The plaintiff alleges:

"That on or about October 17, 1917, the defendant notified the plaintiff that the United States Shipping Board at Washington had requisitioned de-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 256 U. S. —, 42 Sup. Ct. 272, 66 L. Ed. —.

fendant's entire fleet, and from and after said date the defendant refused to perform the said contract on the ground that said requisition constituted force majeure and in consequence thereof it had become impossible for the defendant to carry out the said contract."

Also that recently—that is, shortly before bringing this suit on March 3, 1920—the plaintiff had been informed that the government commenced returning to the defendant its steamships during the month of February, 1919; that defendant wrongfully failed to notify the plaintiff of this fact until November or December, 1919, after all the plaintiff's 1919 crop had been shipped to New York at the rate of 40 cents per 100 pounds; that, immediately upon ascertaining that defendant was in a position to carry out its contract, plaintiff demanded performance of the contract, and tendered its sugar for transportation, but defendant wrongfully refused compliance, contending that the contract had completely terminated upon the requisitioning of its steamers in October, 1917.

The demurrer sets up the same contention—that the requisitioning of its steamers by the government in October, 1917, before any transportation was called for under the contract, entirely abrogated the contract.

[1] Turning to the contract, we observe that it was not a contract or charter party for a designated vessel, but was merely a contract to furnish transportation for the plaintiff's sugar crop. It contains this provision:

"It is understood that this contract is to be fulfilled on the steamers of the Bull Insular Line, Inc., or steamer chartered by them. They mutually agree that the insurance on chartered steamers will be at the same rate of the steamers of the Bull Insular Line, Inc., to have the privilege of placing the insurance at the same rate, terms, and conditions as the steamers of their own fleet."

We find nothing in the record which, as matter of law or as matter of fact, shows that it was impossible for the defendant, after its own steamers were requisitioned, to perform its contract by steamers chartered by it. This is enough to dispose of the demurrer. The case plainly falls within the principle illustrated by Lord Parker in the Tamplin Case, [1916] 2 A. C. 397, 423, where in dealing with implied frustrating conditions he says:

"Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability, if his only horse died before the day arrived."

This contract was for transportation generally, not for the use of the particular steamers requisitioned by the government.

[2] But we are also unable to accept the view of the court below, that, assuming the contract was to be performed by the defendant's own steamers, the requisitioning of these steamers by the government in October, 1917, put an end to the contract.

The provision, "If by reasons of force majeure either of the par-

ties are unable to carry out this agreement in whole or part, such inability by either party will not subject such party to any claims for damages, nor will such inability void this agreement," seems to us plainly to cover such a situation. The contract was made in July, 1916, after the European war had been flagrant for almost two years. The parties must have known of the increasingly hazardous and chaotic condition of sea transport. There was an obvious possibility, if not probability, that the United States would become, as it subsequently was, involved in the war. The contract was made during the war, and in contemplation of changing war conditions. Under these circumstances it was natural for the parties to agree that inability to perform by reason of force majeure should suspend without liability for damages, but should not avoid the agreement. At any rate, the parties did so agree.

To hold, as the court below held, that the requisitioning by our government of the defendant's steamers for a period lasting only a little over two years, ended this five-year contract, would, we think, contravene the clearly expressed intent of the parties. We say this, assuming for the moment that such requisitioning constituted inability, notwithstanding the provision above quoted that the contract might have been fulfilled by steamers chartered by the defendant.

We have examined with care the cases cited in the brief filed by learned counsel for the defendant, and find no authorities, English or American, which sustain their contention. It is, of course, elementary that it is the duty of courts to construe and enforce, not to make, alter, or abrogate, contracts; that the doctrine of frustration rests upon an implied fundamental condition—as for instance, in a contract for personal services that the promisor shall continue to live. See the opinion of Earl Loreburn, in Tamplin's Case, [1916] 2 A. C. 404, where it is said, referring to an implied term of the contract excusing under the circumstances the party from performing the contract:

"It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

The decision of the House of Lords in Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119, relied upon by the defendant, is entirely consistent with our present holding. That case involved a contract, made in July, 1914, for the construction of extensive waterworks within a period of six years, with a provision for extending the time if the engineer required additions or enlargements, or if delays occurred in consequence of unusual inclemency of weather, strikes, disputes, and so on. In February, 1916, the work was stopped by the Minister of Munitions and the plant sold under his direction; so that the undertaking on that date became illegal and remained illegal up to the time of final decision in November, 1917. The court held this not to be "a case of a short and temporary stoppage, but of a prohibition in consequence of war, * * *" and not covered by the provision for an extension of time for such causes as were in the

contemplation of the parties to the contract when it was made; that by fair implication (inclusio unius exclusio alterius) vis major was not within the extension provision; that it was clear that the contract did not bind the parties to perform the legally impossible.

That case is radically different from the case at bar. Here the most that the defendant can contend is that, for a period apparently only two-fifths of that covered by the contract, its own steamers were taken from it by the government; so that, if such government taking was force majeure within the meaning of the contract, it was pro tanto, relieved from performance, and from damages for nonperformance, under this suspension provision of the contract. It would be a strange and unnatural construction of this paragraph to hold that the defendant should be relieved from performing when able to perform.

The fact that performance had become more costly was no legal reason for holding the contract ended.

We have no doubt that force majeure, as used in this contract, was intended by the parties to cover such interference with performance as governmental restraint or acts of the public enemy, interferences having a human origin, as distinguished from natural force. Day v. United States, 245 U. S. 159, 161, 38 Sup. Ct. 57, 62 L. Ed. 219; Railway Co. v. Columbus, 249 U. S. 399, 412, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

See Crossman v. Burrill, 179 U. S. 100, 113,[1] an opinion by Mr. Justice Gray, in which the term vis major is construed as covering inability to perform due to war conditions. In the Metropolitan Water Case, [1918] A. C. 135, is a reference by Lord Atkinson to action of government as vis major. See, also, McLemore v. Louisiana State Bank, 91 U. S. 27, 23 L. Ed. 196; M. O. H. v. Hannevig (C. C. A.) 264 Fed. 311, 314.

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

GENERAL SUPPLY CO. et al. v. MARDEN, ORTH & HASTINGS CO., Inc., et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1921.)

No. 2665.

1. Contracts ⇐147(1, 2), 169—**Cardinal rule of construction to determine intention of parties; intention determinable from language; surrounding circumstances may be considered.**

The cardinal rule in construing a contract is to ascertain the intention of the parties, and when a written contract is clear and unequivocal, its meaning must be determined by its contents alone; but where the language is ambiguous, or susceptible of several significations, its meaning may be found in the subject-matter viewed in the light of the circumstances under which it was entered into.

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

[1] 21 Sup. Ct. 38, 45 L. Ed. 106.

2. **Contracts ⇐10(4)—Mutual agreements in contract held valid consideration for each other.**

A provision of a contract by which plaintiff, owner of a chemical plant, agreed to devote its entire plant for a stated term to the manufacture of certain chemicals for defendant, *held* a sufficient consideration for a further provision by which defendant agreed to take and pay for a stated monthly tonnage of such chemicals, so that the contract was not void for lack of mutuality.

3. **Contracts ⇐217—For manufacture of war products held terminable on notice after close of war.**

Where a contract for the manufacture by plaintiff for defendant of a stated quantity of chemicals monthly was made by both parties in view of the abnormal demand and prices created by the war, though the contract named a stated term, a provision that such quantity should be produced "for the present and until further notice" *held* to give defendant the right to terminate it on reasonable notice.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action at law by the General Supply Company and others against the Marden, Orth & Hastings Company, Inc., and another. From the judgment, plaintiffs bring error. Reversed.

L. Edward Herrmann and Wall, Haight, Carey & Hartpence, all of Jersey City, N. J. (Thomas G. Haight, of Jersey City, N. J., of counsel), for plaintiffs in error.

John M. Emery and Parker, Emery & Van Riper, all of Newark, N. J. (Chauncey G. Parker, of Newark, N. J., of counsel), for defendants in error.

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

WOOLLEY, Circuit Judge. This is an action on a written contract. Under its interpretation of the contract the court directed a verdict for the plaintiffs in the sum of $12,512.18, subject to a possible deduction of $3,000 according as the jury should or should not find this item a proper credit on the defendants' indebtedness, and submitted to the jury a counter-claim of the defendants for $50,000, made up specifically of items for raw materials belonging to the defendants in the possession of the plaintiffs at the termination of the contract, valued at $38,416.03; work in process $2,620.24; containers, carboys, drums, etc., $7,727.76. The jury rendered a verdict for the plaintiffs for $12,512.18 with interest, the amount directed, without deducting a $3,000 credit, and for the defendants for the first two items in the amount of their counter-claim and for the third item in the lesser amount of $3,914.88, or a total of $44,951.15 without interest. To the judgment entered on this verdict the plaintiffs alone sued out a writ of error, challenging as insufficient—because of the court's alleged misinterpretation of the contract—that part of the judgment rendered in their favor (without challenging the verdict for the defendants) and alleging error also in rulings on the evidence arising mainly from the construction which the court gave the contract.

On this review we are concerned primarily—indeed, almost entirely —with the interpretation of the contract, for according as the contract is construed the remaining matters assigned as error grow in magnitude or entirely drop out of view.

[1] In looking for the meaning of this contract we are controlled by no novel rules of interpretation. The cardinal rule in every case is to seek the intention of the parties. The law presumes that the parties understood the import of their contract and that they intended what its terms express. When a contract is clear and unequivocal its meaning must be determined by its contents alone; another meaning cannot be added by implication or intendment; but where the language is ambiguous or susceptible of several significations its meaning may be found in the subject matter, viewed in the light of the circumstances under which it was entered into. Salant v. Fox, 271 Fed. 449 (C. C. A. 3d).

[2] If we had been the first called upon to interpret this contract we should have regarded its language, though quite inartificial, as unambiguous. But the contract has been submitted to another court, where the contending parties, giving it different interpretations, each urge that the contract as interpreted by the other is such that no reasonable man would ever enter into. As we read the contract we regard its language as expressing a reasonable and workable arrangement such as men in the respective positions of the parties might enter into with reference to the peculiar subject matter and in the light of the unusual circumstances surrounding the transaction. If the writing itself shows a reasonable undertaking of the parties and in this respect shows what they intended and all they intended, that undertaking is the contract. We cannot go outside of its terms to find something different, better, or even more reasonable. With these observations, we turn to the contract to see what the parties intended in the circumstances.

The capital circumstance was that the war was on. Production alone was all that was needed for both parties to make money. The defendant corporation, to which we shall refer as the Chemical Company, was a large dealer, and, through subsidiaries, a manufacturer of chemicals, with ample capital. The plaintiff corporation, to which we shall refer as the Supply Company, had a chemical plant at Perth Amboy, New Jersey. The stock of this corporation was mainly owned and the plant was operated by its president and treasurer. The plant was a small affair, costing about $6000, the financial resources of the corporation were meagre, and the experience of those who conducted its business was not extensive. In a word, the Supply Company had a plant and little money; the Chemical Company had money and wanted a plant. The desire of both was—more production. Moving to this common object, the parties entered into the contract of June 3, 1916, now in suit, whereby the Supply Company undertook for a period of fourteen months—later extended to thirty-six months—to devote its factory exclusively to the manufacture of chemicals from raw materials exclusively supplied by the Chemical Company and to sell the same when manufactured exclusively to the Chemical Company at a profit to the Supply Company of 10 per cent. on a cost reckoned on a basis agreed

upon. Cost as agreed upon included monthly salaries of $150 to each of the operating officers of the Supply Company and a monthly amortization of advances by the Chemical Company for the enlargement of the plant. (Later, the salaries were paid in part and the amortization in part cared for before suit and balances of both were included in the verdict.)

Both parties thereupon embarked upon the performance of the contract; the Supply Company enlarging its plant and increasing its production and the Chemical Company supplying raw materials and taking all finished products the Supply Company turned out.

At times, the Chemical Company showed an inclination to lag. Thereupon, in March, 1917, the Supply Company complained to the Chemical Company that it was not delivering raw materials and supplying orders sufficient to enable it to make a "minimum monthly output (of) 7 tons of Aniline Oil, 4 tons of Sulphonilic Acid, and 4 tons of Orange II," a production to which the Supply Company regarded itself entitled as a base for its minimum monthly profit. The Chemical Company thereupon increased its monthly material deliveries and orders to the Supply Company and maintained the same quite consistently until July 1, 1918, when, on a declining market, it decreased its deliveries and orders. A little later there occurred another circumstance which evidently the parties had in view and against which, we think, they had protected themselves in the terms of their contract, which was, that some day the war would end and with it the abnormal demand for production and the unusual opportunity to make money. That day came on November 11, 1918. The Chemical Company then ordered the Supply Company to cease manufacturing on January 1, 1919. There had yet to run six months of the term and there remained a large amount of unfinished supplies in the hands of the Supply Company.

The Supply Company, construing the contract as imposing an obligation on the Chemical Company to deliver raw materials and furnish orders in an amount sufficient to enable it to make a certain minimum monthly commission or profit, thereupon brought this suit to recover damages in the sum of $61,367.88. Of this amount the only sum with which we are presently concerned is $42,512.43, made up of two items: First, $18,174.21, being the difference between payments made and commissions or profits due the Supply Company under the contract throughout its term; and second, $24,338.32, being commissions or profits which the Supply Company claims it would have earned if it had been permitted to convert into finished products the raw materials on hand January 1, 1919, when the Chemical Company ordered manufacturing to cease. Its right to recovery rests on the construction of the contract in general and on the construction of one paragraph in particular. This paragraph reads as follows, the italics being ours:

"The parties of the second part (the Supply Company and its officers) agree to use their best efforts to produce the products *requested* by the party of the first part (Chemical Company) of the party of the second part to be produced (sic), and agree to use their best energies in equipping, at the earliest possible date, and at the lowest possible cost, their plant for the production of the products *asked for* by the party of the first part, *which products for*

the present and until further notice shall be the increase of the Perth Amboy plant so as to produce approximately seven (7) tons per month of Aniline Oil, four (4) tons per month of Sulphonilic Acid, U. S. P. and four (4) tons per month of Orange No. 2."

At the trial, wholly different interpretations of this paragraph were advanced by the parties. We believe that both interpretations were wrong because founded on the common error of both parties in looking only to the paragraph for the consideration of the Chemical Company's undertaking to take chemicals in a named monthly tonnage. The construction placed by the Supply Company upon the paragraph was that the Chemical Company "asked for" and thereby promised to take "the products (of the enlarged plant) * * * which * * * shall be" the monthly tonnage named.

We think this is a correct interpretation of the undertaking of the Chemical Company. It was quite reasonable for the Supply Company to ask and require the Chemical Company to take chemicals in an amount upon which it could rely, for a time at least, as a basis for profits. When pressed to show the consideration moving from the Supply Company for the Chemical Company's undertaking to take a definite amount monthly the Supply Company did not go outside the paragraph but cited that clause in the paragraph where it promised, quite indefinitely, to use its best efforts so to increase the plant as to produce the quantity asked for by the Chemical Company. The Chemical Company, also restricting itself to the paragraph, made the quite pertinent reply that a promise by one party to do its best to make and deliver is not a valid consideration for a promise by the other to take and pay for a named monthly amount, there being in such case a lack of mutuality of consideration. Yielding to the contention of the Chemical Company the court, likewise confining itself to the paragraph in search for a valid consideration for the Chemical Company's obligation to take a named tonnage monthly, held that as the Supply Company had not promised to produce chemicals in any given amount, the promise of the Chemical Company to take chemicals in a named amount was without consideration and was, therefore, not enforcible.

[3] If the trial court in interpreting the contract had been restricted to this one paragraph there would be no answer to the defendants' contention or to the court's construction. But we feel that a valid consideration for the Chemical Company's undertaking to take the monthly tonnage named in the paragraph may be found elsewhere in the contract and that such a consideration is found in the Supply Company's surrender of its plant and the devotion of the energies of its two officers exclusively to production for the Chemical Company. We think such complete surrender of the Supply Company's plant to the Chemical Company's uses was, without more, a valid consideration moving from the Supply Company for the promise of the Chemical Company to take a named monthly tonnage. It was the precise thing which the Chemical Company asked for, and got by tying the Supply Company by terms that held it fast. Of course, it had to give something in return and this it did by promising to take monthly the products of the plant in a named amount, certainly beginning with the

signing of the contract on June 3, 1916, and continuing, the Supply Company urges, until the end of the term on June 3, 1919. It is just here that we leave the position of the Supply Company and give the contract an interpretation which for various and obvious reasons neither party advanced. It is this:

While this contract partook of a business adventure in which the common object of both parties was enlarged production to meet an abnormal market due to war, it was apparent to both that at some time the war would end and with it the market. Therefore the Chemical Company in promising to take the increased production of the enlarged plant in the amount of 7 tons plus 4 tons plus 4 tons of different chemicals undertook to do so only "for the present and until further notice." And it gave that notice by ordering production to cease on January 1, 1919.

In the light of the times and of the business purposes of the parties, we see in this agreement nothing so unreasonable as to make us believe that it was not what the parties intended. Certainly it was what they said. Therefore, under our interpretation of the contract we are of opinion that, on the case made by the pleadings and evidence, the Supply Company was entitled to receive, in addition to the amount of the verdict directed in its favor, the total of the monthly differences between commissions or profits it would have earned under the contract, had the Chemical Company supplied it with material and orders, and the commissions or profits it actually received, reckoned from the date of the contract to its termination by notice on December 31, 1918, which when translated into figures from the tabulated evidence, merely for illustration, would have been $9,228.21 and interest—with one possible deduction.

As to this possible deduction, it appears that during the last six months of 1918 the Chemical Company was disposed to be tardy in giving orders for and taking its monthly quantity of chemicals. The Supply Company complained. As a result the Chemical Company paid the Supply Company $1,500 for each of the months of November and December, 1918, designating the payment, without prejudice to the future construction of the contract, as "compensation * * * in an amount commensurate with the spirit of the contract." The trial court left the jury to say whether this sum of $3,000 was paid on the contract. The jury, under the court's interpretation of the contract disallowing minimum monthly commissions at any period, very properly found that it "was no part of the contract and therefore not an offset or credit to the amount above mentioned, $12,512.18," the amount of the verdict for the plaintiffs on other items. It is conceivable, however, that under the contract as interpreted by us a jury at another trial might find that the $3,000 was payment under the contract or on account of the Chemical Company's monthly shortages, or on certain of them. However that may be, the question should, under the new interpretation of the contract, be submitted again.

For the reasons we have given, and to the extent indicated, we find error in the judgment below. While a number, but not all, of the remaining matters assigned as error disappear from the case on our

construction of the contract, we desire to say, without discussion, that we find in the record no errors other than the one we have discussed. On that error we are constrained to reverse the judgment below and direct a new trial not inconsistent with this opinion.

FRIEDMAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 4.

1. **Customs duties ⟸129—Statute imposing penalty held applicable to importation of aigrettes, etc.**

Rev. St. § 3082 (Comp. St. § 5785), providing a penalty for fraudulently or knowingly importing or bringing into the United States any merchandise, contrary to law, etc., prescribes the penalty for importing of aigrettes, egret plumes, etc., in violation of Tariff Act October 3, 1913 § 1, Schedule N, par. 347 (Comp. St. § 5291).

2. **Witnesses ⟸293—Statute creating presumption as to possession of goods, not explained, does not compel defendant to testify.**

Rev. St. § 3082 (Comp. St. § 5785), providing that whenever, on a trial for fraudulently or knowingly importing merchandise contrary to law, etc., the defendant is shown to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize a conviction, unless defendant shall explain it to the satisfaction of the jury, does not compel defendant to be a witness against himself in violation of the Fifth Amendment, as defendant may rebut the presumption by resting on the prosecution's case, or by adducing explanatory testimony, and, in either event, cannot be convicted, unless his guilt is proved beyond a reasonable doubt.

3. **Criminal law ⟸822(11)—Instruction held not to place duty on defendant of testifying, or create presumption against himself.**

On a trial for fraudulently or knowingly importing aigrettes, etc., an instruction that there was a statute creating a presumption against defendant, if the merchandise was found in his possession, and he was called upon to make some explanation of his possession, when preceded and followed by instructions giving defendant the benefit of any reasonable doubt, did not, when taken with the context, require defendant to testify, in order to explain his possession, or suggest, in violation of Act March 16, 1878 (Comp. St. § 1465), that a failure to testify created a presumption against him.

4. **Indictment and information ⟸119, 167—Allegations as to date and steamer of unlawful importation held superfluous, and not necessary to be proved.**

Under an indictment charging defendant with fraudulently and knowingly importing aigrettes, etc., allegations that the goods were imported on a certain date and by a certain steamer were superfluous, and it was not necessary to prove them.

5. **Criminal law ⟸1038(4), 1056(1)—Refusal to restate law in language of oral request, not presented as required by rules, and to which no exception was taken, not reversible error.**

Under rule 7 of the common-law rules of the District Court for the Southern District of New York, requiring requests for instructions to be submitted long enough before the charge to allow adequate consideration, when the main charge has clearly stated the law, and no exception

---

has been taken, a judgment will not be disturbed because the court refuses to state some principle of law again in the language of a belated oral request.

6. **Criminal law ⊜829(16)—Refusal to charge as to disregarding testimony held justified, where court had charged on credibility of witnesses.**
Where the court had fully charged as to the credibility of the witnesses, it was not error to refuse a requested charge that, if the jury believed any witness had testified falsely to any material fact, they were at liberty to disregard his entire testimony, especially when it was not requested long enough before the charge to allow adequate consideration, as required by a rule of the District Court.

7. **Criminal law ⊜829(9)—Refusal to charge as to giving defendant benefit of favorable construction of evidence not error, in view of instructions given.**
On a trial for importing aigrettes, etc., where the court had fully charged as to the presumption of innocence and as to reasonable doubt, and had explained the statutory presumption arising from the possession of the property, the refusal of a requested instruction that, where the evidence was susceptible of two constructions, from one of which the jury might draw an inference of guilt and from the other an inference of innocence, defendant was entitled as a matter of law to the benefit of the inference of innocence, *held* not error, especially as it might be construed as referring to separate pieces of evidence.

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

Harry Friedman was convicted of fraudulent importation of feather goods, and he brings error. Affirmed.

Elijah N. Zoline and Harry Kopp, both of New York City, for plaintiff in error.

William Hayward, U. S. Atty., and Keith Lorenz and Francis A. McGurk, Asst. U. S. Attys., all of New York City.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

MAYER, Circuit Judge. The indictment charged that on May 27, 1920, Friedman, the defendant, "did fraudulently and knowingly import and bring into the United States" aigrettes, osprey plumes, and the feathers and other parts of birds of paradise; "that is to say the defendant, having arrived at the port of New York * * * from * * * France as a passenger on the steamer La France, on May 27, 1920, did fraudulently and knowingly import," etc.

Testimony was adduced to show that the prohibited goods were found in Friedman's possession, and that he had stated that he had "smuggled" them into this country. There was introduced in evidence a baggage declaration of a passenger, H. Friedman, who arrived in New York on La France on May 27, 1920, and a customs inspector testified that he had witnessed this baggage declaration, and, in effect, had examined defendant's trunk. This trunk had a false bottom, and the inference was that, in this manner, the prohibited merchandise was concealed. Further details of the testimony are unimportant; for the jury had not only some evidence before it, but ample evidence, upon which to arrive at a verdict of guilt.

[1] 1. The first contention of defendant is that, since paragraph 347 of the Tariff Act of October 3, 1913 (Comp. St. § 5291), does not provide a penalty for its violation, the prosecution must fail; while the government insists that, reading section 3082 of the Revised Statutes with paragraph 347, supra, a penalty for the violation of the latter statute is prescribed.

Section 3082 (Comp. St. § 5785) reads as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Paragraph 347, supra, reads in part as follows:

"Provided, that the importation of aigrettes, egret plumes or so-called osprey plumes, and the feathers, quills, heads, wings, tails, skins, or parts of skins, of wild birds, either raw or manufactured, and not for scientific or educational purposes, is hereby prohibited; but this provision shall not apply to the feathers or plumes of ostriches, or to the feathers or plumes of domestic fowls of any kind."

The question now presented is disposed of by Feathers of Wild Birds v. United States (C. C. A.) 267 Fed. 964. See, also, United States v. One Bag of Paradise, etc., Feathers, 256 Fed. 301, 167 C. C. A. 473, and Goldman v. United States (C. C. A.) 263 Fed. 340.

[2] 2. Defendant next contends that section 3082, supra, is unconstitutional, in that, as defendant urges, it requires a defendant to testify, or, in the language of the Fifth Amendment, "to be a witness against himself," and, in support of this contention, Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, is cited. The statute discussed in that case, however, does not bear any similarity to the statute here under consideration. Section 3082 merely prescribes a rule of evidence, by providing, in effect, that possession of prohibited goods is presumptive evidence of guilt. Such presumptions are familiar in state and federal statutes, applicable to criminal as well as civil causes, and have long been sanctioned, as is fully pointed out in Mobile, Jackson & Kansas City R. Co. v. Turnipseed, Administrator, 219 U. S. 35, 42, 43, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

The presumption is not conclusive, and hence not open to constitutional objection. There is nothing in the statute which compels a defendant to take the stand, nor testify either for or against himself. The burden imposed on the defendant is merely to rebut the presumption. This he may do by resting on the prosecution's case, or by adducing explanatory testimony on his own behalf. In either event he cannot be convicted, unless the prosecution proves his guilt beyond

a reasonable doubt. A presumption identical with that of section 3082, supra, is found in section 2 of the Act of February 9, 1909 (35 Stat. 614 [Comp. St. § 8801]), commonly called the Opium Act of 1909, which latter statute reads like section 3082, with the exception that, instead of the word "merchandise," in section 3082, the Opium Act used the words "opium or any preparation or derivative thereof." The legal effect of this provision of the Opium Act was recently carefully considered by the Circuit Court of Appeals for the Fifth Circuit in Gee Woe v. U. S., 250 Fed. 428, 162 C. C. A. 498 (certiorari denied 248 U. S. 562, 39 Sup. Ct. 8, 63 L. Ed. 422), and we fully agree with the views expressed in that opinion in respect of the question here involved.

[3] 3. The trial court fully charged the jury on the rule as to reasonable doubt but it is claimed that there was error in the following instruction:

"There is another statute that provides, when one is found with merchandise unlawfully—that is, merchandise in his possession that is prohibited in the United States—the presumption is against him; that he had it in his possession unlawfully, and he is called upon to make some explanation of his possession; otherwise, it is a prima facie evidence of his guilt."

The foregoing was immediately preceded by, "If you have a reasonable doubt that he imported them [the plumes], then you should give him the benefit of the doubt and acquit him," and immediately followed by, "If you have a reasonable doubt of the defendant's guilt, you should give him the benefit of that doubt and acquit him," and then the court defined "a reasonable doubt."

No exception was taken to the instruction now complained of, nor was it suggested that the instruction was ambiguous or not clear. Taken with the context, this instruction cannot be construed as meaning that the defendant, in order to explain possession was called upon to testify nor was there anything in the charge which suggested, in violation of the Act of March 16, 1878 (20 Stat. 30 [Comp. St. § 1465]), that "his failure to make such request (i. e., his request to be a competent witness) created "a presumption against him."

[4] 4. There were no exceptions to the main charge, but, after it had been delivered, there were several requests to charge. One of these was that the court should charge that the jury must find, not only that the goods were unlawfully imported by defendant, but that he had imported them into the United States on May 27 on the steamer La France.

Under well-settled rules in a case of this character, it was unnecessary to set forth in the indictment either the exact date or the steamer on which the merchandise was brought here. What the prosecution was called upon to prove was the material part of the indictment, which was that defendant had knowingly imported this merchandise into the United States at a time not prior to October 3, 1913, the date of the enactment of paragraph 347 of the Tariff Act, supra, and the fact that the indictment particularized as to the date and steamer was immaterial for purposes of proof, because that much of the indictment was su-

perfluous. Evidently that part of the request which related to the steamer escaped the notice of the court, but that fact was not called to the court's attention, and the omission was of no consequence for the reasons just stated. The court, however, correctly charged as to the matter of date, saying:

"If the jury finds from the evidence in this case that this man unlawfully imported into the United States at any time within three years before the return of this indictment, that is sufficient; the date is not material; it is simply alleged in the indictment, to give the defendant an opportunity to know about when the offense occurred."

[5] Two other requests were then made, which, in view of the court's main charge, might have tended only to confuse the jury. Before referring to them, we think it desirable to call attention to rule 7 of the common-law rules of the District Court for the Southern District of New York, which reads as follows:

"In all civil and criminal trials counsel must submit to the judge all requests for instructions long enough before the charge to allow their adequate consideration. The judge may, in his discretion, refuse to consider all requests submitted too late under the foregoing provision."

This rule gives the trial court a proper opportunity to consider carefully the requests made, and its main purpose is to avoid the danger of the court being led into error in the closing moments of the trial. It was intended to preserve the deliberate character of a properly conducted trial, and to prevent error committed because of hastily given instructions first requested of the court after the conclusion of the main charge, and at a time when the jury is impatient for the word which will send it from the jury box to the jury room.

There is, of course, a marked distinction between a situation where an exception is taken, and, in that connection, an oral request to charge is made, in order that the error exposed by the exception may be cured, or that attention may be called to some material omission, and a situation where an oral request to charge is made, so that the court shall give an isolated instruction in respect of subject-matter which it has already adequately and properly dealt with. In the former instance, the request to charge may assist court and jury, and correct or avoid error, while, in the latter, the request may, and often does, tend to create misunderstanding and confusion, and to befog the jury, at the last moment, in regard to rules of law which, otherwise in orderly sequence, have been properly stated to it.

When, therefore, the main charge has correctly stated the law, and no exception has been taken, a judgment on a verdict will not be disturbed, because the court refuses to state again some principle of law in the language of a belated oral request.

[6] In this case, the court was asked to charge that, if the jury believed that any witness "willfully testified falsely to any material fact in this case, they are at liberty to disregard her or his entire testimony." The court had fully charged as to the credibility of witnesses, and when the above referred to request was made, the court said, "I have given the jury the instruction as to their being the judges of the

witnesses and the credibility of their testimony," whereupon counsel said, "And your honor declines to charge as I have requested?" to which the court answered, "Yes; because I have already given it in effect." In this there was no error, because the request was made in violation of rule 7, supra, and, in any event, the court was fully justified in refusing to charge in the language of the request.

[7] The court was also requested to charge:

"I ask your honor to charge the jury that, where evidence is susceptible of two constructions, from one of which you might draw an inference of guilt, and from the other an inference of innocence, the defendant is entitled to the benefit of the inference of innocence."

The court then said:

"Yes. If the evidence warrants it, if it permits of two constructions, then that most favorable to the defendant is usually taken."

Thereupon counsel said:

"I except to that last part of your honor's charge, 'is usually taken,' and I ask you to charge as a matter of law that the jury is bound to give the defendant the benefit in such event."

Thereupon the court said:

"I decline that."

The court had fully charged as to the presumption of innocence, and as to reasonable doubt, and had explained the presumption created by the statute. The court, perhaps, might have elaborated what was meant by the "two constructions," but to do so would merely have been to repeat the main charge; because in order to make the point clear, and avoid confusion in the minds of the jury, just as it was about to retire, it would have been necessary again to explain the presumption of guilt raised by possession of the merchandise, then the presumption of innocence, and so on. Besides, it will be noted that the request was not clear. It was not directed to the construction of all the evidence, and may have been, and probably was, construed by the court as referring to separate pieces of evidence; i. e., the testimony of respective witnesses; and, if so, the request was properly refused, because the jury must arrive at its verdict on all the evidence, giving to each part of the testimony, making up the evidence, such weight, inference, and conclusion as it may determine.

There are not any other assignments of error which we deem necessary to discuss.

Judgment of conviction affirmed.

NEWMAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 40.

Customs duties ⇐125—Act of smuggling held fully executed.

Where, after a steamship passenger's baggage declaration had been given to the customs inspector, he replied, in answer to questioning, that he had declared everything, and was searched and diamonds found concealed on his person, *held*, that the act of smuggling was fully executed; it not being necessary to the completion of the crime that he should have left the customs inclosure.

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

Joseph Newman was convicted of violating Rev. St. § 2865 (Comp. St. § 5548), and brings error. Affirmed.

Louis C. Whiton, of New York City, for plaintiff in error.

Wallace E. J. Collins, U. S. Atty., of Jamaica, N. Y., and Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y.

Before ROGERS, HOUGH and MAYER, Circuit Judges.

MAYER, Circuit Judge. The single question requiring consideration is whether the facts in this case fall within Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505. In the Keck Case, supra, Keck, one Von Hemmebrick and Loesewitz, the captain of the steamer Rynland, arranged in Antwerp, Belgium, that Loesewitz, on Keck's behalf, should bring a package belonging to Keck into the United States. As the Rynland approached its mooring in Philadelphia, Pa., a special agent of the Treasury Department boarded her. After a conversation between the special agent and Loesewitz, the latter delivered the package to the government agent and it was found to contain diamonds. Loesewitz had not put the diamonds on the manifest, but he did not leave the ship, nor had he made any customs declaration, up to the time he produced and delivered the package containing the diamonds. Keck was indicted, one of the counts having been laid under section 2865 of the Revised Statutes of the United States (Comp. St. § 5548). That section reads as follows:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty or shall make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years or both, at the discretion of the court."

The trial court charged the jury:

"If the statements made here under oath by Capt. Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

Upon the assumption that the acts of Loesewitz were imputable to Keck, the Supreme Court held that the purpose to smuggle was unexecuted, that the various acts were preparatory steps and, thus, that the smuggling denounced by the statute had not reached the stage of consummation. The court said:

"Examining the case made by the record, in the light of the foregoing conclusions, it results that, whether we consider the testimony of the captain alone or all the testimony contained in the record, as it unquestionably establishes that there was no passage of the package of diamonds through the lines of the custom authorities, but that on the contrary the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, that the offense of smuggling was not committed within the meaning of the statute, and therefore that the court erred in instructing the jury that if they believed the testimony of the captain they should convict the defendant and in refusing the requested instruction that the jury upon the whole testimony should return a verdict for the defendant."

In the case at bar, Newman, the defendant below, was a passenger on the steamship Stavangerford which arrived at the Thirtieth Street Pier in the borough of Brooklyn on February 17, 1920. Newman left the ship for the pier. Maxon, an inspector of customs had Newman's baggage declaration, and, on the pier, asked him whether he had declared everything he had purchased or obtained abroad. Newman said he had declared everything. The same question was asked of Newman by Acting Deputy Surveyor of Customs O'Connor, and the same answer was given by Newman. A customs appraiser was then called to appraise the articles set forth in Newman's customs declaration. After some further conversation, not here of consequence, O'Connor said:

"I am going to give you one more chance, if you have anything on your person, or anything you bought abroad, and have not declared it; now is your time to declare it; I want to give you every chance in the world to make a declaration."

To this, according to O'Connor, Newman answered:

"I declared everything; go ahead and search me, if you want to."

Thereupon Maxon, O'Connor, and another customs inspector named Roberts took Newman aboard the ship, went into a cabin, and searched him. Two fountain pens were removed from one of Newman's vest pockets by Roberts. One seemed to be empty, and Roberts put it back in Newman's pocket. The other pen rattled. Newman was asked by Roberts what was in this pen, and, according to Roberts, he said he did not know—"perhaps a couple of pieces of broken pen; it was out of order a couple of months." Maxon testified that Newman said "he thought the pen was not any good; that a piece of rubber was loose." O'Connor testified that Newman said, "There may be some parts of the pen in there; the pen is broken." The details of the testimony of these three government officers are unimportant. The point is that Newman still persisted in concealment and false statements.

When, shortly thereafter, the pen was broken up by Roberts, 7 diamonds were found in it. Later O'Connor asked Newman whether

he had anything else on his person which he had failed to declare, and Newman then asked, if he made "a clean breast of this," whether immunity would be granted to him. To this O'Connor answered in the negative, saying he had no authority. Thereupon Roberts questioned Newman further, and the latter produced from his overcoat the very pen which Roberts had previously returned to his vest pocket, and in this pen were 4 diamonds. Finally, after further pressing, Newman took a box of tooth paste from a handbag, took a tube out, squeezed it, and the contents fell on the ground. O'Connor picked up the paste, and in it found 2 more diamonds. Thus the 13 diamonds referred to in the indictment were accounted for.

It is difficult to conceive of a more deliberate, deceptive, and ingenious method of smuggling than this testimony discloses. There is testimony that, at a time when the customs officials were not sure that the first fountain pen contained smuggled articles, Newman left the customs inclosure, shadowed by an officer; but we do not place decision on the narrow ground that he thus physically was temporarily outside of the customs inclosure.

When, after repeated inquiry made on the pier, Newman persisted that he had nothing further to declare, at a time when his written declaration had been made to Maxon, and when he had made no mention therein of these diamonds, the act of smuggling was complete. But his clandestine introduction of these goods did not stop there, for even when the rattling fountain pen was taken from him he continued his concealment and false statements. After that, at a time when the customs officers not only had before them a false declaration, but in addition had physical possession of part of the smuggled goods, was it requisite that they should wait until the smuggler left the customs inclosure before they could apprehend him, on the theory that the crime was only then committed? Such a construction would make a mockery of the statute, and render it in large measure useless. In this case there was not an unexecuted purpose, nor a mere attempt to smuggle, as in the Keck Case, supra. On the contrary, there is no similarity between the facts of that case and of this. Here the smuggling had been so fully executed that all that was left for Newman to do was to escape detection. We think that the facts in this case are, perhaps stronger against this defendant than were those in Rogers v. U. S., 180 Fed. 54, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264. We fully agree with the court in that case when referring to that defendant's conduct, it said:

"When he knowingly passed the customs office at the dock, and ignored three distinct calls of the customs officer, and as we must conclude, with the intent to evade entering the goods or paying the duty at all, he must be held to have purposely declined the opportunity furnished him to comply with the law, and completed the offense. Counsel's claim comes to be that one must be permitted, not only to leave the ship and then to ignore both customs house and customs officer, with intent to evade payment of duty altogether, but also to escape from the inclosure, before he can be said to have committed the offense of smuggling. But see Keck v. United States and United States v. 218½ Carats Loose Emeralds (D. C.) 153 Fed. 643, 647, 648."

The judgment is affirmed.

DRAZICH v. RAY CONSOL. COPPER CO.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3484.

1. **Master and servant ⟸258(10)—Allegation of negligence unnecessary under state Constitution.**
   Under Const. Ariz. art. 18, § 7, making an employer in a hazardous occupation liable for injuries caused by an accident due to conditions of the occupation, and not by the negligence of the employee, regardless of the employer's negligence, that complaint for injuries in a mine does not count on defendant's negligence is immaterial.
2. **Master and servant ⟸261(3)—Allegation negativing contributory negligence necessary.**
   Under Const. Ariz. art. 18, § 7, in a servant's action for injuries arising out of his employment, an allegation that the injuries were due to conditions of his occupation, and not to plaintiff's negligence, was proper and necessary.
3. **Master and servant ⟸289(1)—Miner's contributory negligence question for jury.**
   In an action for injuries to a workman, who slipped and fell while loading timbers on cars in a drift of a mine, *held*, that the question whether the accident was caused by the plaintiff's negligence was a question for the jury.

In Error to the District Court of the United States for the District of Arizona; Jeremiah Netterer, Judge.

Suit by Andre Drazich against the Ray Consolidated Copper Company. Judgment for defendant. Plaintiff's motion for new trial was denied, and plaintiff brings error. Affirmed.

F. C. Struckmeyer, of Phœnix, Ariz., for plaintiff in error.

Chalmers, Stahl, Fennemore & Longan, of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error sued the defendant in error to recover for personal injuries sustained by him while working as an employee in the mine of the company in Pinal county, Ariz., by reason, according to the allegations of the complaint, "of an accident arising out of and in the course of such" employment, and "due to a condition or conditions of said occupation and employment, in that, while about his said labor, service, and employment, cleaning up and repairing certain underground workings or drift, upon a certain level or drift called the 20–20 level, and while loading timbers, rigs, and other material upon cars standing on a track in said mine, the plaintiff, while in the exercise of due care for his own safety, lost his footing and slipped and fell, and thereby" sustained the injuries for which the action was brought. The answer of the defendant company was to the effect that, if the plaintiff was injured at all, such injuries were the result and were caused by his own negligence, and that such injuries,

if they occurred, were due to risks well known to him, and which he assumed upon taking his employment.

Upon the trial, which was with a jury, besides the medical witnesses, whose testimony as the case comes here is not for consideration, the sole witness was the plaintiff himself. He testified in effect that his business in life was that of timber man in mines, having worked eight years in California "timbering all the time"; that he commenced work in that capacity for the defendant company April 8, 1917, and continued doing so until he was injured, June 30, 1918. We quote the substance of his testimony regarding the accident, given on direct examination:

"On the day that I was hurt I went on shift at 8 o'clock in the morning, and was hurt about 10 o'clock—maybe a little over 10. On the day I was hurt, I was working in the 20-20 level. I was working in a drift. I repaired the drift. The drift was all timbered, mashed and broken; that was an old drift. I knocked the old timber down, broke it and smashed it; broke it down and made more room, to make more room; and I was putting in new timbers. After I took the old timbers out from the walls of the drift, I took them away, because there was no place for me to work. I took the old timbers to the truck and sent them to the station, and the station pull out. There were about 30 or 40 empty drifts between me and the station. There was a track in this drift. There is a track in every drift. The timbers I was taking out were 14x16, 8 feet long. The timbers had not been in the drift long, because that was a system. It was rotten ground, and the timber didn't stay long; maybe two or three weeks, that is all; maybe one week, because of the cave-in system; it would cave in and smash it and break everything. I was hurt on the 13th of June, at 10 o'clock in the morning. Just before I was hurt, I sent my helper to bring the truck. He brought the truck. I don't know what my helper's name was. My helper was changing all of the time, because, if he was short a man, he took the helper away with him, and says, 'You work alone.' My helper was a Mexican. After my helper brought the truck, I went to put up the old timber in the truck, because there was nowhere to work. There was both sides, lots of muck on both sides of the track; only 2 feet on the side of the timbering, and there was lots of muck, and on the center of the track, and I wanted to try to put that timber in the truck, and I put one in, and the helper held that in, what I put in the truck, and I got to put the other in, and my foot slipped on the wet ground, and I fell down and knocked on the knee. There was close to me two car men, and I called the two car men to come and help me. There was just me and the helper in the drift; just me and the Mexican. The old timbering; a man cannot go like this. Where I worked, I made a big place to put in the timbering. A man can't go through the old timbering; just a small hole. The drift was about 8 feet wide on the bottom. The track was in the center of the drift. There was lots of muck in the drift; this muck was both sides of the track, and in the middle of the track, too. There was no floor in the drift. The ground of the drift was wet. When I got hold of the timber, the truck was like this (indicating); both sides of the truck was lots of muck. Well, I was standing like this, left foot like this, and I went to put the timber to swing on the truck, and this leg slipped down, and knocked me down, and I fell right away. My helper was with me, standing on that place. I was lifting the end of the timber where he was first. After that I came and lifted the other end, and he held that end where I left. That was the only way that I could put the timber in the truck. When I fell down I felt pain right away."

Other testimony related to the extent of his injuries.

[1] According to the latest decision of the Supreme Court of Arizona—Consolidated Arizona Smelting Co. v. Egich (Ariz.) 199 Pac.

132, 134 (August 22, 1921)—one of the three conditions creating and defining a new liability of an employer to the employee by section 7, article 18, of the Constitution of that state, is that the injury or death while in the service of the employer in a hazardous occupation "must have been caused by an accident due to a condition or conditions of the occupation, and not caused by the negligence of the employee killed or injured."

The validity of that provision of the Constitution of Arizona, making the employer liable for such injuries or death regardless of whether he or it was in any way negligent, was sustained by the Supreme Court of the United States in the cases reported under the title "Arizona Employers' Liability Cases," in 250 U. S. 400, 39 Sup. Ct. 553, 3 L. Ed. 1058, 6 A. L. R. 1537 et seq.—four of the Justices dissenting. The fact, therefore, that the complaint in the present case does not count upon any negligence on the part of the defendant mining company is immaterial.

[2] The law of Arizona, however, as has been seen, does require that the plaintiff in such an action shall himself have been without negligence, and so the complaint in the present case expressly alleged, not only that the accident by which the plaintiff received his alleged injuries was due to a condition or conditions of his occupation, but was not caused by his negligence.

[3] Whether or not the accident was caused by the negligence of the plaintiff was plainly a question of fact for the determination of the jury, and the jury having decided against the plaintiff, and the trial court having approved the finding by its refusal to grant the plaintiff's motion for a new trial, we can see nothing in the testimony of the plaintiff himself, which is above set out, upon which we can properly reverse the judgment.

Accordingly the judgment is affirmed.

RHEINER et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1921.)

No. 3681.

1. **Bail ⟸58—Description of offense in bond by well-known name is sufficient.**

   It is sufficient if a bail bond substantially sets forth a crime, and it may be described by its well-known name, as embezzlement; the particularity of an indictment not being required.

2. **Banks and banking ⟸257(1)—Charge of offense by officer of national bank held sufficient.**

   Under Federal Reserve Bank Act, § 2 (Comp. St. § 9786), requiring every national bank to become a member of a federal reserve bank under penalty of forfeiture of its charter a charge that a defendant as an officer of a national bank falsified its books or embezzled its funds is sufficient, as charging that he was an officer of a "member bank," within Rev.

St. § 5209, as amended by Act Sept. 26, 1918, c. 177, § 7 (Comp. St. Ann. Supp. 1919, § 9772).

3. Bail ⊂=58—Averment in bail bond that act was done fraudulently held equivalent to one that it was done with intent to defraud.

An averment in a bail bond that an act of defendant was committed fraudulently *held* sufficient, where the statute required the act in order to constitute an offense should be done "with intent to defraud."

In Error to the District Court of the United States for the Western District of Texas, Del Rio Division; William R. Smith, Judge.

Proceeding by the United States against F. J. Rheiner and others for forfeiture of bail bond. From a judgment of forfeiture (U. S. v. Davenport, 266 Fed. 425), defendants bring error. Affirmed.

L. Old and W. D. Love, both of Uvalde, Tex., for plaintiffs in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiffs in error, F. J. Rheiner as principal, and the others as sureties, executed a bail bond in favor of the United States, defendant in error. The principal failing to appear for trial, the bond was declared forfeited by judgment nisi. Thereafter writs of scire facias issued, and judgment final was entered up against all the plaintiffs in error. We have not been favored with a brief by the government.

The charge against the principal is described in the bond as that of—

"having, on or about the 7th day of December, A. D. 1918, within said district, in violation of section 5209 of the Revised Statutes of the United States, unlawfully, willfully, and fraudulently made false entries in the books of the Uvalde National Bank, of which said bank he, the said F. J. Rheiner, was then and there cashier, said bank being an association incorporated and operating under and by virtue of the national banking laws of the United States of America; and it is further alleged that the accused did forge the names of certain depositors of said bank, and otherwise did misapply and embezzle the moneys, funds, and credits of the aforesaid bank."

[1] It is contended that an offense is not sufficiently described to form the basis of the judgment. According to the weight of authority, it is sufficient if a recognizance substantially sets forth a crime. It is not required to be proof against all the objections which might well be urged against an indictment. United States v. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290. 3 R. C. L. 38. But it is said a different rule prevails in Texas, and that under section 1014 of the Revised Statutes of the United States (Comp. St. § 1674), the "mode of process" or procedure should be followed. Conceding that, we find that prior to 1899 one of the requisites of a bail bond was:

"That the offense of which defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state."

In 1899, however, it was enacted that a bail bond should be deemed sufficient as to description of the offense—

"If the defendant is charged with an offense that is a felony, that it state he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor." Texas Code of Criminal Procedure 1895, art. 309, as amended by Acts 1899, c. 74.

Texas decisions prior to and under the act of the Legislature of 1899 are collected in a note to the case of State v. O'Keefe, 32 Nev. 331, 108 Pac. 2, in 38 L. R. A. (N. S.) 312 et seq. In Anderson v. State (1918) 83 Tex. Cr. R. 130, 201 S. W. 994, it is said:

"In other words, the law now is that the bond in this particular will be sufficient, if it states merely that the offense charged is a felony, without telling what the offense is. Under this statute, either this must be done, or the specific offense must be stated."

While the rule in Texas appears, therefore, to be more strict than that which generally prevails, yet an offense need not be described in a bail bond with all the particularity necessary in an indictment. It is sufficient to describe a crime by its well-known name, as that it is seduction, Wisdom v. State (Tex. Cr. App.) 86 S. W. 756; or embezzlement, Nichols v. State, 47 Tex. Cr. R. 406, 83 S. W. 1113; or libel, Jones v. State, 38 Tex. Cr. R. 364, 43 S. W. 78, 70 Am. St. Rep. 751; or forgery, Bowman v. State (Tex. App.) 13 S. W. 1009.

[2] Section 5209, Revised Statutes, was amended by the Act of September 26, 1918, 40 Stat. 972 (Comp. St. Ann. Supp. 1919, § 9772). Offenses by officers of national banking associations remained so under the amendment, when committed by officers "of any Federal Reserve Bank, or of any member bank." It is nevertheless contended that Rheiner, the principal in the bond, is not charged with having violated the statute as amended, notwithstanding that he might be well charged with making false entries in the books of a national bank. There cannot possibly be any merit in this contention, because, under section 2 of the Federal Reserve Act (Comp. St. § 9786), the charter of any national banking association which failed to become a member bank of the Federal Reserve System within one year after its enactment was forfeited. Therefore, on the date named in the bail bond, every national bank was a member bank, and, since Rheiner was charged with making false entries in the books of the Uvalde National Bank, he was necessarily charged with making such entries in the books of a member bank, and of violating section 5209 as amended.

[3] The description of the offense is also attacked, because of the failure to allege that the acts therein set out were committed with intent to defraud. Keeping in view that we are considering a bond, and not an indictment, we think the charge that the false entries were fraudulently made was a sufficient statement that they were made with intent to defraud. But if it be conceded, for the sake of argument, that it was absolutely essential to allege that the book entries were made with intent to defraud, that allegation of intent is not required in charging the misapplication and embezzlement of bank funds, which are also offenses recited in the bond and denounced by the statute. Embezzlement needs no definition, and, if no other crime

had been set out, the principal and the sureties on his bond would have been properly held liable.

The judgment is affirmed.

HERINE v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3665.

1. **Criminal law ⟸395—Intoxicating liquors ⟸247—Searches and seizures ⟸7—Seizure by police officers called for disturbance of peace not violation of federal Constitution and liquors could be used as evidence.**

Where city police officers were not prohibition officers of the United States, and acted on notification of a disturbance of the peace, and entered rooms which were open, and found defendant boastingly selling liquor, their seizure of the liquors as evidence of the crime was no invasion of Const. U. S. Amend. 4 and the federal government had a right to use such liquors as evidence.

2. **Intoxicating liquors ⟸213—Indictment charging willful and unlawful keeping of intoxicating liquors held sufficient under National Prohibition Act.**

An allegation that the defendant maintained a common nuisance, in that he willfully, unlawfully, and knowingly did keep on the premises certain described intoxicating liquors as alleged, *held* sufficient to comply with National Prohibition Act, tit. 2, § 21, and under the provisions of section 32, it was unnecessary that the indictment include more.

3. **Intoxicating liquors ⟸236(9)—Evidence held to justify convicts of violation of National Prohibition Act.**

Evidence *held* ample to justify a conviction for maintaining a common nuisance violating the National Prohibition Act by unlawfully keeping alcoholic liquor for beverage purposes.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Binger Stewart Herine, also known as Binger Stewart Horine, was convicted under the National Prohibition Act of maintaining a common nuisance, by unlawfully keeping alcoholic liquor for beverage purposes, and he brings error. Judgment affirmed.

Chauncey F. Tramutolo, of San Francisco, Cal., for plaintiff in error.

John T. Williams, U. S. Atty., of San Mateo, Cal., and Thomas J. Sheridan, Asst. U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiff in error was convicted under an information charging that on June 20, 1920, he knowingly, willfully, and unlawfully, and in violation of section 21 of the National Prohibition Act (41 Stat. 314), maintained a common nuisance, in that he did unlawfully, willfully, and knowingly keep in certain described premises in San Francisco certain intoxicating liquor, sherry, and port, and then and there fit for use for beverage purposes. Before trial

---

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

*Rehearing denied February 20, 1922.

defendant, by his attorney, petitioned for an order directing the prohibition enforcement officer to return the liquor and wine, which were seized in the apartments of the defendant on the evening of his arrest. The petition set up that the seizure was made by a policeman of the city of San Francisco, but that the liquors and wines were being retained by a district prohibition enforcement officer; that the seizure was in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and that the government intended to use the seized property against defendant at the time of his trial, unless return was ordered. By return the persons charged to have made the seizure denied it, or that they retained possession of any whisky or brandy, or that the government intended to use them against defendant at any trial to be had.

Respondents set up that on the night of June 20th the police were notified that at certain apartments in San Francisco the peace and quiet of people was being disturbed by loud and boisterous noise and that intoxicating liquors were being sold therein; that a policeman, with other police officers of the city, went to the rooms, found the doors open, and saw bottles of intoxicating liquor and glasses, and heard loud and boisterous noises being made by the occupants, and that thereupon the officers entered the rooms and found defendant and several other men and some women, all of whom were drunk and noisy, boisterous and disturbing the peace; that there were numerous bottles and kegs containing sherry and port wine; that defendant then and there, in the presence of the officers, furnished four of the men and the three women some of the wine; that defendant told the officers he was selling the wine for 25 cents per drink; that he said he lived in the Adair Hotel, and had no permit to move the wine from the Adair Hotel to the Summerville Apartments; that thereupon a police officer arrested defendant, and took the bottles of wine and kegs of sherry and port wine; that on information obtained as a fact defendant, on the 20th of June, resided at the Adair Hotel; that the district prohibition officer did not seize or take into his possession or retain any of the wine or liquor referred to.

The District Court denied the order prayed for and ordered the trial to proceed. Upon the trial the evidence was substantially in accord with the statements above given. During the trial the wine which had been found in the apartments was introduced in evidence, and after verdict motion in arrest of judgment was denied.

The errors assigned are: (1) Denial of the defendant's petition for the return of the liquor seized without a search warrant or other process; (2) that the information does not state facts sufficient to charge a crime against the laws of the United States; (3) that the evidence was insufficient to justify a verdict of guilty.

[1] The record shows that the seizure of the wines and liquors was made by police officers of the city, and not by authority of the prohibition officers of the United States. The policemen acted upon notification of a disturbing of the peace. They entered the rooms, which were open, and which the evidence tended to show were not defendant's, and there found defendant with a quantity of liquor and

wine, which he boastingly said that he was selling; and the peace was being disturbed. Under such circumstances the seizure of the wines and liquors as evidence of crime was no invasion of the security given by the Fourth Amendment to the Constitution, and the government of the United States had a right to use the evidence upon trial of defendant for a violation of the laws of the United States. Burdeau v. McDowell, 256 U. S. ——, 41 Sup. Ct. 574, 65 L. Ed. ——. 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, cited by defendant was so essentially different on the facts that it is not a precedent in the present case.

[2] The allegation that defendant willfully and unlawfully and knowingly did keep on the premises certain described intoxicating liquor, as alleged, was sufficient to comply with the statute. Section 21, title 2, National Prohibition Act. Under the provisions of section 32 of title 2 of the act, it was unnecessary in the indictment to include more.

[3] From what we have already stated, it is plain that there was ample evidence to justify the verdict.

The judgment is affirmed.

KATHRINER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3637.

1. **Intoxicating liquors ⊂⊃238(1)—Evidence held to warrant denying motion for a directed verdict of not guilty.**

   In a prosecution for violation of the National Prohibition Act, denying a motion for a directed verdict of not guilty, made on the ground that the evidence was insufficient to show that the defendants had com mitted any offense, *held* not error.

2. **Intoxicating liquors ⊂⊃213—Information charging maintenance of nuisance, contrary to National Prohibition Act, held sufficient.**

   An information charging that defendants unlawfully, willfully, and knowingly violated Act Oct. 28, 1919, tit. 2, § 21, known as the National Prohibition Act, by maintaining a common nuisance on certain premises, by unlawfully, willfully, and knowingly keeping a quart of brandy, containing one-half of 1 per cent. or more of alcohol by volume, *held* sufficient to inform the defendants of the offense charged.

3. **Intoxicating liquors ⊂⊃249—Search warrant held unnecessary, in view of evidence.**

   Where government officers entered the defendants' soft drink parlor without warrant or process, jumped over the bar, and made a search, seizing a small quantity of liquor, which they preserved for evidence, under the circumstances disclosed, *held*, that a search warrant was not necessary.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Benjamin Kathriner and James Sullivan were convicted of violating the National Prohibition Act, and they bring error. Judgment of conviction affirmed.

Frank J. Hennessy, of San Francisco, Cal., for plaintiffs in error.

John T. Williams, U. S. Atty., of San Mateo, Cal., and Thomas J. Sheridan, Asst. U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] The plaintiffs in error were convicted and sentenced under count 1 of an information filed against them, charging a violation of the National Prohibition Act (41 Stat. 305). One of the specifications of error relied upon is that the court erred in denying their motion for a directed verdict of not guilty on the ground that the evidence was insufficient to show that they had committed any offense. In their brief regarding that matter they say that the officers of the government—

"entered the soft drink parlor of the defendants, and without a warrant or process of any kind jumped over the bar and made a search, seizing a small quantity of liquor behind the bar."

A few extracts from the testimony of one of the government officers will be enough to dispose of that assignment of error. Said that witness:

"Mr. Kathriner conducts a soft-drink establishment, formerly a saloon, and Officer Hanley and myself entered his place about half past 12 of the 23d. walked up to the bar, and told him who we were. I myself jumped over the bar, and the bartender was behind the bar at the time. Mr. Kathriner was not in the saloon at the time.

"Q. Who was his bartender; the other defendant? A. Mr. Sullivan; and we found behind the bar a pitcher containing about a quart of jackass brandy, which we poured in some bottles and sealed up there at the time. * * *"

After stating that the place was at 1123 Folsom street, and being asked concerning the conversation had at the time, the witness said:

"Mr. Kathriner says, 'You can't arrest us;' and Mr. Hanley says, 'Why?' and he said, 'I am paying for protection to do this kind of business.'"

The witness further testified:

"They had another pitcher with liquor in it, but they beat me to it and dumped it; they had a sink full of creosote, and they dumped it in it."

The witness further stated that he was at the same place again at 3:30 of the same day, when both of the plaintiffs in error were there, and, being asked whether he had had any further conversation regarding the matter, answered:

"When we were taking Mr. Sullivan to lock him up, walking up Seventh street, I said to him, 'What are you getting a shot for it?' And he said, 'Twenty-five cents.'

"Q. What is that? A. I asked him what he was getting a drink for it, and he said, 'Twenty-five cents.'

"Q. Who said that? A. Mr. Sullivan.

"Q. Were there any statements made by Mr. Kathriner, other than you have stated or related with respect to this case? A. Not outside of saying what I have said; no."

[2, 3] The first count of the information charged that on April 23, 1920, at San Francisco, the plaintiffs in error—

"did unlawfully, willfully, and knowingly, in violation of section 21 of title 2 of the Act of October 28, 1919, known as the 'National Prohibition Act,' maintain a common nuisance, in that they did unlawfully, willfully and knowingly keep on the premises situated at 1123 Folsom street certain intoxicating liquor, to wit, about one quart of brandy containing one-half of 1 per cent. or more of alcohol by volume."

We think it sufficient under the ruling of this court in the case of Young v. United States (C. C. A.) 272 Fed. 967. The question argued by counsel for the plaintiffs in error respecting the power of Congress to prohibit mere possession of intoxicating liquors is not involved. And under the circumstances of the case, as disclosed by the evidence, that a search warrant was not necessary, see Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

The judgment is affirmed.

BURROUGHS v. CITY OF DALLAS.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1921.)

No. 3748.

Eminent domain ⇐273—Remedy at law held adequate for closing street.

Where the only injury inflicted on the owner of property abutting on the street by the closing of a portion of the street was depreciation in the market value of his property, the remedy at law was adequate, and an injunction to restrain the closing was properly denied.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Suit by Nelson T. Burroughs against the City of Dallas to enjoin the obstruction of a portion of a street. From a decree refusing the injunction without prejudice to an action at law, complainant appeals. Modified and affirmed, and cause remanded, with leave to apply for an order transferring the suit to the law side.

Francis Marion Etheridge and Charles T. McCormick, both of Dallas, Tex. (Francis Marion Etheridge, Joseph Manson McCormick, Henri Louie Bromberg and Charles Tilford McCormick, all of Dallas, Tex., on the brief), for appellant.

James J. Collins, City Atty., and Allen Charlton, both of Dallas, Tex. (Jas. J. Collins, Allen Charlton, and Carl B. Callaway, all of Dallas, Tex., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The appellant, who owns a lot, with a building used as a boarding house thereon, abutting on Exposition

avenue in the city of Dallas, filed the bill in equity in this case, alleging that the value of said property was lessened and its usefulness rendered less beneficial by the act of said city in obstructing a part of Exposition avenue between the appellant's property and the business part of Dallas, and praying that the appellee, the city of Dallas, be enjoined from continuing to obstruct Exposition avenue, and for such other relief as the appellant may be entitled to.

It was disclosed that what was complained of was done after the appellee had become the owner of the property abutting on both sides of the part of Exposition avenue which was obstructed, and had, pursuant to an ordinance, closed as a public street or thoroughfare that part of said avenue. It was averred that this was done without the appellee taking any steps to ascertain the damage to the appellant's property that would ensue therefrom, and without giving the appellant any notice or opportunity to be heard in respect to his damages, and without arranging for any compensation whatever to the appellant or any other person for the damages that might be caused thereby, and that after said avenue was so obstructed it became and has continued to be impossible for the appellant or any occupant of the boarding house on his property to go from that property to points in the direction of the business part of Dallas without traveling a distance more than 1,000 feet greater than that by way of Exposition avenue before it was so obstructed. After the filing of an answer and the taking of evidence, the case was submitted to the court on the pleadings and proofs, and the court rendered a decree refusing the injunction prayed for; that decree stating that it "is made without prejudice to any action at law that complainant may have or file."

Assuming, without deciding, that the appellant has a right of action based on the alleged conduct complained of, we are of opinion that neither the allegations of the bill nor the evidence adduced showed that his remedy at law therefor is inadequate. No damage is shown beyond an impairment of the property's value in consequence of the closing of part of the street on which that property abuts. If the appellant has a right of action based upon the closing and obstruction of the street, the resulting depreciation of the market value of the property furnishes the measure of his damages, which are recoverable in a single action at law. Dennis v. Mobile & Montgomery Ry. Co., 137 Ala. 649, 35 South. 30, 97 Am. St. Rep. 69; Armour & Co. v. Texas & Pacific Ry. Co., 258 Fed. 185, 169 C. C. A. 253; Id., 251 U. S. 551, 40 Sup. Ct. 56, 64 L. Ed. 410. For the reason indicated, the court did not err in refusing the injunction prayed for.

The decree is affirmed, so far as it denied equitable relief, and the cause is remanded, with direction that the appellant have leave to apply to the trial court for an order transferring the suit to the law side, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv).

Modified and affirmed.

BURROUGHS v. CITY OF DALLAS et al.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1921.)

No. 3749.

1. **Nuisance ⟸3(9)—Scenic railway not nuisance per se.**
The operation of a scenic railway on exposition grounds is not a nuisance per se.

2. **Nuisance ⟸33—Evidence held not to show substantial injury.**
In a suit to restrain the operation of a scenic railway as a nuisance, evidence *held* not to show that the operation substantially interfered with the physical comfort of persons of ordinary sensibilities occupying nearby property, or that the value of that property was materially impaired.

3. **Injunction ⟸36(1), 37—Not granted where right is doubtful.**
Injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling, and where the evidence is conflicting, and the injury doubtful, the remedy may be withheld until the asserted right has been established at law.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Suit by Nelson T. Burroughs against the City of Dallas and others to restrain the operation of a scenic railway. Decree for defendants, and complainant appeals. Modified and affirmed, and cause remanded, with leave to apply for an order transferring the suit to the law side.

See, also, 276 Fed. 810.

Francis Marion Etheridge and Charles T. McCormick, both of Dallas, Tex. (Francis Marion Etheridge, Joseph Manson McCormick, Henri Louie Bromberg and Charles Tilford McCormick, all of Dallas, Tex., on the brief), for appellant.

James J. Collins, City Atty., and Allen Charlton, both of Dallas, Tex. (Thompson, Knight, Baker & Harris, and Thomas A. Knight, all of Dallas, Tex., for State Fair of Texas, T. D. Gresham and J. Hart Willis, both of Dallas, Tex., for Fair Park Scenic Railway Co., and James J. Collins, Allen Charlton, and Carl B. Callaway, all of Dallas, Tex., for city of Dallas, on the brief), for appellees.

Before WALKER, BRYAN and KING, Circuit Judges.

WALKER, Circuit Judge. This was a suit in equity brought by the appellant, a citizen of Illinois, living in Chicago, against the appellees, the city of Dallas, the State Fair of Texas, a Texas corporation, the Fair Park Scenic Railway Company, a Texas corporation, and Palmer G. Cameron, the manager of the last-named corporation. The relief sought was an injunction restraining the appellees, or either of them, from operating or permitting others to operate a described scenic railway in its present location on premises separated by Exposition avenue in the city of Dallas from a lot owned by the appellant, upon which is a residence containing 18 rooms, which is used as a boarding house, and such other relief as the appellant may be entitled to. The bill contained averments to the following effect:

The city of Dallas owns the property situated in that city which is known as Fair Park, which abuts on Exposition avenue, a part of which property fronts the above-mentioned property of the appellant, being separated therefrom by said avenue, which is 64 feet wide. By contract between the city of Dallas and the State Fair of Texas, the latter has been let into the joint or partial use of Fair Park, and during a period of 30 days of each year takes possession of said park, using it in conducting a State Fair. The appellees Fair Park Scenic Railway Company and its manager, Palmer G. Cameron, under some contract with their coappellees, or one of them, are permitted to operate said scenic railway. The scenic railway is a structure erected for the purpose of running pleasure cars on elevated and irregular iron rails, the cars running on iron wheels, and filled with joy riders when in action. The Scenic Railway Company and Cameron, acting in concert with their coappellees, operate the cars on the scenic railway habitually in the daytime and in the nighttime, thereby creating a great volume of noise and raucous sounds coming from the cars themselves and from the occupants of the cars. The noises so arising cause such discomfort to the occupants of the appellant's house as to render it almost uninhabitable. Those noises occur in the summer time almost nightly, and are particularly annoying on Sundays and other holidays, and especially so during the holding of the Texas State Fair in the fall of each year. The scenic railway cannot be operated without producing such noises, and when it is in operation it is impossible for persons on the front porch of the appellant's house to hear each other when talking in an ordinary tone of voice, and sleep is almost impossible for one occupying a room in the appellant's house, with the results that the value of said property as a boarding house is greatly impaired, its usefulness is rendered less beneficial, and the revenue derived therefrom is greatly less than it would be with the scenic railway not in operation.

The material allegations of the bill were put in issue. The testimony of a number of witnesses was taken. That testimony was in conflict on the question of the noise incident to the operation of the scenic railway having the effect of seriously interfering with ordinary conversation carried on in the front porch of the boarding house, or of keeping occupants of that house from sleeping. A nephew of the appellant occupies the house mentioned, and he and his wife have been running it as a boarding house for several years. That nephew has lived on that lot continuously since 1889. He was connected with horse racing in Fair Park until 1912, when the races were done away with. His mother built the house now on the lot in 1908, after the scenic railway was built and was in operation. Since that house was built it has been continuously used as a boarding house by that nephew or members of his family. The appellant became the owner of the property in 1918, paying $8,000 for it. Before he bought the property he had held a mortgage on it.

So far as appears, the operation of the scenic railway was not complained of by any keeper or occupant of the boarding house until after the city of Dallas, before this suit was brought, closed a part of Ex-

position avenue between the appellant's property and the business section of Dallas. After that occurred the above-mentioned nephew of the appellant made a proposition to the city that it buy said property at the price of $30,000, or remove the scenic railway, or reopen the closed part of the street, one of the three. The city took no action on the proposition, and this suit and another one seeking an injunction restraining the city from continuing to obstruct Exposition avenue were brought by the appellant. It was disclosed that several of the witnesses examined in behalf of the appellant are interested in the result of this suit, and contributed to the expenses of it. It was not made to appear that the operation of the scenic railway has prevented the keeper of the boarding house getting and retaining boarders, and it was shown that the rates for board had been increased.

[1, 2] It is apparent that the evidence disclosed circumstances which properly may have been given the effect of unfavorably affecting the weight to be accorded to testimony offered in behalf of the appellant. The scenic railway is not a nuisance per se. We are not of opinion that it clearly appears from the record that the evidence adduced was such as to require the conclusion that the operation of the scenic railway substantially interferes with the physical comfort of persons of ordinary sensibilities who are or may be occupants of the appellant's property, or that the value of that property is materially impaired thereby.

[3] It is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling. If the evidence be conflicting and the injury doubtful, this extraordinary remedy properly may be withheld when it is applied for before the asserted right has been established at law. Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777; Parker v. Winnepiseogee Lake Cotton & Woolen Co., 2 Black, 545, 17 L. Ed. 333.

The conclusion is that the record does not show that the court erred in refusing the injunction prayed for. The decree is affirmed, so far as it denied equitable relief, and the cause is remanded, with direction that the appellant have leave to apply to the trial court for an order transferring the suit to the law side, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv).

Modified and affirmed.

BERWIND-WHITE COAL MINING CO. v. FLANNERY TOWING LINE, Inc.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 14.

Collision ⇐125—Evidence held to support a finding as to identity of tug which collided with barge while attempting to move it.

In a suit for damages to a barge, which was lying alongside a steamship at a pier, and which was struck by a steam tug attempting to move the barge to a point between the pier and the steamer, evidence *held* to

warrant the trial judge's finding as to the identity of the tug which did the damage.

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

Libel by the Berwind-White Coal Mining Company against the Flannery Towing Line, Incorporated. From a decree for libelant, respondent appeals. Affirmed.

Foley & Martin, of New York City (George V. A. McCloskey, of New York City, of counsel), for appellant.

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

Before ROGERS, MANTON, and MACK, Circuit Judges.

MANTON, Circuit Judge. On the 17th of January, 1918, the libelant's barge Eureka 105 was lying alongside the steamship Montevideo, on the north side of Pier 17, Brooklyn, and at about 10 o'clock in the morning of that day, a steam tug proceeded in the slip alongside the Eureka 105, intending to shift the barge around to a position between the steamship Montevideo and the pier. The Montevideo was lying at the pier with her bow to the bulkhead, bringing her starboard side to the dock. The steam tug moved the libelant's barge up toward the bow of the steamship and a line was placed on the port bitt amidships on the Eureka to the forward winch of the steamer, for the purpose of pulling the barge between the steamer and the dock; the steamer being breasted out from the dock in order to allow the barge room to pass between the steamer and the dock. While the barge was thus lying in this position, across the bow of the steamer, with the stern of the barge toward Pier 17, the steam tug struck the forward port corner of the Eureka damaging it. That the damage occurred through want of care on the part of the steam tug is not questioned on this appeal, nor, indeed, could it be successfully questioned. The identity of the steam tug, however, was the sole issue argued on this appeal.

We think the evidence as to the identity of the steam tug Annie E. Flannery, owned by the appellant, is sufficiently established by competent proof to have warranted the District Judge reaching the conclusion which he did. The captain of the libelant's scow testified that it was a tug of the Flannery Towing Line that did the damage. He had some uncertainty as to the name on the tug. He testified:

"Q. At about 10 o'clock on the morning of January 17th did you see the tug Annie E. Flannery? A. Yes, sir; I recall a tug. I know it was a Flannery tug, but didn't know her first name.

"Q. Did that Flannery tug come and shift you? A. Yes, sir.

"Q. When she shifted you, did you notice her name? A. I know it was a Flannery boat, but didn't know before this happened. I went—

"Q. She was a Flannery boat? A. Yes, sir.

"Q. She came there to shift you that morning? A. Yes.

"Q. At some time after she shifted you, did you discover her name? A. I didn't see. I know it was a Flannery boat, and asked the man on the deck the first name. He said Annie Flannery—

"Mr. Darrow: I move to strike that out.

"Q. Never mind what the man on the deck said. This boat Flannery came and shifted the Eureka 105 at about 10 o'clock on the morning of the 17th of January? A. Yes, sir."

It is admitted by the president of the appellant company that the Annie E. Flannery was owned by it. The log of the tug Annie E. Flannery, produced by her captain, shows that the tug was at Piers 16 and 17 at about 10:15 a. m. on January 17, 1915, which is the time of the collision. It also appears that the Flannery Towing Line did the towing for the Spanish Line, which was the owner of the Montevideo. There were denials of having done this work by the president of the appellant company, and also by the captain of the Annie E. Flannery. We think that the question of fact thus presented to the District Judge, and found against the appellant, should not be disturbed.

Decree affirmed.

BECHTOLD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3754.

Habeas corpus ⊜3, 4—Sufficiency of indictment not considered, where no objection below, nor writ of error.

Where one was convicted of manufacturing intoxicating liquors without registration, etc., in violation of internal revenue laws (Rev. St. §§ 3258, 3281, 3282 [Comp. St. §§ 5994, 6021, 6022]), without testing the sufficiency of the indictment by demurrer or otherwise, and without filing a motion in arrest, or otherwise questioning the conviction, or seeking writ of error, a petition for habeas corpus on the ground that conviction was illegal, in that such statutes had been repealed by the Eighteenth Amendment and the National Prohibition Act, will be dismissed; the District Court having jurisdiction of the class of offenses charged, and to decide whether they were a violation of the internal revenue laws or the National Prohibition Act.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Petition in habeas corpus by August Bechtold, who was convicted in a prosecution by the United States. Petition dismissed, and petitioner appeals. Appeal dismissed.

For opinion below, see Ex parte Lawrence, 273 Fed. 876.

Frank A. Lenz, of Butte, Mont., for plaintiff in error.

John L. Slattery, U. S. Atty., and Ronald Higgins and Wellington H. Meigs, Asst. U. S. Attys., all of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a proceeding to review dismissal of petition for writ of habeas corpus. Bechtold set up that he was convicted under three counts of an indictment, charging: (1) That on July 12, 1920, he made and fermented a certain mash fit for the production of spirits in a certain building other than a distillery duly au-

thorized according to law, and on premises other than a distillery duly authorized according to law; (2) that on July 12, 1920, he failed and neglected to register with the collector of internal revenue a still then in his possession and under his control, which still was set up; (3) that on July 12, 1920, he carried on the business of a distiller without first having given the bond required by law and complied with the provisions relating to registration. Petitioner does not specify the particular statutes under which the conviction was had, nor does the indictment, nor do the judgment and commitment; but it is evident that the offenses are defined in sections 3282, 3258, and 3281 of the internal revenue laws, title 35, R. S. U. S. (Comp. St. § 5994, 6021, 6022). The sentence was imprisonment in the county jail at Butte, Mont., for nine months and to pay a fine of $500.

The contention is that the above-cited sections of the Revised Statutes were repealed by the Eighteenth Amendment to the Constitution and the act of Congress, known as the National Prohibition Act, approved October 28, 1919, chapter 85, 41 Stat. 305. The record fails to show that defendant below, by demurrer or otherwise, tested the sufficiency of the indictment at the time of trial, or that he filed a motion in arrest of judgment, or in any other way in the District Court questioned the legality of his conviction, or sought writ of error to review the judgment against him. He is now endeavoring by this proceeding to have this court decide a question of law, which he should have raised in the District Court at the time of trial or judgment, and which, if decided adversely to him, might have been presented to this court by writ of error.

Whether the indictment was sufficient or insufficient, the District Court had jurisdiction of the class of offenses charged, and to decide whether the acts alleged were a violation of the internal revenue laws or the National Prohibition Act. Rarely in such a case will an appellate court on habeas corpus inquire into the question of the sufficiency of the indictment. Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147. We may add that we do not construe Yugenovich v. U. S., 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, as holding that the indictment in the present case fails to state an offense.

The appeal is dismissed.

UNITED STATES v. HANA.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3727.

Customs duties ⇐129—Master of ship not liable for failing to include intoxicating liquor in manifest.

The master of a ship is not liable for the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506), by omitting goods and chattels from the manifest that are not in a legal sense adapted to or susceptible of entry in the custom house, and hence is not liable for failure to include intoxicating

liquors, which is not merchandise in a legal sense, unless imported in a manner authorized by the provisions of the Prohibition Act.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by the United States against Olaf O. Hana. Judgment for defendant, and the United States brings error. Affirmed.

Robert C. Saunders, U. S. Atty., and Charlotte Kolmitz, Asst. U. S. Atty., both of Seattle, Wash.

Bronson, Robinson & Jones, of Seattle, Wash., for defendant in error.

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

HUNT, Circuit Judge. Some liquor, wine and beer, was brought into the port of Seattle on the ship Lovejoy, arriving from a foreign port, and Hana, the master, failed to include the articles in the manifest filed with the authorities. The government brought action under Rev. St. § 2809 (Comp. St. § 5506). General demurrer to the complaint was sustained, and to review judgment of dismissal the United States brought writ of error.

In United States v. Sischo (C. C. A.) 270 Fed. 958, it was held in effect that the master of a ship is not liable for the penalty imposed by section 2809, R. S. U. S., by omitting goods and chattels that are not in a legal sense adapted to or susceptible of entry at the custom house. While liquor and wine may be the subject of importation for certain restricted purposes, nevertheless, unless the liquor or wine is brought in as authorized by the provisions of the Prohibition Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305), it is not merchandise in a legal sense.

Judgment affirmed.

UNITED STATES v. KICHIN.

(District Court, E. D. Missouri, E. D. November 26, 1921.)

No. 5158.

1. **Courts ⇐375—Federal courts recognize, but are not conclusively bound, by state limitation statutes.**

Federal courts sitting in equity recognize and apply state statutes of limitation, though they may not be bound by them absolutely.

2. **Aliens ⇐71½, New, vol. 7 Key-No. Series—One living in concealed bigamous relation when naturalized not law-abiding within statute.**

One who made a second and bigamous marriage in 1904, which continued when he was admitted to citizenship in 1912, had not been a moral and law-abiding citizen for five years before such naturalization, within the meaning of the statute (Comp. St. § 4352, subd. 4), but was guilty of such fraud in concealing a fact which would have prevented his naturalization as to constitute ground for its cancellation.

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

3. Aliens ⇐60—Naturalization not a right, but a matter of grace.

Naturalization is not made as of course, but is an act of grace, applicant not demanding it, but petitioning for it, and no vested right thereto exists, and the court may examine conduct of applicant antecedent to the five years mentioned in Comp. St. § 4352, subd. 4, as bearing on qualifications for citizenship.

In Equity. Suit by the United States against John Jacob Kichin to cancel a certificate of naturalization. Decree for the United States.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., for the United States.

Matt G. Reynolds, Chase Morsey, and Horace Dyer, all of St. Louis, Mo., for defendant.

FARIS, District Judge. At a session of court held in St. Louis, Mo., on November 26, 1921, the court orally [1] announced the following opinion:

This case was submitted to the court on the merits, after a full and complete hearing. I am now ready, or partially ready, or ready as I will ever be (the many duties confronting me considered), to decide it. This is an action on the equity side of this court, brought by the United States, as complainant, to set aside and cancel a certificate of naturalization issued by this court to defendant some time in the year 1912, for that, as it is alleged by complainant, this certificate was procured by fraud.

The specific ground of fraud invoked in the case by the government is that defendant, at the time of the issuance to him of the certificate in question, was not a man of good moral character, and also, perhaps, that upon the hearing had in this court on his application for naturalization he fraudulently concealed certain facts as to his prior history and behavior.

Specifically, upon the question of his alleged immoral character at the time of his naturalization, it is averred that he was living with a woman with whom he had contracted a bigamous marriage. The evidence touching the question whether, when defendant married his present wife (called such for convenience only), he then had another wife living, is voluminous, and somewhat contradictory. Without taking up time or space in weighing this evidence here, I am convinced that the preponderance of it establishes the fact of such former marriage.

Briefly, on this question, I find the facts to be that defendant and one Yetta Yankofsky were married to each other about the year 1890. This marriage seems to have occurred in Russia, and to have been according to the religious rites of the Hebrew church. There was some contradiction as to the place of its occurrence; some of the witnesses having stated that it occurred in Germany. This contradiction may arise, and probably does arise, from the fact that the homes of the two parties were, at the time the alleged marriage was contracted, quite close to the boundary of Germany.

Shortly after this marriage, defendant and the woman Yetta left

[1] This oral opinion is published in the Federal Reporter at the special instance of the Chief Naturalization Examiner.

Russia and went to London, England, where they lived together as man and wife until the year 1900, when defendant left his London family, then consisting of such wife and four children begotten of this relation, and went to reside in South Africa. In the latter place defendant, without procuring a divorce, married, or went through a marriage ceremony with, the woman with whom he is now living, and ever since has lived, as his wife. As late as the year 1911, and just prior to his procuring the certificate of naturalization here sought to be canceled, defendant saw fit to induce, by the payment to her of 50£, or about $250, the woman Yetta to sign a paper wherein it was mutually recited that she had never been married to the defendant. In passing, I may state (though the fact, in the view which the court takes of it, has little bearing upon the final result) the defendant there gave his address as London, England, notwithstanding it is apparent that if he were naturalized, as undoubtedly he was in 1912, his address must have been St. Louis, Mo. But, as stated, I pass that as having a negligible bearing upon the result, however the fact, arguendo, may be otherwise of value.

Even if the circumstances of the procurement of this paper I have just referred to were not suspicious, if the statements therein were not contradicted by the actions, efforts, and language of defendant, and by the testimony of a cloud of witnesses, and if the mutual conclusion that defendant and said Yetta were not married to each other do appear therein, this paper yet recites facts from which a common-law marriage arises, for it says they cohabited and lived together as man and wife for ten years, and that said Yetta during said period of ten years lived as, and passed as, Yetta Kutchinsky, and as the wife of the said Jacob Kutchinsky.

In passing it may be said that the present name under which defendant is here sued, to wit, that of John Jacob Kichin, was acquired, either when he was naturalized, or was changed by him of his own volition, since he came to the United States, for the evidence is conclusive that when he left Russia, and when he lived in London, he passed by the name of John Jacob Kutchinsky.

Even after the execution of the above-named paper, defendant continued his efforts to procure, seemingly according to the rites and rules of the Hebrew religion, a so-called divorce from the woman Yetta, and these efforts were continued by him up to the time of the death of the woman Yetta, which occurred only some six or eight months ago.

So far as the record discloses, the defendant has lived (barring his continued bigamous relation with his second wife) an upright and moral life since he came to the United States. Touching alleged immoralities of defendant while in South Africa, however, much testimony was adduced upon the trial. But these alleged immoralities, in the view which I take of the case, need not be gone into now, and have, in the view of the court, but a negligible bearing upon the point before it.

It is contended on the part of the defendant that, regardless of whether he was or was not married in 1890 to Yetta, that since for

more than five years next before he was naturalized his conduct as a resident alien here was impeccable, that this is all that is required or contemplated by the statute. The statute relied on reads, so far as it is pertinent to the point urged, as follows:

"It shall be made to appear to the satisfaction of the court * * * that immediately preceding the date of his application he has resided continuously within the United States five years, at least * * * and during that time he has behaved as a man of good moral character." Comp. St. § 4352, subd. 4.

Counsel for defendant therefore contend that it makes no difference what his moral behavior or conduct may have been before he came to this country, if for five years prior to his naturalization he has been a moral and a law-abiding citizen. This they urge is all that is required, and no fraud, they contend, mete for cancellation of his citizenship, can be bottomed upon any act which occurred more than five years before he was naturalized. In short, it is urged by defendant, that the five-year period mentioned in the statute quoted so far constitutes an absolute statute of repose as that, whatever his prior conduct may have been, the government may not go behind such period and urge antecedent crimes or immoralities. This view, I think, loses sight of the facts here involved. When defendant applied for and was granted citizenship, it was not known to the government that he was then living in bigamous adultery with a woman who was not his lawful wife. Clearly, if this fact had been disclosed on the hearing, no order naturalizing him would have been entered. This condition existed until the death of his first wife, which occurred long after this present action was commenced. The facts on which this action is based did not become known to the government until a very short time before this action was begun.

[1] Merely in passing, I may suggest that federal courts sitting in equity recognize and apply state statutes of limitation, though they may not be bound by them absolutely. If this rule were applicable and decisive, the action is in time. Section 1316 R. S. Mo. 1919. But it will be seen that reliance is had by defendant, not upon a general statute of limitations, but upon the specific language of the section which I have quoted above. Many cases are to be found wherein actions such as this were brought more than five years after the issuance of the certificate of naturalization. See U. S. v. Mansour (D. C.) 170 Fed. 676; U. S. v. Spohrer (C. C.) 175 Fed. 440; U. S. v. Luria (D. C.) 184 Fed. 643; U. S. v. Ellis (C. C.) 185 Fed. 546; U. S. v. Raverat (D. C.) 222 Fed. 1018; U. S. v. Wursterbarth (D. C.) 249 Fed. 908; U. S. v. Darmer (D. C.) 249 Fed. 989; Johannessen v. United States, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066; U. S. v. Herberger (D. C.) 272 Fed. 278. The case of United States v. Luria was afterwards ruled on by the Supreme Court of the United States, and it is reported under the title of Luria v. United States, 231 U. S. 23, 34 Sup. Ct. 10, 58 L. Ed. 101.

[2] It will be noted, of course, that this is not yet the precise point relied on, which is that, since the second marriage of defendant occurred not later than 1904, and since he was naturalized in 1912, he

had for more than five years prior to the date at which he was naturalized been a moral and law-abiding citizen, and this (so counsel for defendant contend) is all that the statute requires, regardless of his conduct prior to the beginning of such five-year period.

The first difficulty met in applying this view arises from the fact that defendant's immorality was a continuing fact, and this fact was not known to the government when it naturalized him. Obviously, had he disclosed then that he had living two wives, from the first of whom he had not been divorced when he married the second, no order would have been entered here naturalizing him. Defendant was required to make oath that he did not believe in either the theory or practice of polygamy. It is hardly conceivable that he would have been naturalized, had he admitted, rather than concealed, the fact that he was then practicing polygamy.

[3] Moreover, I think it is apparent that the view urged here by defendant loses sight of the fact that an order of naturalization is not made as of course, but it is made as an act of grace; that an applicant for citizenship does not demand naturalization, but petitions for it, and that no vested right in such petitioner to have this privilege accorded to him exists in law. Luria v. United States, 231 U. S. 23, 34 Sup. Ct. 10, 58 L. Ed. 101; In re Sigelman (D. C.) 268 Fed. 217.

It is obvious that the view urged by defendant could be the law only if the court were compelled to naturalize one who, born in a foreign country, had therein broken every commandment in the decalogue, and had committed every crime in the criminal calendar, if, forsooth, on coming to this country he had seen fit to temporarily reform for five years.

It logically follows, I think, that the five-year period mentioned in the statute quoted is not a statute of repose, in so far as to preclude a court from going beyond it, in order to ascertain the behavior and antecedent conduct of the petitioner, for the purpose of so far judging the future by the past as to form a conclusion whether benefit or harm would accrue from such petitioner's admission as a citizen. To take any other view of the law would be tantamount to saying that which all the decisions hold cannot be said, namely, that one applying for citizenship does so as a matter of right, and not as an humble petitioner for an act of grace.

As I read the statutes, they vest discretion in the trial courts in matters of naturalization. This discretion is, of course, not an arbitrary discretion, but rather a judicial one, and I cannot read the statute in such wise as to construe it to mean that the greatest criminal who ever left his native country unhung may come to this country, and after five years of impeccable conduct demand, and on his demand compel, the acceptance of himself as a citizen by this country. Unless this can be done, I am of opinion that the position of defendant's learned counsel cannot be sustained, and so the case comes back to the point whether, if all of the facts now presented to this court had been before the court when defendant was naturalized, would he have been naturalized, or would the court, notwithstanding such knowl-

edge, have been by law compelled to naturalize him? I cannot be brought to so conclude.

Since, then, the full facts were not developed on account of the fraudulent withholding of them by defendant when the naturalization herein was had, I am of opinion that a decree ought to be entered, on the facts found, for plaintiff, canceling the certificate of naturalization.

Let a decree be submitted accordingly.

THE MANHATTAN.

(District Court, D. Maryland. November 28, 1921.)

No. 833.

1. **Shipping ⟸108—Measure of damages for breach of contract stated.**
Libelant, an exporter of grain, contracted with respondent for cargo space on a designated steamship for 5,000 bushels of wheat from Baltimore to Hamburg, but before doing so, in accordance with the custom of the trade, contracted for the sale of the grain in Hamburg to arrive by such steamship. Respondent desired to substitute another vessel, but the Hamburg buyer refused to consent, except at a stated reduction in the price of the grain, and as respondent would not agree to stand the loss and refused to accept the shipment on the vessel named, libelant sold the grain in Baltimore and brought suit for breach of the contract. *Held*, that its damages recoverable were limited to the amount it would have lost if it had shipped by the other vessel and accepted the reduced price.

2. **Customs and usages ⟸12(1)—Contract to carry grain to foreign port construed with reference to known custom of the trade.**
Where a shipowner, contracting to carry a cargo of grain to a foreign port, had knowledge of the custom of shippers of grain to contract in advance for sale of the cargo to arrive, it contracts with reference thereto, and on breach of its contract to carry is liable for the resulting loss to the shipper, arising from his failure to deliver under his contract of sale.

In Admiralty. Suit by Harry C. Jones against the steamship Manhattan. Decree for libelant.

Albert S. Gill and Edward M. Hammond, both of Baltimore, Md., for libelant.

Lord & Whip, of Baltimore, Md., for respondent.

ROSE, District Judge. [1] The libelant is asking damages for the breach by respondent of a contract to carry on the latter's steamship, Manhattan, 5,000 quarters of heavy grain from Baltimore to Hamburg. Both the making and breaking of the contract are admitted. All that is in dispute is the measure of damages. As the libel was originally filed, it appeared not to be so much in personam against the respondent, as in rem against the ship; but, as the grain had never been received by the Manhattan, the latter had not become liable. The parties have, however, agreed that the libel shall be treated as against the respondent, a British corporation, in personam, with a clause of foreign attachment, under which the ship was arrested.

There is little difference as to facts. The libelant is engaged, among

other things, in the purchase of grain in this country and in its sale abroad. It is the usual practice of it and all others engaged in a similar business in this port, before engaging transatlantic cargo space, to sell or to contract to sell the grain to some buyer on the other side. From this method of doing business, the libelant and the other Baltimore grain shippers seldom depart, and then only under rare and exceptional circumstances.

Two contracts for space are really involved—one for 3,000 quarters; the other for 2,000; but, as the circumstances concerning both are identical, they will be dealt with as if they were simply one for 5,000.

The steamship's brokers or agents offered to the libelant space on the Manhattan. The libelant asked if their proposition could not take the form of space for 5,000 quarters to Hamburg, for shipment during the latter half of April, the time during which the Manhattan was expected to sail, instead of being limited to that ship; but the libelant was informed that the respondent was unwilling to offer anything except space on that particular vessel. Thereupon the libelant cabled Hamburg, offering to sell 5,000 quarters of wheat for April shipment by the Manhattan, at 19½ guilders per 100 kilos. The offer was accepted by cable, the name of the steamer being repeated in the acceptance, and when the formal contracts were executed and arrived here, it was found that they also specifically provided that the shipment was to be by the Manhattan.

Not until the cablegram from Germany, accepting the proposition for the wheat was received, did the libelant close with the option for space and enter into the contract here sued on, which is dated March 23–24, 1921. About two weeks later the respondent told the libelant that it would like to substitute the steamer Maryland for the Manhattan; but the libelant said it could not agree to such change without the consent of the Hamburg buyer. The respondent asked libelant to cable, asking for buyer's permission, but buyers cabled back refusal. Again and again, from the 7th to the 14th of April, at the respondent's instance, the libelant cabled, renewing the request for substitution, and as often refusal came back. The respondent asked libelant's permission to get in direct communication with the German purchasers. The libelant readily consented; but, if respondent did so, its efforts were also fruitless.

On the 12th the respondent tendered the Maryland to the libelant, who refused to accept it. On the 16th the respondent notified the libelant that the Maryland would be ready to receive grain under the contract. The libelant adhered to its position, and notified the respondent that it would hold the latter for its loss; but it again cabled Hamburg, telling of the situation here. Then, on the 17th, the German buyer, which was really the German government, or the German Food Commission, acting for the government, cabled that it would agree to the substitution at a reduction of one guilder per 100 kilos in price which was equivalent to about $3,739.24 on the 5,000 quarters. The libelant, from time to time, submitted all the cablegrams it received to respondent, and the one offering to accept the substitution

at a reduction of one guilder per 100 kilos was among the rest. The respondent, however, said nothing, and the libelant doubtless accurately treated this silence as a refusal to make good the proposed sacrifice of a guilder per 100 kilos. On the 18th the libelant cabled Hamburg that it could not accept the proposed reduction, for fear of prejudicing its claim against the respondent, and notified the latter that the time for accepting the offer of reduction had passed, and that it would hold it for exemplary damages.

About this time the Manhattan arrived in Baltimore, and the libelant tendered to the respondent 5,000 quarters of wheat for it, which tender was refused. About this time the president of the libelant called up the general manager of the respondent's line in New York, and explained the situation in which the libelant was placed; but the reply was that it would cost the respondent more to send the Manhattan than to pay any damages the libelant could get in court. The libelant notified the respondent that it would sell the wheat at or for its account and risk, and did so on the floor or the Baltimore Chamber of Commerce. It realized therefrom $10,689.23 less than would have been the net return, had the grain been carried by the Manhattan to Hamburg and delivered to the buyer. The cablegrams, which, at the request of the respondent, libelant paid for, cost $197.03. When the contracts were made, it had bought exchange to cover, and its loss thereon was $744.10, which, added to the other items already named, foots up $11,630.36, which represents the amount the libelant was out of pocket in consequence of respondent's breach of contract.

It is, however, not entitled to recover for any loss which it could have prevented. It might have accepted the proposition of the Hamburg buyer to ship the grain by the Maryland, at a guilder per 100 kilos below the original selling price. If it had done so, its loss would not have exceeded $3,739.24, plus the cost of cablegrams. It did not, because, as it told the Hamburg buyer, it feared to prejudice its claim against the respondent, but that was not, under the circumstances, a sufficient reason for sacrificing nearly $8,000 more by selling the grain in Baltimore. The libelant assumed that, if it sent the grain by the Maryland, it would waive its claim against the respondent for breach of contract. It could have protected itself from any such possibility by notifying the respondent that its forwarding the grain on a substituted steamer was not to affect its claim for the loss it had suffered by the change. If the respondent had refused to take the wheat under such terms, then the libelant might well have been justified in selling it here; but there is no hint in the record that respondent took any such position.

The most favorable rule of law for which libelant can contend measures its damage by the difference between what would have been obtained for the merchandise at the port of destination, if it had been shipped as the contract called for, and that realized at the time the shipment actually arrived. The libelant points out that, under the laws and regulations then existing in Germany, there was only one legal buyer of wheat, the German Food Commission, to which it had sold. True enough, but a responsible buyer had offered to take the

grain at a guilder per 100 kilos less than the original contract price. The fact that such buyer was the original purchaser made no difference.

The libelant, if it had shipped by the Maryland, could have obtained a price only one guilder per 100 kilos less than it would have secured, if the same merchandise had gone forward on the Manhattan, according to contract, and that, plus the cost of the cablegrams, would seem to be the true amount of recovery to which the libelant is entitled.

[2] The respondent claims that the libelant may not be awarded anything more than nominal damages, because it says that it offered to carry the grain on the Maryland at the same freight, and that it was not responsible for any special losses which the libelant incurred. The answer is that I find as a fact that the respondent perfectly well knew the custom of the Baltimore grain trade and contracted with reference to it. When it told libelant that it would sell space on the Manhattan, and not on a ship, it was aware that the libelant would necessarily have to contract in Hamburg for grain to arrive by the Manhattan, and that therefore the release of the German buyer and the resulting damage to the libelant would be the natural and proximate consequence of any failure of the grain to go forward by that vessel.

It follows that the libelant is entitled to a decree for $3,936.27.

KELLY-SPRINGFIELD TIRE CO. v. KELLEY TIRE & RUBBER CO.

(District Court, D. Delaware. July 21, 1920.)

No. 385.

Trade-marks and trade-names and unfair competition ⟸95(1)—Temporary restraint of use of family name not granted on conflicting affidavits.

A preliminary injunction restraining defendant from using a family name in his business should not be granted on conflicting affidavits, in the absence of compelling necessity and where the plaintiff has delayed bringing action.

In Equity. Bill by the Kelly-Springfield Tire Company against the Kelley Tire & Rubber Company. Preliminary injunction denied.

Frank F. Reed and Allen M. Reed, both of Chicago, Ill., Herman G. Kopald, of New York City, and David J. Reinhardt, of Wilmington, Del., for plaintiff.

Charles Neave and Stephen H. Philbin, both of New York City, and Charles Warner Smith, of Wilmington, Del., for defendant.

MORRIS, District Judge. Kelly-Springfield Tire Company, a New Jersey corporation, now and for many years last past engaged in the manufacture and sale of pneumatic tires and tubes for automobiles and rubber tires for trucks and carriages, by its bill of complaint charges the defendant, Kelley Tire & Rubber Company, a Delaware corporation, engaged in the sale of pneumatic tires and tubes for au-

tomobiles, and contemplating also the manufacture of such tires and tubes, with unfair competition in trade, and moves for a preliminary injunction restraining the defendant from using the word "Kelly," "Kelley," or any like word or name, alone or in combination, in its business, upon its products, or as a part of its corporate title.

The answer of the defendant expressly denies fraud and unfair competition. There is an irreconcilable conflict upon crucial points of fact between the ex parte affidavits filed on behalf of the respective parties. The defendant bases its claimed right to the use of the word "Kelley" upon the fact that the name of one of its organizers, its president and active chief executive, is Kelley, avers its good faith in the use of that name, attempts to show that it has done nothing to confuse its business or goods with those of the plaintiff, and that it has taken all reasonable precautions to forestall any possible confusion on the part of the public, and denies that the word "Kelly," as used by the plaintiff, had, at least prior to the organization of the defendant, acquired a secondary or trade meaning.

Whether a plaintiff in cases of this nature, involving the use of a family name, is entitled to any relief, and, if so, the character thereof, turns largely upon the precise facts. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 70. A determination of the relative rights of the parties under such issues should not, in the absence of compelling necessity, be ventured upon conflicting affidavits. The Circuit Court of Appeals of this circuit, in Lare v. Harper & Bros., 86 Fed. 481, 483, 30 C. C. A. 373, 376, said:

"It is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case. * * * If there be any substantial doubt as to the right to a preliminary injunction in such a case, it should be refused."

But, apart from the foregoing considerations, it appears that the plaintiff knew the purposes and objects of the defendant and its corporate name within a few days after its organization in February, 1919. In the following month of May the plaintiff filed before the Federal Trade Commission an application for complaint against the defendant, which application, after investigation and consideration, was, on July 21, 1919, dismissed. The bill of complaint herein was not filed until April 27, 1920. In the meantime the defendant had, in carrying out its corporate purposes, purchased a factory site, begun the erection of its factory, contracted for its equipment, including molds, and spent thousands of dollars in building up a good will and organization, and, under its corporate name, widely advertised its tires and tubes. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 415, says:

"Delay in suing * * * will be considered by the court on an application for a preliminary injunction, and has often been held to bar the right to the interlocutory relief."

To like effect are Pope Manufg. Co. v. Johnson (C. C.) 40 Fed. 584; C. O. Burns Co. v. W. F. Burns Co. (C. C.) 118 Fed. 944; Brush Electric Co. v. Electric Storage Battery Co. (C. C.) 64 Fed. 775; Valvoline Oil Co. v. Havoline Oil Co. (D. C.) 211 Fed. 189, 195.

This rule seems particularly applicable where, as in this case, the inaction of the plaintiff has not been satisfactorily explained, and a final hearing may be had without delay. Further, the plaintiff will not suffer much, if any, additional loss or damage during the intervening period, while, if an interlocutory injunction were improperly granted, the resulting injury to the defendant would be great and irreparable.

A careful examination of the pleadings, affidavits, and exhibits fails to convince me of the propriety of issuing a preliminary injunction. A decree in accordance with this opinion may be submitted.

ROCKFORD REPUBLIC FURNITURE CO. v. THOMAS J. WILLIAM CO.

(District Court, E. D. Pennsylvania. December 13, 1921.)

No. 7978.

Pleading ⊂=348—Affidavit of defense held sufficient against motion for judgment.

In suit for price of furniture sold at different times up to June 4, 1920, the complainant alleging some complaints by defendant as to goods which it had nevertheless retained for an unreasonable time until December 8, 1920, an affidavit of defense, denying the correctness of the account and alleging that on its order for certain pieces of specified dimensions plaintiff sent other and unsuitable pieces, and that plaintiff's agent agreed such pieces did not comply with the order, but requested defendants to retain them until he could dispose of them to save reshipment, which they did until October, 1920, when they notified defendant, presented trial questions as against a motion for judgment.

At Law. Action by the Rockford Republic Furniture Company against the Thomas J. William Company. On rule for judgment for want of a sufficient affidavit of defense. Rule discharged.

Reber & Granger, of Philadelphia, Pa., for plaintiff.

Illoway & Felix, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff claims to recover the sum of $3,740.45 for furniture sold and delivered to the defendant at its special instance and request, and sets forth a copy of an alleged book account. The book entries show sales on a number of dates, beginning July 22, 1919, and terminating June 4, 1920. The statement sets forth credits of cash received in payment of all the sales prior to May 3, 1920. It is averred that all the merchandise was shipped and delivered to a common carrier at Rockford, Ill., addressed to the defendant at Philadelphia, in care of a warehouse company, and that it received and took possession of all the merchandise; that at some time, not stated, the defendant complained of the style and size of certain buffets contained in the shipments, but nevertheless retained all the merchandise in its possession for an unreasonable length of time, namely, until about December 6, 1920, when the defendant attempted to reship some of the furniture to the plaintiff, but the plaintiff refused to receive and still refuses to receive the same.

The affidavit of defense denies the correctness of the book account, and denies that the prices charged therein are correct, just, or reasonable, or are the ordinary market prices or the prices the defendant agreed to pay. It admits various purchases from the plaintiff, upon which it received merchandise, and avers payment for all merchandise which it purchased, received, and accepted. This averment apparently refers to the payments for which credit is given in the statement of claim.

Leaving out of consideration the items covered by the credits, the affidavit of defense sets out that during September, October, and November, 1919, it advised the plaintiff's duly authorized agents and representatives in New York that it would be willing to purchase from them certain four-piece dining room sets, which sets were to contain walnut buffets, 60 inches long, containing mirror backs; that during the months of May and June, 1920, there were shipped by the plaintiff four-piece dining room sets, which, instead of containing buffets 60 inches long, contained buffets 54 inches long, without mirror backs, but with plain wooden backs; that immediately upon inspection of the dining room sets, during the latter part of June or the early part of July, 1920, the defendant advised the plaintiff's representative that the dining room sets were not what the plaintiff had purchased or agreed to purchase, and that the defendant would immediately return the merchandise; that after examination of the merchandise by the plaintiff's representatives, the latter agreed the merchandise was not what the defendant had agreed to purchase, and requested the defendant to retain it in order that they might dispose of it and save transportation charges; that, the plaintiff's agents not having disposed of the sets, the defendant, during October, 1920, notified the plaintiff and its representatives that it would hold the furniture no longer, and accordingly reshipped the sets to the plaintiff.

Neither the plaintiff nor the defendant state whether the orders for the furniture were oral or written. In either event, if the sets were not in accordance with the contract, the defendant was not obliged to retain them. If the duly authorized representatives of the plaintiff, upon notice, instructed the defendant to hold the furniture in order that it might dispose of it, no question of unreasonable delay arises for the determination of the court upon the pleadings, but it is a question to be determined at the trial, when the real facts are presented. The affidavit of defense is sufficient to prevent judgment upon the case set out in the statement of claim.

The rule is discharged.

HECHT v. MALLEY.

(District Court, D. Massachusetts. December 3, 1921.)

No. 1226.

1. **Internal revenue ⇐9—A Massachusetts trust held not subject to tax on capital stock imposed by Revenue Acts of 1916 and 1918.**

A Massachusetts trust, constituting an arrangement whereby the legal title to property is conveyed to trustees, who execute a declaration of trust to hold and manage it for the benefit of holders of transferable certificates issued by trustees, is not subject to the tax on capital stock imposed by Revenue Act 1916, § 407, providing for payment of tax by "every corporation, joint-stock company, or association * * * having a capital stock represented by shares," and Revenue Act 1918, § 1000 (Comp. St. Ann. Supp. 1919, § 5980n et seq.), providing that, in lieu of such tax imposed by such act of 1916, "every domestic corporation shall pay annually a special excise tax," and section 1 (section 6371¼a) defining the term "corporation" to include associations, stock companies, and insurance companies; such a trust not being an "association" or a "corporation," within the statute, in view of the character of the tax imposed as an excise tax imposed on the privilege of doing business in corporate or quasi corporate form.

2. **Internal revenue ⇐38—Taxpayer's failure to formally protest payment held not to preclude recovery of amount paid, in view of previous protest to payment of similar tax.**

Failure to formally protest payment of tax on capital stock imposed by Revenue Acts of 1916 and 1918 *held* not to preclude recovery of amount paid, where taxpayer had formally protested previous payments during the year of the same kind of tax, and tax collector knew that the taxpayer objected to the tax; such payment not having been voluntarily made.

At Law. Action by Louis Hecht, Jr., against John F. Malley. Judgment for plaintiff.

Dunbar, Nutter & McClennen, of Boston, Mass., for plaintiff.

The United States Attorney and Alonzo H. Garcelon, Sp. Asst. U. S. Atty., of Boston, Mass., for defendant.

MORTON, District Judge. This case raises the question whether Massachusetts trusts are subject to the tax on capital stock imposed by the acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

A Massachusetts trust is a peculiar form of business organization common in this state, which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts Supreme Judicial Court.[1] In outline, it is an arrangement whereby property is conveyed to trustees, who execute a declaration of trust to hold and manage it for the benefit of such persons as from

[1] Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424; Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601; Malley v. Bowditch (1st Cir.) 259 Fed. 809, 170 C. C. A. 609, 7 A. L. R. 608; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Dana v. Treasurer, 227 Mass. 563, 116 N. E. 941; Gleason v. McKay, 134 Mass. 419; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

time to time shall own certificates, which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate holders. Sometimes these are little, if any, greater than those of cestuis que trust under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations in which the certificate holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either "strict trusts," or partnerships; the former class comprising those in which the certificate holders have substantially the same rights as cestuis under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have intrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute, and in neither do the Massachusetts courts recognize any entity apart from the persons of the trustees, or of the certificate holders.

The taxes here in question were levied under the Revenue Acts of 1916 (section 407, title 4, Act Sept. 8, 1916, c. 463, 39 Stat. 789) and 1918 (section 1000 et seq. [Comp. St. Ann. Supp. 1919, § 5980n et seq.]). The act of 1916 (section 407, subd. 1) provides that—

"Every corporation, joint-stock company, or association, now or hereafter organized in the United States 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 any state or territory of the United States, shall pay annually," etc.

The act of 1918 provides (title 10, § 1000) that—

"In lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916. * * * Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock * * * as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included."

On the face of this section the Hecht Trust was not within it. The tax was imposed because of the defining section of the act of 1918 (Comp. St. Ann. Supp. 1919, § 6371¼a), which provides:

"The term 'corporation' includes associations, joint-stock companies, and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States."

The Treasury Department held that the Hecht Real Estate Trust was an "association," and therefore taxable as a corporation. It is not contended by the government that the trust was a "joint-stock company or an insurance company," within the defining section quoted. Under the Treasury Regulations (article 7), some trusts are taxed under this statute, while others are not; trusts, the members of which have all the liability of partners (see Horgan v. Morgan, 233 Mass.

381, 124 N. E. 32), are taxed as corporations, and the members may perhaps also be liable to taxation as partners. The underlying principle on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by Jessel, M. R., in Smith v. Anderson, 15 Ch. Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c., 15 Ch. Div. 273).

The tax in question began with the act of 1909 (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112), which imposed on "every corporation, joint-stock company, or association, organized for profit and having a capital stock represented by shares, and every insurance company" a tax based on its net income. It was challenged as being an income tax, and as such at that time unconstitutional; but it was sustained, on the ground that it was not an income tax, but an excise tax. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. And it was also held in Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, that Massachusetts trusts were not subject to it; i. e., that they were neither joint-stock companies nor associations within its meaning. The tax of 1909 was in substance continued in the act of 1916. But as that statute imposed a general income tax on corporations it was recast and was based on capital stock. The tax imposed by the act of 1916 is by express language continued by the act of 1918, and the provisions of the former act are, with some modifications, retained in the later one.

Decisions under the earlier acts are obviously of much importance in determining the meaning and scope of this one. Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, establishes that the act of 1909 imposed an excise tax on the privilege of doing business in corporate or "quasi corporate" (220 U. S. 151, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312) form—i. e., in forms not recognized by common law which possess special advantages conferred by statute—and that Massachusetts trusts are not such organizations. In Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601, such a trust was held not to be an "association," the income of which was taxable under Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114. The radical differences between a Massachusetts trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

[1] It is clear, I think, from the background and history of this tax and the decisions which I have referred to, that it is essentially an excise tax imposed on the privilege of doing business in corporate or "quasi corporate" form. The word "association" is to be construed in the light of this general purpose and scope. The use in statutes and contracts of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general idea conveyed by the other words used in the same connection—

"noscitur a sociis." Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. "Association" was intended to bring under the tax all business organizations which resemble corporations and joint-stock companies, in that they invoke special statutory powers in their organization. It was probably inserted out of abundant caution, in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words "organized," etc., in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts trust is fundamentally different from a corporation, and is not within a statute dealing with corporations and similar organizations, unless expressly specified. The persons interested are taxable as partners, if the trust be of that character; otherwise, as trustees and beneficiaries of a "strict" trust.

The statute under consideration in Crocker v. Malley, supra, taxed the income accruing "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." If the words "no matter how created or organized" be regarded as applying to "associations," as the court assumed in its opinion, it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as "associations" are concerned, and that decision seems to be nearly conclusive of the present case.

The detailed provisions of the statute tend to support this conclusion. They make "capital stock" the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust, and it is contended by the government that "capital stock" should be so interpreted. But in the very next section to that under which the tax is levied the act refers to "invested capital," and taxes foreign corporations on that basis. The distinction between "capital stock" and "invested capital" is there recognized in the act itself. The section also provides that "in estimating the value of capital stock the surplus and undivided profits shall be included," which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

[2] The only other question is whether the tax paid on July 26, 1919, amounting to $1,193 cannot be recovered, because it does not explicitly appear that a formal protest was made at the time of pay-

ment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment, or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the collector knew the plaintiff's position on the matter, viz. that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. See Atchison, etc., Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed, with interest.

I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse.

Judgment accordingly.

FLOYD SMITH AERIAL EQUIPMENT CO. v. IRVING AIR CHUTE CO.

(District Court, W. D. New York. September 29, 1921.)

No. 294–B.

1. **Patents ⟸328—1,340,423, for parachute, claims 1, 4, 6, 10, and 13, held valid and infringed.**

   The Smith patent, No. 1,340,423, for a parachute for the use of aviators, claims 1, 4, 6, 10, and 13, *held* for a combination not anticipated, valid, and infringed.

2. **Patents ⟸109—Substituted claims held within specification and not requiring supplemental oath.**

   Where the specification in an application described a "fabric material," claims later substituted, more specific and limited to "a sheet of flexible material," *held* within the description and not requiring a supplemental oath.

3. **Courts ⟸518—Infringement by articles made for government not subject of suit in District Court.**

   Under Act June 25, 1910, as amended by Act July 1, 1918 (Comp. St. Ann. Supp. 1919, § 9465), providing that, where a patented invention shall be used by or manufactured by or for the United States without lawful right, the remedy of the patentee shall be by suit in the Court of Claims, a District Court is without jurisdiction to award damages for infringement by articles made for the United States under a contract by which it agreed to protect the manufacturer against damages for infringement, but it may award an injunction and damages where defendant has also sold such infringing articles to individuals.

In Equity. Suit by the Floyd Smith Aerial Equipment Company against the Irving Air Chute Company. Decree for complainant.

Wm. F. Freudenreich, of Chicago, Ill., and Charles W. Pooley, of Buffalo, N. Y., for plaintiff.

Clarence S. Walker, of Buffalo, N. Y., for defendant.

Laurence A. Janney, Sp. Asst. Atty. Gen. (Osgood H. Dowell, of Chicago, Ill., of counsel), for the United States as amicus curiæ.

HAZEL, District Judge. This is an action in equity for infringement of letters patent No. 1,340,423, granted to Floyd Smith on May 18, 1920, for a parachute or what is known as a "lifepack," and parachute paraphernalia for use of aviators in falling or leaping from an airship in flight. The device is simple in construction and of light weight. Parachutes carried in packs on the back of aviators during flights and opened up by air resistance upon jumping or falling, and parachutes of the free pack type or tied by a cord to the top of an airship and opening upon extension or stretching, admittedly were old and well-known devices when the patent herein was conceived. On this point the specification states:

"Parachutes are now carried in shoulder packs carried upon the back of an aviator and are adapted to be released by tearing or opening the pack and adapted to be extended by air resistance or by the top of the parachute being attached to the airplane by a cord which will break when fully extended. But this type of parachute has a decided disadvantage in that it depends upon the aviator being able to jump and drop away from the airplane in order to extend the parachute and cause it to open. If the airplane is falling and the aviator cannot get away from it, he may then merely fall with the plane."

By his improvement the inventor designed to overcome certain disadvantages resulting from falling with the plane, and to devise means for falling or leaping free therefrom to minimize the peril. His idea was that a lifepack should not be made to open immediately upon jumping, but should open up after being carried forward horizontally by momentum for a short distance or dropping from the plane after the aviator had opened up the pack while standing up on the plane by releasing a cord attached thereto to allow the parachute to catch the air and expand. To overcome the inefficiency of prior structures, the specification states that a feature of the invention is the use of a small automatically operated parachute placed on top of the main parachute which serves to accelerate opening the latter upon releasing it from the pack. In practice the pilot parachute first catches the air and assists in stretching the main parachute as the aviator drops or is lifted from the machine, or leaps away from it. The main parachute with its pilot, together with the pack and harness, comprises the inventor's preferred form of apparatus. The pilot parachute, however, is not believed to be an essential feature of the claims in suit. The principle by which the main parachute operates is the same whether its pilot is used or not since the function of the latter was to assist in rapidly opening up the pack. The specification describes the parachute as one contained in a pack for carrying on the back of the aviator who may release the fabric enfolded therein by pulling a cord extended from the

pack to the wearer's chest. The parachute fabric is provided with flaps which, after folding in the pack, are fastened together by a thread or by loops which easily part on jerking the cord to release the pack.

[1] The patentee simply claims, and I find his claim substantiated by the evidence, that he was the first to fold a parachute in a compact mass into a sheet of flexible material in a way to permit the suspending members to respond to a jerk of a cord extending from such members to the aviator's front and by such adaptation to open up the parachute in leaping or falling from the airplane.

Claims 1, 4, 6, 10, and 13 are typical of the invention, and claim 1 is fairly illustrative of it. It reads as follows:

"1. In combination: a parachute folded into a compact mass and having suspending members, a sheet of flexible material folded about said parachute and permitting the ends of said suspending members to project, releasable fastening means between each side of the sheet and some other portion of the sheet, a releasing device, and means connecting said fastening means to said releasing device."

The separate elements in combination are: (1) A folded parachute with suspending members. (2) A sheet of flexible material infolding the parachute with projecting suspending members. (3) Releasable fastening means. (4) A device for opening the pack and connecting the fastening means thereto.

Claim 4 includes the body harness attached to the pack; claim 6 is substantially the same as claim 4, save that the flaps are described as being on the side farther removed from the wearer; and claim 10 is the same as claim 1, except that in addition it has means for simultaneous release of the fastening means and drawing back parts of the sheet to expose the parachute; while claim 13 embodies the additional element of a pilot chute attached to the apex of the main chute.

The defenses in the main are invalidity of the patent, and limitation of the claims. The defendant contends, inter alia, that inasmuch as the Patent Office rejected the broad claims originally filed for a combination of a pack containing a folded parachute with free mounting on an air craft opening independenly on any fixed relation to the aircraft and for means releasable manually, and for a pack provided with spring means for opening it, the patentee, acquiescing therein by canceling such claims and accepting narrower ones, is not estopped from an interpretation of the claims in issue of such a scope as will include the combination of elements in suit, and also that they are strictly limited to a container for the parachute comprising a sheet of flexible material. Such a strict interpretation, however, would be unwarranted and indeed is not required by the prior state of the art or by any limitation placed on the claims by the patent office examiner. The improvement in question was intended to lessen the perils in the field of aviation, and the construction by the patentee of a so-called free lifepack during the war and the subsequent efforts to perfect the same fairly establish its novelty, although the improvement over the prior art seems very slight. No one before the patentee designed a device wherein light weight and effectiveness in straightening out the parachute under all conditions was secured, and in the circumstances

the simplicity of the improvement does not bar patentable protection for that which was reasonably achieved by it.

A broad interpretation to include, for example, means for folding the parachute or means for releasing the pack, would not be warranted in view of the substitution of narrower claims. But as finally allowed, the claims, even though considered of limited scope, are in my opinion entitled to a construction to include an obvious appropriation. Certainly a specious modification of enfolding the parachute should not be permitted to avoid the clear terms of the patent. The claims in issue, true enough, cannot be enlarged to cover infringement beyond their fair meaning, still the wording appears to be clear and explicit, and little room exists apparently for interpretation. The original claims were changed at different times, as the file wrapper and contents shows, to meet the objection of the Patent Office, and more specific claims were substituted; but the patentee did not at any time limit himself to a particular kind of a sheet of flexible material for folding the mass or to a flat sheet or one without any turning up or sewing at the ends to form corners. The elements of the combination of "a sheet of flexible material folded about said parachute" is thought to reside in a light and flexible material container for the fabric as distinguished from one that is rigid, hard, heavy, or firm.

Nothing is found in the prior art to require the limitation of the claims as urged by the defendant. In the Uttz patent, for instance, there is described a long container of pilot and main parachutes positioned underneath the airplane; the apparatuses being released by the action of coiled springs. In Van Meter's patent there is shown a body plate harnessed to the aviator's back which supports a casing for a parachute, preferably made of aluminum, and is released by a spring attachment. The Rouchleau patent also shows a receptacle carried on the aviator's back from which the parachute is forced out by fluid pressure. The Signaigo patent shows the container plate made of staves harnessed to the back of the aviator with means for throwing the parachute sideways from its seat. Such structure, however, as well as the others above mentioned, was heavy and cumbersome, and lacked lightness and easy facilities for releasing the pack. In the Fugi patent, No. 1,264,050, a close approach to complainant's patent is shown, but he lacked the element of the container. He adapted heavy padded casing for inclosing the parachute—a knapsack, and it is doubtful whether the pack would open up quickly. I think the life-pack in suit, with its flat sheet for enfolding the parachute and fastening and releasing means, was a patentable improvement over it. In the specification to Miller, patent No. 1,037,959, there is shown a case for enfolding the parachute body, presumably made of flexible material, but since the device was for a parachute carried on the head of the wearer, and its practicability doubtful, I incline to the view that it should not bear heavily against the combination in suit. The prior patents cited in the Patent Office, and the additional ones emphasized at the hearing, true enough, embodied one or more of the elements of the combination in suit, but none included the exact combination—none included a flexible container of a flexible material or sheet for folding

the parachute into a compact mass with projecting ends for folding over and fastening thereto a cord to release the pack—and accordingly the claims in suit are for a new combination, and a limitation to a flat sheet of flexible material folded about the parachute is not demanded.

Defendant's lifepack (third type Ex. 1) embodies every element of the claims. Noninfringement, however, is contended because the fabric cover or container for defendant's pack is not of a flat sheet of flexible material but consists of a sheet with bottom corners sewn (upper corners free) to form a boxlike structure. In its pack the edge of the flexible boxlike cover extends about the parachute which is folded on a compact mass and the edges fastened to corresponding edges and fastening means. To open the pack a ring and cord is provided extending to the releasable fastening means. By such means and adaptations in combination the defendant's apparatus in my view infringes claim 1 of the patent in suit. Defendant in its lifepack sold to individuals has also adapted a harness for strapping the pack to the back of the aviator with a releasing device extending from the fastening edges to the front of the harness as in claim 4, and such adaptation in combination is an infringement thereof. Claim 10, embodying means for releasing the fastening means and drawing back the flexible sheet, finds its counterpart in the drawing back of the flaps on defendant's pack by the use of rubber bands. In its construction it also uses a pilot parachute attached to the apex of the main chute—an element of the combination in claim 13—and such adaptation is an infringement thereof. The departure by defendant from the infolding sheet of complainant's patent did not result in a change of function or mode of operation, and, indeed, the precise result of compacting the mass was attained that is attained by the sheet of flexible material around the parachute of the patent in suit. Three parachutes and parachute paraphernalia (third type) concededly have been sold to individual customers by the defendant, and other sales to individuals are contemplated. Infringement of the combination in suit is not avoided by Mr. Irving's testimony that he submitted a boxlike container for his parachute to the government as early as 1918.

[2] It is contended that the Smith patent is invalid because the claims were not supported by any supplemental oath; that the application merely refers to fabric material the sides of which are folded over and meet at the center of the pack, and no reference is made to a sheet of flexible material. But this point is not maintainable under Eagleton Mfg. Co. v. West Mfg. Co., 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493, since the original description was sufficient to fairly include a sheet of flexible material, though the exact words were not used and the amendments made were not descriptive of a different invention than the one sworn to. See George Cutter Co. v. Metropolitan Electric Mfg. Co. (decided June 23, 1921 C. C. A. 2d Circuit) 275 Fed. 158.

[3] A motion by the government was made at the beginning of the trial, counsel appearing as amicus curiæ, to dismiss the bill on the ground that the defendant company had built infringing lifepacks for

the United States under contracts and pursuant to specifications supplied by the government and that the government in terms saved the defendant harmless from all demands or liability for the manufacture and use of the patented invention in question. Such appearance and motion, even though the government is not a party to the suit, were proper. Marconi Wireless Tel. Co. v. Simon (D. C.) 227 Fed. 906. It was contended in opposition that the proofs would disclose sales by defendant of infringing types of parachutes to individual customers, and hence the trial was permitted to proceed to final hearing. As to the devices (second and fourth types) constructed under conceded contract with the United States this suit in my opinion would be in effect a suit against the United States, and therefore, as to such constructions, this court is thought without jurisdiction to determine the controversy. See Act of June 25, 1910, as amended by act July 1, 1918 (Comp. St. Ann. Supp. 1919, § 9465).

Complainant, however, insists for an accounting as to profits and damages arising from sales to the government of the infringing apparatus, and also for an injunction as to future contracts with the government for constructions of lifepacks. Such relief, however, in view of the statute and the contractual obligations assumed by the government, is not permissible. Defendant's manufacture in the main has been confined exclusively to supplying parachutes to the government except as to three devices admittedly sold by defendant to individual customers as heretofore stated. Since the lifepacks admittedly are constructed for the government in accordance with specifications found to embody the invention of the patent in suit, the manufacture is in effect a manufacture of the government which uses and appropriates the invention in suit. The amendment of 1918, enlarging the earlier act of 1910, clearly shows that Congress intended that the government should be left free to contract with any one for the manufacture of any article used by it, and if as a result thereof a patented invention is manufactured or used "by or for the United States without license of the owner," such owner's remedy is to recover a reasonable compensation for such use or manufacture in a suit against the United States in the Court of Claims. This determination is based upon an examination of prior decisions construing the original act and in the light of the subsequent amendment of 1918. See Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 50 L. Ed. 771; Marconi Wireless Telegraph Co. v. Simon (D. C.) 227 Fed. 906, affirmed 231 Fed. 1021, 145 C. C. A. 656; Firth-Sterling Co. v. Bethlehem Steel Co. (D. C.) 216 Fed. 755; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 246 U. S. 28, 38 Sup. Ct. 271, 62 L. Ed. 560.

Accordingly, a decree may be entered herein with costs holding the patent valid and infringed by the defendant as to the three apparatuses manufactured and sold by it to individual customers; but no decree shall be entered holding it accountable for its manufacture under contract with the United States, or to prevent it from carrying out any

existing contract with the United States, or from making further contracts with the United States for the production of such apparatus. So ordered.

CURLEY et al. v. TAIT, Collector of Internal Revenue, et al.

(District Court, D. Maryland. November 29, 1921.)

No. 1109.

1. **Internal revenue ⇐8—Reserved interest of decedent in securities transferred only held subject to estate tax.**

A decedent, several years before his death, made an absolute transfer of certain securities, the transferee by a contemporaneous agreement binding itself to pay the net income to the wife of the transferor during her lifetime, and after her death, in case he survived her, to him during his lifetime. *Held*, that the estate was not subject to tax on the value of the securities themselves, under Act Sept. 8, 1916, § 202 (Comp. St. § 6336½c), but at most on the value of the reserved contingent interest of decedent therein.

2. **Internal revenue ⇐8—Estate Tax Act not retroactive as to property transferred.**

Act Sept. 8, 1916, § 202b (Comp. St. § 6336½c[b]), providing for a tax with respect to property of which a decedent has at any time made a transfer, is not retroactive, and does not apply to transfers made prior to its enactment; the words "at any time" being limited to a time subsequent thereto.

At Law. Action by John J. Curley and others, executors of the will of William H. Grafflin, deceased, against Galen L. Tait, Collector of Internal Revenue, and others. On demurrer to declaration. Overruled.

See, also, 276 Fed. 845.

J. Wallace Bryan, Charles McH. Howard, and Joseph C. France, all of Baltimore, Md., for plaintiffs.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for defendants.

ROSE, District Judge. The plaintiffs, as executors of the executrix of the late William H. Grafflin, who died July 7, 1917, are here seeking to recover $23,927.22 paid the defendant under protest as an estate tax upon $285,655, being the aggregate value, at the testator's death, of various securities transferred at different times, within 7½ years before he died to either the Johns Hopkins Hospital or the Johns Hopkins University. As neither institution was, in the view of the government, to get any substantial benefit from the property until after the testator's death, the defendant says that the transfers were not intended to take effect in enjoyment until that time, and that, in consequence, the tax was properly collected.

The facts said to make the other securities taxable did not exist as to some Russian Roubles Internal 5's, worth, at the testator's death, $2,255. The inclusion by the government of these in its tax charge appears to have been the result of some mistake or misunderstand-

ing. They were given by Grafflin outright, and, as neither they nor any of the other property involved in this litigation was transferred in contemplation of death, the demurrer, so far as concerns the sum exacted upon them, must necessarily be overruled.

There are various minor differences in the terms of the transfers, but they were all alike, in that by each of them an out-and-out gift of the securities was made, and consummated by the issue and delivery of new certificates in the name of the grantee. It was expressly declared that the property conveyed was not charged with any trust. On the other hand, the Hospital, or the University, as the case might be, covenanted, in each of three agreements of transfer, that it would pay the net income during Grafflin's life to him, and after his death, and during such time as his wife should survive him, to her. After both of them were gone, the income, as well as the principal, was to be applied to the use of the grantee. The remaining one of the four, as it happened the earliest of them all in point of time, was in the nature of a marriage settlement. It recited that Grafflin was about to be married, and the Hospital, with whom this particular agreement was made, covenanted to pay, after the marriage was solemnized, the net income to the wife during her life, and afterwards to him during his life, if he should prove to be the survivor.

By the terms of one of the agreements, the grantee, during the continuance of the life estate, was, after paying taxes, to retain 1 per cent. of the income for itself; by another, 2½ per cent.; and by the others, 5 per cent., but in that case it was itself to pay the taxes, whether they amounted to more or less than the 5 per cent. retained. By most of them it was provided that anything in the nature of stock or bond dividends, or payments on account of cumulative preferred dividends then in arrear, should be treated as additions to principal. To the man in the street, the enjoyment of a share of stock would be found in the right to apply to his own uses the dividends that might be declared upon it, and from this standpoint there is so much force in the government's contention that neither Hospital nor University enjoyed their gifts during Grafflin's lifetime, that without further discussion it may, for the purpose of this case, be assumed to be sound, although it will be unnecessary so to decide.

Even so, and upon the further assumption to be hereafter critically examined, that the statute is retroactive, and covers these transactions entered into years before it was enacted, the query remains: Was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the Hospital, which covenanted to pay the net income thereof to the prospective wife during her life; Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? The government answers, Yes. It says that the Hospital was not to enjoy the stock until after his death. True; but is that all that is necessary?

[1] If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death, and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, "the interest" which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little, or nothing. As he died before his wife, it proved to be in fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the agreement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities, and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness.

The question of how such a contingent interest as Grafflin retained for himself under this agreement should be valued for estate tax purposes is not at all clear. Apparently what the statute had in mind in declaring 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, etc., is what it said, and no more. That is to say, the value of the property is to be then determined as of that date and not his interest in it; for, if the latter were the case, any property which had been transferred by him in such manner that his interest ceased at death would have no taxable value, and that is clearly what the statute does not mean.

At the hearing the government was so confident that it was entitled to tax the full value of his interest, and the plaintiffs so certain that none of it should be taxed, that neither of them discussed the question now mooted. As from what has been said it follows that the entire interest was not taxable, the demurrer to so much of the plaintiff's declaration as seeks to recover the tax exacted on all of it must be overruled. The question of whether the government was entitled to any part of the tax less than the whole need not be passed upon, and should not be, until the court is enlightened by further argument.

[2] All the above will be unimportant, if the conclusion to which I have arrived upon another contention of the plaintiffs shall ultimately be sustained. They say that no tax at all was collectable because the transfers here in controversy were all made before the statute was enacted. To this the government has two answers. It says that the statute itself declares that it has reference to a transfer made "at any

time." These words, however, are susceptible of a reasonable construction, which would limit them to transactions taking place thereafter.

Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so "antecedent rights are affected or human conduct given a consequence it did not intend." Union Pacific Railroad Co. v. Snow, 231 U. S. 204–213, 34 Sup. Ct. 104, 58 L. Ed. 184.

For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which, in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 34 Sup. Ct. 101, 58 L. Ed. 179. If this were a case of first impression, I personally would have no hesitation whatever in holding that the act of 1916 does not affect transfers made before it was passed.

But the government says, in the second place, that in Shwab v. Doyle, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes, in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of the clearest conviction will justify a District Judge in doing so; but there are rare occasions in which he must, because, as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

In Shwab v. Doyle, supra, the case of Wright v. Blakeslee, 101 U. S. 174, 25 L. Ed. 1048, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession—that is, upon the right to receive—and was levied upon what passed to the heir, devisee, legatee, distributee, or successor, and not upon the estate. Knowlton v. Moore, 178 U. S. 41, 42, et seq., 20 Sup. Ct. 747, 44 L. Ed. 969. The distinction is neither pedantic nor technical, but, as applied to the matter now in hand, is in the highest degree practical. In Shwab v. Doyle, supra, it was held that the addition made by the act of 1918 (40 Stat. 1097 [Comp. St. Ann. Supp. 1919, § 6336¾c]), of the words "whether such transfer is made or occurred before or after the passage of this act," was a legislative construction, rather than an amendment, of the statute now under consideration. The Supreme Court has since taken the opposite view

as to other broadening language then first introduced. U. S. v. Field, 255 U. S. 257, 41 Sup. Ct. 256, 65 L. Ed. ——.

The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying:

"It is true that, if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death: but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the 2-year prima facie provision."

Apparently the court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in Wright v. Blakeslee, supra, or in Cahen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.

It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. v. Snow, supra.

It follows that the demurrer to the declaration must be overruled generally.

CURLEY et al. v. TAIT, Collector of Internal Revenue, et al.

(District Court, D. Maryland. November 29, 1921.)

No. 1114.

Internal revenue ⇐8—State inheritance tax deductible before computing federal estate tax.

The Maryland collateral inheritance tax attaches to an estate before distribution, and the remainder of the estate only is subject to federal estate tax, under Act Sept. 8, 1916, §§ 200–212 (Comp. St. §§ 6336½a–6336½m).

At Law. Action by John J. Curley and others, executors of the will of Helen M. Grafflin, deceased, against Galen L. Tait, Collector of Internal Revenue, and others. On demurrer to declaration. Overruled.

See, also, 276 Fed. 840.

J. Wallace Bryan, Charles McH. Howard, and Joseph C. France, all of Baltimore, Md., for plaintiffs.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for defendants.

ROSE, District Judge. There is but one question in this case, and that is: Does the Maryland collateral inheritance tax attach to an estate before distribution? If so, the plaintiffs, as executors, are entitled to recover $3,343.07, which is the amount of estate tax the defendant exacted from them in excess of what they should have paid, had the Maryland collateral inheritance tax of $58,759.44 been deducted before ascertaining the amount of the estate liable to the federal levy. Lederer v. Northern Trust Co. (C. C. A.) 262 Fed. 52; Id., 253 U. S. 487, 40 Sup. Ct. 483, 64 L. Ed. 1026. On the other hand, if the Maryland tax is upon the individual beneficiaries of the testatrix's bounty, the sum here in controversy was properly collected. New York Trust Co. v. Eisner, 256 U. S. —, 41 Sup. Ct. 506, 65 L. Ed. — (Supreme Court, May 16, 1921).

It is unfortunate that under the act now being construed the amount of the estate tax depended upon a distinction which may be more logical than practical, as it certainly is, when the whole property of a decedent passes to collaterals, for in that event the tax is in fact borne by them, no matter what the theory may be. The language employed by the various states in imposing inheritance taxes is, as a rule, quite similar. Before the highest court of any of them has spoken, it is usually possible to argue either that the tax attaches before distribution or after. Some state tribunals have held one way; some, the other; and some have had no occasion to pass upon the question at all. It is not now and here either necessary or expedient to marshal the considerations which tend to one conclusion or the other. The Circuit Court of Appeals for the Third Circuit has held that the Supreme Court of Pennsylvania has interpreted the statute of that state as imposing the tax upon the estate before distribution. This holding the Supreme

Court of the United States declined to review. Lederer v. Northern Trust Company, supra.

Apparently, Pennsylvania was the first state in the country to levy an inheritance tax, as it did in 1826. P. L. Pa. 227. In 1844 Maryland, in common with a number of other states, was hard put to it to pay the interest on a heavy debt, that of Maryland amounting to twelve millions of dollars, incurred for internal improvements during the flush times of the middle 30's. Looking about for new sources of revenue, the attention of the state was drawn to the tax upon collateral inheritance, which for 18 years had been successfully collected by its next-door neighbor. The General Assembly of Maryland thereupon copied and enacted the Pennsylvania statute, making such changes in the verbiage, and apparently only such as were necessary to adapt it to the difference between the probate machinery of the two commonwealths. Laws Md. 1844–45, c. 237.

In the case at bar, each side has argued that the Court of Appeals of this state has interpreted the act in the sense for which it contends, and each quotes language which, if standing alone, might sustain its position. That each is able to do so is perhaps the best proof that the attention of that high court never has been drawn to the precise point now at issue, in such sense, at least, as to call for its definite determination. Under such circumstances, it will be well to assume that the English language means the same thing on one side of Mason and Dixon's line as it has been held to do on the other.

It follows that, as the instant case is ruled by Lederer v. Northern Trust Co., supra, defendant's demurrer to plaintiff's declaration must be overruled.

THE LORD ORMONDE.

(District Court, S. D. New York. December 12, 1921.)

Clerks of courts ⇐54—Clerk, receiving commission on transmuting money into government certificates, may not have further commission on distribution.

Where proceeds of sale of property, being paid into court, was expended by the clerk in purchase of United States certificates of indebtedness, he was not entitled to a 1 per cent. commission as for a payment, under Rev. St. § 828 (Comp. St. § 1383), but, having taken such commission, it might be treated as an advance under section 1320, Revenue Act Feb. 24, 1919 (Comp. St. Ann. Supp. 1919, § 3301a), entitling the clerk to 1 per cent. for care of Liberty Bonds, etc., deposited; the clerk, however, being entitled to but a single commission of 1 per cent. on bonds deposited.

In the matter of the Steamship Lord Ormonde. On motion for an order directing the clerk to deliver certain certificates of indebtedness without charging any commission. Motion granted.

Murray, Prentice & Aldrich, of New York City (Mark W. Maclay, Jr., and Hugh L. M. Cole, both of New York City, of counsel), for petitioner.

William Tallman, Chief Deputy Clerk, appearing for Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York.

KNOX, District Judge. Upon May 10, 1921, in the suit of Equitable Trust Company of New York against the steamship Lord Ormonde, that vessel was sold under a writ of venditioni exponas. The proceeds of sale, amounting to $100,005, were deposited with the clerk of this court, and, from such sum, costs of the United States marshal to the extent of $2,114.45 were taxed, allowed, and paid. The balance then remaining in the registry of the court was $97,890.55.

Thereafter, the clerk of the court, being duly authorized by orders entered herein upon June 15 and June 27, 1921, and upon the stipulation of the parties in interest, expended from such balance, in the purchase of United States certificates of indebtedness due June 15, 1922, and bearing 5½ per cent. interest, the total sum of $96,103.33. This being done, the clerk withdrew from the funds remaining in his hands, and applied, as and for the commission payable under section 828 of the Revised Statutes (Comp. St. § 1383), an amount equal to 1 per centum of the purchase price of said certificates.

Thereupon, the clerk pursuant to order held any unexpended portion of the money in his hands together with the said certificates of indebtedness, for payment over and delivery to such persons as should be found to be entitled thereto. By order of distribution entered herein on November 4, 1921, said certificates were directed by this court to be delivered by the clerk in specie to the persons in said order respectively named.

This last order has not been complied with, and for this reason, viz.: Upon September 2, 1921, the Department of Justice, by letter, called the clerk's attention to the recent decision of the Circuit Court of Appeals for the Seventh Circuit in McGovern et al. v. United States, 272 Fed. 262, wherein it was held that under section 1320 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, § 3301a), United States Liberty Bonds or other bonds of the United States may be deposited in lieu of surety or sureties upon any recognizance, stipulation, bond, guaranty, or undertaking given pursuant to the laws of the United States, and, being so deposited, "shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post office money orders, or cash, * * *" and that for receiving, caring for, and delivering bonds deposited the clerk of the court was entitled to exact a commission of 1 per centum upon the par value thereof. The clerk of this court accordingly takes the position that he should, before delivering the certificates of indebtedness aforementioned, receive a commission of one per centum thereof. The petitioner herein, having been declared to be entitled to the said certificates, has declined to accede to the clerk's demand, and brings this motion for relief.

It is my judgment that the motion should be granted. Even assuming the certificates to be the equivalent of money, and that the clerk, had said certificates been deposited in the first instance, would be entitled to commissions thereon, these certificates represent, and stand in the place of, the same money which the clerk originally received, and upon which he has already been paid his commissions. The mat-

ters leading up to the present situation seem to me to be aptly described by what is said in the brief of counsel for the petitioner, viz.:

"* * * What has occurred in this case is a conversion of 'money' in the form of one set of denominations into 'money' in the form of another set of denominations. When the certificates were purchased * * * the sum of the transaction * * * was the clerk took one bill of $100,000 denomination and changed it for 100 bills of $1,000 denomination. Such action did not constitute a payment within the meaning of section 828, and therefore the clerk, in receiving his commission at that time, in accordance with the order of court, received the same in advance, and should not now be permitted to collect the same commission again."

Up until the certificates now in the hands of the clerk are turned over to the persons entitled thereto, there will have been no money paid out of the moneys in the registry of the court within the meaning of that term as used in section 828 of the Revised Statutes. Up until now all that the clerk has done has been to receive and keep the proceeds of sale of the Lord Ormonde. To earn his commission he must pay out such proceeds. The circumstance that the payment of the clerk's commission has been anticipated doesn't entitle him to again collect it. Petitioner's motion will be granted.

For the guidance of the clerk in cases wherein Liberty Bonds or other bonds of the United States are deposited with him under the provisions of section 1320 of the Revenue Act of 1919, it may be said that, while the facts of the instant case do not fall within the decision of McGovern et al. v. U. S. (C. C. A.) 272 Fed. 262, the principle thereof is approved, and the clerk is entitled to charge upon such deposits a single commission of 1 per cent. of the par value of bonds so deposited.

WINDOW GLASS MACH. CO. et al. v. PITTSBURGH WINDOW GLASS CO. et al.

PITTSBURGH PLATE GLASS CO. v. AMERICAN WINDOW GLASS CO.

(Circuit Court of Appeals, Third Circuit. September 30, 1921. Rehearing Denied January 20, 1922.)

Nos. 2663, 2684.

1. **Patents ⊂=328—834,165, for glass drawing and shaping machine, held void for inoperativeness.**
   The Raspillaire patent, No. 834,165, for a glass drawing and shaping machine, claim 15, for a bait or drawing implement, covers such implement only as an element of the machine described and claimed, of which the former is the essential feature, and the entire patent is void for inoperativeness of the machine.
2. **Patents ⊂=328—1,208,851, claims 1–4, for method of drawing glass cylinders, held not infringed.**
   The Spinasse patent, No. 1,208,851, claims 1–4, for method of drawing glass cylinders, *held* not infringed.

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

Suits in equity by the Window Glass Machine Company and another against the Pittsburgh Window Glass Company and others, and by the Pittsburgh Plate Glass Company against the American Window Glass Company. Decrees for defendants, and complainants appeal. Affirmed.

For opinions below, see 276 Fed. 193, 197.

No. 2663:

Geo. H. Parmelee, Geo. E. Stebbins, and Clarence P. Byrnes, all of Pittsburgh, Pa., for appellants.

Charles Neave and Clarence D. Kerr, both of New York City, for appellees.

No. 2684:

Marshall A. Christy, of Pittsburgh, Pa., and Frederick P. Fish, of Boston, Mass. (Charles Neave, of New York City, and James C. Bradley, of Pittsburgh, Pa., of counsel), for appellant.

Geo. E. Stebbins, Geo. H. Parmelee, and Clarence P. Byrnes, all of Pittsburgh, Pa., and Livingston Gifford, of New York City, for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. Because these two cases concern the art of mechanically blowing window glass, we discuss and dispose of them in one opinion. The art of blowing window glass by machine, as contrasted with lung blowing, was created and made commercially successful by the patents considered in this circuit in an opinion reported in Consolidated Window Glass Co. v. Window Glass Mach. Co. (C. C. A.) 261 Fed. 362. In that opinion this court described and dis-

cussed at length the window glass arts, and we avoid needless repetition by referring to that opinion, and by reference thereto thus making its description and explanation of the art as much a part hereof as though restated by quotation. This being done, and that opinion read, it suffices to say that both cases now before us concern the bait of a window glass blowing machine; that such bait is substantially the shape of an inverted mushroom, located at the lower end of a tube through which air is mechanically blown into the bottom or pocket of the bait; that the bait is first lowered and dipped into a molten mass of glass and then drawn upward carrying with it the molten glass, which is meanwhile being blown or distended into the cylinders, which were subsequently cut, flattened, and annealed, and thus made into the glass window panes of commerce. Originally the bait was of such high temperature that the molten glass adhered to it. Later it was found if a bait of much lower temperature, hence technically called a cold bait, could be used, that the molten glass, chilled by the bait's lower temperature, would not adhere to it. The cold bait has for various reasons proven more desirable than the hot and has virtually supplanted its use. Hence the great importance of these cases, wherein each of the great glass companies here litigating contends that it owns a patent which entitles it to an exclusive monopoly of the use of a cold bait, and that the other company—and therefore other users as well—infringe such patent. From these facts the importance and far-reaching effects of these cases will be seen.

These two companies having brought suit against each other upon their respective patents, the court below heard the two cases at the same time, and in opinions and decrees of the same date declined to sustain the contention of each company that its patent controlled the use of the cold bait, and dismissed their several bills, its opinions being reported in 276 Fed. 193, and 276 Fed. 197.

Thereupon each company took an appeal, which appeals were heard together in this court, and which, as we have said, it seems fitting we should now dispose of in a single connected opinion. Notwithstanding the voluminous records before it and the seemingly great number and complexity of the questions involved, the lower court found that in the final analysis the cases turned on comparatively simple questions. As we agree with the court's analysis of the real issues, the case before us therefore resolves itself into following or rejecting the lower court's determination of those issues. Ample time was given by this court to the arguments of these appeals. We have had the benefit of full and able discussions by counsel and the aid of elaborate briefs. To these aids we have since added a patient and detailed study of the cases with the result that we find no error in the action of the court below.

In view of the exhaustive and self-sustaining opinions of the trial judge and the fact that little or nothing additional remains to be said, this court might well limit itself to adopting such opinions as aptly setting forth its views. Instead, however, of so limiting ourselves, we shall, in view of the magnitude of the interests involved, the far-reaching effects of a decision other than we now make, not only on the two companies concerned, but to the consuming public whose use window

glass largely concerns, add a few thoughts which the argument and the later study of the case have borne in upon us.

The underlying and influencing fact in this case is that the pioneer stage of the making of window glass by machinery was reached and its complete commercial success assured earlier than these patents here in issue. And it is equally basic that the disclosures made by these patentees were attempts to improve an established, not to create an unknown art. In no way can the terms "radical," "revolutionary," "undreamed-of," elements that mark the pathway of inventive pioneership, be justly applied to their efforts to improve.

[1] Turning first to the patent of Raspillaire, No. 834,165, granted October 23, 1906, owned by the American Window Glass Company, we hold that Raspillaire recognized the existence of machines for drawing window glass, and his purpose was to improve them. In that regard he said he had "invented new and useful improvements in glass drawing and shaping machines." A study of his specification shows that his proposed improvement consisted of two interrelated changes in the existing practice and mechanism. As we have already stated, in that practice the blowing of air through the bait pipe into the bait pocket as the glass was being drawn upward served to initially form and thereafter maintain the cylinder walls as the cylinder rose in mid air from the pot of molten glass. In this air practice the glass necessarily took the form of a cylinder, and thickness uniformity or nonuniformity of the cylinder walls was effected by air control and manipulation. Now, as nonuniformity of cylinder walls might result in cylinder shattering during the drawing process or in inferior product, and as the cylinder had to be cut and subjected to the expensive and skilled flattening process, it seems that Raspillaire's idea was to avoid the use of air, avoid the inevitable production of cylinders, and do away with the labor and expense of flattening. That these two elements of air elimination and flattening elimination were the objects—and the only ones—Raspillaire had in view and disclosed is shown by his patent specification:

"When it is desired to draw glass for the purpose, for instance, of window glass—that is, in flat sheet form—my invention, as shown in Figs. 1 to 6, is particularly valuable in that the draw is made in the form of two walls or sheets of glass *without flaws and perfectly flat.* The consequence of the new combination of elements is the entire elimination of the heretofore *necessary process of flattening, as when glass is drawn in cylindrical form.* When glass is drawn in cylindrical form, it is necessary, as is well known in the art, to crack the cylinder and then subject it to a process of flattening, which requires expensive apparatus and the constant attendance of skilled operators. According to my invention, such expensive apparatus and operators are dispensed with."

The means by which Raspillaire proposed to dispense with air blowing and the irregularities and objections incident to the use of varying air was the use of a "former," which, as he conceived, "determines and imposes upon the draw the desired shape," and he therefore says:

"My invention relates to a machine for simultaneously drawing glass from a molten mass of glass and *imparting desired shape* to the draw.'"

He further emphasizes the prearranged contour of the glass by the shape of his "former," viz.:

"The former may be of any suitable configuration to impart to the draw a tubular formation of *any desired* shape. That illustrated in the drawings is one the use of which will result in an oblong tubular draw, such as illustrated in Fig. 6 The former may be of other configuration; for instance, to draw a cylinder or hexagonal or octagonal tube."

It will thus be seen that the "former," the substitution of its predetermined shape and its unvarying contour after being shaped, was the gist and the only disclosure of Raspillaire, and the monopoly of invention to which he was entitled under the patent laws was adequately protected by claims and a construction thereof by the court which shall cover his "former" device and the incidents thereof.

Touching the latter element, namely, the mechanical incidents to his "former," we note what Raspillaire's specification says:

"Combined with the former is the drawing implement by which the glass is drawn over or about said former. This drawing implement is shown in separated detail in Figs. 5 and 6 of the drawings and consists of a body, 7, and a bait 8, detachably connected thereto. The drawing implement surrounds and is of cross-sectional dimensions and configuration corresponding to the *effective like dimensions and configuration of the former and has an operatively close fit to the former, whereby the glass in being drawn will contact with the active shaping-surfaces of the former to determine the cross-sectional size and shape of the draw.*"

Moreover, it will be noted that not only was his "former" the gist of Raspillaire's device, but it was the only alleged invention he disclosed. If the mechanism by which his "former" was operated embodied any other inventive feature, Raspillaire either did not know of it, or, if he did, he failed to disclose it in his specification and thus comply with the statutory requirement on which to secure a claim for patent monopoly thereof. The alleged originality of his "former" Raspillaire emphasized in his specification by quotation marks, and in this form he made his "former" a claim element. The other six claims disclose nothing disassociated from his "former," but are manifestly but minor claims for parts or incidents of the "former" machine he had disclosed, and with this machine the six claims are associated by the claim element found in each, namely, "in a glass-drawing machine," and "on a machine for drawing glass," and it is in this true sense that this is a claim for a part of Raspillaire's "former" glass-drawing machine; that his claim here in issue, viz. "in a machine for drawing glass, a drawing implement adapted to be dipped into a glass bath and to draw glass therefrom, said implement provided with a groove to receive the molten glass," was allowed and must therefore be construed, and, this being done, the invention Raspillaire disclosed and his monopoly to the enjoyment thereof is fulfilled by limiting such claims to use in a window glass drawing machine which shapes by a "former," and not by air. Nor is there any ground for broadening such claim by construction to accord with the great and unlooked-for impress the invention made on the art, for Raspillaire's "former" made none. It was not commercially used, and the evidence in the record is to us, as it was to the court below, persuasive, and indeed convincing, that it

could not be used operatively. And in point of fact Raspillaire's patent and his "former" did not pass beyond the stage of a paper disclosure, and it yet remained such, until the success of the cold bait in the mechanical drawing of window glass evidently suggested the resurrection of this claim with its comprehensive literalism as a means of blanketing the use of cold baits, whose use Raspillaire had not disclosed, and, as we view it, had neither needed nor suggested in connection with his "former." In that regard the Commissioner of Patents, during the interference proceedings, held:

"No advance practically followed from Raspillaire's suggestion. For four or five years after his patents were granted the art was conducted exactly as it had been conducted since glass cylinders have been made by machinery."

Moreover, far from disclosing the use and operative functioning of his bait as a self-functioning cold bait by reason of its own relative temperature, Raspillaire made use of another element, namely, a presser to chill the glass his bait did not chill. In that regard his specification says:

"To enhance the security of the engagement of the bait with the glass, means are provided to compress the lip of glass which flows into the groove of the bait and chill the same. * * * When the drawing implement has been lowered into the molten bath and a lip of glass has flowed into the groove thereof, the pressure device is forced downward against the lip of glass by pulling upon the rope, compressing the glass into the groove, and *chilling and setting the same.*"

Finding, as we do, no error in the views of the court below in its estimate of this patent, it follows that its decree dismissing the bill of the American Window Glass Company and others against the Pittsburgh Window Glass Company and others should be affirmed.

[2] Having thus disposed of the attempt of the American Window Glass Company to blanket, by the patent of Raspillaire, the use of a cold bait in the mechanical blowing of glass, we now address ourselves to the effort of the Pittsburgh Plate Glass Company to do the same thing by the patent of Spinasse.

In taking up that question, we note the all-important basic facts that the claims of Spinasse's patent here in issue are not for a cold bait, nor does his specification assert the invention or show a disclosure by him of a cold bait. On the contrary, the study of the specification shows that his patent here involved, viz. No. 1,208,851, granted December 19, 1916, is for "a method of drawing glass," and not for an implement called a cold bait. Indeed, the specification assumes the existing use of a cold bait of some type in the art, and is for "a method of drawing glass * * * the essential feature of which is *the peculiar structure of bait.*" Now what the peculiar structure which constitutes "the essential feature" of his invention is Spinasse proceeds in his specification to point out, viz.:

"My invention resides in the formation of a glass novel with a bait of a *special structure* and in such a manner that there will be an assured capability of relative movement of the glass novel upon the bait during the expansive and contractive actions which inevitably result during the drawing operation and which necessarily are the source of the existing great percentage of breakage."

It will therefore be apparent that the existing evil which Spinasse sought to lessen was the breakage caused by the different relative contraction and expansion of the metallic bait and the glass novel.

In dealing with that problem Spinasse accepted as a fact that there operatively had to be in the use of cold baits a destructive differential of relative contraction and expansion of bait and novel, which would "inevitably result in the shattering of glass." This inevitable, accepted, operative, and destructive differential evil Spinasse proposed to counteract by "an assured capability of relative movement of the glass novel upon the bait," during the relative contractive and expansive actions of the glass and metal. In other words, Spinasse accepted the evil and provided a safety valve. The gist of his method was tersely and accurately summed up by the judge below in the statement that "fracturing pressures on the novel are avoided, by providing for relative movement in the cooling process." This relative movement of glass novel and metallic bait Spinasse counteracted by constructing his bait pocket with "upwardly diverging working surfaces and having what may be termed a lineal departure point at their orifice." This latter is effected "by the use of outwardly curved lips for the orifice of the bait pocket." Indeed, in summing up his disclosure in its entirety, Spinasse says his method consists of two steps: "First, the use of a cold bait, viz. curing a novel supported upon a bait without fusion"; the second, counteracting the destructive, but accepted, operative factor of the differential metal and glass contraction and expansion by "insuring such relative formation of the novel and bait that rupturing pressures are avoided throughout the drawing operation." It will thus—we emphasize by repetition—be seen that Spinasse's disclosed invention was based on two things: First, using a cold bait to form a novel, a practice which so far as this patent is concerned was old; and, second, by making his cold bait of such form as to allow the differential of novel bait contraction and expansion to vent itself by reason of the physical contour of his bait. This bait contour, we, for present purposes, assume was new. Such being Spinasse's method, we turn to a consideration of defendant's practice. It attacks the problem of breakage from a different angle, and the difference between the two methods may be illustrated by the difference between preventive and curative medicine. Spinasse cures an existing evil; the defendant prevents the arising of the evil. Spinasse overcame an existing evil by venting the evil on the upward curve of his bait; the defendant prevents the evil from arising, and therefore had no need to use Spinasse's venting device, or, indeed, anything of a venting kind. Its preventing differential contraction and expansion between glass novel and metal bait from operatively arising the defendant effects by novel bait thermal control or as aptly summarized by the court below when it said the defendant's "purpose is to prevent movement rupturing pressures by keeping substantially constant the relative diameters of the bait and novel by adjustment of temperature conditions."

Such being the radical difference between the two methods, the court below, in language we could not improve and for reasons to which we can add no weight by discussion, held that, while both practices les-

sened breakage, yet their methods of doing so were wholly different. In that respect it said, quoting the view of the patent office authorities which it adopted:

"They then explain that the bait is initially heated to several hundred degrees, immersed in the glass, and kept there until heated to a temperature slightly below the fusing point, and then commencing the draw. That the bait thus has its highest temperature before the drawing begins, and during the draw the contraction is substantially equal to that of the glass novel, and the two will therefore be maintained in substantial contact without a tendency to break the glass as it cools; that, while the bait has a higher coefficient of expansion than the glass, it has a lower temperature and is subject to a lower rate of change of temperature during the cooling operation, and thus the two will contract at a substantially uniform rate, causing little change in the relative diameters of the bait and novel."

From all these considerations it will be seen that Spinasse's method was a venting practice, venting a destructive force by the agency of bait contour. The defendant's method was a preventing practice by preventing the coming into operation of the destructive force. Such being the fact, we encourage inventive effort and beneficially administer the patent law by recognizing the patent differential in method between the two practices and in affirming as we do a decree which, in effect, adjudges that Spinasse and the defendant solved the problem of breakage by basically different methods.

The decrees below are affirmed.

VIDAL v. SOUTH AMERICAN SECURITIES CO. et al.

(Circuit Court of Appeals, Second Circuit. August 15, 1921. On Petition for Rehearing, January 11, 1922.)

No. 69.

1. **Courts ⇐321—Alien entitled to sue in federal court.**
   Under Judicial Code, § 24 (Comp. St. § 991), an alien is entitled to sue a citizen of the United States in a federal court.
2. **Courts ⇐270, 274—Alien may sue citizen, but must sue in district of residence.**
   An alien can maintain a suit in the federal courts against a citizen only in the district of the latter's residence, unless defendant waives his privilege, and a corporation cannot without its consent be sued by an alien in any district out of the state where it is incorporated, and, if there is more than one district in such state, then the suit should be brought in that district in which it has its headquarters and general offices.
3. **Courts ⇐276—Pleading to merits not waiver of objection to jurisdiction.**
   In the federal courts, if a defendant appears specially for the single purpose of objecting to the jurisdiction of suit by alien in district in which defendant is not a resident and his objection is overruled and he excepts to the overruling thereof and then pleads to the merits, he is not considered as waiving or abandoning his objection and may raise the question on writ of error in the appellate court.
4. **Courts ⇐269—Stocks and bonds "property" within statute relating to jurisdiction of federal courts.**
   Stocks and bonds are 'property" within the meaning of Judicial Code. § 57 (Comp. St. § 1039), which authorizes a suit to be commenced in any

District Court of the United States to enforce any legal or equitable lien upon or claim to real or personal property within the district against one who is not an inhabitant of or found within the district.

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

5. Corporations ⟸65—Shares of stock not "chattels" and have situs in different places.

Shares of stock are not chattels, but are in the nature of choses in action, are intangible incorporeal personal property, and may have a situs for some purposes at the domicile of the owner and for some purposes at the domicile of the corporation, and it makes no difference in determining such situs where the certificate of stock may physically be, since it is merely evidence of title to the stock.

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

6. Courts ⟸269—Suit must be one to enforce lien upon or claim to property to give jurisdiction.

If a suit in a federal District Court against one not resident or found in the district is not one to enforce a lien upon or claim to property of the defendant within the district, or to remove a cloud upon the title to such property, the court is without jurisdiction to proceed, under Judicial Code, § 57 (Comp. St. § 1039).

7. Courts ⟸269—"Lien," within statute giving court jurisdiction of action against nonresident having property in district, defined.

The term "lien," within Judicial Code, § 57 (Comp. St. § 1039), giving federal District Court jurisdiction of an action against one not resident or found in the district to enforce a lien on property therein, is the right which a creditor has to obtain satisfaction of a debt or duty out of a specified res which is owned by the defendant; that is, it is a charge or incumbrance upon specific property which is security for the payment of money or the performance of some duty.

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

8. Courts ⟸269—Plaintiff held not to have lien on property giving District Court jurisdiction of action; "profit."

Where plaintiff contracted to render certain services for 30 per cent. of the net profits arising from an enterprise, without anything being said as to a lien on moneys paid or stocks or bonds delivered to defendant and out of which the profits were to be realized, defendant cannot be regarded as a constructive trustee holding such money and stocks and bonds, and was at liberty to use them as he saw fit, being simply a debtor to plaintiff, and plaintiff had no lien on the property within the meaning of Judicial Code, § 57 (Comp. St. § 1039), giving federal District Court jurisdiction of an action against one not resident or found in the district to enforce a lien upon property therein; "profit" being the gain made in a business transaction, and representing the excess of acquisition over expenditure.

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

9. Courts ⟸269—"Claim" as used in statute giving federal District Court jurisdiction against nonresident, defined.

The word "claim," as used in Judicial Code, § 57 (Comp. St. § 1039), giving federal District Court jurisdiction of an action against one not resident or found in the district to enforce a claim to property, is the right to lay claim to a specific property which is in another's possession, and does not give to a mere general creditor a right to sue a nonresident when he has no lien and no claim of ownership in the property to assert.

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

10. Courts ⟸269—What constitutes suit to remove incumbrance or cloud upon title to property to give federal District Court jurisdiction.
Under Judicial Code, § 57 (Comp. St. § 1039), giving federal District Court jurisdiction of an action against one not resident or found in the district to remove an incumbrance or lien or cloud upon the title to property, one can only bring a suit concerning property to which he is himself entitled.

11. Appeal and error ⟸790(1)—Appeal dismissed if effectual relief cannot be given.
It is the duty of an appellate court to dismiss an appeal and not proceed to formal judgment if pending the appeal an event occurs without any fault of the defendant which renders it impossible for the court, if it should decide the case in favor of the plaintiff, to grant any effectual relief whatever.

12. Appeal and error ⟸799—Extrinsic evidence admissible to show issue moot.
On appeal, facts which have occurred since the decree below and which make the question at issue moot, and which are outside of the record, may be proved by extrinsic evidence.

Hough, Circuit Judge, dissenting.

On Petition for Rehearing.

13. Courts ⟸351½—Counterclaims treated as original bills, and not dismissed.
Where counterclaims, which, under equity rules 30 (201 Fed. v, 118 C. C. A. v) and 31 (198 Fed. xxvii, 115 C. C. A. xxvii), are substituted for cross-bills against certain defendants, set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, except as to one cross-defendant, they should not be dismissed, but should be treated as original bills on the dismissal of the original bill.

14. Courts ⟸307(1)—Jurisdiction of federal court limited to controversies between citizens of different states.
The jurisdiction of a federal District Court is limited to controversies between citizens of different states, and counterclaims, which, under equity rules 30 (201 Fed. v, 118 C. C. A. v) and 31 (198 Fed. xxvii, 115 C. C. A. xxvii), are substituted for cross-bills by certain defendants against other defendants, were properly dismissed as to a cross-defendant, who, although a citizen of the United States, was domiciled and engaged in business in a foreign country for many years.

15. Equity ⟸415—Rights of parties not within jurisdiction not to be determined.
Rights of persons not parties or persons not within the jurisdiction of court should not be determined in a civil action.

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

Bill by Enrique De Arraga Vidal against the South American Securities Company and others, in which cross-bills were filed. From adverse decrees, the named defendant appeals. Reversed with directions.

The appeal is from a decree of Judge A. N. Hand, entered on March 28, 1916, and from a decree of Judge Mayer, entered on October 30, 1917.

The case was tried before Judge Hand and was decided by him in an elaborate opinion. He, however, directed a reference to a special master to investigate and report on certain facts. The master filed a comprehensive report which came before Judge Mayer, who confirmed it as is hereinafter more fully stated.

The complainant is an alien, being a citizen of Uruguay.

The South American Securities Company, named as a defendant, is alleged to be a New York corporation, and to have its principal office and to be doing business in the Southern District of New York. It is hereinafter referred to as the Securities Company.

The Pan-American Transcontinental Railway Company, another defendant, is alleged to be a Maine corporation, and to have its principal office and to be doing business in the Southern District of New York. It is hereinafter referred to as the Railway Company.

The National Railway Construction Company, also a defendant, is alleged to be a Maine corporation, and to have its principal office and to be doing business in the Southern District of New York. It is hereinafter referred to as the Construction Company.

The defendants, Charles Bright (hereinafter called Bright), Frederick R. Bright, John Jay McKelvey, and Alpheus H. Favour sued individually and as copartners doing business under the firm name of McKelvey & Favour; Charles R. Demarest, Edward L. Thompson, Warren G. Thompson, and Ralph H. McKelvey are all alleged to be citizens of the state of New York; and they are all alleged to be of the city of New York except Warren G. Thompson, who is said to be of North Tonawanda in this state. In his answer Bright denied that he was a resident of the state of New York or that he was served within the Southern District. He admitted himself to be a citizen of the United States and alleged that he was domiciled in the city of Buenos Aires, in the republic of Argentine, where he was engaged in business as a merchant. And Frederick R. Bright in his answer denied that he was a citizen of the state of New York and alleged that he was a citizen of the state of California, but he admitted "that he now resides in the Southern District of New York."

The defendant William F. Piper is alleged to be of Tenafly in the state of New Jersey.

The other defendants are alleged to be citizens of foreign states: Thomas B. Holoway is alleged to be a citizen of the Argentine Republic; Fanny Yaureguiberry de Castro, sued individually and as administratrix of Juan Jose Castro, is alleged to be a citizen of the republic of Uruguay, as are the defendants Enrique Castro, Marta Castro, Juan Jose Castro, and Fanny Maria Castro.

The complaint alleges that the Railway Company is the owner of certain rights and franchises under a concession granted by the republic of Uruguay, on July 15, 1909, for the construction of the Interior Railway of Uruguay. It alleges also that the Construction Company is engaged in the construction of the said Interior Railway, under a contract with the Railway Company aforesaid.

The complaint sets out in minute detail the relations of the various defendants to the enterprise, and alleges that the defendant Bright either directly, or indirectly through his agents, obtained possession of a large amount of securities for his services.

The cause of action, briefly stated, is that defendant Bright agreed with the complainant that if the complainant would co-operate with and aid him, Bright, in procuring certain concessions from the government of Uruguay to the Railway Company, he (Bright) would pay to the complainant 30 per cent. of his profits. That the complainant did so co-operate and did obtain the concession as agreed, and that the complainant is entitled to the promised 30 per cent. of Bright's profits.

The relief demanded in the complaint is:

1. An injunction restraining the defendants from disposing of any of the securities of Bright or of the Securities Company which any of the defendants have in their possession or control.

2. A discovery in respect to all matters and things concerning the securities.

3. An accounting from Bright and the Securities Company.

4. That the rights of the complainants in the securities be fixed and determined, and that an order of distribution be entered.

5. That an injunction be issued restraining all other suits and proceedings in the premises.

6. That Bright be adjudged the beneficial owner of all of the stock of the Securities Company.

That defendants Frederick R. Bright and Favour be enjoined from disposing of any of said stock. That it be adjudged that the said stock and all securities so far as the same are a part of the securities in which Bright and the Securities Company, or either of them hold the beneficial interest, held in the names of defendants Piper, Demarest, Thompson, and Ralph M. McKelvey is a part of the said Bright's receipt from the railway enterprise, and is subject to the claims of the complainant and to the claims and liens of such other parties as may establish the same to the satisfaction of the court.

The Securities Company and the two Brights filed pleas in which they asserted that the court was without jurisdiction upon the ground that Bright was not a resident of the state of New York and was not served within the Southern District of New York, and that the action was not one to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon title to property within the Southern District of New York.

The motion for judgment on the pleadings came before Judge Coxe sitting in the District Court and was disposed of by him in an opinion filed on April 2, 1913. He overruled the motion and permitted the defendants to answer within 20 days.

Thereafter elaborate answers were filed. The answer of Bright occupies 158 printed pages of the record; that of the Securities Company, 67 pages; and that of Frederick R. Bright, 24 pages. The answers all allege that the bill of complaint is wholly without equity and that the court is without power to grant the relief asked for.

The answers interposed by the two Brights and by the Security Company each assert that the complainant by false and fraudulent representations made by him for the purpose induced Charles Bright to enter into the alleged agreement in the words and letters as follows:

"London, July 22, 1907.

"Charles Bright, Esq.,— Dear Sir: Under the terms of a letter signed by Juan Jose Castro, concessionaire of the Interior Railway of Uruguay, I am entitled to a commission of $100,000, Uruguayan gold, in case I negotiate the concession.

"I hereby agree to pay to you one-third of this sum or any other commission that I may receive from the heirs or successors of the said Mr. Castro in consideration of your agreeing to pay to me for myself and the people whom I represent thirty per cent. (30%) of the net profits that you may make in negotiating the said concession, after paying out or deducting all expenses, obligations or commissions, or other sums whatsoever that you may incur in connection with the said business, and a further sum of £5,000 to be deducted for your personal expenses.

"This letter as agreed by you will have full legal effect in Montevideo.

"Yours faithfully, [Signed] H. D. Arraga Vidal.

"I agree to the above terms.

"C. Bright."

The answers also set forth in detail the alleged false and fraudulent representations by which it is asserted that Bright was induced to enter into the pretended agreement, and it is alleged that the complainant knew that they were false.

The answers also deny that the complainant did anything under the pretended agreement which entitled him to the 30 per cent. or any portion of either the securities or the profits realized by Bright from the enterprise referred to in the complaint.

By a cross-bill the Railway Company and the Construction Company sought a decree rescinding and canceling two contracts, both dated February 8, 1910, between the Railway Company and the Securities Company, and between the Securities Company and the Construction Company, providing for the issuance

to the Securities Company of certain second mortgage bonds, known as 5 per cent. gold debenture bonds, and certain common and preferred stock of the Railway Company, and certain common stock of the Construction Company. The grounds for the rescission and cancellation as alleged were fraud and failure of consideration on the part of the Securities Company and of Bright.

The Securities Company in its answer also set up a counterclaim in which it alleged ownership of bonds and common and preferred stock of the Railway Company aggregating more than $1,000,000 par value and $900,000 par of the common stock of the Construction Company, and that it had come wrongfully, fraudulently, and unlawfully into the possession of the defendants McKelvey and Favour who refused to deliver the same to it. It alleged that through its ownership of the stock of the Railway and of the Construction Company it had a controlling interest in those companies, but that it was prevented from voting the stock by the wrongful acts of McKelvey to its great loss. It asked judgment against the defendants McKelvey and Favour individually and as copartners, and that they be directed to turn over to the defendant the securities as described and that they pay in addition the sum of $500,000 in damages.

The defendant John MacDonald Henderson was not named as a party in the original complaint. He petitioned to be made a party on the ground that he was the trustee in bankruptcy in Great Britain of the estate of Bright adjudicated a bankrupt in the courts of that country, and the prayer of his petition was granted.

An injunction was issued on October 16, 1912, pursuant to an order of Judge Learned Hand, restraining the defendants pending the suit from in any manner dealing with or disposing of any of the securities as complained of in the bill which were then held by them or either of them on behalf of Bright or of the Securities Company.

An order was entered on July 18, 1913, by Judge Coxe, sitting in the District Court, appointing a receiver of all stocks and bonds in the possession of the defendants McKelvey and Favour for the account of Bright and for the account of the Securities Company. The receiver was directed to hold the same pending the litigation or until the further order of the court.

It appears that in 1907 Bright employed the defendant John Jay McKelvey to incorporate the Railway Company, and it was in that year incorporated under the laws of Maine. In the same year he incorporated the Construction Company under the laws of the same state. In the following year Bright employed McKelvey to incorporate the Securities Company, and it was so incorporated under the laws of New York. The stock of the Securities Company consisted of 1,000 shares, of which 670 shares stand in the name of Bright and the remaining 330 shares in the name of his brother Frederick. The trial judge found that these 330 shares belonged to Charles who furnished the consideration and that he was the absolute owner of all of the stock of the Securities Company, and that he paid for it by turning over shares of the common stock of the Railway Company having a par value of $500,000, which had been issued to him by a resolution of the board of directors of the Railway Company adopted on September 20, 1907, "as compensation for investigations, surveys, and reports in connection with corporate enterprise."

It further appears that on October 24, 1908, the Securities Company entered into an agreement with Bright which recited that "Bright has obtained * * * rights and franchises under a concession originally granted to Castro, Petty & Co. and subsequently transferred" all these rights to the Securities Company, and that thereafter the concession became vested in the Railway Company, and that it had been agreed that certain considerations consisting of cash and stocks should be paid to Bright for obtaining the same. It went on to provide that the Securities Company should pay to Bright £60,000 in cash upon ratification of the ad referendum agreement by the Legislature, and £60,000 in shares of the Pan-American Transcontinental Railway Company, said shares to be preferred shares in case the Railway Company should issue any part of its capital in the form of preferred stock, and to be delivered at the same time as the cash payment.

On the same day that the foregoing agreement was made, an agreement was also entered into between the Securities Company and the Railway Company. The Securities Company, it recited, had acquired control of the Castro Franchise as modified in the ad referendum agreement and had assigned the same to the Railway Company, and it provided for the construction of the railway by the Securities Company or a Construction Company to be furnished by it.

The last-named agreement was canceled on February 8, 1910, by a new agreement between the Securities Company and the Railway Company, and it was agreed that the Railway Company should cause to be issued to the Securities Company the following securities:

$1,200,000 of its 5 per cent. gold debenture bonds.
800,000 par value of its preferred stock.
1,000,000 par value of its common stock.

—said securities to be issued and delivered upon the completion and signing by the Railway Company of a satisfactory contract with a contractor to be furnished by the Securities Company. The Securities Company agreed to execute any further papers necessary to perfect the title of the Railway Company in all of the rights and franchises granted to it and to furnish a contractor to construct the railway in accordance with the requirements of the concession in consideration of the payment to such contractor of the following securities of the Railway Company:

$9,000,000 par value of its 5 per cent. first mortgage gold bonds.
2,000,000 par value of its 5 per cent. gold debenture bonds.
1,200,000 par value of its preferred stock.
1,500,000 par value of its port income bonds.

On the same day, February 8, 1910, the Railway Company entered into a contract with the Construction Company for the construction of the line. By this agreement the Construction Company agreed to pay the obligations which had been incurred by Bright for preliminary surveys amounting to $25,000, and it also agreed to construct the railway in accordance with the government concessions and decrees, and to furnish the railroad with an initial operating capital of $250,000. There were to be delivered upon the execution of the agreement:

$2,000,000 par value 5 per cent. gold debenture bonds.
1,200,000 par value of preferred stock.
5,000,000 par value of common stock.
1,500,000 par value of the port income bonds.

It provided also that the Construction Company upon the completion of each section of road should receive first mortgage bonds in proportion to the extent of the section so approved.

On the same day, February 8, 1910, an agreement was also signed between the Securities Company and the Construction Company. It provided that the Securities Company should:

1. Procure the execution of a construction contract between the Railway and the Construction Company.
2. Procure for the latter an advance of $100,000 upon the security of a note of the Construction Company.
3. Negotiate an advantageous arrangement for the disposition of the securities to be received by the Construction Company from the Railway Company as consideration for the construction work.
4. Provide as working capital cash subscriptions at par to the stock of the Construction Company amounting to $500,000.

In consideration of the above agreements the Construction Company contracted to issue and deliver to the Securities Company $1,000,000 par value of the capital stock of the Construction Company, the aggregate of which authorized capital stock was $1,500,000.

It thus appears that Bright owned all the stock of the Securities Company, that the Securities Company was to have the majority of the stock of the Construction Company, and that that company was in turn to control the Railway Company by holding $5,000,000 of common and $1,200,000 of prefer-

red stock out of a total issue of $6,500,000 of common and $1,500,000 of preferred stock.

The decree of March 28, 1916, found that in 1889 a concession was granted by the government of Uruguay to Juan Jose Castro to build a railroad in that republic. That that concession on December 31, 1907, although then regarded as of doubtful value, was transferred to the Railway Company. That in February, 1908, the executive power of the republic of Uruguay entered into what is referred to as an ad referendum agreement by which the government granted the concession to one Holoway as the representative of the Railway Company. That in July, 1909, a law was passed which authorized the executive power to contract for the construction of the railway, and under which the original Castro concession was granted. That in September, 1909, the heirs of Castro and other owners of an interest in the old concession contracted with Bright as attorney in fact of the Railway Company for the sale of all their rights in the concession. That in October, 1908, Bright entered into a contract with the Securities Company, which he had caused to be incorporated, in which it was stated that Bright had transferred to the Securities Company the concession originally granted to the Castros, and that thereafter the Securities Company, in accordance with its understanding with Bright, had transferred the concession to the Railway Company; it having been agreed that certain securities and cash should be paid therefor to Bright or to such person or persons as he might direct for obtaining the concession. That the decree also found, among much other detail which need not now be recited, that the basis of the entire enterprise was the transfer by Bright or the Securities Company to the Railway Company of a concession the title to which should be perfect and without incumbrances; and that this was the consideration for all the securities which Bright or the Securities Company received with the exception of $500,000 of the common stock of the Railroad Company originally issued to Bright. That no concession was in fact ever transferred by the Securities Company to the Railway Company, but that the latter obtained the concession direct from the Castro interest, and that the concession was charged by Bright with various incumbrances which the Railway Company had to assume and discharge in order to obtain the benefit of it. It referred to the special master the question whether the concession had a net value after deducting the disbursements, obligations, and incumbrances which the Railway Company was obliged to pay or incur, or was reasonably justified in paying or incurring in order to obtain the concession unincumbered. And if it should be found that after such deductions had been made the concession had no net value, it decreed that the receiver should restore to the Railway Company and to the Construction Company the securities in his hands which had been issued by these companies respectively as a consideration for the valid and unincumbered concession which Bright and the Securities Company had agreed to turn over but had failed to perform. If, however, upon the coming in of the report it should be found that there was a net value in the concession, after making the deductions, the receiver was to turn over the securities on payment to him of the net value of the concession so ascertained and found.

The decree found that the complainant, Vidal, was entitled to 30 per cent. of any amount which the Railway Company might be found liable to restore under the contract between Vidal and Bright dated July 22, 1907, and which represented the net profits to Bright as a result of his negotiating the railway concession, less any amounts in money or securities which it might appear Bright had paid to Vidal on account of the contract between them; and that the net profits were to be determined after paying out or deducting all expenses, obligations, or commissions or other sums which Bright had incurred in negotiating the concession, and a further sum of £5,000 to be deducted for his personal expenses, so far as any such obligations, commissions, or expenses, whether personal or otherwise, remained unpaid. The decree dismissed the cross-claim which had been made by the Securities Company against John Jay McKelvey and Alpheus H. Favour individually and as copartners doing business under the firm name of McKelvey & Favour for $500,000 damages, there being no evidence whatsoever as to any injury done to the Securities Company

by them. It also directed that the amended bill of complaint be dismissed as to the defendants Frederick R. Bright, William F. Piper, Charles R. Demarest, Edward L. Thompson, Ralph H. McKelvey, and Warren G. Thompson; they having no right, title, or interest in or to any of the securities forming the subject-matter of the suit.

The decree found that Bright had been adjudged a bankrupt by the High Court of Justice of the United Kingdom of Great Britain and Ireland, and that that court having jurisdiction of Bright and of the matter of the adjudication of his bankruptcy had appointed the defendant Henderson a trustee in bankruptcy of his estate, and that he had duly accepted the appointment and duly qualified as such trustee and claimed any net profits which might exist up to the sum of $150,000; that being the total of Bright's liabilities in bankruptcy.

The decree further found that there was a complete breach in limine on the part of the Securities Company of the contract between it and the Railway Company of such a fundamental and essential character that the Railway Company is entitled to rescission and cancellation of the said contract, and to a return of all the securities delivered to the Securities Company or to Bright for its account and held by either of said Securities Company or the said Bright, upon the restoration of the net value of the concession as herein pro vided, except the $500,000 common stock of the Railway Company separately delivered to the said Bright for his own personal account, together with all coupons originally attached to any of the said securities.

The decree further found that there had been a complete breach of the contract between the Securities Company and the Construction Company, and it adjudged that the Construction Company was entitled to a rescission and cancellation of the contract and to a return of the securities in the hands of the receiver, or delivered to the Securities Company or to Bright for account of the Securities Company, subject to an exception which need not here be noted.

The decree contained certain other findings and adjudications which need not be set forth herein.

But as any net profits which might be ascertained to exist would be claimed by the Securities Company and by John McDonald Henderson, as trustee in bankruptcy in Great Britain of Bright, and as 20 per cent. of such of the net profits as belonged to Bright were likewise claimed by McKelvey, the master was directed to report upon these various and conflicting rights. He was to report whether the interest in the concession received from the Railway Company from Bright was of any net value. And he was to report what obligations the Railway Company had to assume or was reasonably justified in assuming in order to obtain an unincumbered title to the concession.

The master made a most careful and painstaking investigation of the subject submitted to him. On the coming in of his report the cause was further heard before Judge Mayer, who approved and confirmed the report in all respects. A decree was entered by him on October 30, 1917. It adjudged that the concession had no net value after deducting the obligations the Railway Company had to assume or was reasonably justified in assuming in order to obtain the benefit of the concession and to secure an unincumbered title. The receiver was ordered to deliver to the Railway Company the shares of preferred and common stock and the debenture bonds issued by it, and to the Construction Company the shares of stock issued by it, all of which were in his hands. It also adjudged that the Railway Company was entitled as against the Securities Company and the two Brights to the participation in what is known as the "Johnson Syndicate" aggregating $64,200, and the receiver was directed to deliver to the Railway Company any and all documents in his hands representing the said syndicate participation. It further adjudged that the Railway Company was entitled to the delivery to it from the defendant Bright and the Securities Company of 374 debenture bonds of the Railway Company, and of 2,000 shares of preferred stock and 3,110 shares of common stock which had been heretofore delivered to them, and they were ordered to deliver the same forthwith to the Railway Company.

The Railway Company was also adjudged to be entitled to 150 debenture

bonds then in the hands of the Construction Company, and to 1,000 shares of preferred stock of the Railway Company then in the hands of Antonio Maria Rodriguez, and to debenture bonds of the Railway Company of the par value of $8,000 then held by J. A. Barbosa Caravia, and to certificates for the common stock of the Railway Company of the par value of $98,000 then held by the Castro interests, and it was decreed that all of these should be delivered to the Railway Company.

Herbert H. Gibbs, of New York City, for appellant.

O'Gorman, Battle & Vandiver, of New York City, for appellee John Jay McKelvey.

Murray, Prentice & Howland, of New York City, for appellees Pan-American Transcontinental Ry. Co. and National Ry. Const. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The complainant brought this suit for an accounting of the profits realized by Bright from the sale which Bright made of a railroad concession granted by the government of Uruguay to one Juan Jose Castro, the profits being realizable from or out of certain securities delivered by the Railway Company and the Construction Company to the Securities Company under contracts existing between them. The complainant alleges that under his agreement with Bright he is entitled to receive 30 per cent. of the profits. District Judge Augustus Hand was satisfied that the complainant was entitled to 30 per cent. of any net profits which belonged to Bright as a result of his negotiating the concession. Under the decree which has been entered, the complainant receives nothing, as the court has found that the concession which Bright caused to be transferred to the Railway Company had no value and has directed that the securities which were issued therefor should be returned to the Railway Company and to the Construction Company by which they were issued. And the contracts between those corporations and the Securities Company, and under which the securities were issued, were directed to be rescinded and canceled in accordance with the prayer of the cross-bills.

The Securities Company has taken an appeal from the orders and decrees which have been entered, and we are presented with a prolix record of 5 printed volumes containing over 3,000 pages, with 316 different assignments of error. The thirty-eighth assignment of error is as follows:

"That the court erred in finding in the interlocutory decree that this court has jurisdiction of this case, of the subject-matter thereof, and of the parties hereto."

We shall therefore proceed at once to inquire whether the court had jurisdiction. The Securities Company and the two Brights each appeared specially under protest for no other purpose than to plead to the jurisdiction. The plea of each declared that—

"The court has no jurisdiction because the action is not one to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon title to real or personal property within the Southern District of New York, and defendant Charles Bright is not a resident of the state of New York, and was not served within the Southern District of New York."

The answers interposed by the other defendants all asserted that the court was without jurisdiction. The question was heard before Judge Coxe, who overruled the objection and stated that, while he had some doubt as to the jurisdiction of the court, he was not sufficiently convinced to determine the question adversely to the complainant upon the papers then before the court. Later another motion was made to dismiss the complaint for want of jurisdiction. This time it was alleged that it was apparent from the bill that the jurisdiction of the court must be founded only on the fact that the action was between citizens of different states, and that the required diversity of citizenship did not exist. This motion was denied by Judge Holt.

[1] The jurisdiction of the court does not depend upon diversity of citizenship, the complainant not being a citizen of the United States. The complainant being an alien he is by virtue of that fact entitled to sue in a federal court one who is a citizen of this country. Section 24 of the Judicial Code (Comp. St. § 991) expressly provides that the District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity between citizens of a state and foreign states, citizens or subjects. So that the alienage of a plaintiff of itself gives jurisdiction to a court of the United States as against a citizen. Katalla Co. v. Rones, 186 Fed. 30, 108 C. C. A. 132; Suravitz v. Pristasz, 201 Fed. 335, 119 C. C. A. 537; Eldorado Coal & Mining Co. v. Mariotti, 215 Fed. 51, 131 C. C. A. 359. And if an alien begins his suit in a state court against a citizen, the latter, it has been held, may remove it into a federal court. Barlow v. Chicago Ry. Co. (C. C.) 164 Fed. 765; Stalker v. Pullman Co. (C. C.) 81 Fed. 989; Katalla Co. v. Rones, supra.

[2] In Lehigh Valley Coal Co. v. Washko, 231 Fed. 42, 145 C. C. A. 230, this court held that an alien can maintain a suit in the federal courts against a citizen only in the district of his residence unless defendant waives his privilege to be sued only in such district. And such we understand to be the well-established law. Galveston, etc., R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; Colosino v. Pittsburgh & L. E. R. Co. (D. C.) 210 Fed. 550. So a corporation cannot without its consent be sued by an alien in any district out of the state where it is incorporated, and if there is more than one district in such state then the suit should be brought in that district in which it has its headquarters and general offices. Galveston, etc., R. Co. v. Gonzales, supra; Lehigh Valley Coal Co. v. Washko, supra; Vitkus v. Clyde Steamship Co. (D. C.) 232 Fed. 288, 292; Best v. Great Northern Ry. Co. (D. C.) 243 Fed. 789. The defendant Bright was not at the time this suit was instituted a resident of the Southern District of New York in which the suit was commenced, and he was not served in the district. He appeared in the suit to object to the jurisdiction, and after his plea to the jurisdiction was overruled he put in an answer. But unlike some of the other defendants he filed no cross-bill and asked for no affirmative relief. In his answer he again insisted on the want of jurisdiction and stated that he made answer "without waiving any objections which he may have to the jurisdiction of the court." Then in the first, second, and third paragraphs of the answer he specifically

declared that the court was without jurisdiction. The third paragraph reads as follows:

"Third. That the court has no jurisdiction because the action is not one to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon title to real or personal property within the Southern District of New York, and this defendant is not a resident of the state of New York, and was not served within the Southern District of New York."

[3] In the federal courts if a defendant appears specially for the single purpose of objecting to the jurisdiction and his objection is overruled and he excepts to the overruling thereof, and then pleads to the merits, he is not considered as waiving or abandoning his objection to the illegality of the proceeding, but may raise the question on writ of error in the appellate court. Southern Pacific Co. v. Denton, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 942; Mexican Central Ry. v. Pinkney, 149 U. S. 194, 209, 13 Sup. Ct. 859, 37 L. Ed. 699; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Davis v. C., C., C. & St. Louis Ry. Co., 217 U. S. 157, 174, 30 Sup. Ct. 463, 54 L. Ed. 708; Western Indemnity Co. v. Rupp, 235 U. S. 261, 272, 35 Sup. Ct 37, 59 L. Ed. 220. We do not think the defendant Bright by his answer waived his right to object to being sued by an alien in a district in which he did not at the time reside. In his sworn answer he alleged as follows:

"This defendant admits that he was at all the times mentioned in the bill as amended, and still is, a citizen of the United States, but he denies that he is a citizen of the state of New York, and alleges that he has been and still is domiciled in the city of Buenos Aires, republic of Argentine, South America, and by order of the Commercial Judge is a duly registered merchant in the register of Commerce of said city in good standing, where he is still carrying on business as a merchant, as the complainant well knew. That he is now in the city of New York and within the Southern District of New York."

[4] But this makes it necessary for us to inquire further, for the federal courts are authorized to assume jurisdiction in certain cases notwithstanding the fact that a defendant is not an inhabitant of the district and has not been served in the district and has not voluntarily appeared. Section 57 of the Judicial Code (Comp. St. § 1039), which is found in the margin,[1] authorizes a suit to be commenced in any Dis-

[1] "Sec. 57. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said

trict Court of the United States to enforce any legal or equitable lien upon or claim to real or personal property within the district against one who is not an inhabitant of or found within the district or does not voluntarily appear. So that the question arises whether the claim which the complainant asserts relates to property which is within the Southern District of New York.

This section of the Judicial Code is a re-enactment of section 8 of the Act of March 3, 1875. The courts in construing the statute have said in a number of cases that an act which undertakes to give to courts jurisdiction over nonresidents, who do not come within the district for purposes of residence or business should be strictly construed and not enlarged by liberal construction. Woolridge v. McKenna (C. C.) 8 Fed. 650; Batt v. Proctor (C. C.) 45 Fed. 515; Non-Magnetic Watch Co. v. Association Horlogere Swisse of Geneve (C. C.) 44 Fed. 6. In Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co. (D. C.) 228 Fed. 528, 530, the court was of the opinion that the statute should receive a liberal construction. In Non-Magnetic Watch Co. v. Association Horlogere Swisse of Geneve, supra, speaking of this provision of the statute, Judge Lacombe said:

"Statutes which undertake to give to courts jurisdiction over nonresidents, who do not come within the district for purposes either of residence or business, should not be enlarged by too liberal construction."

And he declared that he could not satisfy himself that the section was intended to cover such incorporeal and intangible property as a patent right, possession of which must of necessity be ideal, not actual, and which could not be seized or sold under an execution. In De Ganay v. Lederer, 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042, the court declared that stocks and bonds are often regarded as "property" and not simply evidence of the ownership of the interests which are property. The court said that—

"Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property."

---

order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state; Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said District Court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." 36 Stat. L. 1102.

And we have no doubt that stocks and bonds are property within the meaning of section 57 of the Judicial Code.

In the case now before the court there are in the district in which the suit is brought certificates of shares of stock and debenture bonds issued by the Railway Company and by the Construction Company, both of which were organized, as already stated, under the laws of Maine.

[5] Shares of stock are not chattels but are in the nature of choses in action. They are intangible incorporeal personal property. They may have a situs for some purposes at the domicile of the owner, and for some purposes they may have one at the domicile of the corporation. It makes no difference in determining such situs where the certificate of stock may physically be, since it is merely evidence of title to the stock. 14 C. J. 390. Cook on Corporations (7th Ed.) vol. 1, p. 61, states that—

"Legal proceedings against the stock may be initiated at the domicile of the corporation. A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are nonresidents and are brought into the case only by publication and substituted service. The court acquires jurisdiction over the defendants."

The same writer, in volume 2, § 363, declares that it is well established that shares of stock may have a situs at two separate places at the same time. That for purposes of taxation, and for a few other purposes, shares of stock follow the domicile of the shareholder. But that for purposes of suits concerning the title to the stock, for attachment and execution, and for various other similar purposes, the situs is at the place where the corporation exists.

An important distinction exists between shares of stock and certificates for the shares, the certificates being mere evidence of title. Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122. And it has been held that shares can have no situs in a state merely because a corporation does business in a state other than the one in which it is incorporated. Ashley v. Quintard (C. C.) 90 Fed. 84; Plimpton v. Bigelow, 93 N. Y. 592; New Jersey Sheep, etc., Co. v. Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677.

And while ordinarily shares of stock have their situs either at the domicile of the corporation or at the domicile of the shareholder, it is possible that under some circumstances they may have their situs elsewhere. In Lockwood v. United States Steel Corporation, 209 N. Y. 375, 103 N. E. 697, L. R. A. 1915C, 471, the domicile of the corporation was in New Jersey and the domicile of the deceased shareholder was in Bermuda. But the New Jersey corporation maintained an office in New York for the purpose of receiving certificates of its stock for transfer upon its books and for the delivery of new certificates when such transfers had been made. It was held in a unanimous opinion, reversing the Appellate Division, that the foreign corporation had a domicile in New York for transfer purposes.

In Re Clark, L. R. (1 Ch. 1904) 296, the will of a testator domiciled in England bequeathed all his personal estate in the United Kingdom to his home trustee and all his personal estate in South Africa to his

foreign trustee. He was possessed of shares in South African mining companies, which had an office in London where a duplicate register of shares was kept and shares could be transferred. The court had to determine the locality of the personal estate. The actual effective transfer could be done equally effectually in South Africa or in England. And the court held that where the certificates of the shares were in England they passed under the gift of property in South Africa. No reference was made to the doctrine that personal property is deemed to follow the domicile of the owner.

In the instant case while the corporations issuing this stock were organized under the laws of the state of Maine, each maintains its principal office in the city of New York in the Southern District in which this suit was brought. The certificates of the stock being within the district and capable of transfer within the district on the books of the corporations at their principal offices therein, the securities constitute property within the district within the meaning of section 57 of the Judicial Code.

In Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, a suit was brought in a Circuit Court of the United States for the Western District of Michigan against a mining corporation organized under the laws of that state and against certain individual defendants holding shares of stock in that corporation and being citizens of the state of Massachusetts. The suit was brought by plaintiffs living in another state. They sought a decree removing a cloud upon their title to the stock. They alleged in their bill that the shares of stock in the defendant company constituted personal property "and its location is where the company is incorporated and nowhere else." The Supreme Court reversing the court below held that the locus in quo of the stock was in Michigan and in the district in which the suit was brought within the meaning of the act of Congress now under consideration. We think that case is distinguishable from this in view of the fact that in this case the corporations maintained their principal office, not in the state in which they were incorporated, but in the district in New York in which the suit was brought and where its books are kept and transfers made.

In Blake v. Foreman Bros. Banking Company (D. C.) 218 Fed. 264, District Judge Carpenter held that certificates of stock in a foreign corporation properly indorsed and delivered as security to a trustee with power of sale in case of default are "property" having a situs at the place of business of the trustee under section 57.

[6] Assuming then that there is property within the district within the meaning of section 57, the question remains whether the complainant has such an interest in it as can be asserted by him in the suit which he has brought. Is the suit one to enforce a legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon title to real or personal property within the district? If the suit is not one to enforce a lien upon or claim to property within the district, or to remove a cloud upon the title to such property, the court was without jurisdiction to proceed.

In Shainwald v. Lewis (D. C.) 5 Fed. 510, the court construed the language of the section now under consideration, and it was declared that—

> The section "was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words 'legal or equitable lien or claim against real or personal property,' Congress intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity. This is manifest to my mind from the section as it stands; but when we look to the Act of March 3, 1875, which was evidently intended as a substitute for section 738, all doubt vanishes. Such expressions as were obscure in the latter section are by the former made clear."

And the doctrine announced in the above case is followed in the subsequent decisions. See Dormitzer v. Illinois & St. Louis Bridge Co. (C. C.) 6 Fed. 217; Jones v. Gould, 149 Fed. 153, 80 C. C. A. 1; Wabash Railroad Co. v. West Side Belt Railroad Co. (D. C.) 235 Fed. 645.

[7] The term "lien" is the right which a creditor has to obtain satisfaction of a debt or duty out of a specified res which is owned by another. It is a charge or incumbrance upon specific property which is security for the payment of money or the performance of some duty. See Hotchkiss v. National City Bank of New York (D. C.) 200 Fed. 287, 291; In re National Cash Register Co., 174 Fed. 579, 581, 98 C. C. A. 425; In re Maher (D. C.) 169 Fed. 997, 999; Hardin v. Kelley, 144 Fed. 353, 354, 75 C. C. A. 355; In re Bennett, 153 Fed. 673, 690, 82 C. C. A. 531. Unless there is a specified res there can be no lien. It certainly will not be said that any legal lien exists in the complainant. And we are satisfied that no equitable lien is possessed by him. Judge Story, in his Equity Jurisprudence (volume 2, § 1215), refers to "that class of implied trusts, arising from what are properly called equitable liens." And he says that a lien is not, strictly speaking, either a jus in re, or a jus ad rem; that "it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing." And in section 1217 he says that equitable liens arise from constructive trusts. The instances are numerous in which courts of equity acting upon the theory of an implied trust convert a party who has received property which he cannot conscientiously withhold from another into a constructive trustee, making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien. I Fonbl. Eq. B. 1, c. 2, § 2, note K. A lien based upon the fundamental maxims of equity may be implied and declared by a court of chancery out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. If one enters into a valid executory agreement whereby he indicates his intention to make some particular property a security for a debt, or promises to convey, or assign or transfer the property as security, the courts of equity hold that the mere agreement creates an equitable lien which is enforceable against the property not only in the hands of the promisor but in those

of his voluntary assignees and purchasers or incumbrances with notice. The doctrine rests upon the maxim that equity regards as done that which ought to be done. Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865; Ketcham v. St. Louis, 101 U. S. 306, 25 L. Ed. 999; Farmers' Loan & Trust Co. v. Penn. Plate Glass Co., 103 Fed. 132, 151, 152, 43 C. C. A. 114; 56 L. R. A. 710; Pinch v. Anthony, 8 Allen (Mass.), 536; Pomeroy's Eq. Jur., vol. 3, § 1235. And in Legard v. Hodges, 1 Vesey, Jr., 478, Lord Thurlow said:

"I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and therefore, this is a pure trust estate."

[8] In the case under consideration it was agreed between the defendant Bright and the complainant that the latter should render certain services to Bright in carrying through the enterprise and that the complainant should have 30 per cent. of the profits arising from the enterprise. The written agreement which appears in the answers gives the complainant "thirty per cent. (30%) of the net profits that you (Bright) may make in negotiating the said concession, after paying out or deducting all expenses, obligations or commissions, or other sums whatsoever that you may incur in connection with the said business, and a further sum of £5,000 to be deducted for your personal expenses." But there was never any agreement to give the complainant a lien on moneys paid or on stocks or bonds delivered to Bright and out of which the profits were to be realized. Bright cannot be regarded as a constructive trustee holding such moneys and stocks and bonds in trust for the complainant. He was at liberty to use the moneys and stocks and bonds as he saw fit and could pass an unincumbered title to one with notice. He was simply a debtor to the complainant for 30 per cent. of the net profits after all proper deductions had been made. "Profit" is the gain made in a business transaction and represents the excess of acquisition over expenditure. Providence Rubber Co. v. Goodyear, 9 Wall. 788, 804, 19 L. Ed. 566; People v. Niagara County Supervisors, 4 Hill (N. Y.) 20, 23; Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co., 79 Md. 103, 29 Atl. 69; Mitchell v. Chicago, Rock Island and P. R. Co., 138 Iowa, 283, 114 N. W. 622. Profits and net profits usually mean the same thing. Thomas v. Columbia Phonograph Co., 144 Wis. 470, 129 N. W. 522. There is no reason to doubt that the profits out of which the complainant in this case was to be paid his 30 per cent. meant net profits. We cannot see, therefore, that Vidal had any lien upon any specific sum of money or upon any specific security delivered to Bright or to the Security Company on his behalf.

[9] It remains to inquire, if Vidal had no lien, whether he had such a "claim" to property within the district as was sufficient to justify the court in assuming jurisdiction under the section under consideration. The term "claim," as used in the section, is the right to lay claim to a

specific property which is in another's possession. Webster's New International Dictionary defines the word as follows:

"2. A right to claim something; a *title* to any debt, privilege, or other thing in the possession of another; also a *title* to anything which another should give, or concede to, or confer on, the claimant.

The Century Dictionary defines it as follows:

"3. A right to claim or demand; *a just title* to something in one's own possession or in the possession or at the disposal of another."

The legal definition given by Jacobs is:

"A challenge of interest in anything that is in the possession of another, or at least out of a man's own possession."

As quoted by Jacobs from Plowden, giving the definition of Chief Justice Dyer, it is "a challenge of the ownership or property that one hath not in possession but which is detained from him by wrong." In Silliman v. Eddy, 8 How. Prac. (N. Y.), 122, 123, the word "claim" is defined to mean "a demand of anything that is in the possession of another." The term "claim" must be construed in the light of the context, and so construed it cannot be understood as giving to a mere general creditor a right to sue a nonresident in any district in which he can find any property belonging to his debtor when he himself has no lien and no claim of ownership in the property to assert. It has been held that where the plaintiff has no special claim against the property, or any right in or to it different from any other general creditor of the defendant, or any one having a right to sue the defendant in tort, he cannot use the existence of the property within the district as a basis for bringing his suit within it against a defendant who is not an inhabitant of the district or found in the district or does not voluntarily appear therein. George v. Tennessee Coal, Iron & R. Co. (C. C.) 184 Fed. 951.

In Ladew v. Tennessee Copper Co. (C. C.) 179 Fed. 245, 251, Judge Sanford, construing section 57 and the words "claim to * * * property," said that—

They "are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based, * * * and do not include the assertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use."

And it cannot be said that Vidal asserts any claim in the nature of ownership or proprietary interest in the property which is within the district.

In Lengel v. American Smelting & Refining Co. (C. C.) 110 Fed. 19, a stockholder who resided in Pennsylvania sued in a Circuit Court of the United States in New Jersey to restrain the enforcement of a contract by which the New Jersey corporation sold certain of its stock to

its codefendants who were citizens of New York. In dismissing the bill Circuit Judge Gray said that an "ingenious" argument was made in favor of jurisdiction under section 738 of the Revised Statutes (section 57 of the Judicial Code) on the ground that the subject-matter of the suit was the capital stock of the New Jersey corporation, and as such must be regarded as property within the district." He continued:

"It is very clear that the present suit is not brought to 'enforce any legal or equitable lien or claim against real or personal property,' within the meaning of this statute. * * * The enforcement of an antecedent existing lien held by the complainant is not the subject-matter of this suit."

[10] Neither can it be said that the suit is one to remove an incumbrance, or lien, or cloud upon the title to real or personal property. One can only bring a suit to remove "an incumbrance, or lien, or cloud upon the title" to property to which he is himself entitled. And a mere general creditor who has not reduced his claim to judgment has no such interest in the property of his debtor as brings him within this provision.

In Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the suit was in equity to subject to the payment of a debt alleged to be due and owing to the complainants by the defendant, certain property of the defendant within the district. The equitable suit was brought to enforce the application of the property to the purposes intended by the contract of the parties. The court in holding that the suit could not be maintained said:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding."

And in the case now before us the suit is also in equity to secure the payment of a debt, although in this suit and in aid thereof an accounting and discovery is asked. And in this suit, as in that, the suit is to enforce the application of property within the district to the purposes intended by the contract of the parties. But in this case, as in that, the complainant has "no interest in the property and no lien thereon."

The conclusion we have reached is that the suit is one to enforce the payment of a debt and for an accounting, and that the facts alleged do not show a lien or a claim of ownership in specific property, and therefore is not within section 57 of the Judicial Code. And that as the suit was not within the section the court was without jurisdiction over Bright with whom Vidal made the contract which is the basis of the suit and who is a necessary party, and who is not an inhabitant of the district and has not been served, and has not voluntarily appeared.

This conclusion makes it unnecessary to consider a motion to dismiss the appeal for a reason now to be mentioned. Upon the argument of the appeal in this court a motion was made for an order dismissing the appeal on the ground that the bonds and shares of stock involved in the litigation had become valueless, and that the appeal therefore

brought up only a moot question. We reserved our consideration of that motion and allowed the argument of the appeal to proceed with the understanding that we would dispose of the question thus raised after we had examined into the whole case.

[11, 12] We have no doubt that it is the duty of a court to dismiss an appeal and not proceed to formal judgment if pending the appeal an event occurs without any fault of the defendant which renders it impossible for the court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever. Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; Board of Flour Inspectors v. Glover, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382; Kimball v. Kimball, 174 U. S. 158, 162, 19 Sup. Ct. 639, 43 L. Ed. 932. And the cases show that facts which have occurred since the decree and which make the question at issue moot and which are outside of the record may be proved by extrinsic evidence. See Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Dakota County v. Glidden, 113 U. S. 222, 225, 226, 5 Sup. Ct. 428, 28 L. Ed. 98; California v. San Pablo & Tulare Railroad, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; Ridge v. Manker, 132 Fed. 599, 601, 67 C. C. A. 596. If we had concluded that the court had jurisdiction of the case it might have been our duty to have dismissed the appeal if convinced that the property within the district had become valueless and that the question presented was moot. But it is unnecessary now to enter upon a consideration of that phase of the matter.

The decrees appealed from are reversed, and the case is remanded, with directions to dismiss the bill of complaint and the cross-bills of the Pan-American Transcontinental Railway Company and the National Railway Construction Company for want of jurisdiction. Costs of the appeal to be taxed against John J. McKelvey and the Railway and Construction Companies.

HOUGH, Circuit Judge, dissents.

On Petition for Rehearing.

PER CURIAM. We dismissed the original bill in this case because the plaintiff had no lien upon or claim to the securities mentioned under section 57 of the Judicial Code, and also because the defendant Bright was not an inhabitant of the Southern district of New York or served therein. Following the general rule that a cross-bill falls with the original bill, we also dismissed the counterclaims which under equity rules 30 (201 Fed. v, 118 C. C. A. v) and 31 (198 Fed. xxvii, 115 C. C. A. xxvii), are substituted for cross-bills of the defendant Pan-American Transcontinental Company and of defendant National Railway Construction Company against defendant Charles Bright and defendant South American Securities Company. The Securities Company only has appealed.

[13, 14] As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, except in the case of the defendant Bright, they should not have been dis-

missed, but should have been treated as original bills upon the dismissal of the original bill. Bates on Federal Equity Procedure, § 386; Markell v. Kasson (C. C.) 31 Fed. 104; Jesup v. Illinois Central R. R. Co. (C. C.) 43 Fed. Rep. 483; San Diego Flume Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548. The defendant Bright, however, although a citizen of the United States, not being a citizen of any state, because he has been domiciled and engaged in business at Buenos Aires, Argentina, for many years, the counterclaims were properly dismissed as to him; the jurisdiction of the court being limited to controversies between citizens of different states.

[15] We agree with the court below that the contracts between the Securities Company and the Railway Company and the Construction Company should be canceled and rescinded, and all securities delivered thereunder to the Securities Company, in its possession or in possession of the receiver, be returned to those companies, respectively, and that the counterclaim of the Securities Company against John J. McKelvey and Alpheus H. Favour, individually and as copartners, for $500,000 damages, should be dismissed, and that the amended bill of complaint be dismissed as to the defendants Frederick R. Bright, William F. Piper, Charles R. Demarest, Edward I. Thompson, Ralph H. McKelvey, and Warren G. Thompson. But the decree must be reversed because the original bill should have been dismissed, with costs to defendant Charles Bright against Vidal, and the counterclaims of the Railway Company and Construction Company against defendant Charles Bright should also have been dismissed, with costs of both courts, payable one-half by the Railway Company and one-half by the Construction Company, and the affirmative relief before mentioned on the counterclaims should have been given to the Railway Company and the Construction Company, with costs of both courts against the Securities Company, and, finally, the rights of persons not parties or persons not within the jurisdiction of the court should not have been determined.

Decree reversed, and the court below is directed to enter a decree in accordance with this opinion, making such provisions for payment of the fees of the special master, receiver, and stenographers as to it shall seem proper.

WILSON et al. v. ALEXANDER.

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

No. 3753.

1. **Courts ⇐264(4)—Federal court has ancillary jurisdiction to enjoin suit in state court to relitigate matters determined by its decree.**

A federal court has ancillary jurisdiction to interpret and enforce its judgments, decrees, or orders, and to that end may entertain a supplemental bill, after decree, to enjoin prosecution of a suit in a state court which attacks in a substantial respect the effect of such decree.

2. Courts ⊜264(4)—Federal court should enjoin suit in state court to alter effect of its decree.

Where the decree of a federal court foreclosed liens on property set up in a cross-bill and adjudged that a conveyance of the property by defendants to cross-complainant made in satisfaction of the decree vested absolute title in him free from any right, title, or claim of defendants, and made a sale unnecessary, a subsequent suit in a state court by one of the defendants to establish an alleged agreement made prior to the decree, by which cross-complainant was to hold title to the property in trust, as security only, *held* an attempt to alter the effect of the decree of the federal court, which entitled cross-complainant to an injunction to restrain its prosecution.

Appeal from the District Court of the United States for the Northern District of Texas; W. Lee Estes, Judge.

Suit in equity by McCornick & Co., Bankers, against the Texas Loan & Trust Company and others. On supplemental cross-bill by Fred P. Wilson and others, executors of the will of J. B. Wilson, deceased, against C. H. Alexander. From the decree cross-complainants appeal. Reversed.

Francis Marion Etheridge, of Dallas, Tex. (Etheridge, McCormick & Bromberg, of Dallas, Tex., on the brief), for appellants.

R. H. Ward, of Wichita Falls, Tex., and John H. Bickett, of San Antonio, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. To a bill filed in the United States District Court for the Northern District of Texas by McCornick & Co., Bankers, a corporation of Utah, attacking a certain issue of bonds of the Texas Loan & Trust Company, and a deed of trust executed to a trustee to secure the same, J. B. Wilson was made a defendant, as the holder of said bonds, together with C. H. Alexander, the Texas Loan & Trust Company, and L. R. Terry, trustee under said trust deed. Wilson filed a cross-bill, asserting the ownership of said bonds, received from Alexander, and seeking a foreclosure of said trust deed and the enforcement of a vendor's lien on said property arising on a purchase-money note. To the cross-bill the complainant and all the defendants were made parties. The cross-bill alleged that the entire issue of bonds was originally owned by Alexander, who was also the sole stockholder of the Texas Loan & Trust Company, that he had pledged said bonds to Wilson to secure a loan of $250,000 which fell due, and that Wilson had become the owner of said bonds, and also had taken up and held a purchase-money note of the Texas Loan & Trust Company payable to one Dees, carrying a vendor's lien on the property covered by said trust deed, known as the Northern Texas Building, in the city of Dallas, Texas.

Alexander entered an appearance to the cross-bill, which prayed the foreclosure of the trust deed securing said bonds, and of said vendor's lien, against all parties, including Alexander, and "that an accounting be had of all matters set up in the cross-bill, and that all parties to the

cause be required to set up and to have adjusted all their rights, claims, and equities in the premises." By written stipulation filed in said cause it was agreed by all the parties that the original bill should be dismissed without prejudice to Wilson's cross-bill; that a final decree should be entered on the cross-bill for all the relief therein prayed, the allegations of said cross-bill being taken as true; that, if he preferred, Wilson might dismiss his cross-bill without prejudice.

Wilson did not elect to dismiss his cross-bill, and a final decree was entered thereon which adjudged: That the allegations of the cross-bill were true, that Wilson was entitled to the relief prayed therein, that the $250,000 of bonds were duly issued and secured by said deed of trust, and that they passed to the hands of Wilson, who became the owner and holder thereof. It adjudged the default in interest to have occurred, and the right therefrom for a decree for the full amount of principal and interest, and for the foreclosure of said deed of trust. It also gave judgment for the $25,000 purchase-money note, and decreed the foreclosure of the vendor's lien securing the same. It further decreed that the defendants in said cross-bill (naming each), "and all persons claiming under them, be and they are hereby foreclosed of all right, title, claim, and interest in or to the said real estate." It further decreed that as the Texas Loan & Trust Company, pursuant to resolutions of its directors and stockholders, had on that day executed and delivered to Wilson a deed conveying all of said property in satisfaction of said judgments so decreed, it was unnecessary to order a sale under the decree, and, the costs having been paid, it was ordered that, on the decree being entered and the record completed in the cause, it be no longer retained on the dockets of said court. The decree bears date June 7, 1912.

On April 25, 1919, C. H. Alexander, one of the persons named as having been "foreclosed of all right, title, claim, and interest in or to the said real estate," filed in the district court of Dallas county, Tex., a petition which undertook to recite the acquisition by Alexander of his interest in the stocks and bonds of the Texas Loan & Trust Company and the loans made by Alexander on the security of the stocks and bonds and the suit instituted by McCornick & Co., Bankers. He alleged that said issue of bonds and the trust deed securing same were void under the Constitution of Texas, as not having been issued by the corporation for actual money, and that while the deed from the Texas Loan & Trust Company recited that it was made in satisfaction and release of the judgment rendered on June 7, 1912, in said suit of McCornick & Company, Bankers, v. Texas Loan & Trust Company et al., it was in truth made in order to secure the indebtedness due by Alexander to Wilson and to place him in possession as a mortgagee; that this was in pursuance of an agreement made prior to the execution and delivery of said deed, Wilson agreeing to dismiss his cross-bill; that Wilson had collected from the rents of the property more than enough to discharge the indebtedness due from Alexander to Wilson; and prayed for an accounting and a decree canceling and holding for naught said deed to the North Texas Building, as well as the $250,000 of bonds.

Wilson thereupon filed, in the United States District Court for the Northern District of Texas, a bill, styled a supplemental cross-bill and bill of revivor, entitled in the said cause of McCornick & Co., Bankers, v. Texas Loan & Trust Company et al., reciting the former proceedings in said cause and the decree entered therein, alleging that by said decree it was adjudged that Alexander was foreclosed from asserting any ownership of, claim to, or interest in said property, or any part thereof, and that the deed made to said Wilson by the Texas Loan & Trust Company was in satisfaction of said decree in said cause. He prayed an injunction against the prosecution of so much of said state court suit as attempted to disregard or overthrow the decree in said cause above recited, and that said decree be construed and enforced, so as to forever bar Alexander from in any wise asserting any ownership of, claim to, or interest in said property, or any part thereof, or from asserting in said state court, or otherwise, that he has any claim thereto. Wilson having died pendente lite, his executors were made parties plaintiff in his stead.

Alexander answered said supplemental bill, first moving therein to dismiss the same: (a) Because it sought to enjoin a proceeding in a state court, in violation of Judicial Code, § 265 (former Rev. St. § 720, Comp. St. § 1242). (b) Because complainant can interpose said decree as res judicata by defense in said state court case, and the presumption is that the state court will correctly construe it and give it full force and effect, and it must first appear that the state court has not done this before this court has jurisdiction. (c) Because the parties are not identical, in that Scott Greene is a party to the state court suit and was not to that in the United States District Court. (d) Because there are issues of law and fact set up in said state court petition which were not presented, litigated, or determined in the cause in this court. (e) Because, while it appears from the allegations of said supplemental bill and those in the state court petition that Wilson had such legal title to the mortgage bonds of said Texas Loan & Trust Company as would enable him to foreclose the mortgage securing the same, there was not presented to said United States court, and it did not determine by its decree, whether in foreclosing the lien on said property Wilson was acting under a collateral agreement with Alexander that, when he took title to said property, he should hold it as trustee for Alexander, which is the gravamen of the state court suit, which issue is not hostile to the judgment obtained by Wilson in this court, but is in complete harmony and subordination thereto.

Alexander further answered said bill, asserting again the allegations of his state court petition, except those attacking the validity of the stock and bonds of the Texas Loan & Trust Company, averring that they were made through a mistake of fact on the part of his counsel, and that the stock and bonds were issued for full value and in compliance with the Constitution and laws of Texas. By consent all proceedings in the state court suit were stayed pending the trial of the supplemental bill in the United States court. No preliminary injunction was applied for.

The original and cross bills and all amendments thereto and answers and cross-bills filed in the said case of McCornick & Co., Bankers, v. Texas Loan & Trust Company et al. were offered in evidence; also the appearance of C. H. Alexander in said case, the agreement made therein, under which the decree of June 7, 1912, on the cross-bill of J. B. Wilson, was entered; the substance of said decree; the resolutions of the board of directors and stockholders of the Texas Loan & Trust Company, signed by C. H. Alexander as president, reciting said decree, and that the Texas Loan & Trust Company cannot pay the judgments awarded thereby, except by the conveyance of all of its property, which is not worth more than the amounts so adjudged, and directing the sale of said property to Wilson and the execution of deeds thereto in satisfaction of said judgments, reciting that the draft of said deeds had been submitted to the meeting and were approved, also the deed from said Texas Loan & Trust Company to said Wilson, and an agreement, signed by Wilson and Alexander, dated February 1, 1913, reciting that Wilson was the owner of said North Texas Building, and giving Alexander an option until September 1, 1913, to acquire it from Wilson, who is therein stated to have the absolute title to and possession of said property. This agreement expressly stipulates that it shall extend only to September 1, 1913, and thereafter Alexander shall have no further right to acquire said property, and the agreement then expires. This agreement recites that, of the original $250,000 debt due by Alexander to Wilson, $200,000 had been paid by the sale of the $250,000 of bonds held as collateral, and that it left, with interest due thereon, $92,842.85 on June 1, 1912, for which sum Alexander was giving his note. A copy of Alexander's petition, filed in the state court on April 25, 1919, and also a copy of a petition filed in said state court by Scott Greene to recover on said note of $92,942.85, dated June 1, 1912, executed by Alexander to Wilson and indorsed by him to Scott Greene, were introduced. No oral evidence was introduced.

On June 25, 1921, the cause was heard and a final decree rendered, perpetually enjoining said Alexander from prosecuting so much of said state court suit as attacked the validity of said 250 bonds issued by said Texas Loan & Trust Company, but refusing all other relief, and dismissing said supplemental cross-bill, except as to the injunction granted. Wilson's executors have appealed from the decree dismissing said supplemental cross-bill and denying all further injunction, assigning as error the refusal to enjoin the prosecution of the state court suit as prayed, and the failure to hold that the state court suit constituted an original attack on the decree of said United States suit of June 7, 1912; that it constituted an attempt to relitigate issues finally adjudicated thereby, which decree must stand, unless vacated or modified by said United States court in said cause.

[1] If it be true that the proceeding filed by Alexander in the state court attacks, in a substantial respect, the effect of the decree rendered in the United States court on June 7, 1912, there can be no doubt of the jurisdiction of the United States court to entertain proceedings to construe and give full effect to its decree, and to protect one holding

under a deed made in accordance therewith. A case of such a character is not affected by Judicial Code, § 265 (Rev. St. § 720), prohibiting the enjoining by a United States court of a proceeding in a state court except under a law relating to proceedings in bankruptcy. In such case the United States court is protecting its previously acquired jurisdiction, which has resulted in a decree giving rights which are attacked by subsequent proceedings brought in a state court.

A striking illustration of this is afforded by the case of Gunter, Attorney General, etc., v. Atlantic Coast Line, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. Ed. 477. In a former suit, brought by parties in privity with the Atlantic Coast Line Railway, a decree was rendered adjudging that a railroad had a contract with the state exempting it from certain taxation. The state had become a party to said suit. For at least 25 years thereafter no further attempt was made to tax the property so declared exempt. Thereafter another attempt was made, and suits to collect such taxes were instituted in the state courts. Thereupon the defendant in said state court suits began proceedings in the United States Circuit Court for the District of South Carolina, filing a bill as ancillary to the former case, terminated for more than 25 years, setting up that the decree therein was res judicata as to the existence of the tax exemption, that the suits in the state courts sought to relitigate said question, and prayed an injunction. After holding that the state of South Carolina was a party to the original suit in the United States court, the court held an injunction would properly issue to enjoin the further progress of the suits in the state courts, and that in such a case section 720 of the Revised Statutes did not apply. Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. Ed. 477.

Where a cotton mill had been sold out under foreclosure proceedings in the United States Circuit Court, and thereafter a bill was filed in the chancery court of a state, seeking to redeem the mortgage on the ground that the entire proceedings in the United States court were void, because the complainant and defendant were citizens in fact of the same state, an ancillary bill was maintained to enjoin the state court suit and to assert the title acquired under the foreclosure proceedings. It was insisted that the injunction suit was not an ancillary, but an original, bill, and therefore the injunction forbidden by Revised Statutes, § 720. But the Supreme Court of the United States held:

"Under such circumstances there can be no doubt that the federal court may inquire and determine whether its proceedings were a nullity, and such inquiry is not an original proceeding, but ancillary to those which have already been had. In other words, a federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed. It may protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined. French, Trustee, v. Hay, 22 Wall. 250; Cole v. Cunningham, 133 U. S. 107; Root v. Woolworth, 150 U. S. 401. In this case, on page 410, it was said: 'It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading (9th Ed.) § 338:

"A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution." * * * The jurisdiction of courts of equity to interpret and effectuate their own decrees by injunctions or writs of assistance in order to avoid the litigation of questions once settled between the same parties, is well settled. Story's Eq. Jur. § 959; Kershaw v. Thompson, 4 Johns. Ch. 609, 612; Schenck v. Conover, 13 N. J. Eq. (2 Beasley) 220; Buffum's Case, 13 N. H. 14; Sheperd v. Towgood, Tur. & Rus. 379; Davis v. Black, 6 Beav. 393. In Kershaw v. Thompson, the authorities are fully reviewed by Chancellor Kent, and need not be reexamined here.'" Riverdale Mills v. Manufacturing Co., 195 U. S. 188, 195, 25 Sup. Ct. 629, 632 (49 L. Ed. 1008).

As was said in another case:

"In such cases, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Revised Statutes, restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. Sharon v. Terry, 36 Fed. 337, per Mr. Justice Field; French v. Hay, 22 Wall. 250; Deitzsch v. Huedekoper, 103 U. S. 494." Julian v. Central Trust Co., 193 U. S. 93, 112, 24 Sup. Ct. 399, 407 (48 L. Ed. 629).

The right to plead the decree of the federal court in defense to Alexander's suit in the state court is no reason why a resort should not be had to the equitable jurisdiction of the federal court. There is no remedy available at law in the federal court, except by the ancillary proceedings instituted in said court. National Surety Co. v. State Bank of Humboldt, 120 Fed. 593, 602, 56 C. C. A. 657, 61 L. R. A. 394; St. Louis & San Francisco Ry. Co. v. McElvain (D. C.) 253 Fed. 123; Gunter v. Atlantic Coast Line, 200 U. S. 273, 293, 26 Sup. Ct. 252, 50 L. Ed. 477.

[2] The question therefore recurs: Does the claim set up in the state court suit trench upon the rights Wilson had acquired under the decree of June 7, 1912? The cross-bill in that case set up that Wilson was the owner of the 250 bonds, and the decree so adjudged; the cross-bill prayed an accounting between all the parties, and that they be required to set up all their rights, claims, and equities, in the premises; and the decree adjudged that all right, title, claim, or interest of Alexander in and to the real estate was foreclosed, and that the deed from the Texas Loan & Trust Company was made in satisfaction of the debts evidenced by the decree and rendered any sale under the decree unnecessary.

The state court bill seeks to assert an agreement, claimed to be then existing, by which Alexander held an equitable interest in the property, and by which Wilson went into possession of the property only as a mortgagee in possession, liable to account to Alexander for rents, issues, and profits. It seems to us that a decision by the state court in favor of Alexander would result in a radical alteration of the terms, and certainly of the effect, of the decree of June 7, 1912. The legal effect of this decree is to adjudge that the deed of the Texas Loan & Trust Company to Wilson vested in him the absolute title to said real estate, and that Alexander and the other named defendants had no right, title, interest, or claim therein or thereto.

If this decree was incorrect, and if at the time Alexander had a right

to redeem from foreclosure, and if Wilson was to hold only as a mortgagee in possession, it should have been so declared in the decree. Certainly it cannot be attempted in proceedings in another court to ingraft a trust, claimed to exist at the time, on the decree, which expressly debars Alexander, the party claiming as the beneficiary, of all right, title, interest, or claim.

No evidence tending to prove the existence of any such agreement, as is now asserted, appears in the statement of evidence in this case. None appears to have been offered. On the contrary, an agreement dated February 1, 1913, was introduced, reciting that Wilson was then the absolute owner of the property, and permitting Alexander to acquire it by September 1, 1913, providing that, if not acquired by this time, Alexander should have no further right to acquire the same.

We think that the court erred in not construing its former decree as vesting in Wilson the absolute title to said real estate as against Alexander and the other parties to the cross-bill in said United States court suit, and in not enjoining Alexander from prosecuting said suit in the state court to the extent prayed for in said supplemental cross-bill.

So much of the decree of the court below as refuses the injunction prayed for and dismisses the supplemental cross-bill is reversed, and the case remanded for further proceedings consistent with this opinion.

INTERSTATE COMPRESS CO. v. AGNEW.

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

No. 5634.

1. **Appeal and error ⟸1050(1)—Evidence ⟸317(11)—Testimony as to analysis of water, held hearsay and prejudicial.**
   In an action for loss of cotton by fire on the ground that defendant was grossly negligent in failing properly to open and flush hydrants to keep them from becoming clogged, testimony of a plumber that the city water contained 106 pounds of mud to the thousand gallons "according to the analysis I had made of it," that he did not make the analysis himself, but had it made by another, was bald hearsay and prejudicial, in the absence of proof as to who made the analysis or his qualifications.

2. **Bailment ⟸31(3)—Evidence held insufficient to show gross negligence in providing equipment for putting out fires.**
   In an action against a compress company to recover for cotton lost by fire, evidence *held* insufficient to warrant court in charging the jury that they might return a verdict for the plaintiff if they found that the defendant was guilty of gross negligence in providing equipment to prevent loss by fire.

3. **Trial ⟸139(1)—Scintilla of evidence not enough to take case to jury.**
   The rule in the federal courts is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside, if rendered, and any evidence, a scintilla of evidence, is not sufficient to warrant such a refusal, and the question of law arises on a request for a peremptory instruction made before the case goes to the jury.

---

4. **Appeal and error ⇐997(3)—Appellate court must review ruling refusing peremptory instruction.**
On request for a peremptory instruction before case goes to the jury, the jurisdiction is conferred and the duty is imposed on the trial court to decide it, and, on exception, on the appellate court to review that decision, and, the jury having no jurisdiction of this issue of law, its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction, or relieve it of its duty to review its decision by the trial court.

5. **Bailment ⇐14(1)—Compress company held only liable for gross negligence for loss occasioned by fire.**
Compress company, keeping cotton on platform under contracts providing that it was "not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company," was not liable for loss of cotton by fire for mere negligence, but owner must show gross negligence.

6. **Bailment ⇐31(3)—Evidence insufficient to support finding of "gross negligence" of compress company in maintaining system to protect cotton against fire.**
In an action against a compress company to recover for loss of cotton by fire, based on gross negligence only, *held* that there was no substantial evidence that defendant was guilty of gross negligence, in view of Rev. Laws Okl. 1910, §§ 2917, 2919, defining gross negligence as want of slight care or diligence.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by J. W. Agnew against the Interstate Compress Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

James R. Keaton, of Oklahoma City, Okl. (Frank Wells and David I. Johnston, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Everett Petry, of Tulsa, Okl., for defendant in error.

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

SANBORN, Circuit Judge. This is an action by J. W. Agnew to recover of Interstate Compress Company, a corporation, damages which he alleges were inflicted upon him by the gross negligence of the defendant in providing equipment for its compress platform and plant, and in maintaining in efficient condition such equipment to prevent fire, which, on November 16, 1916, destroyed a large part of its plant and 294 bales of the plaintiff's cotton, which was on the defendant's compress platform. The parties stipulated to the effect that if the defendant's gross negligence was the proximate cause of the loss of this cotton the plaintiff would be entitled to recover $17,485.66, and at the close of the trial the jury returned a verdict for the plaintiff for that amount and interest.

At the time of the fire the plaintiff's cotton was held by the defendant as its bailee, on its compress platform, under contracts which pro-

vided that it was "not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company." At a former trial the court below held that the defendant could not limit its liability in this way by agreement, but this court was of the opinion that the contract was legal and valid, and a new trial was directed. Interstate Compress Co. v. Agnew, 255 Fed. 508, 168 C. C. A. 199.

The chief complaints of this new trial are: (1) The admission of incompetent evidence; (2) the charge of the court that, if the jury should find that the defendant was guilty of gross negligence in providing the equipment of its compress platform and plant, they might return a verdict for the plaintiff; and (3) that it denied the request of the defendant that it direct the jury to return a verdict in its favor.

The origin of the fire was unknown. It was first discovered by the defendant's night watchman about 6 o'clock in the afternoon. He immediately called his helpers, went to one of defendant's hydrants on the main which led from the water system of the city of Altus the source of the water used by the defendant for protection, attached 100 feet of hose to this hydrant which reached to within about 10 feet of the fire, and turned the water on, but the stream was so weak that it did not reach the fire. If the stream had been such as a pressure of 60 pounds to the square inch ordinarily produced, he could then have extinguished the fire. He immediately attached hose to and turned the water on to a second hydrant near the fire, but it produced nothing but air. By this time the fire had so increased that he could not have extinguished it if a hydrant had produced a powerful stream.

[1] It was one of the theories of the plaintiff that the reason why these hydrants failed to produce forcible streams was that the city water used contained much sediment, that this sediment had clogged the hydrants or the mains of the compress company by reason of the gross negligence of the defendant in failing properly to open and flush the hydrants. In its endeavor to establish this theory the plaintiff's counsel called a witness to testify that he was a plumber and had lived in Altus 6½ years, that the source of the water supply of that city was surface water which drained into a lake whence the city took its water. After this testimony had been received the plaintiff's counsel asked this witness what the condition of that water was as to mud or silt in it. Defendant's counsel objected to the question on the grounds that no proper foundation had been laid for an answer to it; that no showing had been made that the witness was qualified to make an analysis of the water to determine the percentage of sediment it contained; that the witness showed that he had the analysis made and did not make it himself; that he did not show that it was made by anybody that was qualified to determine the fact; and that the answer was incompetent and hearsay. The court overruled these objections, the defendant excepted, and the witness answered, "Well, it had 106 pounds of mud to the 1,000 gallons, according to the analysis I had made of it." Counsel for the plaintiff, in his argument in this court, gives weight to this answer as he probably did before the jury. The answer

was prejudicial to the defendant, was bald hearsay, clearly incompetent, and its receipt was error.

[2] Another specification of error is that the court charged the jury that they might return a verdict for the plaintiff if they found from the evidence that the defendant was guilty of gross negligence in providing its equipment for preventing loss by fire of cotton on its compress platform and in connecting that equipment with the water system of the city when the fact was that no substantial evidence of such neglect had been introduced. When the court charged the jury, these facts relative to this specification had been established by uncontradicted evidence. At the time of this fire the defendant had a plant, consisting of furnaces, boilers, presses, and other machinery for receiving, storing, and compressing cotton, surrounded by several acres of platforms for storing and keeping cotton in the southwestern portion of the city of Altus, and it was engaged in operating this plant and using this platform, on which there were about 9,000 bales of cotton. The city of Altus had provided and used for several years, to protect itself and its citizens from fire and for other purposes, a city water system consisting of a standpipe, pumps, and mains which were connected with a lake that was supplied with water by surface drainage from the higher grounds surrounding it. This system was capable of producing a pressure of 60 pounds to the square inch and of throwing a stream of water, from a 2½-inch nozzle of a hose connected with a 4-inch main, 65 to 75 feet. The mains of the city system in that part of the city in which the defendant's plant and platforms were located were 4 inches in diameter. The platform of the defendant on which the plaintiff's cotton was, was about 4 feet above the ground. To prevent the injury and destruction by fire of its platform, its boilers, engines, and machinery, and the cotton on the platforms, the defendant had installed and was maintaining an elaborate and properly laid and distributed system of water mains, hydrants, hose, and water barrels throughout its platforms, and had connected this system with the water system of Altus by a main of the same diameter, 4 inches, as those of the city water system in the southwestern part of the city. It had provided 18 hydrants, properly distributed throughout the platforms, and had furnished every hydrant with 100 feet of hose with a nozzle 2½ inches in diameter. It had provided 140 barrels distributed throughout the platforms 40 feet apart, filled and kept filled within 6 or 8 inches of their tops with water. It had provided a night watchman, who, at the time of the fire, had just completed his first round and found no fire where it broke out. This watchman was required to patrol the compress platform at night, and record his presence at 15 properly distributed stations once in each 30 minutes. This water system had been previously used to throw water on burning cotton from one of the hydrants for an hour, and had put out that fire. This system of fire protection had repeatedly been inspected and approved by an inspector of the companies insuring the property, and so far as this record discloses no inspector or other person had ever complained or charged, and no witness came at the trial to testify, that this system was not a reasonably adequate equipment to protect the plant, the plat-

form, and the cotton against fire, and our conclusion is that the court fell into error in its charge to the jury that they might find the defendant guilty of gross negligence in providing this equipment to prevent loss by fire and connecting it with the city water system, because there was no substantial evidence in this case to sustain such a finding.

A further complaint of counsel for the defendant is that the court refused to grant its request to instruct the jury to return a verdict in its favor on the ground that there was no substantial evidence in the case that it was guilty of gross negligence, either in providing or in maintaining its equipment to prevent loss of the cotton by fire.

At the close of the trial the court properly charged the jury that there was no other ground than (1) gross negligence in providing the equipment to prevent loss by fire, and (2) gross negligence in maintaining such equipment on which the jury could lawfully find for the plaintiff. Our examination of the record has convinced that there was no substantial evidence to sustain a verdict of gross negligence in providing the equipment, and the only question remaining, presented by the refusal to instruct for the defendant, is Was there any substantial evidence of gross negligence of the defendant in maintaining the equipment in an efficient condition? The evidence on this issue is too voluminous for citation in detail, but the general effect of it may be stated. The plaintiff produced testimony to the effect that when the fire was discovered the two hydrants in the defendant's system first opened produced, one a weak and useless stream of water, and the other none at all, and that when these had been tried it was too late for the watchman to put out the fire, that when the members of the city fire department and the officials and employees of the city arrived the city hydrant near the connection of the city system with the compress system would not produce an efficient stream, but that the reason for this was that several of the hydrants of the compress system were then open, that these officers caused the main connecting the compress system to the city system to be cut and capped and then the city hydrant threw a stream 60 to 75 feet from the nozzle of the hose; that shortly after the fire started the pressure on the city system at the city water plant was 60 pounds to the square inch, and this was ordinarily sufficient to throw an efficient stream from 65 to 75 feet from the nozzle of 100 feet of hose attached to a hydrant; that in their opinion there was no obstruction in the mains of the city; that the water derived from the lake carried sediment; that this sediment settled in dead ends of mains in pipes and in hydrants, and if they were not flushed once in from one to four weeks it sometimes clogged a hydrant or main in the city system so that it required two or three minutes, and in some cases longer, after it was opened to clear the main, pipe, or hydrant and cause it to throw an efficient stream; and that in the opinion of some of the witnesses for the plaintiff the failure of the two hydrants of the compress company to produce forcible streams was because they had not been properly flushed and had become clogged with sediment. The plaintiff, however, produced no witnesses who testified that any of the compress company's hydrants had ever been so clogged, or that the defendant or any of its employees

had ever experienced or been notified of any such clogging before the fire. On the other hand there was substantial evidence that the first hydrant opened after the fire started was on that main which connected the city water system with that of the compress company, that the boilers of the company were in operation on the day of the fire, that 12,000 gallons of water per day were required by them when thus in operation, that this amount of water had been drawn through this main by the engineer of the compress company on that day and used in the boilers and that he had observed nothing unusual in the supply or pressure, but this water was drawn by pumps so that its use in this way would not measure the pressure; that he cleaned the boilers once a week on Sunday; that on the Sunday before the fire he used the compress company's hydrant 20 feet south of the boilers and the hose therewith to clean them and the pressure was as good as usual; that the 140 barrels had been filled at least once in each two weeks before the fire to restore the loss of water by evaporation, that at such fillings all the hydrants were ordinarily used for that purpose and the pressure had always been normal; that the engineer of the compress company had never known one of the hydrants of that company to become clogged or stopped up with mud; and there was no evidence that any one had ever known of the clogging of any of the mains or hydrants of the compress company with mud or sediment so that it did not throw an efficient stream before the fire. In this state of the record it is difficult, if not impossible, to hold that there was any substantial evidence of gross negligence in the defendant's maintenance of the system of protection against fire.

[3, 4] Counsel for the plaintiff invokes the rule adopted by some courts that if there is any evidence, including every reasonable inference the jury could have drawn from the same reasonably tending to support the verdict, the judgment will not be reversed for insufficient evidence, but that rule does not prevail in the federal courts. The rule in these courts is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside if rendered, and any evidence, a scintilla of evidence, is not sufficient to warrant such a refusal. This question of law arises on a request for a peremptory instruction made before the case goes to the jury. The jurisdiction is conferred and the duty is imposed upon the trial court to decide it and, on exception, upon the appellate court to review that decision. The jury has no jurisdiction of this issue of law, and its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction or relieve it of its duty to review its decision by the trial court. So it is that the question here is, was there such substantial evidence of the gross negligence of the defendant in maintaining its system of protection against fire as would justify a court in sustaining a verdict against the defendant?

[5, 6] The defendant was not liable for negligence. It was liable for gross negligence only. Its contract of bailment was an Oklahoma

contract. The statutes of Oklahoma declared that gross negligence consists in the want of slight care or diligence. Oklahoma Revised Laws 1910, §§ 2917, 2919. The court below charged the jury that—

"To fix liability on the defendant gross negligence is necessary, which is more than the want of ordinary care, and it is, as defined by the law, the want of slight care or diligence, that is, such as persons of ordinary care usually exercise about their own affairs of slight importance."

There was no exception to this portion of the charge and, conceding, as counsel for the plaintiff claims, that it was correct, without deciding or intimating any opinion on that question and testing the issue of substantial evidence thereby, a deliberate examination and consideration of the entire record in this case, the evidence of the laborate system of protection against fire which the defendant installed, of the mains, hydrants, water barrels, and of the connection of this system with the city water system; the evidence of the care exercised by the defendant in the maintenance of this system, of the filling of the water barrels, of the opening and use of the hydrants for that purpose, of the provision and use of the watchman, the absence of any evidence by any witness that he had ever known before the fire of the clogging of any main or hydrant of the compress company with sediment so as to render it inefficient, and the positive testimony of the witnesses of the defendant who had been in charge of and using the defendant's fire protection system that they had never experienced or known of such clogging before the fire, have left no doubt that there was no substantial evidence in this trial that the defendant either in providing or maintaining its system of protection of the compress platform and the cotton upon it against fire failed to exercise such slight care or diligence as persons of ordinary care usually exercise over their own affairs of slight importance, and the court below should have instructed the jury to return a verdict for the defendant. Let the judgment below be reversed, and let the case be remanded to the court below for a new trial.

REED v. ATCHISON.

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

No. 5753.

1. **Judgment ⇐951(4)—Evidence held not to show wife estopped by judgment against husband.**

   As respects contention that plaintiff's wife, to whom her husband had conveyed land 23 months before he brought action as owner in the state court against defendant and others for possession of the land, was bound by the judgment for defendants in that action, evidence *held* not to show that she authorized him to bring the prior action so as to bind her.

2. **Champerty and maintenance ⇐7(4)—Deed by one out of possession invalid only against adverse occupants.**

   A deed by one out of possession, under Rev. Laws Okl. 1910, § 2260, is valid as against all parties except those who were in possession claiming adversely at the time of the execution and delivery of the deed, and is

invalid as to them only if their possession was open, visible, continuous, and exclusive, with a claim of ownership such as to notify parties seeking information that the premises were not held in subordination to any title or claim of others, but against all titles and claimants.

3. Appeal and error ⇐1201(7)—Amendment to substitute real party in interest as plaintiff allowable after reversal.

Where plaintiff appellant sued for the use of his wife, and the wife at the trial testified that the suit was her suit, brought for her use and benefit, the trial court had power to allow an amendment to the complaint, and a substitution of the wife, as the real party in interest, for her husband as the plaintiff, and it would still have such power after reversal of its judgment for defendant, under Comp. St. § 1591.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Robert L. Williams, Judge.

Action by Andrew Reed, for the use of Mary E. Reed, against A. L. Atchison. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

J. V. Bourland, of Ft. Smith, Ark., for plaintiff in error.

N. A. Gibson, J. L. Hull, and T. L. Gibson, all of Muskogee, Okl., and J. B. Patterson, of Okemah, Okl., for defendant in error.

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

SANBORN, Circuit Judge. This is an action brought by Andrew Reed, for the use of Mary E. Reed, the alleged equitable and legal owner of 160 acres of land in the state of Oklahoma, against A. L. Atchison, for the possession thereof and $2,000 rents and profits during the defendant's possession. Both parties claimed title under the heirs of Prince Jefferson, a citizen of the Creek Nation who died intestate in 1901.

The plaintiff alleged and produced substantial evidence to prove that Losky was the wife of Prince Jefferson at the time of his death and his sole heir, that she and Lucy Kernal, a niece of Prince Jefferson and after her marriage Lucy Caesar, conveyed this land to Andrew Reed on July 6, 1904, and that Andrew Reed conveyed it to Mary E. Reed, his wife, for value on February 6, 1911.

The defendant claimed title under a deed from Lucy Kernal or Caesar to him and John W. Wright dated October 14, 1911, and a deed from Wright to him dated October 18, 1912. As the deed from Losky and Lucy Kernal to Reed antedated that from Lucy Kernal to Atchison and Wright, the title on the face of the deeds was in Mary E. Reed, and at the close of the plaintiff's evidence the court properly overruled a demurrer of the defendant to the evidence for the plaintiff.

[1] In his answer the defendant Atchison pleaded that the deed from Losky and Lucy Kernal to Reed was obtained by fraudulent representations, but he produced no evidence at the trial to sustain that plea which was denied by the reply. He also alleged in his answer that in an action in the district court of Okfuskee county in the state of Oklahoma, in which Andrew Reed was the plaintiff and Atchison and others were defendants, that court on February 10, 1914, adjudged

that Reed's claim to the land was baseless, that he and all persons claiming under him were barred from claiming any title or interest therein, and that the title was quieted in Atchison. He averred that the action in the state court was between the same parties and involved the same issues as were involved in the suit in the action now in hand. This averment was denied by the reply. In support of this second defense Atchison offered, and the court, over the objections and exceptions of the plaintiff, received in evidence, a certified transcript of the pleadings and judgment in the district court of Okfuskee county between Reed on the one hand and Atchison on the other, and then instructed the jury to return a verdict for the defendant Atchison. These rulings are assigned as error.

The objections of the plaintiff to the receipt in evidence of the certified transcript of the pleadings and judgment in the state court were many, and chief among them was this: That the action and judgment in that case were not between the same parties as is this action, in that Mary E. Reed was not a party to that action while she is the real and only party in interest in this action, that the fact that she is the only party in interest in this action appears from the allegations of the plaintiff that she is the owner of the land, that the title was vested in her by Andrew Reed's deed to her on February 6, 1911, that the defendant has taken the rents and proceeds of the land to the damage of Mary E. Reed in the sum of $2,000, and from the persuasive evidence in the record in support of these averments as well as from the prayer of the plaintiff which is for the possession of the land and for judgment for $2,000 "in favor of said Mary E. Reed."

Turning to the certified transcript of the pleadings and judgment in the action in the state court, we find that it was a plain action by Andrew Reed alone against six defendants, of which Atchison was one; that it was not commenced until January 28, 1913, more than 23 months after Andrew Reed had on February 6, 1911, deeded the land to Mary E. Reed; that Andrew Reed alleged in his complaint in the action in the state court that he was the legal and equitable owner of the land, that the defendants were in possession thereof, and had wrongfully kept him out of possession for more than a year to his damage in the sum of $800; and he prayed for judgment for possession, for $800 damages, and for a decree quieting the title to the property in himself. The defendants in that action answered and set up their claim of title under the deed of Lucy Kernal or Caesar of October 14, 1911, and there was a decree in their favor. But Mary E. Reed had acquired her claim and title to that property more than 23 months before that action was commenced, so that on the face of the transcript of the pleadings, judgment, and proceedings in the state court, she was not and could not be in any way bound or estopped thereby.

Counsel for Mr. Atchison, however, argue that Mary E. Reed was estopped because she was the wife of Andrew E. Reed and because of her testimony in this case in that she said she knew, when her husband brought suit in his name in the state court to put Atchison out, that she

had her deed then, that he brought that suit and lost it, and because she further testified in this way:

"Q. He did lose it? A. Yes, sir; but I was not in the suit at all.
"Q. But you were in the court there? A. No, sir; was not there.
"Q. You think you knew of the filing? A. Yes, sir; but I was at home.
"Q. You did not tell your husband much about it? A. He told me what the lawyers said, and what could I do?
"Q. He told you your lawyers said you could win it and could not stop it? A. He said he would have to bring it in his name and I could not tell the man what to do; I am not supposed to know the law."

Mrs. Reed testified that she might have known about the suit, but that she never authorized him to bring it or conferred with him about bringing it before it was brought or had "a thing in the world to do with it." This evidence is very far from sufficient to bar an owner of property from a hearing and trial of her claim to it by a judgment against her grantor in an action to which she was not a party commenced by him more than 23 months after he had conveyed the property to her, and we here dismiss this contention.

[2] Another claim of counsel for Mr. Atchison is: (1) The deed of Andrew Reed to Mary E. Reed was champertous and void under section 2260 of the Revised Laws of Oklahoma, which makes it a crime for any person to buy or to procure or make any covenant to convey any pretended right to lands or tenements in that state unless the grantor thereof or the person making such covenant or those under whom he claims have been in possession thereof or have taken rents or proceeds thereof for one year before such grant or conveyance was made; (2) the grantor in a deed champertous under this statute may maintain an action for the use of the grantee for the recovery of the land described in the grantor's deed although the grantee cannot, Powers v. Van Dyke, 27 Okl. 27, 29–32, 111 Pac. 939; 36 L. R. A. (N. S.) 96; (3) therefore Andrew Reed brought his action in the state court, not for himself but for Mrs. Mary E. Reed, on the ground that he was the grantor in his champertous deed to her and the judgment in that case estops her from claiming the land. But the short and conclusive answer to this argument is that when the transcript of the judgment and proceedings in the state court were offered in evidence, the major premise of this syllogism, the statement that the deed of Reed was champertous, had been admitted or proved to be untrue: First, by the legal presumption that neither Andrew Reed nor Mrs. Mary E. Reed committed the crime of making or taking such a deed, a crime which under section 2260 would have subjected each of them to liability to fine or imprisonment; and, second, by the pleadings and proof in this case.

Counsel cite in support of their statement that the deed to Mary E. Reed was champertous, the allegation which appears in the complaint in this action being:

"That at the time of the conveyance aforesaid by Andrew Reed to Mary E. Reed, neither the said Andrew Reed nor the person through whom he claimed title had been in possession of said land, nor had they taken rents or proceeds therefrom for the space of one year, and for this reason this action is brought in the name of said Andrew Reed for the use and benefit of his said grantee."

But, if the facts contained in this allegation had existed and had been admitted, they would not have rendered Mr. Reed's deed champertous. For a deed by a grantor who has not been in possession, and whose predecessors in interest have not been in possession and have not derived rents and proceeds from the land within a year preceding the execution of the deed, is valid against all parties, except those who were in possession claiming adversely at the time of the execution and delivery of the deed. And the possession of such adverse claimants requisite to invalidate such a deed "must be open, visible, continuous, and exclusive, with a claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants." Flesher v. Callahan, 32 Okl. 283, 285–287, 122 Pac. 489, and cases there cited. And there was no averment in any of the pleadings in this case, nor was there any evidence that the defendant Atchison or any of his predecessors in interest was in possession of this land claiming adversely on February 6, 1911, when Reed made and delivered his deed to Mrs. Mary E. Reed. Not only this, but Atchison in his answer denied the quoted allegation in the complaint. He denied each and every allegation of fact in said petition contained except such as are in his answer specifically admitted, and that allegation was not specifically admitted. In this state of the pleadings Mrs. Mary E. Reed was sworn at the trial of this case and testified that she was the person for whom this action was brought, a certified copy of her deed from Andrew Reed was offered and received in evidence without objection, and no evidence was offered or received in this case which tended to prove, either (1) that she or her predecessor in title had not been in possession of the lands and had not received rents or profits therefrom for a year before she received her deed, nor (2) that the defendant Atchison or his predecessors in title were in possession of the land claiming adversely, when Mr. Andrew Reed made and delivered his deed to her—two indispensable conditions to the invalidity of that deed for champerty. Moreover, the course of the trial indicates that when the denial of the quoted allegation of the complaint was made in the answer, both parties treated the issue of champerty as out of the case and proceeded to match Mrs. Mary E. Reed's title from Losky against Mr. Atchison's from Lucy Kernal or Caesar.

Nor is there anything in the transcript of the judgment and proceedings in the state court tending to indicate that in that case Mr. Reed was suing or claiming as grantor in his deed to Mary E. Reed for her use on the ground that his deed to her was champertous. On the other hand, he alleged in his complaint in that case which was filed in January, 1913, that he was the owner of both the legal and equitable title to the land, and that the six defendants were unlawfully in possession of it, and asked for possession, damages, and a decree quieting the title in himself, but made no averment concerning or referring to his deed to Mrs. Reed. Atchison and the other defendants in their answer in the state court made no reference to that deed, nor is there any reference to it in any of the proceedings certified from the district

court of Okfuskee county. The issues presented by the pleadings in that case were foreign to any question concerning or title under the deed from Andrew Reed to Mary E. Reed, and this court may not lawfully presume from this state of the record in the state court that Mr. Reed sued or sought to recover in that case, for the use of his grantee in a champertous deed, the execution of which would have made him liable criminally in the face of the presumption of innocence and the record that he sued in his own right and for himself. The result is that the averment in the complaint upon which counsel for Mr. Atchison rely so confidently was in itself futile, immaterial, and negligible. It was insufficient to charge champerty. It was denied by the defendant, no evidence, no reference to it was offered or received. All these things were known to counsel when the certified transcript of the pleadings and judgment in the state court were offered in evidence, and that averment wrought no estoppel of Mary E. Reed from proving and relying on her deed and title in the court below and in this court.

[3] The court below had ample authority at the trial after Mrs. Reed had testified that this suit was her suit, brought for her use and benefit, to allow an amendment to the complaint and a substitution of Mary E. Reed, the real party in interest, for Andrew Reed as the plaintiff in this action, and it will still have authority so to do after the reversal of the judgment already rendered. U. S. Comp. Statutes, § 1591.

The entire record before this court has been examined and deliberately considered with the purpose to follow the admonition of the statute that on the hearing of any appeal or writ of error "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." Judicial Code, § 269, as amended, 40 Statutes 1181, Supplement 1919, U. S. Compiled Statutes, § 1246, and this is our conclusion:

The truth is that on the pleadings and evidence before us there is no question of champerty in this case. The plaintiff proved the record title to the land in Mary E. Reed and that title must prevail, unless convincing evidence is produced on another trial of facts, not proved at the trial under review impugning that title. The record before us compels the conclusion that the action in the state court was not brought by, or by the authority of, on the right of or for the use of Mrs. Mary E. Reed, who is the real party in interest in this suit, and she is not bound or estopped by the judgment in the state court. It was therefore error to receive in evidence the certified copy of the transcript of that judgment and of the proceedings in that court. And because, in the absence of that transcript, there was no evidence to sustain the court's instruction to the jury to return a verdict for Mr. Atchison, that direction was also erroneous. Let the judgment below be reversed, and let the case be remanded to the court below with directions to grant a new trial.

DEL TORO v. JUNCOS CENTRAL CO.

(Circuit Court of Appeals, First Circuit. December 1, 1921.)

No. 1528.

Landlord and tenant ⇐112(2)—Right to forfeit lease not waived by landlord by acceptance of accrued rent after due.

Acceptance by a lessor under protest of accrued rent after the time it became due and payable, where at the same time he made public declaration before a notary that he reserved his rights under the lease, *held* not a waiver of his right to enforce a forfeiture of the lease under its terms for failure to make the payment when due.

In Error to the Supreme Court of Porto Rico.

Action at law by Fernando del Toro y Saldana against the Juncos Central Company. Judgment for defendant, and plaintiff brings error. Reversed.

Henry G. Molina, of San Juan, P. R. (Jose Martinez Davila, of San Juan, P. R., on the brief), for plaintiff in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action of unlawful detainer brought by Fernando del Toro y Saldana, a citizen of Spain, against the Juncos Central Company, a Porto Rican corporation, in the district court of San Juan, Porto Rico, July 27, 1920, to recover possession of three rural properties situated in the municipality of Juncos.

It appears that on February 24, 1911, the plaintiff leased to the defendant the properties in question for a period of ten years from March 1, 1911, to March 1, 1921, with the privilege of renewal for a period of ten years, at an annual rental of $6,000, payable as follows:

"C.—The rent shall be paid semiannually and the Juncos Central Company shall make the said payments in drafts on New York, Paris or Madrid in favor of Fernando del Toro y Saldana, according to the instructions which he will duly give the Juncos Central Company, deducting or adding the exchange prevailing when the respective installments of rent become due and sending the draft for each semiannual installment of the rent directly to the residence of the lessor in Madrid in a registered letter. The Juncos Central Company shall remit the said payments by one of the mail steamers leaving San Juan, Porto Rico, for Europe, either by the way of New York or directly to Spain, within the fifteen days following the date on which the respective installments become due, and only in case there should be no opportunity to send the draft within the first fifteen days shall the lessee be allowed to wait until the next steamer sailing after the payment becomes due."

The lease also provided:

"J.—If at the final termination of the lease there should be any unharvested crops standing the contract shall be extended one year under the same conditions."

"L.—Failure to pay punctually the installments of rent in the manner agreed upon will be a sufficient cause for the eviction of the lessee from the leased properties and the Juncos Central Company shall have no claim upon nor be allowed any extension of time to harvest the growing crops.

"M.—Failure of one of the contracting parties to comply with any of the stipulated conditions shall give the other party a right to an indemnity for the damage suffered."

"O.—The parties submit themselves to the courts of San Juan, Porto Rico, for the settlement of any questions that may arise from this contract."

It further appears that the installment of rent due February 29, 1920, was not sent to the plaintiff until April 26, 1920, nearly two months after it became due and payable; that it was then sent in an unregistered envelope which was received by the plaintiff at Madrid, June 3, 1920; that the defendant did not prove or attempt to prove that it did not have an opportunity to send the draft within the first fifteen days after February 29, as required by the contract; that upon receipt of the installment of rent due February 29, the plaintiff immediately went before a notary public and protested against the failure of the defendant to comply with the terms of the contract as to the time and manner of the payment of the rental, stating that the failure to remit the rent within the time fixed by the contract was a cause for rescission of the lease and the eviction of the lessee, and reserving his right of eviction as well as his right to damages; and that thereafter he caused his representative in Porto Rico to institute the present suit, which was begun July 27, 1920.

The defenses set up to the action were: (1) That the contract had been tacitly modified by the plaintiff's acceptance, without protest, of several payments of rent made during previous years after the expiration of the time agreed upon in the contract; and (2) that the action of unlawful detainer would not lie as the contract provided that in case either of the parties failed to comply with any of its conditions the other party would be entitled to recover damages.

The district court of San Juan found and ruled against the defendant as to both these matters and entered judgment for the plaintiff, in which the defendant was ordered to vacate the properties within twenty days, and pay the costs, disbursements, and attorney's fees of the plaintiff. The defendant appealed to the Supreme Court of Porto Rico, which court sustained the ruling of the district court as to the defenses set up by the defendant, but reversed the judgment of that court and dismissed the action for the reason that the plaintiff had received and accepted the semiannual installment of rent in question before bringing the action of unlawful detainer.

To review this judgment the plaintiff has prosecuted the present writ of error and the single question is whether the Supreme Court was right in ruling that the plaintiff, notwithstanding he publicly protested, at the time he accepted the check for the rent, that he did so without waiving his right to evict the defendant for failure punctually to forward the rent, waived or lost his right thereafter to bring this action to oust the defendant.

In considering this question it is necessary to bear in mind that the rent accepted by the plaintiff became due and payable February 29, 1920; and that the breach complained of arose after the rent had accrued and become payable, and was due to the defendant's failure to forward the rent within fifteen days thereafter. It is no doubt the

law that, where rent accrues after a breach and is accepted by the lessor, his acceptance is a recognition of the existence of the lease and a waiver of the breach. The law governing such a state of facts is undoubtedly what the Supreme Court regarded as applicable to the facts in the case now before us, for, in support of its position, it gives quotations from Shirley's Selections of Leading Cases in the Common Law, p. 104, and 24 Cyc. 1361, both of which relate to a situation where the acceptance was of rent which had accrued after the breach complained of. The quotation from Cyc. is as follows:

"The acceptance by a landlord of rent which accrues after the breach of a condition contained in the lease is a waiver of the right to declare a forfeiture of the lease and re-enter because of such breach, provided the acceptance was with full knowledge upon the part of the landlord of the fact of the breach and all the circumstances thereof."

But this proposition of law is not applicable to the present case, for the rent here in question did not accrue after the breach complained of, but prior thereto. The plaintiff was entitled to the rent that had accrued prior to February 29, as rent. The lease was undoubtedly in existence up to February 29, and his acceptance of the rent then due added nothing to the binding effect of the lease down to that time. Was his acceptance of the rent a recognition of the lease and a waiver of the breach that arose after the rent had accrued?

In 16 Ruling Case Law, p. 1136, § 655, it is said:

"According to the generally received view the acceptance of rent which accrued prior to the time the cause of forfeiture relied on arose, is not necessarily a waiver of the forfeiture, as the forfeiture in no way affects the liability of the lessee for such rent."

In Kimball v. Rowland, 6 Gray (Mass.) 224, Chief Justice Shaw, in considering this question in a case brought by a landlord to recover possession of leased premises after the expiration of a notice to quit for nonpayment of rent, the rent having been paid and received on the day after the giving of the notice and before the commencement of the action, and the landlord upon receiving payment having expressly reserved his right under the notice, said:

"But in the present case, the lessee at will was bound to pay his rent at the day, without demand; his failure to do so was a neglect to pay the rent due; and this gave the plaintiff a right to terminate the tenancy at will by fourteen days' notice; and notice was given on that ground. His right to the possession, and to the aid of this summary process, was fixed by that notice.

"2. And the receipt of the money due for rent, after such notice given, will not necessarily operate as a waiver of that right, if the landlord, at the time of receiving such rent, gives notice that he does not thereby intend to waive his right to terminate his lease, or revoke his notice.

"If the landlord received such rent without protest, or notice of any sort, it might be inferred, from his silent acceptance of the rent in arrear, that, the cause of his notice being removed, it was his intent to revoke it, and waive his right to terminate his lease, as in Tuttle v. Bean, 13 Metc. 275, and Collins v. Canty, 6 Cush. 415. But it is a presumption that may be rebutted, and the mere acceptance of rent, under a protest that he does not thereby waive, will not raise such presumption; for the money is his due, and he has a right to receive it, without barring his right to terminate the tenancy at will, which is the direct object of the suit."

See, also, Miller v. Prescott, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434, and 24 Cyc. p. 1362.

We know of nothing in the law of Porto Rico controverting the principles above stated. See Civil Code, §§ 1472, 1458; Bringas v. Lopez, 80 Jur. Civ. 641 (1896); Boet v. Sans, 56 Jur. Civ. 450 (1880).

We are therefore of the opinion that, if from the acceptance of the rent, standing alone, it might be inferred that the plaintiff waived the forfeiture, such an inference cannot be drawn in this case, for the plaintiff, before accepting it, publicly declared that he did not waive the forfeiture and thereafter, as soon as the circumstances permitted, notified the defendant that he did not by instituting this suit.

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

BAKER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1921.)

No. 3623.

Master and servant ⇐13—Telegraph office held not "continuously operated night and day," in violation of statute.

The fact that defendant railroad company, which kept its telegraph office at a station open from 7 a. m. to 7 p. m. only, having only one operator, who remained on duty from 7 a. m. to 6 p. m., and until 7 p. m. if necessary to deliver a train order, had an arrangement with another railroad company, which maintained a separate telegraph office in a tower at some distance, continuously operated by three shifts, to receive and deliver its train orders during the hours when its own office was closed, for which it paid a sum monthly, *held* not to make its office one "continuously operated night and day," within the meaning of Hours of Service Act, § 2 (Comp. St. § 8678), which rendered the hours of service required of its operator a violation of the act.

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

In Error to District Court of the United States for the Southern District of Texas; J. C. Hutcheson, Judge.

Action by the United States against James A. Baker, receiver of the International & Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 261 Fed. 703.

Samuel B. Dabney and William H. Wilson, both of Houston, Tex., for plaintiff in error.

D. E. Simmons, U. S. Atty., of Houston, Tex., and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The United States brought this action against the plaintiff in error, the receiver of the International & Great

Northern Railway (herein referred to as the defendant), to recover penalties for 10 alleged violations of the following portion of the Hours of Service Act (34 St. 1415; U. S. Compiled Stats. § 8678):

"That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

Each of the several counts of the petition alleged that on a named day the defendant required and permitted its certain telegraph operator and employee, M. Menger, to be and remain on duty for a longer period than nine hours, to wit, from 7 o'clock a. m. on said day to 6 o'clock p. m. on said day, at defendant's office and station at Navasota, Tex., which office and station was alleged to have been at the times mentioned one continuously operated night and day, and it was alleged that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce. The defendant denied the alleged violations of the act, claiming that its telegraph office or station at Navasota was one operated only during the daytime.

The case was tried on the pleadings and an agreed statement of facts. That statement shows the following:

At Navasota the defendant maintained a telegraph office and station, at which M. Menger was employed and acted as telegraph operator from 7 a. m. to 6 p. m., with an hour off about noon for dinner. If a train for which he had an order had not arrived at 6 p. m., he was required to remain on duty until 7 p. m., in order to deliver that train order. No telegraphic service whatever was carried on in defendant's station building between 7 p. m. and 7 a. m. The Houston & Texas Central Railroad Company, whose line of railroad is parallel to and immediately adjoins the line of the International & Great Northern Railway at Navasota, had a building, known as the H. & T. C.-Santa Fé tower, about 850 feet from defendant's station, at which were employed by the Houston & Texas Central Railway Company three telegraph operators, each of whom worked a shift of 8 consecutive hours; that tower being operated continuously for 24 hours each day. Under a contract between the Houston & Texas Central Railroad Company and the defendant, the former, for $50, per month, furnished telegraphic service to the latter between the hours of 6 p. m. and 6 a. m. All orders issued between those hours for the movement of trains over the defendant's line were issued by the defendant's train dispatcher at Mart, Tex., and transmitted to the Houston & Texas Central operator on duty in said tower, and were delivered by that operator to the

crews of the defendant's trains to whom they were directed. When Menger had orders for trains which failed to arrive by 7 p. m., he would carry those orders to the Houston & Texas Central operator, who would sign for them in defendant's transfer book, and thereafter deliver them to the proper train crews. Each morning, before Menger went on duty, he would telephone to the tower to find if any train orders were undelivered, and, if so, would go after them and sign for them in the transfer book, thereafter delivering them from the defendant's station in the usual manner. The defendant had no part in employing or paying the operators in said tower. He had nothing to do with the selection or discharge of those operators, and had no authority or jurisdiction over them or over the operation of said tower.

The act of the defendant in requiring and permitting his employee, Menger, to remain on duty as telegraph operator from 7 o'clock a. m. to 6 o'clock p. m. at the defendant's office and station at Nevasota did not make the defendant liable to the penalty prescribed by section 3 of the Hours of Service Act (U. S. Comp. St. § 8679), unless that office and station was one continuously operated night and day. What is relied on as having the effect of making that office and station of the defendant one continuously operated night and day is the existence of the above-mentioned contract between the defendant and the Houston & Texas Central Railroad Company and the rendition of service in pursuance of that contract. The language of the statute discloses an intention to forbid a carrier coming within its terms to require or permit an employee engaged in the specified service to be or remain on duty for a longer period than 9 hours in any 24-hour period in any tower, office, place, or station continuously operated by such carrier night and day.

The Houston & Texas Central Railroad and the railroad of which the defendant is the receiver are different and distinct entities, separately operated and managed. The former's telegraph tower or office at Navasota was continuously operated night and day; three operators being employed, each of them serving only 8 hours during the 24. The defendant operated his telegraph office at that place only during the daytime. So far as appears, nothing occurred which we think properly can be given the effect of making those two offices at any time in substance and effect a single office, place, or station within the meaning of the act. The facts disclosed clearly differentiate this case from decided cases (Atchison, Topeka & Santa Fé Ry. Co., v. United States, 236 Fed. 908, 150 C. C. A. 168; Illinois Central R. Co. v. United States, 241 Fed. 667, 154 C. C. A. 425), in which it was unsuccessfully contended that a railroad company had more than one telegraph office or service at a place where that service was merely divided between employees of such company who operated successively in two or more places in near proximity; the two services constituting practically one unit.

The Houston & Texas Central tower at Navasota was not jointly operated at any time by its owner and the defendant. The telegraphic services therein were rendered by operators employed and paid by its owner, with whose selection and discharge the defendant had nothing to do; he having no part in or control over the operations there carried

on, nor authority over another's employees working therein. At no time were the two offices practically one unit. There was a lack of identity between them. And this is not a case of two carriers exchanging services, of one of the two rendering the telegraph services required by both during part of the day, and the other rendering such services during the other part of the 24 hours. What was done was not, in intention or effect, an evasion of the provisions of the statute. We are not of opinion that the performance by the Houston & Texas Central Railroad Company of the services called for by its contract with the defendant had the effect of making the defendant's telegraph office at Navasota one continuously operated night and day within the meaning of the statute. That being so, what the defendant did was not a violation of the statute.

The judgment is reversed.

THE LADY OF GASPE. THE JOHN L. WADE. THE MARION OLSEN.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 30.

1. **Collision ⟸90—Duty to another vessel obstructing navigation stated.**
   A vessel, even while obstructing navigation, does not, for the purposes of civil suit, become an outlaw, but other vessels must exercise care for her safety according to the circumstances; but the duty to exercise such care does not require insuring the safety of the obstructing vessel, and the carelessness or obstinacy of her navigators is a circumstance to be considered in determining such care.

2. **Collision ⟸70—Need not cease navigating until obstructing vessel is removed.**
   A lighter, which tied up in a position which obstructs navigation in a slip, cannot insist that all navigation cease until the lighter is removed.

3. **Collision ⟸70—Vessel movable by hand cannot require tug to be furnished.**
   A lighter, moored at a slip in such a way as to obstruct navigation by steam vessel, but which could be and customarily was moved by hand, cannot refuse to move out of the way of the approaching vessel, and require a tug to be furnished to take her where she desired to go, even though the easiest direction to move her by hand would be back into the slip, where she might become pocketed.

4. **Collision ⟸71(2)—A gentle contact with lighter obstructing navigation held not a fault.**
   Where a lighter was moored at the entrance to a slip, in such a position as practically to obstruct navigation by an incoming steamer, and refused to move unless a tug was furnished to take her where she desired to go, the steamer was not at fault for striking against the lighter so gently as not to injure the hull, in an effort to push her to one side.

5. **Collision ⟸74—Evidence held not to show vessel had anchor projecting.**
   Though it would be a fault for a steamship to attempt to enter a slip occupied by other vessels with her anchor projecting from her side, she will not be held at fault in that respect, where there was very little evidence that her anchor was projecting, the point was given no attention in the court below, and fault in the carriage of her anchor was not specifically assigned for error on appeal.

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

Libel by the Chiarello Bros. Co., Inc., against the steamship Lady of Gaspe and two tugs, the John L. Wade and the Marion Olsen. From a decree dismissing the libel as against all vessels, libelant appeals. Affirmed.

Libelant sued for damages to a harbor lighter of ordinary size (92x33) belonging to them, and injured because (according to the libel) the anchor of steamship Lady of Gaspe caught the mast stay of the lighter. The accident occurred in Erie Basin; the Gaspe, under her own steam, assisted by two tugs. and with the master of one of the tugs on the bridge and in charge, was very slowly attempting to enter a slip in the Basin, which slip was bounded on the steamer's port side by Pier B. At the end of Pier B there lay numerous vessels, how many does not clearly appear. They had been there for some time. Most of these vessels lay in the usual way, broadside to the pier end, but libelant's lighter had come out of the slip some time before the accident, and made fast to some of the boats at the pier end, lying at right angles to them. The lighter was unloaded, she had moved out of the slip by hand, she is the kind of vessel that is commonly moved by hand, and no sufficient reason appears why she could not by hand have moved out of the way of the approaching Gaspe.

It is admitted that this lighter was an especial obstruction to the Gaspe's navigation; that she was warned that the steamer was coming, in ample time to enable her to get out of the way. It is possibly true (though by no means certain) that the only place that she could have navigated to with ease unassisted was into the slip; and if she went far enough up the slip to be out of the steamer's way, she might get "blocked in." At all events it is certain that the lighter master, though warned of the steamer's coming and asked, if not ordered, to get out of the way by those in charge of Pier B, refused to attempt to move, insisting (in substance) that any one who wanted him to move must send a tug to take him away, and apparently to whatever nearby place he chose to lie at.

The Gaspe very slowly came in contact with the side of this lighter, intending to press her back, for her lines were slack, or had slacked, and (as we find) she was projecting quite out into whatever fairway these crowded waters afforded. There is no evidence that any injury was done to the hull of the lighter by this contact; but some projection from the bluff of the steamer's bow—it is not certain whether an anchor stock or a chute—caught the lighter's mast stay and did the damage complained of.

Libelant, as owner, sued the steamer and both the assisting tugs. The court below dismissed the libel as against all. Libelant appealed.

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

Bullowa & Bullowa, of New York City (Ralph J. M. Bullowa, of New York City, of counsel), for the Lady Gaspe.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for the steam tugs.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The claim made on this appeal is that, admitting the lighter did obstruct the entrance to the pier, admitting that she might justly be called an obstruction to lawful navigation, and admitting that she had received warning and orders to move, yet nevertheless she was (1) not an outlaw; and further (2) was not required to move unless those who wanted her out of the way furnished a tug for her convenience.

[1] We are not aware of any circumstances under which a vessel for purposes of civil suit becomes an "outlaw"; it is always necessary for other vessels having to do with her to exercise care according to the circumstances. The Westernland (D. C.) 24 Fed. 703. But one even exercising care does not insure the safety of those who are persistently and wantonly exposing themselves to danger. The carelessness or obstinacy of the person ultimately injured often furnishes the background or groundwork which constitutes the circumstances measuring the care demandable from others.

[2] Pushed to its logical conclusion, the position of libelant is this: My lighter was a menace to navigation, therefore the Gaspe could not navigate until that menace was removed. This, under The Etruria (D. C.) 88 Fed. 555, is not the customary law of this harbor. If it were, one vessel might block the entrance to a large slip or choke a narrow channel as long as she liked, or until the harbor authorities were roused to interfere. No hard and fast rule can be laid down; every case will always depend upon its own set of circumstances. In this case it was not impossible, but very difficult, for the Gaspe to get into her slip unless the lighter moved. Therefore it is claimed that a tug should have been furnished to move her.

[3] How a vessel is to move or to navigate depends upon her habitual method of propulsion. In The Westernland, supra, the schooner which blocked the steamer's exit from a slip could not move without assistance; in this case libelant's lighter could move without any other power than the muscles of her crew. She was in the habit of so moving or navigating, and it was no excuse for remaining where she was that, if the easiest thing were done (i. e., move up the slip) she might get "blocked in." That would have been inconvenient, perhaps even expensive, but it does not justify remaining a wilful menace to navigation.

[4] Inasmuch, therefore, as the lighter was able to comply with a reasonable warning by her habitual method of wharf-side navigation, it was a fault in her to refuse so to do. It was not a fault for the Gaspe to come in contact with this obstinate lighter. That, also, is a question of degree; but there is no evidence to show that the contact was not as light and gentle as the circumstances required, there is no evidence of breaking the lighter's hull.

[5] If we were satisfied that the Gaspe had an anchor hanging from her cathead, or otherwise unusually projecting from her side, she likewise would be liable under The Sontag (D. C.) 40 Fed. 174, and The Overbrook, 142 Fed. 950, 74 C. C. A. 120. No vessel can lawfully navigate around wharves and piers with such a dangerous appendage. But there is very little evidence on this subject; the result thereof is very doubtful; the point was given no attention in the opinion of the Court below, and fault in the carriage of her anchor is not specifically assigned for error in this Court.

Therefore we disregard it, and direct that the decree appealed from be affirmed, with costs.

THE PARTHIAN.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 5.

1. **Aliens ⟸58—Penalty for permitting unlawful landing not recoverable on proof of nonproduction of alien at immigration station.**

   Under Immigration Act Feb. 5, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ee), imposing a penalty on steamship owners, etc., failing to prevent the landing of an alien at any time or place other than as designated by the immigration officers, such penalty is not recoverable without proof that the alien has landed, or proof that the steamship officers have failed to produce the alien at the immigration station within the time ordered by the inspector.

2. **Admiralty ⟸105—When sufficiency of answer not questioned, it is too late on appeal to claim allegations not answered.**

   In a libel by the government to recover a penalty for permitting an alien to land unlawfully, where the answer alleged that defendant was "not guilty of the matter and form alleged" in the libel, and no exceptions were filed, and the case was tried on the theory that the allegations of the libel were put in issue, it is too late on appeal to contend that allegations not specifically denied, or not denied other than by the language of the answer, must be taken as admitted.

3. **Aliens ⟸44—Department cannot make regulations beyond powers delegated.**

   While the Commissioner of Immigration may make regulations to enforce the Immigration Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼a et seq.), it is not permissible for the department to make or proclaim regulations beyond the powers delegated to the Commissioner by section 23 (section 959).

4. **Aliens ⟸58—Government has burden of showing unlawful landing, for which penalty sought.**

   Under Immigration Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ee), providing a penalty for the failure of steamship owners, etc., to prevent the landing of any alien at any time or place other than as designated by the immigration officer, the burden is on the government to show that the alien has landed contrary to the statute and the instructions of the immigration officers.

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

Libel by the United States against the steamship Parthian, her engines, etc., claimed by the Olympia Shipping Corporation. From a decree for the United States, the claimant appeals. Reversed.

Walter F. Welch, of New York City (Vincent P. Donihee, of Brooklyn, N. Y., of counsel), for appellant.

William Hayward, U. S. Atty., of New York City (J. Joseph Lilly and Theodor Megaarden, both of New York City, of counsel), for the United States.

Before ROGERS, MANTON and MACK, Circuit Judges.

MANTON, Circuit Judge. The steamship Parthian is owned by the Olympia Shipping Corporation. On the 23d of June, 1918, she arrived at the port of New York from a foreign port, having as a

stowaway an alien, Constantin Aliyizakis. The appellee seeks to recover a penalty of $1,000 from the owners of the steamship for failing to prevent the unlawful landing of this alien from this vessel. Aliyizakis was found on the ship on the 23d of June, 1918, by an inspector, and before leaving the ship the government inspector served a written notice upon the first officer, requesting him to deliver the alien at the United States immigration station at Ellis Island. The evidence shows that the alien was not delivered at Ellis Island in accordance with this direction, and after a lapse of five days the immigration inspector in charge of the inquiry division reported that the alien had not appeared for inspection, and this libel was then filed. Liability is sought to be imposed upon the ship by virtue of section 10 of the Immigration Act of February 5, 1917 (39 Stat. 881 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ee]). This act provides:

"It shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, otner than railway lines which may enter into a contract as provided in section twenty-three of this act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than $200 nor more than $1,000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of $1,000 shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court."

[1, 2] No other proof was adduced at the trial, and from this evidence the appellee endeavors to support the decree below, asking us to find that the appellant did not endeavor to prevent the landing of this alien at a time and place other than as designated by the immigration officers, and that it failed to produce the alien as required by the order at Ellis Island. We think there is a failure of proof of any violation of this statute. Nor can the appellee support this decree because of lack of denial in the allegations of the answer interposed by the appellant to the libel. The answer alleges that "it is not guilty of the manner and form alleged in the said libel of information." No exceptions were filed to this answer, and the case was tried upon the theory that the allegations of the libel were put in issue by the answer. We think it is too late now to contend that the allegations not specifically denied, or not denied other than by the language of this answer, must be taken as admitted.

The Commissioner of Immigration has prescribed the following rules, which are relied upon as his authority for directing the production of the alien in question. Rule 2, subd. 4, provides:

"Alien stowaways shall be manifested and produced for inspection in the same manner as are other aliens and the fact that they were stowaways shall be indicated on the manifest."

[3] While the Commissioner may make regulations to enforce the Immigration Act, it was not permissible for the department to make or proclaim regulations which were beyond the powers delegated by the Congress to the Commissioner. United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37.. Regulations must not transgress the statute. Waite, etc., v. Macy et al., 246 U. S. 605, 38 Sup. Ct. 395, 62 L. Ed. 892; United States v. Antikamnia Chemical Co., 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. 419, Ann. Cas. 1915A, 49.

Section 23 of the Immigration Act (section 959) provides that the Commissioner General of Immigration shall perform all his duties under the direction of the Secretary of Labor:

"Under such direction he shall have charge of the administration of all laws relating to the immigration of aliens into the United States and shall have control, direction and supervision of all officers, clerks and employees appointed thereunder; he shall establish such rules, regulations * * * and shall issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act. * * *"

[4] The statute does not impose a penalty for failing to deliver the alien at Ellis Island to the immigration inspector. It prescribes the penalty for the owner or master or agent of the ship in not preventing the alien to land at any place other than is designated by the immigration officer. Indeed, there is no evidence in this record that the alien was permitted to land at any place. All that appears is that he was on the vessel on June 23d. He may have remained on the vessel and returned to the country from whence he came with the ship. The burden was upon the appellee to prove that the alien did in fact land at some other time or in some other manner. It was incumbent upon the appellee to show that there was in fact a landing contrary to the statute and to the instructions of the immigration officers. This burden it did not sustain.

For these reasons, the decree below is reversed.

EINZIGER et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 19, 1921.)

No. 2779.

1. **Conspiracy ⟸47—Evidence held not to sustain conviction.**
An indictment for conspiracy to sell liquor in violation of law *held* not sustained by proof merely that defendants transported liquor, without any evidence of a sale or attempted sale.

2. **Criminal law ⟸1172(2)—Instructions which authorize conviction on proof of offense other than that charged held erroneous.**
Instructions which would tend to authorize the jury to convict, if the evidence established a violation of the law, though not that charged in the indictment, *held* prejudicial error.

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

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Criminal prosecution by the United States against Emanuel Einziger and Joseph Brenna. Judgment of conviction, and defendants bring error. Reversed.

Harry Heher, of Trenton, N. J., and A. V. Dawes, of Hightstown, N. J., for plaintiffs in error.

Elmer H. Geran, U. S. Atty., of Asbury Park, N. J., and Frederic M. P. Pearse, Asst. U. S. Atty., of Newark, N. J.

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

WOOLLEY, Circuit Judge. The defendants below, Einziger and Brenna, were charged by the indictment with having conspired with persons unknown to the grand jurors to commit an offense against the United States, that is to say, to sell intoxicating liquors to a person also unknown to the grand jurors. The overt acts in furtherance of the conspiracy as laid in the indictment were: First, that Einziger endeavored to deliver liquors to one Brown, whom Einziger thought was the person (referred to in the indictment as unknown) to whom the liquors were to be sold but who, in fact, was a prohibition agent engaged in detective work on the transaction; and, second, that in attempting delivery of the liquors Einziger and Brenna transported them through the streets of Trenton to a certain garage.

[1] At the trial, the Government introduced evidence in support of the indictment which tended to show that the prohibition authorities had learned that a whiskey deal was to be "pulled off" at the Eagles' Club in the City of Trenton. Thereupon Brown, a prohibition agent, was assigned to the case. Brown placed himself on watch in a position across the street from the Eagles' Club. In due course, a man—who later proved to be Einziger—came along looking at the numbers of the houses. Brown went over to him and said: "Are you looking for me?" Einziger replied: "Are you the secretary?" Brown said: "No, sir; I am not." Einziger inquired: "Where is he?" Brown replied: "Across the street. * * * I'll take care of you. Are you the man with the case goods?" Einziger replied: "Yes; where do you want them?" Continuing, he said: "You cannot put the barrels down this club (referring to an areaway of the Eagles' Club). Have you got a back way to it?" Observing a garage near by, Brown replied: "We are going to run all the stuff in there. When will you have it?" Einziger replied: "I will fetch it in an hour." They separated and by agreement met at the garage later. Einziger then asked Brown: "Is the secretary here yet?" Brown replied: "He will be here when you have the case goods here." After telephoning, Einziger came to Brown and said: "The stuff is rolling and it will be here in twenty minutes." Later, a Ford car driven by Brenna came along and Einziger motioned him into the garage. When Brenna had driven into the garage, Brown arrested both men and took from the truck twenty cases of whiskey and three barrels of wine. This was the Government's case.

After conviction and sentence the defendants sued out this writ. Of the several assignments of error, only two raise serious questions. The first is, whether on the evidence the trial judge erred in refusing the defendants' motion for a verdict directed in their favor.

That the defendants when caught were violating some provision of the Volstead Act (41 Stat. 305) is quite clear. But whether they had conspired to violate the provision of the Act forbidding the sale of intoxicating liquors for beverage purposes—judged alone from what they were doing with the liquors when caught—is not so clear. Conspiring to sell liquor was the sole offense with which they were charged. It was, therefore, the only offense of which, under the indictment, they could be convicted. To sustain the verdict that the defendants were guilty of the crime of conspiring unlawfully to sell intoxicating liquors, there must of course have been evidence of a sale, contemplated, in progress, or completed. Obviously this is true, for if the defendants when caught were merely transporting liquor for themselves or for others, or were doing anything with it other than carrying out a conspiracy for its sale, they were—however guilty of other offenses—not guilty of the one for which they were being tried.

In all human likelihood a sale was involved somewhere in the transaction. Yet a lawful conviction for conspiracy to effect such a sale cannot be had except on evidence. No evidence of a sale is disclosed in the record. The nearest approach to it was the statement made by the witness Brown that Einziger's purpose in seeking the secretary was to receive from him pay for the liquor. It may have been. Yet this was only Brown's conclusion of Einziger's purpose and was nothing more than an inference from testimony which was equally capable of raising an inference that the defendants were merely transporting liquor. Evidence of a sale cannot be gathered from the fact of transportation alone.

[2] Aside from error in submitting the case on evidence which we think does not sustain the verdict, we find a vein of error running through the charge. In the beginning the learned trial judge directed the attention of the jury to the crime charged by the indictment, namely, conspiracy to sell liquor in violation of a law of the United States, and correctly instructed them on the law. But thereafter, in elaborating the law of conspiracy, the learned trial judge drifted—quite unconsciously—from the offense particularly charged by the indictment and extended his remarks to a conspiracy to violate the Volstead Act generally, conveying to the jury, we are constrained to believe, the idea that if they found the defendants had violated the Volstead Act in any of its provisions they should return a verdict of guilty. It was, of course, obvious to the jury that the defendants when arrested were violating some provision of the Volstead Act and it was inevitable that they would, under these general instructions repeatedly made and differently phrased, return a verdict of guilty; but whether the jury would have returned such a verdict if the court's instructions had been addressed and limited to a conspiracy to violate that part of the Volstead Act which forbids the sale of liquor, no one can say.

Rules of law, whether pertaining to evidence or to the charge of the court in a case arising under the Volstead Act, differ in no respect from like rules applicable in other cases.

We are constrained to find prejudicial error in the trial and to hold, in consequence, that the judgment below must be reversed and a new trial awarded.

ELIAS v. WRIGHT.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 28.

1. **Appeal and error ⟸999(1)—Jury finding conclusive.**
   The finding of a jury on a question of fact is conclusive on the Circuit Court of Appeals.

2. **Damages ⟸141—Pleading of particulars of damage unnecessary.**
   Complaint alleging a contract to put in the glass in the construction of a building, breach thereof, and damage from such breach, *held* sufficient, without alleging the particulars of the damage.

3. **Damages ⟸120(3)—Measure for breach of contract to put in glass in construction of building stated.**
   For breach of contract to put in glass in building being constructed, the measure of damages was the difference between the contract price and the actual cost of the completion of the work.

4. **Damages ⟸5—General damages presumed to have ensued from breach.**
   The law presumes or implies that general damages have ensued from the wrongful act of the breach of contract.

5. **Damages ⟸45—Cost of muslin placed in windows to preserve interior, on contractor's failure to glass in windows, held recoverable.**
   Where, because of delay caused by contractor's breach of contract to put in the glass in a building being constructed, it became necessary to put muslin in the windows of the building, so as to preserve the interior and machinery therein, the contractor was liable for the cost of putting in the muslin.

6. **Damages ⟸120(3)—Overhead charge of 6 per cent., allowed as item of damages for breach of contract, held reasonable.**
   In action for breach of contract to put in glass in construction of new building, overhead charge of 6 per cent., allowed plaintiff as an item of damages, *held* reasonable.

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

Action by Benjamin D. Wright against Joseph Elias for breach of contract. Judgment for plaintiff, and defendant brings error. Affirmed.

Phillips & Avery, of New York City (Frank M. Avery and Earl A. Darr, both of New York City, of counsel), for plaintiff in error.

Joseph A. Arnold, of New York City (Joseph A. Arnold and Samuel I. Rosenman, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The parties to this action on August 20, 1917, entered into a written contract, pursuant to which the plaintiff in error obligated himself to furnish, deliver, and set in place, including all putty, all glass of every description required to complete a large power house then in process of construction at Chester, Pa., known as the "Chester Waterside Station." The defendant in error agreed to pay for such work, labor, and services the sum of $12,700. The plaintiff in error breached this contract, by failing to carry out or attempting to carry out any of its provisions, and it became necessary for the defendant in error to furnish the material and perform the work. The questions of the breach of contract and the damages flowing therefrom were submitted to the jury, and a judgment has been entered in favor of the defendant in error for $8,995. The finding of the jury is conclusive upon us.

The two errors which have been assigned and argued on this appeal, were, first, the sufficiency of the complaint; and, second, the allowance of two items, one for overhead, and the other for the installation of muslin as a part of the construction work.

[2] The complaint sufficiently sets forth the making of the contract, the repudiation thereof, and the notification by the plaintiff in error of his unwillingness to perform. It alleges the failure to deliver or tender any of the materials specified in the agreement, and the failure to perform the work required thereunder. Paragraph 9 alleges that, before the trial, the defendant in error served upon the plaintiff in error a "certified itemized list of the expenses and damages sustained by the plaintiff by reason of the aforementioned failure and refusal on the part of the defendant to fulfill the aforesaid agreement." Paragraph 10 alleges a willingness on the part of the defendant in error to receive the materials and pay for the merchandise and services. Paragraph 11 alleges that the plaintiff has been damaged in a sum of money by reason of this default. If the pleading sets forth sufficient facts showing that there has been a breach of contract, and that the plaintiff has sustained damages as a result thereof, and demands judgment based thereon for the sum named, it is unnecessary to plead, in words, the particulars of the damage. Murphy v. Mitchell (D. C.) 245 Fed. 219; Howard Supply Co. v. Wells, 176 Fed. 513, 100 C. C. A. 70.

[3] If the defendant in error was entitled to recover because he performed the work, it is such reasonable sum as he was required to outlay for the purchase of the material and for the services necessary for the completion of the work contracted for with the plaintiff in error. Or, as it is sometimes stated, he may recover the difference between the contract price and the actual cost to the plaintiff in error for the completion of the work. Elmohar Co. v. Surety Co., 217 N. Y. 293, 111 N. E. 821; Along the Hudson Co. v. Ayres, 170 App. Div. 218, 156 N. Y. Supp. 58.

[4] The law presumes or implies that general damages have ensued from the wrongful act of the breach of contract. We think the complaint is sufficient to permit the recovery which has been had here.

[5] There was testimony that the actual cost of the glass and of putting it in place was $21,417.27, and, further, that this cost was a rea-

sonable cost. It was proved that it became necessary to put muslin in the windows of the building under construction, so as to preserve the interior and some machinery therein. It is objected, by the plaintiff in error, that such an item cannot be recovered. But it is due to the plaintiff in error's failure to carry out his contract, and the delay in completing the work, that it became necessary to provide this protection in the window frames, and it is proved that the defendant in error proceeded with reasonable dispatch to carry out the contract after the plaintiff in error's breach. Such protection was necessary and essential. It is an item of damage which flows from the plaintiff in error's breach.

[6] Error is also assigned for permitting a recovery for overhead expenses, which is an item included in the cost of the work to the defendant in error. It is now well recognized that contractors have an overhead expense. This varies with the size and character of the contract and the amounts involved. It is computable by experience. In this instance it is upon a basis of 6 per cent. Opportunity was accorded the plaintiff in error on the trial to refute, either by testimony or cross-examination, that such a charge was unreasonable. Its fairness was for the jury's consideration. We do not think that an overhead charge of 6 per cent. is unreasonable. We find no error in the record.

Judgment affirmed.

BOSTON PENCIL POINTER CO. v. AUTOMATIC PENCIL SHARPENER CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 96.

1. **Patents ⇐36—Prior efforts to fill want essential to commercial success as guide to invention.**
   Commercial success is an unsafe guide to invention, unless prior efforts to fill the want are shown.

2. **Patents ⇐16—Mere novelty is not invention.**
   Articles may be new in a commercial sense, when they are not new in the sense of the patent law, and novelty, however great, can never be put in place of invention.

3. **Patents ⇐328—1,305,855, claims 1–4, for chip receptacle for pencil sharpener, held to lack invention.**
   Wilson patent, 1,305,855, claims 1–4, for a chip receptacle for pencil pointers, having celluloid sides and metal ends, *held* not to disclose invention, in view of the use in the prior art of both celluloid windows and celluloid receptacles.

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

Suit by the Boston Pencil Pointer Company against the Automatic Pencil Sharpener Company for infringement of a patent. Decree for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss the bill.

Suit is upon claims 1–4 of Wilson patent, 1,305,855, for a "chip receptacle for pencil pointers." The first (and most general) claim is as follows:

"A chip receptacle for pencil pointers, comprising a transparent body portion and nontransparent end portions secured to said transparent body portion."

The article patented is an adjunct to a style of sharpener for wooden pencils, illustrated by the same inventor's patent 972,488, wherein the pencil end is presented through a tube to the action of two rotary cutters carrying on their faces spiral knife edges. Such a machine makes many small chips, as well as much dust, and various styles of receptacles have been provided to catch and retain the same. In result, or in mechanical or operative effectiveness, the device of the patent does not differ from other and prior receptacles. No claim is made for the means by which it is attached to or detached from the frame of the sharpener proper; patentable invention is asserted to exist in the transparency of the body portion, and opaqueness of the end portions, and in nothing else.

The specification statement of what is accomplished by the thing disclosed is this: "It will be seen that the transparent body portion of the chip receptacle will permit the operator to observe the sharpening operation and the amount of chips that have accumulated in the chip receptacle."

The trial court declared the patent valid and infringed, gave decree accordingly, and defendant appealed.

Henry M. Huxley and Hervey S. Knight, both of Chicago, Ill. (D. A. Usina, of New York City, of counsel), for appellant.

E. Clarkson Seward, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). A pencil sharpener whose chips and dust fall into a receptacle with metal ends and celluloid sides is now too familiar an office appliance to need more than mention. The evidence before us is almost wholly devoted to emphasizing the commercial success producing this familiarity. The small remnant of oral testimony relates the history of the patented article—briefly that the idea of a transparent chip catcher found too expensive an embodiment in glass, was not attractive when wholly celluloid, though improved by blackening the celluloid ends, but became the success it is when strength and comparative cheapness were united by connecting metal ends with rods, and fitting the celluloid body or casing over the rods, by clamping into the end pieces.

The inventive thought (if there be one) is shown by the evidence, just as clearly as by the claims in suit, to be transparency. Much might be said to show that what plaintiff calls commercial success grew, not out of the merits of the patented chipholder (Hubbell v. General, etc., Co. [C. C. A.] 267 Fed. 564), but from the cheapness of one grade of sharpener of which the sales have overshadowed all others.

[1] But we will (for argument's sake) adopt plaintiff's views on that point; and we are not inclined to vary or minimize anything said in Minerals, etc., Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286, or Benjamin v. Northwestern, etc., Co., 251 Fed. 288, 163 C. C. A. 444, as to the persuasive probative effect of prompt and extensive use plus displacement of earlier devices. Nevertheless commercial success is an unsafe guide to invention unless prior efforts to fill the

space be shown (National, etc., Co. v. Bissell, etc., Co., 249 Fed. 196, 161 C. C. A. 232); and when they are shown, it is not infrequently found that the faculty of invention was not necessary to fill whatever vacancy existed.

[2] Further, it is settled that articles may be new in a commercial sense, when they are not new in the sense of the patent law (Collar Co. v. Van Deusen, 23 Wall. 530, 23 L. Ed. 128), and novelty, however great, can never be put in the place of invention (Robins v. Link Belt, 233 Fed. 1005, 148 C. C. A. 15). The fact that a patented device has had enormous sales does not dispense with all other evidence of invention. In patents of the kind before us, the test inquiry is always, "What will it do?" and the answer to that question in the present instance is shortly, "It permits one to see inside." It does nothing else, and in the claims in suit pretends to no other merit or mark of distinction.

[3] We pass the question whether mere transparency can constitute patentable invention, but, assuming that possibility, find in the record that chip receptacles of many kinds were old, and such holders with transparent windows were old. There were receptacles with no windows, with small windows, and some celluloid ones that were all window. This patent covers nothing but the concept of a large window; i. e., all windows but the ends.

The commercial embodiment of this idea, when affixed to a sharpener not covered by this patent, and all sold at a cheap rate, seems neat, clean, durable, and effective; but we hold it obvious that the only part of that combination or aggregation of merits which is before us (the transparent body) does not constitute patentable invention because it did not require the inventive faculty to enlarge a window, until it constituted the body of the holder.

We point out again that the claims are so drawn as to exclude from consideration the shape, detachability, or mechanical structure of what embodies the claims.

Decree reversed, with costs, and cause remanded, with direction to dismiss the bill, with costs.

THE WELSH.

THE ROBERT PARSONS.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 25.

Collision ⇐95(1)—Both tugs held at fault for collision in Hudson river.

As respects damages from collision at night in the Hudson river, off Hoboken, between two tugs and their tows, due to misunderstanding of signals or failure to hear signals until the boats and their tows were too close for an exchange of signals to pass safely, where one tug admitted a share of liability, and it appeared that on the other tug the deckhand, who was charged with the duty of lookout, was sitting in the pilot house at the time of collision, and therefore had no better opportunity for see-

ing the lights of the other tug than did the master who was navigating the boat, and that the collision could have been avoided, had efficient lookout been maintained, *held*, that both tugs were at fault.

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

Libel in admiralty by the New York & New Jersey Transportation Company against the steam tug Welsh, her engines, etc., the Cornell Steamboat Company, claimant, and the steam tug Robert Parsons, her engines, etc., the Erie Railroad Company, claimant. Decree for libelant against the steam tug Robert Parsons, and claimant Erie Railroad Company appeals. Modified.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for appellee Welsh.

Macklin, Brown, Purdy & Van Wyck, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The New York & New Jersey Transportation Company owned the coal boat the H. M. Lane. On the 23d of January, 1917, the H. M. Lane was taken in tow on the starboard side of the steam tug Welsh at the foot of Washington street, Jersey City, and proceeded for Weehawken. The steam tug Robert Parsons was on a voyage from Forty-Ninth street, North River, Manhattan, with a car float made fast on her port side and was bound for Pavonia Ferry, Erie Railroad, Jersey City. At the time of the collision herein referred to, which occurred at about 6 o'clock in the evening, the tide was flood. The master of the Welsh testified that he was proceeding up the river about 100 feet off the end of the piers and was about off Eighth street, Hoboken, when he observed the green light of the Parsons about 300 feet off on the starboard hand. At this time he gave a signal of two whistles to the Parsons and received no answering signals. After such two whistles, he put his wheel to starboard and changed his course to port about two points. Shortly thereafter he saw the red light of the Parsons. Again he gave two whistles and stopped, and reversed the engines of the Welsh. He says that, when he first saw the red light of the Parsons, the Welsh was then about at Ninth street and that the collision occurred off Tenth street. The master of the Parsons says, on the other hand, that the collision occurred off Thirteenth street, Hoboken; that, after crossing the Hudson river, he straightened down on a course of about 300 feet off the end of the pier, and then observed the two side lights of the Welsh, thereupon giving a one-whistle signal; and that at this time the Parsons was about at Fourteenth street. He says that, after giving one whistle to the Welsh and porting his wheel, he heard a two-whistle signal from the Welsh, whereupon the Parsons reversed her engines. After this alarm signals were given by each tug, and then while the

Parsons and her tow were swinging to starboard, and the Welsh and her tow swinging to port, the boat Lane came in collision with the car-float.

On this appeal, the appellant does not ask to be exonerated from blame, but insists that the Welsh was also at fault, and should share the damages with the appellant. It is clearly established that the deckhand on the Welsh, Raine, who was charged with the duty of a lookout, was sitting in the pilot house at the time of the collision and prior thereto. The master of the Welsh, who was navigating with the tow upon the starboard side, was endeavoring to perform the duties of navigator, wheelsman and pilot. The night was clear, and no good reason is advanced why those in charge of the Welsh could not see the Parsons at a greater distance off than the testimony of the master shows the Parsons was seen. The deckhand, in the pilot house with the master, had no better advantage of seeing the lights of the Parsons than did the master. If an efficient lookout had been at his post, performing his duty as the law requires, the lights of the Parsons would have been observed in time for an exchange of whistles for the tugs to have passed in safety. The lookout of the Parsons was "cleaning up" preparatory to leaving the tug, and did not assume his post of duty on top of the car float until just previous to the collision. He did not observe the Welsh in time, and, when he did, the Welsh was exhibiting both side lights to the Parsons; the Welsh being ahead of the Parsons.

We are satisfied from the proof that the Parsons gave a signal of one whistle, which should have been heard, and with the aid of an efficient lookout at his post of duty the Parsons would have been observed. It is this misunderstanding of signals, or failure to hear the signals, that permitted the tugs and their own tows coming in such close proximity, and, when each observed the navigation of the other, there was not sufficient time for an exchange of signals to pass safely. We cannot say but that, if the Welsh had maintained a proper lookout, the Parsons would have been observed in time for a proper exchange of signals. Each tug changed its course in accordance with its own signals. The proper signals would have been exchanged, and the collision avoided, had each tug maintained an efficient lookout. It is a fundamental rule that a vigilant lookout must be kept on all vessels, and it is adherence to this obligation by tug owners which avoids collisions of the type here under consideration. The admiralty courts have always insisted upon the enforcement of this duty when the question of liability is presented. D., L. & W. R. R. v. Central R. R. of N. J., 238 Fed. 560, 151 C. C. A. 496.

We think the decree below should be modified, and both tugs held at fault. Decree modified, with costs to appellant against the Welsh. The District Court is directed to enter a decree in accordance with this opinion.

LITTLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1921. Rehearing Denied February 6, 1922.)

No. 5397.

1. **Criminal law ⇐730(1), 823(1)—Statement of district attorney in argument and court in instructions held not prejudicial.**
   In a prosecution for failure to register under Selective Draft Act, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044e), defendant was not prejudiced because the district attorney in his argument, and the judge in his instructions to jury, stated that the penalty for the offense charged might be only a fine, where the judge corrected this misstatement by further instructions before submitting the case to the jury.
2. **Criminal law ⇐762(2)—Judge in federal court may express opinion on facts.**
   In the United States courts the judge may comment on the evidence, call the jury's attention to parts of it that he thinks are important, and may express his opinion upon the facts, provided he finally leaves the decision of the questions of fact to the jury.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Barney Little was convicted of failing to present himself for registration under the Selective Draft Act, and brings error. Affirmed.

Charles J. Wright, of Springfield, Mo. (Henry D. Green and J. L. Bess, both of West Plains, Mo., and Fyke & Snider, of Kansas City, Mo., on the brief), for plaintiff in error.

Sam O. Hargus, Sp. Asst. U. S. Atty., of Kansas City, Mo. (James W. Sullinger, U. S. Atty., of King City, Mo., on the brief), for the United States.

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

MUNGER, District Judge. The plaintiff in error, hereafter called defendant, was convicted of a violation of section 5 of the Selective Draft Act (40 Stat. 80, vol. 1, Supp. U. S. Comp. Stats. § 2044e), on an indictment charging that he failed to present himself for registration on June 5, 1917, although he was within the age limits prescribed by that act. At the trial the chief issue contested was the age of the defendant. It is now urged that the judgment should be reversed because the evidence is as consistent with innocence as with guilt. There was no request for an instructed verdict, and no assignment of error challenges the sufficiency of the evidence, but it has been examined, and it appears that testimony was received showing that the defendant had repeatedly stated his age to various persons, and this was corroborated by much other testimony. The defendant relied upon the testimony of some relatives and former acquaintances, and testimony as to entries of birth dates in a family Bible. Without reviewing this testimony it is sufficient to say that it made a question for the jury. It is assigned that the indictment did not state an of-

fense, but no argument is made in support of the contention, and an inspection of the indictment discloses no substantial defect in its form.

Complaint is made of statements made by the district attorney in his address to the jury as unfair and prejudicial to the defendant. The trial court's attention was not challenged to the statements of which complaint is now made, nor does any assignment of error present the subject, but the remarks made by the district attorney have been carefully considered, and the portions challenged do not appear to have been beyond the fair limits of comment.

[1] It is claimed that the defendant was prejudiced because the district attorney in his argument, and the judge in his instructions to the jury, stated that the penalty for the offense charged might be only a fine, but the judge corrected this misstatement of the statutory penalty by further instructions before submitting the case to the jury. No exceptions were taken and no assignment of error presents this complaint, and no prejudice to the defendant appears.

[2] A further complaint is made that the charge of the court unfairly commented on testimony given by some of the defendant's witnesses, and failed to comment on the weakness of portions of the plaintiff's testimony. Only a general exception to the charge was made, but it is now said that the jury was practically told to disregard the testimony of all of the defendant's witnesses. In the instructions the court reviewed some of the testimony given by each side, and mentioned the relationship of some witnesses to the defendant, but it does not appear that the jury was told to disregard any portions of the evidence. The jurymen were told repeatedly that they were to decide the questions of fact upon their own judgments, and that the comments of the court upon the facts were not binding upon them. This was not error, for in the United States courts the judge may comment on the evidence, call the jury's attention to parts of it that he thinks are important, and may express his opinion upon the facts, provided he finally leaves the decision of the questions of fact to the jury. Vicksburg & Meridian Railroad Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Lovejoy v. United States, 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; Horning v. District of Columbia, 254 U. S. 135, 138, 41 Sup. Ct. 53, 65 L. Ed. —; Stokes v. United States (C. C. A.) 264 Fed. 18, 25; Savage v. United States (C. C. A.) 270 Fed. 14, 21.

One assignment of error alleges that the court refused two instructions requested by the defendant but the record does not show that any such instructions were asked. No other questions require consideration, and the judgment will be affirmed.

McWILLIAMS BROS., Inc., v. PAYNE, Director General of Railroads.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 20.

1. **Collision ⇐107—Tug backing out of slip held bound to notice load and course of approaching tug, ordinary rules not applying.**
   A tug, backing out of her slip and rounding to under a hard aport wheel to swing down the river, *held* bound to exercise reasonable care, and take notice that a tug coming up the river, about 900 feet off, on the same side, within 400 feet of the shore, was heavily laden and trying to keep a steady course; the steering and sailing rules being inapplicable to a vessel situated as the tug.

2. **Collision ⇐102—Tug backing out of slip and tug coming up river on left-hand side, with heavy tow, held both at fault.**
   A tug, backing out of a slip with two barges in tow and rounding to under a hard aport wheel to swing down the river, and a tug coming up the river on the same side, about 900 feet off, and within 400 feet of the shore, with a heavy car float in tow, *held* both at fault for a collision between a barge on the port side of the former tug and the car float; the tug coming up the river being presumptively at fault, despite the strong ebb tide, in that she was on the left-hand side, instead of the middle of the river, as required by the New York statute, and hence obliged to navigate so as to accommodate the other tug's maneuvering, and also at fault for placing her long, heavy tow in crowded waters, while the maneuvering tug was at fault, in that, after giving one blast of the whistle, she proceeded further out into the river, thus placing herself in the way of the car float.

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

Libel by McWilliams Bros., Inc., against John Barton Payne, Director General of Railroads, etc. Decree for libelant, and respondent appeals. Affirmed.

Haight, Sandford, Smith & Griffin, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before ROGERS, MANTON, and MACK, Circuit Judges.

MANTON, Circuit Judge. On April 20, 1918, at about 11 o'clock in the morning, a collision occurred between libelant's barge Carrie, which was in tow of the libelant's tug Abraham P. Skidmore, and a car float in tow of the New York, New Haven & Hartford Railroad's tug Transfer No. 17. The collision occurred in the East River, off Seventeenth street, near the Manhattan shore. The Transfer No. 17 had two car floats in tow, one on each side. She was proceeding from Greenfield, N. J., down the North River, and rounded the Battery. She was coming up the East River on her way to Oak Point, and was keeping close to the Manhattan piers for the purpose of avoiding the ebb tide and taking advantage of the slack water at the pier ends. The Skidmore took the Carrie and another barge, which were in the slip between Piers 21 and 22, Manhattan, and intended to shift them down

to Pier 18, three piers below. Both her barges were light, and, as fastened, the Carrie was on the port side. After backing out with the barges, the Skidmore rounded to under a hard aport wheel to swing down to Pier 18. While thus maneuvering, she gave a signal of one whistle to the Transfer 17, and the latter answered with a similar signal. The Transfer No. 17 had a very heavy tow while coming up the river, and kept within 400 feet of the Manhattan shore.

[1] It is apparent that the Skidmore intended to get out into the stream sufficiently to turn under a port helm, and so drop down with the ebb tide to Eighteenth street. While doing this, she was pointing slightly to the Brooklyn shore. The Transfer No. 17 was about 900 feet off, and was bearing about a point or nearly so on the Transfer No. 17's port bow. While engaged in this maneuver, the situation presented made applicable the rule in a case of special circumstances. The Transfer No. 17 was the privileged vessel, but the Skidmore was bound to exercise reasonable care, and take notice that the Transfer No. 17 was heavily laden and trying to keep a steady course. The situation presented by a vessel coming out of the slip and maneuvering to get on her course, or maneuvering to get into her slip, is not navigating upon any course, and the steering and sailing rules do not apply. The Coamo (C. C. A.) 267 Fed. 686; The Wm. A. Jamison, 241 Fed. 950, 154 C. C. A. 586; The Black Diamond (C. C. A.) 273 Fed. 811.

[2] Examining the vessels under these special circumstances, and with due regard for the rules applicable thereto, we think both vessels were at fault. The Transfer No. 17, in her navigation, violated the New York statute (Ash's Greater New York Charter [4th Ed.] 1253, § 757), for she was on the left-hand side of the stream when the statute required her to be in the middle of the river. She is not excused because of the strong ebb tide. The Black Diamond (C. C. A.) 273 Fed. 811. Her participation in a collision makes her presumptively at fault. Under the circumstances, she was obliged to navigate so as to accommodate the maneuver of the Skidmore. She ought to have seen what the Skidmore was doing and navigated accordingly. She was at fault for placing her long, heavy tow into crowded waters, and this directly contributed to the collision. It is this type of collision the statute intended to prevent. The Skidmore, after giving the whistle, proceeded further out into the river. By this navigation she placed herself in the way of the heavy car floats. She did not stop or navigate with that reasonable prudence which would have helped to avoid the collision.

We think both vessels were at fault, and that therefore the result below must be affirmed.

Decree affirmed.

SUSQUEHANNA COAL CO. v. PRATT & YOUNG, Inc., et al.

(Circuit Court of Appeals, First Circuit. December 19, 1921.)

No. 1522.

1. **Injunction ⟸26(3)—A defendant held not entitled to an injunction to restrain action at law.**
   A litigant insistent on formal proof of facts easily ascertained and ordinarily disposed of by stipulation cannot urge the resulting waste of labor, time, and money as a ground for removing the controversy, with the parties reversed into a court of equity.
2. **Injunction ⟸26(6)—Action at law will not be enjoined where the issues can as well be determined therein as in equity.**
   Equity will not enjoin prosecution of an action at law where the issues tendered by defendant can be as efficiently and economically presented and determined therein as in equity.
3. **Appeal and error ⟸1176(6)—Appellate court may direct dismissal of bill on appeal from interlocutory order.**
   Where it is apparent from the pleadings and record that complainant is not entitled to equitable relief, the Circuit Court of Appeals may direct dismissal of the bill on appeal from an interlocutory order.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Suit in equity by Pratt & Young, Incorporated, and others against the Susquehanna Coal Company. From an interlocutory decree granting an injunction, defendant appeals. Reversed, with directions to dismiss bill.

For opinion below, see 269 Fed. 667.

Richard W. Hale, of Boston, Mass. (Joseph N. Welch and Hale & Dorr, all of Boston, Mass., on the brief), for appellant.

Albert W. Rockwood, of Boston, Mass. (Henry F. Hurlburt and Damon E. Hall, both of Boston, Mass., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. This is an appeal from an interlocutory decree enjoining the appellant from maintaining its action at law against the appellee for the conversion of 45,600 tons of coal, part of a larger quantity of 93,756 tons alleged to have been converted by the A. H. Dollard Coal Sales Company and sold by it to the appellee.

The suit at law was brought in March, 1917. The appellee required formal proof that the coal purchased by it was a part of the lot converted by the Dollard Company. The case was consequently referred to an auditor, with the usual result of protracted hearings, past and prospective, in order to prove an identity which the appellee in its bill now alleges to be completely established, and upon which it now relies, in this suit in equity brought three years later, in April, 1920, as an essential part of the basis of its claim for equitable relief.

[1] A litigant, insistent on formal proof of facts easily ascertained and ordinarily disposed of by stipulation, cannot urge the resulting

waste of labor, time, and money as a ground for removing the controversy, with the parties reversed, into a court of equity.

[2] The appellee's real defense to the suit at law is now shown to be that, by conduct and various legal proceedings, the appellant waived the tort by the Dollard Company, transmuted the alleged conversion into a sale, and thus barred its action against the appellee for conversion. These issues as to whether there was such waiver or election by the appellant and its effect upon the appellee's rights can be as directly and easily tried and the rights of the parties as fully and justly determined in the suit at law as this suit in equity.

Assuming, without deciding, that the court below was correct in its view that the controversy, as now presented, involves no real issue of fact, but only purely legal questions, we cannot agree that the parties can approach a determination of the cause "only by way of long and expensive hearings before an auditor, and a long and expensive jury trial."

We think the method of pleading adopted by the parties in Plews v. Burrage (C. C. A.) 274 Fed. 881, shows that for such a controversy the procedure in a court of law is as flexible, economical, and efficient as in a court of equity.

The appellee has a plain, adequate, and complete remedy at law.

The case is governed by Plews v. Burrage (C. C. A.) 266 Fed. 347, which is not distinguishable from it, although in that case it was thought that there might be a question involving an issue of fact.

[3] While this is an appeal from an interlocutory decree, yet it is apparent from the pleadings and the record that the whole case is before us, and that the plaintiff is not entitled to equitable relief. In such a case our power of review is not confined to the decree granting the injunction, but extends as well to determining whether there is such insuperable objection in point of jurisdiction or merits to the maintenance of the bill that it should be dismissed. Denver v. New York Trust Co., 229 U. S. 123, 136, 33 Sup. Ct. 657, 57 L. Ed. 1101. See, also, In re J. B. Judkins Co., 205 Fed. 892, 124 C. C. A. 205, a case in this circuit.

The entry must be:

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dissolve the temporary injunction and to dismiss the bill, with costs to the appellant.

LANSTON MONOTYPE MACH. CO. v. PITTSBURGH TYPE FOUNDERS CO.

(District Court, D. Delaware. July 13, 1921. Supplemental Opinion, November 18, 1921.)

No. 399.

1. **Words and phrases—"Lead," "rule," "slug," "point," and "pointwise dimension" defined.**
As used in the printing trade, a "lead" is a strip of metal used to separate lines of type; a "rule" is a thin plate or strip of metal, of the same height as the type, used for printing lines, as in tabular work or between columns of the same page; a "slug" is a thick lead; the "point" is the standard unit of measure of type bodies, it being .0138+, or approximately 1/72, of an inch; and the "pointwise dimension" of a lead, rule, or slug is its thickness.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lead; Point; Rule.]

2. **Patents ⇐328—Cutting mechanism for casting machine held not infringed.**
The Bancroft & Indahl patent, No. 1,193,344, claim 13, and the Hockman patent, No. 1,193,388, claims 32 and 38, each for cutting mechanism for machines for casting printer's leads and rules, *held* not infringed.

3. **Patents ⇐328—1,222,415, claims 1 and 2, and 1,237,058, for machine and process for making type-metal elements for printing forms, held not infringed.**
The Knight patents, No. 1,222,415, claims 1 and 2, for apparatus for casting type-metal elements for printing forms, and No. 1,237,058, for the process and product of such casting, *held* not infringed.

In Equity. Suit by the Lanston Monotype Machine Company against the Pittsburgh Type Founders Company. Bill dismissed.

Melville Church and Alexander S. Steuart, both of Washington, D. C., and Ward, Gray & Neary, of Wilmington, Del., for plaintiff.

Fay, Oberlin & Fay, of Cleveland, Ohio, and Thomas F. Bayard, of Wilmington, Del., for defendant.

MORRIS, District Judge. [1] The bill of complaint in this cause charges infringement by Pittsburgh Type Founders Company of letters patent Nos. 1,222,415 and 1,237,058, issued April 10, 1917, and August 14, 1917, respectively, to Amos L. Knight, assignor to Lanston Monotype Machine Company, the plaintiff. The earlier patent is for a machine to manufacture typographic elements, known as leads, rules, and slugs. The later one, the application for which was a division of the application for the former, is for the product and the process of such manufacture. A "lead" is a strip of metal used to separate lines of type in printing. A "rule" is a thin plate or strip of metal, of the same height as the type, used for printing lines as in tabular work or between columns of the same page. A "slug" is a thick lead. The "point" is the standard unit of measure of type bodies; it being .0138+, or approximately 1/72, of an inch. The pointwise dimension of a lead, rule, or slug is its thickness, as to which uniformity and exactness is essential.

As to the objects of the invention, the inventor states:

"The principal objects to be accomplished are, first, the casting of the elements in indeterminate lengths adapted to be subsequently severed to form lines, rules, or leads of the desired length for any particular printing form; and, secondly, to permit of the casting of such elements free from cavities or defects, and of accurately proportioned dimensions, to correspond either to the point size of the elements composing the form, or to bear such relation to the same that the elements of the form may be locked up without permitting of any looseness or play of the elements. Other objects of the invention are to provide mechanism which will produce the elements in indeterminate lengths economically and from molten metal such as is commonly employed in the type-casting art for casting type characters, and commonly known as type metal, thus putting it within the capacity of the ordinary printing establishment to produce all of the elements entering into the printing form at such time as the same may be needed and of proper size as to fit the work in hand."

An advantage of making the product of type metal rather than of brass, as formerly, is that the articles constituting the product may be returned to the melting pot with the type, instead of being picked out by hand from the type form, and results in what has become known in the printing art as a "nondistribution" system.

With respect to the machine the specification says that "the apparatus adopted for illustrating the invention is one designed more especially for use in connecting with a monotype casting machine," and adds:

"But it will be understood that the invention may be incorporated in a machine designed for the special function of casting elements of printing forms, without having incorporated therein the refinements of mechanism embodied in the monotype casting machine for producing accurately justified lines of type, and therefore the present invention is susceptible of embodiment in a comparatively simple machine."

The principal characteristics of the machine described in the patent are the *mold,* in which the product is cast in successive increments, each increment as cast being joined by fusion to the preceding one; the *pump,* which forces the molten type metal from the melting pot into the mold; and the feeding mechanism, consisting of a mold blade or thrust rod, which pushes the product toward and out of the exit end of the mold cavity, step by step, as each succeeding increment congeals and becomes fused to the preceding increment. The mold, which is above the melting pot, is a built-up structure having a bottom or mold base through which the molten metal is injected into the mold cavity; a top, formed by a matrix or part which gives shape to the upper surface of the element being cast; two parallel sides, or type blocks, between whose extended ends are placed point blocks which determine the width of the mold cavity and consequently the point size of the element being cast; and a rear end wall, formed by the forward end of the mold blade when retracted.

To retain within the mold cavity the first injection of molten metal until it becomes congealed, the exit opening at the other end of the mold is closed by inserting therein, before the machine is started, a section of product previously made. When the first injection of molten metal becomes congealed, and fused to the inserted section of finished product, the mold blade advances and pushes the rear end of the congealed increment to the exit opening of the mold cavity; the rear end

of each succeeding increment in turn constituting the front wall of the mold during the formation of the next increment. The mold blade, after pushing forward a congealed section, is immediately retracted. A new charge of molten metal is injected into the mold cavity as the mold blade retracts, or after it has been retracted. The metal in the mold is chilled by water circulating through channels in the bottom and sides of the mold. A pressure screw bears upon the type block forming the front side wall of the mold, and is so operated as to press the type blocks tightly against the separating point blocks during the casting operation and to release such pressure during the forward feeding of the product. There is also at one side of the mold cavity a channel and opening in the type block, through which the air from the mold cavity may escape at each injection of the molten metal. The small quantity of metal which escapes with the air forms a thinly connected projection on the side of the cast element. This projection is sheared off by a stationary knife, and drops into the melting pot as the cast element is fed forward.

The pump is immersed in the molten metal in the melting pot, and forcibly injects the separate charges of metal into the mold cavity through a nozzle and nozzle opening in the mold base; the nozzle opening being located immediately behind the rear end of the congealed increment in its advanced position. The pump is actuated in coordination with the reciprocating mold blade, so that there is one stroke of the pump for each complete reciprocation of the mold blade.

The machine claims in suit, being 1 and 2 of patent No. 1,222,415, are:

"1. An apparatus for casting type metal elements for printing forms, embodying means for confining molten metal, in contact with a surface of a previously congealed portion of the element being cast whereby the two portions are caused to unite by fusion, means for intermittently advancing the element with relation to the confining means as succeeding increments congeal, and means for forcibly injecting molten metal within the confining means to form succeeding increments of the element.

"2. An apparatus for casting type metal elements for printing forms embodying means for confining a body of molten metal in contact with a surface of a previously congealed portion of the element being cast, whereby the two portions are caused to unite by fusion, means for intermittently advancing the element as succeeding increments congeal, means for intermittently injecting molten metal within the confining means, and means for directing the incoming metal along the face of the previously congealed portion of the element."

The specification of patent No. 1,237,058 states that the form of apparatus described in patent No. 1,222,415 may be employed for carrying out the process and producing the article forming the subject-matter of the later patent, and adds:

"In the practical making of the strip material of the present invention it was found to be of great importance, especially with strip material provided with a printing surface, to follow a process in which, generally set forth, the molten type metal is forced into a suitable cavity, one of the walls of which constitutes a matrix or die to determine the facial characteristics of the finished strip, the metal when congealed being fed forwardly to permit the entry of the next increment and to close the exit of the cavity, the above operations being repeated successively to produce a strip of the desired length."

The claims in suit for the process, being 4 and 6 of patent No. 1,237,058, are:

"4. The method of forming a distinctive finished strip of material for use in a form of printing type which consists in intermittently forcing increments of molten metal into a mold cavity the exit to which is closed by the congealed metal forming the strip, intermittently feeding the metal forwardly through the exit of the mold cavity and in causing the molten metal to congeal in the mold cavity during the intervals between feed movements."

"6. The method of forming a distinctive finished continuous strip of metal for use in a form of printing type, which consists in intermittently forcing molten type metal into a mold cavity the exit to which is closed by the congealed metal of a previous increment, causing the succeeding increments to unite by fusion, intermittently feeding the metal forwardly through the exit of the mold cavity and in causing the molten metal to congeal in the mold cavity during the intervals between feed movements."

With respect to the product the later patent says:

"The product of such process is, as will be readily understood, a strip of type metal of definite width and depth and of indefinite length, which is formed of successively congealed sections fused together to form an integral structure. Each section after congealing becomes melted in the region of the end thereof which forms the end wall of the mold, by contact with the molten metal subsequently injected, and the melted portion of the congealed section and the injected molten metal thereafter congeal to form a new section fused to the previously congealed section."

While the application for the later patent was pending in the Patent Office it was amended by the addition, among other things, of the following:

"The lead or rule strip which is produced by the process described is, when it issues from the machine, a distinctive finished product; that is to say, it is a strip which is of the proper transverse dimension, for use in a form of printing type. The face or that edge which corresponds to the face of the type is a cast face and the surfaces of the strip at the sides are cast surfaces which in appearance and function correspond substantially to the appearance and function of the face and surfaces of ordinary undressed cast type, and consequently require no planing, dressing or finishing, either to give the proper transverse dimension or face or surface finish. The strip product is thus sharply distinguished from prior lead and rule strip material which, as heretofore made by the rolling extrusion or machining processes, invariably presented surfaces which were not cast surfaces but were dressed surfaces. * * * The several increments or sections which go to make up the complete strip are congealed in the mold cavity successively and merge one into the other by a process of fusion."

The product claims in suit, being 1 and 2 of patent No. 1,237,058, read as follows:

"1. A finished type metal strip to form a lead or rule element in a form of printing type, composed of successively congealed sections of metal merged by fusion one into the other with finished cast side surfaces showing the sectional formation and with a cast face.

"2. A finished type metal strip to form a lead or rule element in a form of printing type, composed of successively congealed increments of metal forming sections each with finished cast side surfaces showing the sectional formation and with a cast face, the several sections being merged one into the other to form an element of any desired length."

The defendant does not deny the presence of invention in plaintiff's patented product, process, and machine, but contends that, when the

claims are interpreted in the light of the prior art, defendant's product, process, and machine cannot be regarded as infringements.

Defendant's machine has a melting pot, a pump, a mold or forming die, and a feeding mechanism operating as a draw blade. The bottom of the melting pot is on the same horizontal plane as the bottom of the cavity in the mold or die. The pump is located in the melting pot. The molten metal flows from the melting pot into the pump chamber through a small opening located in the surrounding cylinder at a point just below the bottom of the piston when in its elevated position. The pump chamber is connected with the mold or die cavity by a throat or channel, the bottom of which is on a horizontal plane slightly below that of the bottom of the mold or die cavity. The function of the pump is to inject molten metal into the mold or die cavity. The mold or die has a top, bottom, two parallel sides, and a rear end wall, all rigidly fastened together. Inclosed therein is a cavity, the inlet to which is through the bottom part of the rear end wall of the mold. The inlet or nozzle is relatively small in cross-section. The exit of the mold cavity is at the forward end of the mold. The cross-sectional dimensions of the cavity correspond with and depend upon the height and point size of the strip to be formed therein. The mold is approximately four inches long. The molten metal is chilled in the mold by the circulation of water in a surrounding jacket. The mold is removable; each mold being so designed as to make elements of one size only. The mold cavity is open at its exit end to permit the outward feeding of the strip as it is formed.

Before starting the machine this opening is closed in the same manner as is the similar opening in plaintiff's mold. During the operation of the machine this exit is continuously closed by the congealed metal forming the strip as in plaintiff's mold. There is no air vent in the mold or die, as during operation the air is excluded from the cavity therein by the congealed strip closing the exit and by the molten metal, which continuously fills the channel leading from the pump cylinder in the melting pot to the inlet in the rear end of the mold or die. Consequently there is no fin to be sheared from the product. The feeding means operates as a draw blade. There is a withdrawal movement of the feeding device for every stroke of the pump. In the normal operation of the machine the downward stroke of the piston synchronizes with the pulling movement of the draw blade. The injection of the metal into the mold or die cavity and its withdrawal therefrom is intermittent. The injection, being aided by pump action, is likewise forcible. The forcible injection of the metal through the inlet, the bottom of which is on a level with the bottom of the mold cavity, would seem effective to produce a swirl of molten metal in the mold sufficient for directing the incoming metal along the face of the previously congealed portion of the element. The withdrawal movements are made at the rate, approximately, of one per second, between which there is a relatively long period of rest, to permit the newly injected molten metal to congeal in the mold or die cavity. The product is type metal elements for printing forms. With respect to the feeding means I think the draw blade of

defendant's machine an equivalent of the mold or thrust blade of plaintiff's.

Each of the elements of the machines covered by the mechanism claims in suit would seem to be present in defendant's machine, and each of the steps of plaintiff's process covered by the claims therefor in suit would seem to be present in defendant's process. The defendant contends, however, that the term "mold" designates a rigid matrix or body frame provided with a mold cavity adapted to receive an isolated charge of molten or plastic material, and adapted to confine and shape that charge to the definite form and pattern of that cavity while the material hardens and becomes self-sustaining; that the embodying means of the Knight patents for confining molten metal is such a mold, and that, in view of the specification and the prior art, the claims of those patents must be limited to such embodying means. It further contends that defendant's machine does not have a mold, but that in lieu thereof it has a matrix or die opening that determines merely the cross-sectional shape of the strip; that there is always a continuous uninterrupted passage or opening from the pump chamber in the melting pot to the exit end of the die which, during operation, is always filled with an unbroken mass of metal that progressively changes from the molten to the solid state; that by reason thereof there is in the latter machine never at any stage of operation a mold cavity, or closed space, into which a charge of molten metal is injected or cast, and that therein lies an essential distinguishing feature between the two machines.

I am unable to agree with the defendant in its theory that its mold or forming die is always filled with an unbroken mass of metal. The withdrawal of the element or strip is intermittent, not continuous. The withdrawal movements are begun when the metal in the mold or die cavity is in a state of rest. They are sudden and abrupt. The movement thus given to the congealed element necessarily stops at the rear end of the solid material. It is not communicated to the molten metal beyond, then in a state of rest. The force that gives movement to and advances the molten metal at the rear of the congealed element is not that of the withdrawal device, but is the pump pressure, supplemented possibly by gravity. However quickly this force may change the molten metal from a state of rest to a state of motion, the changed state cannot occur until the congealed element moves, and its movement is sudden and abrupt. The result, as I view it, is a breach of continuity in the metal in the mold at each withdrawal movement; the breach occurring along an irregular line constituting the boundary between the solidified and the molten mass. This conclusion is fortified, I think, by the arrow head markings on defendant's product, which seem to me to be lines or zones of fusion corresponding with the conformation of the rear end of each section of the congealed metal when fed forward. The breach of continuity and the fusion are, I think, both well illustrated by the sectional markings on the top and bottom faces of the strips, defendant's exhibit No. 31, made with the pump cam so adjusted as to make the pump action alternate with the drawing action. The markings on a strip of given length are equal in number to the with-

drawal movements imparted to that strip. It follows, I think, that the change of the metal from the molten to the solid state is not progressive, as defendant contends, and as it probably would be, were the withdrawal from the mold or die cavity continuous and at a uniform rate of speed, but is incremental and sectional.

Nor am I able to agree with defendant's contention that there is not in its machine at any stage of operation a mold cavity, or closed space, into which a charge of molten metal is injected or cast. Whatever the defendant's confining means may be called, it contains a cavity. The metal incrementally solidified by casting and united by fusion is intermittently withdrawn from a portion thereof as succeeding increments congeal. The fact that the portion of the cavity so vacated is filled as it is vacated, instead of after completed vacation, does not seem to me to warrant defendant's conclusion.

I have examined the patents put in evidence by the defendant as illustrating the prior art. Even in the light thereof, I think that defendant's operation is an incremental casting operation, not a drawing one, and that defendant's mold performs the same function in substantially the same way as does that of plaintiff. Hence I find claims 1 and 2 of patent No. 1,222,415 and claims 4 and 6 of patent No. 1,237,058 valid and infringed.

The product of defendant's machine is, if the previous findings herein be correct, a finished type metal strip to form a lead or rule element in a form of printing type, composed of successively congealed sections of metal merged by fusion one into the other, with finished side surfaces showing the sectional formation with a cast face. To this extent defendant's element is the product described in the product claims in suit. Each of those claims, however, gives an additional feature to the product covered thereby, namely, cast side surfaces. The term "cast" must be construed in the light of the description in the specification. The amendment thereto, above quoted, shows that the term signifies having the appearance of an undressed cast surface, in contradistinction to a dressed surface. This is illustrated by figures 7 and 8 of the patent. As the claims are thereby expressly limited to a product having undressed cast side surfaces, such side surfaces are an indispensable feature of the product covered by the claims in suit. If the defendant has in its product succeeded in dispensing with this feature it does not infringe those claims.

That the defendant has dispensed with that feature is made clear, I think, by burnishing the sides of plaintiff's element, whereupon it presents an appearance much more nearly like the side surface of defendant's element than it does before such burnishing. Consequently, I find claims 1 and 2 of patent No. 1,237,058 not infringed. The difference in side surface appearance between the product of the defendant and that of the plaintiff is accounted for, possibly, by the fact that each increment of defendant's element is cast very near the rear end of the mold cavity, which is, in length, four or five times that of an increment. The passage of each increment, after it is cast, between the tightly confining walls of a cavity of such length, may burnish or

dress the side surfaces of defendant's product. While this step of defendant's process is not present in plaintiff's process, yet the defendant, having used each step of plaintiff's process, may not, by the use of an additional step, escape the charge of infringement. Nor does the fact that defendant's mold performs a burnishing function in addition to its casting function make defendant's machine any less an infringement of plaintiff's.

[2] The defendant's machine has also a mechanism for cutting off the formed elements in such lengths as may be desired. The bill of complaint alleges that this mechanism infringes letters patent No. 1,193,344, granted August 1, 1916, to J. S. Bancroft and M. C. Indahl, assignors to plaintiff, and No. 1,193,388, granted on the same day to C. C. Hockman, likewise assignor to plaintiff. The claims in suit are 13 of the former patent and 32 and 33 of the latter patent. They are:

"13. In apparatus for producing printers' leads and rules, the combination with means for casting and feeding a lead or rule strip of indeterminate length, of a cutter carriage movable in unison with the strip, a gage rod movable with the carriage, a gage adjustably mounted on said rod and projecting in the path of the end of the strip, a transversely movable cutter mounted in the carriage, and operating mechanism for advancing the cutter when set by the gage."

"32. The combination with a casting mechanism, of a cutting mechanism, movable elements constituting a part of the casting mechanism and moving in unison therewith, and means for bringing the cutting mechanism into operative connection with said movable elements at intervals whereby said elements actuate the cutter.

"33. The combination with a casting mechanism, of a cutting mechanism, members constituting an actuating means between the casting mechanism and the cutting mechanism whereby the latter is operated by the former, said members being normally out of engagement with each other, and means for establishing a connection between said members at intervals."

Defendant's counsel have not contended that those claims are invalid, nor have they in argument or brief made any reference to the prior art discussed by defendant's expert. They contend, simply, that one of the elements of each of those claims is missing from defendant's machine. They point out that in the mechanism of both of those patents the movable element, constituting a part of the strip forming mechanism and moving in unison therewith, does not, as in defendant's machine, operate directly upon the head of the transversely movable cutter mounted on the movable cutter carriage when the cutter carriage is advanced by the strip, but actuates the cutter through intervening mechanism. They point out that such intervening mechanism is called for by each of the claims in suit—in claim 13 as "operating mechanism for advancing the cutter when set by the gage," in claim 32 as a "means for bringing the cutting mechanism into operative connection" with movable elements constituting a part of the casting mechanism, and in claim 33 by substantially identical language. I think the absent mechanism is called for by the claims, and, one element of the combination of the claims not being found in defendant's machine, I find claim 13 of patent No. 1,193,344 and claims 32 and 33 of patent No. 1,193,388 not infringed.

A decree in conformity herewith may be submitted.

Supplemental Opinion.

(After Reopening Case and Additional Proofs.)

[3] One of the findings made in the original opinion was that a breach of continuity in the metal passing through defendant's mold occurred at each withdrawal movement. As defendant's mold was made wholly of metal, this finding was, of course, pure deduction. After the filing of the original opinion, the defendant succeeded in making a mold with a glass, or pyrex, window. Upon a petition setting forth both this fact and the further fact that defendant, before final hearing, made numerous and prolonged, but unsuccessful, efforts looking to this end, the cause was reopened on the original pleadings, to enable defendant to submit to the court an ocular demonstration of the behavior of the metal in its mold. The demonstration has been had. A window was first placed in the side of the mold next to the observer. A strong light was thrown upon it. A subsequent demonstration was made with a window in each side of the mold. In the latter demonstration a light of high candle power was placed at the far side of the mold. The rays of light, other than those that might pass through the windows of the mold and the breaches of continuity, if any, in the metal within the mold, were diverted from the observer by a funnel-shaped box or inclosure leading from his eyes to the window in the near side of the mold. The machine was operated under each of these conditions. The evidence does not disclose that any observer discerned under these conditions any breach of continuity in the metal within the mold. None was observed by the court. While in these experiments, by reason of the slower congelation brought about by the decreased size of the cooling jacket made necessary by the windows in the mold, the length of draw and consequently the output of product within a specified time was greatly reduced, yet the speed and abruptness with which the solidified portion of the lead or rule was put in motion at each withdrawal movement was the same as in the normal operation of the machine. At the rehearing it was also pointed out that the arrow-head markings of defendant's product do not extend through the lead or rule, but are to be found only upon its surface. This indicates, I take it, that, while the molten metal in the mold may become attenuated by the withdrawal movement, yet no complete breach therein occurs. Under these circumstances I am constrained to conclude that theory must give way to demonstration, and that in the operation of defendant's machine there is no breach of continuity in the metal within defendant's mold during the normal operation of its machine.

Claims 1 and 2 of patent No. 1,222,415 call for an apparatus for casting type metal elements for printing forms, for confining (a body of) molten metal in contact with a surface of a previously congealed portion of the element being cast, "whereby the *two* portions are caused to *unite* by *fusion*. * * *" One of the steps in claim 6 of patent No. 1,237,058 is "causing the succeeding increments to *unite* by *fusion*." Each of these claims either expressly calls for or necessarily presup-

poses, among other things: (a) "Two" masses, bodies, or increments of metal; (b) that such increments should "unite"; and (c) "by fusion." Unless the stream of metal in defendant's machine is broken in its mold, there are not at any time "two" masses, bodies, or increments of metal in its machine, but only one unbroken, continuous mass. Unless the stream of metal in defendant's machine is broken in its mold, there are not at any time separate masses, bodies, or increments of metal to be "united." Unless the stream of metal in defendant's machine is broken in its mold, there are not at any time two masses, bodies, or increments of metal to unite "by fusion." The meaning of "fusion," as used in the claims, may be stated in the language of the inventor, found at page 1, lines 47–56, of patent No. 1,237,058, thus:

"The product of such process is, as will be readily understood, a strip of type metal of definite width and depth and of indefinite length, which is formed of successively congealed sections fused together to form an integral structure. Each section, after congealing, becomes melted in the region of the end thereof which forms the end wall of the mold, by contact with the molten metal subsequently injected. * * *"

It is clear that "fusion," as thus used, does not mean the mere rendering fluid by heat, but means the union by heat of two separate masses or increments. In the absence of a breach of continuity in the stream of metal within defendant's mold, there is no opportunity for fusion therein, such as occurs in plaintiff's mold and as is called for by the claims. Consequently I deem a breach of continuity of the metal within defendant's mold an indispensable prerequisite to infringement by defendant's machine and process of claims 1 and 2 of patent No. 1,222,415 and claim 6 of patent No. 1,237,058.

Claim 4 of patent No. 1,237,058 was a substitute for a prior claim 4 rejected by the Patent Office upon Illingsworth patent No. 473,579. The rejected claim reads:

"4. The method of forming a relatively thin and broad strip of type metal for use in a printing form, which consists in casting the same in successive sections with the rear edge of a preceding section in direct contact with the molten metal of the succeeding section and causing the edges of the sections to fuse together, due to the inherent heat of the metal being cast."

Manifestly the present claim 4 may not be given the same meaning as the rejected claim, and consequently may not be construed so as to permit the congealed section to be at all times "in direct contact with the molten metal of the succeeding section." Hence I deem a breach in the continuity of the metal within defendant's mold likewise an indispensable prerequisite to infringement of claim 4 of patent No. 1,237,058. Not finding such breach of continuity, I am of the opinion that claims 1 and 2 of patent No. 1,222,415 and claims 4 and 6 of patent No. 1,237,058 are not infringed by defendant's machine and process. The bill of complaint must therefore be dismissed.

A decree accordingly may be submitted.

In re GURVITZ et al.

(District Court, D. Massachusetts. November 17, 1921.)

No. 28864.

Bankruptcy ⟸140(2)—Purchase by insolvent, on promise to pay not capable of honest fulfillment, held fraudulent.

Where shoe merchants, while so heavily involved that they had omitted customary statement of firm's condition and had not taken stock, because fearful of facing conditions, purchased stock on a promise, not capable of fulfillment in an honest and regular way, to pay in 15 days, the purchase was fraudulent, and the sellers, who delivered about a week before the involuntary petition in bankruptcy was filed, were entitled to restoration.

In Bankruptcy. In the matter of Morris Gurvitz and others, bankrupts. Petition by claimant for restoration of goods sold to bankrupts. Referee's order dismissing petition vacated, and order for restoration entered.[1]

J. L. Wiseman, of Boston, Mass., for petitioners.
Joseph Michelman, of Boston, Mass., for respondent.

MORTON, District Judge. This is a petition to reclaim goods from an estate in bankruptcy. The petitioners contracted to sell the goods in question (shoes) to the bankrupts on or about April 28, 1921, and delivered them at the request of the bankrupts on May 10 and May 12 following. The involuntary petition in bankruptcy was filed on May 17. The ground of the present petition is that the goods were fraudulently obtained without an intention or expectation of paying for them.

The bankrupts had been in business several years. They had started with a capital of $10,000, and up to the fall of 1920 they seem to have been reasonably successful. Beginning about October of that year, there was a heavy decline in the shoe business and in the prices for shoes. It was rapid during that autumn, and continued through the winter and spring at a slower rate. From the fall of 1920 to the time of the failure the shoe business was notoriously bad, and many houses engaged in it were seriously affected. The bankrupts were among those who suffered. At the time of the failure their capital had been completely wiped out and their debts were two to three times their assets. When these goods were contracted for, and when they were delivered, the bankrupts were deeply insolvent. Isenberg, who kept the accounts of the firm, testifies that—

"From November on, when things went bad, I couldn't pay any attention to business. I mean I did not know what I owed and what I had. I was too much worried to meet my bills. Q: You were hard pressed and were taking from one source to pay to another? A. That is what I was doing. Q. Robbing Peter to pay Paul? A. I was taking merchandise and selling it and trying to pay my bills."

The bankrupts testify that the customary statement of the firm's condition was omitted in January and in April, the reason being that

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

[1] For order of referee, see 276 Fed. 1022.

they were afraid to face the result which they feared the statement would show. Gurvitz testifies: "We lost, and that is why we didn't take stock." Both bankrupts testify that they did not realize that they were insolvent, and expected to pay for these goods at the time when they contracted for them and at the time when the goods came in. The learned referee who heard the witnesses accepted this statement, and, relying on it, found that there was no actual intent to defraud and accordingly dismissed the petition.

The indisputable facts, however, make it clear that the expectation on the part of the bankrupts to pay for the goods was illusory and unfounded, and was based on an ignorance of the actual condition of their business, brought about by their refusal to face the facts. No reasonable person, knowing the facts about the bankrupts' business, would have supposed that they could pay for these goods, except at the expense of some other creditor. It is not the case of business men who, being temporarily insolvent in the bankruptcy sense, were nevertheless trying to keep on and pull out with a reasonable chance of success. See In re Berg (D. C.) 25 Am. Bankr. Rep. 170, 183 Fed. 885. The absence of actual fraudulent intent, which arose from the bankrupts' refusal to face the facts as to their business and from deliberate ignorance concerning the actual condition of it, is not sufficient to save the transaction from being in legal effect fraudulent. In re Henry Siegel Co. (D. C.) 223 Fed. 369, and cases there referred to.

At the time when the contract of sale was made, they told the seller's representative that they could pay in 15 days; and it was because of this statement, in part, at least, that the goods were delivered. It was at that time impossible for the bankrupts to pay for the goods in an honest and regular way, and the statement was false. As it was material, this avoids the sale, regardless of whether there was a fraudulent intent on the part of the buyers. In re Underwood & Daniel (D. C.) 215 Fed. 279.

It follows that the order of the referee dismissing the petition to reclaim must be vacated and an order entered allowing reclamation.

SUSSEX LAND & LIVE STOCK CO. v. MIDWEST REFINING CO.

(District Court, D. Wyoming. January 11, 1922.)

No. 1139.

1. **Nuisance ⟸9—Action maintainable against any joint tort-feasor.**
   Where there are joint tort-feasors and a continuing trespass in the nature of a nuisance is maintained, an action will lie against any one of the tort-feasors who helps to maintain the nuisance.

2. **Damages ⟸40(3)—Prospective profits recoverable for damage to going business if proven with reasonable certainty.**
   The damage to a going business by another either on account of negligence or the commission of a continuing trespass may be the loss of prospective profits, providing they are proved with reasonable certainty so as to take them out of the realm of speculation, uncertainty, and remoteness.

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

3. **Damages ⟸190—Evidence insufficient to show loss of prospective profits from damage to pasture land by oil.**
In an action for damages to a rancher's business caused by defendant's acts in allowing oil to escape from its wells into a stream from which in times of overflow it was carried upon plaintiff's land and deposited upon the grass, damaging the pastures, evidence failing to show plaintiff's profits before the damage as compared with his profits after the damage *held* insufficient to justify an award for loss of prospective profits.

4. **Waters and water courses ⟸76—Measure of damage for injury to land by oil escaping into stream depends upon individual case.**
In actions for damage to pasture lands caused by oil escaping into a stream and carried over the lands upon the overflow of the stream, whether the measure of damages is to be based upon the usable value of the lands as measured by loss of profits or upon the rental value of the land must be determined by the circumstances of the individual case.

5. **Waters and water courses ⟸76—Measure of damages for injury to pasture land by oil held rental value.**
In action for damage to plaintiff's pasture lands through the acts of defendant in allowing oil to escape into a stream from which it was carried over the lands at times of flood, the proper measure of damages was the rental value of the land.

6. **Waters and water courses ⟸77—Evidence held admissible to determine proper measure of damages.**
In a suit in equity involving claim for damages to plaintiff's pasture lands caused by defendant's acts in allowing oil to escape into a stream from which it was carried over the land at time of flood, evidence as to loss of prospective profits and as to the fair rental value was admissible, since the proper rule of damages is not determinable until all evidence both as to damages to profits and as to rental value has been introduced.

7. **Waters and water courses ⟸77—Evidence as to damage to defendants from issuance of injunction held proper.**
In action for damages to plaintiff's pasture land by escaping oil and for an injunction, evidence as to the injury which would ensue to defendant from the issuance of an injunction restraining his operations in the oil field was admissible on the question of whether or not an injunction should issue.

8. **Injunction ⟸208—Issuance of writ conditioned on defendant's failure to pay damages.**
A decree may provide that if the party against whom damage is found to have been committed shall pay that damage an injunction will not issue but if such party neglects or fails to pay the damage assessed, an injunction will issue.

9. **Evidence ⟸359(3)—Pictures inadmissible in absence of showing of similar circumstances.**
In an action for damages to plaintiff's pasture lands through defendant's acts in allowing oil to escape into a stream from which it was carried over the lands at time of overflow, pictures of oil field *held* not admissible where it did not appear that conditions surrounding operations in the field were similar to those surrounding the operations in the field where the damage occurred.

In equity. Action by the Sussex Land & Live Stock Company against the Midwest Refining Company for damages and for an injunction. Decree for plaintiff, with provision for an injunction, if payment not made.

George L. Nye, John H. Fry, and A. E. Ryman, all of Denver, Colo., for plaintiff.

John D. Clark, of Denver, Colo., A. C. Campbell, of Cheyenne, Wyo., and Frederick D. Anderson, of Denver, Colo., for defendant.

KENNEDY, District Judge. This action is brought by the plaintiff against the defendant upon the theory that the defendant has committed and is committing a continuing trespass, which amounts to a nuisance, in permitting oil from wells in the Salt Creek oil field operated by defendant to find its way into Salt creek and, upon occasion of floods in that creek, to overflow with the water upon plaintiff's pasture lands, damaging these lands for use by plaintiff in its live stock operations.

In its complaint a permanent injunction is sought against the defendant by which the defendant would be enjoined from permitting the escape of the oil in the manner indicated and a prayer for the damage suffered by the plaintiff on account of the oil going upon plaintiff's lands.

A motion to dismiss was interposed by the defendant in which the cause of action of plaintiff as set out in the complaint is challenged, which motion was overruled by the court. Judge Riner in overruling the motion relied upon the rule laid down in Arizona Copper Co. v. Gillespie, 230 U. S. 46, 33 Sup. Ct. 1004, 57 L. Ed. 1384.

The defendant then interposed an answer to the complaint, in which its defenses may be substantially described as denying the allegations of the complaint as to the escape of any substantial quantity of oil upon plaintiff's lands; the denial of any damage in consequence of the escape of any such oil; that the damage, if any, was caused by the natural escape of oil not within the control of the defendant; that the damage, if any, from the escape of oil in the manner set forth in the complaint, was largely contributed to by other parties than the defendant; that the oil field, so far as the defendant was concerned, was operated through modern, scientific, and best-known methods which should in law relieve the defendant of any damage incurred by plaintiff on account of the escape of oil; and that if damage were caused through the operation of the oil field by defendant in the manner indicated, in any event an injunction should not issue, on account of the public welfare, including the vast amount of money involved, the great number of employees engaged in the enterprise, and the life and prosperity of entire communities being largely dependent upon the continued operation of the field.

Upon the trial of the cause application was made to amend the answer by including another defense which would limit any damages to a period of four years immediately preceding the commencement of the action, which amendment was allowed by the court, and the case was tried upon this theory, approved by both plaintiff and defendant, that no damage prior to four years before the filing of the complaint on August 4, 1920, should be considered; and all evidence introduced tending to show conditions pertinent to the issue prior to that date was admitted by the court upon the theory that it was of an historical value and neces-

sary in order to get the entire condition surrounding the operation of the oil field, and the operation of the stock business by plaintiff, before the court, without, however, being used as a basis for fixing damages accruing to the plaintiff prior to the date mentioned.

At the close of plaintiff's testimony a motion was made to amend the complaint by increasing the damages sought so as to make the pleadings conform to the proof, which amendment was allowed by the court and which increased the prayer for damages from $126,000 to approximately $222,140.

The record in the case is voluminous, as practically three weeks were consumed in the trial, and many witnesses examined by both plaintiff and defendant tending to establish the respective points contended for in the pleadings.

It would be impracticable in this memorandum to review at length the testimony offered and also unnecessary in some respects, considering the court's view of the proper analysis of the evidence and its weight and materiality as considered by the rules of law which would seem to govern the issues in the case.

Accordingly, the first question to be determined, whether with a view of fixing damages or granting an injunction, is: Was the plaintiff damaged? An analysis of the testimony upon this point discloses that the plaintiff is possessed of a certain ranch located near the junction of Salt creek with Powder river, in the county of Johnson in the state and district of Wyoming. The holdings of the plaintiff for the purposes of discussing the issues of this case may be divided into two parcels. One parcel may be described as what is known and referred to in the evidence as the Salt Creek pastures, consisting of approximately 1,800 acres, and the other parcel as lands of the plaintiff lying north of the Salt Creek pastures along Powder river, comprising approximately 2,500 acres. The damages sought by plaintiff in this action are confined exclusively to the Salt Creek pastures, except as these pastures may have a certain bearing and value when used in connection with the other holdings of the plaintiff and the outside public domain.

The Salt Creek pastures extend from the mouth of Salt creek as it empties into Powder river south, up and along Salt creek for a distance of seven or eight miles. These pastures consist both of deeded and leased lands, occupied and in the possession of the plaintiff. The lands are not, however, in a solid block as it were, but are apparently taken up so as to follow the course of the stream, as near as may be, and at all times give the plaintiff access to the waters of the stream and the low lands adjacent thereto.

The stream known as Salt creek is exceedingly tortuous in running through the territory above described, and is intermittent in its flow—that is to say, that during certain periods of the year there is no flowing stream of water down Salt creek, but during these periods the evidence discloses there are certain pools of water lying in the bed of the creek which may be available for stock watering purposes. At certain other periods of the year, during the spring months, there is a continuous flow of the stream for a limited period caused by the spring floods and melting snows, and at still other periods, on ac-

count of exceedingly heavy rains or cloud-bursts, there are so-called flood seasons during which the stream overflows its banks throughout almost the entire length, and particularly at the point or points known as the plaintiff's Salt Creek pastures.

What is known in this case as the Salt Creek oil field is located some 20 miles south and up Salt creek from the point where it empties into Powder river. This oil field has developed during a period of approximately ten years to one of the greatest oil fields in the world to-day. For a distance of several miles Salt creek flows through the heart of this field. Beginning with the year 1911 there has been a continuous, active development of the field which is still very largely in progress. The area of the field is exceedingly rough and broken as to topography throughout its entire extent, being cut not only by Salt creek but by other creeks, gulches, and draws, all of which drain as a rule into Salt creek. Prior to the year 1910 there had been some evidence of oil upon the waters of Salt creek, but there was no oil of a substantial quantity prior to the operation of the field upon a larger scale, beginning about the year 1911. There is also evidence of some oil springs in or near the bed of Salt creek which had been seeping oil for a number of years, and which undoubtedly led to the after-discovery of the large pool underlying the Salt Creek structure. The seep or flow of oil from these springs and crevices prior to the major operations in the field was exceedingly small, and the evidence discloses that this was not sufficient in amount to cause any particular damage on account of being carried upon the surface of the stream.

At this point, in considering whether or not the plaintiff has been damaged, it might be well to distinguish the element of damage, if any, in this case, as compared with the damage outlined in the majority of overflow cases found in the books. In this vast majority of overflow cases, whether from the erection of dams, smelters, or other processes of manufacture, the damage is caused by débris or a foreign substance created by the plant or dam being flooded upon the land and thereby causing it permanent injury. In the case at bar the element of damage contended for is entirely different. It is not claimed, as the court analyzes the evidence, that on account of the oil overflowing upon the lands of the plaintiff there is created a permanent damage to the land. Salt creek has uniformly overflowed its banks long before there were any operations in the Salt Creek oil field, and before and since that operation these floods have uniformly carried silt, sand, and débris over and upon the Salt Creek pastures. The element of damage claimed by plaintiff is that with a flood of Salt creek over its banks and upon the Salt Creek pastures of plaintiff there has been carried an immense quantity or coating of oil which, when the waters recede and find their way again into the creek, is left upon the grass and other vegetation, injuring it and making it undesirable and unusable for stock feeding purposes; that at some points pools of oil are left in the low depressions which it becomes necessary to burn and which burning retards the growth of the grass for an unnatural period of time. There is an additional claim by plaintiff that the heavy coating of oil at different periods upon the surface of the stream, when it does not overflow its

banks, damages the stock of plaintiff, in that it adheres to the wool of sheep, udders of cows, and legs and sides of the horses, causing some irritation and affecting the salable quality of the wool. There is likewise some testimony tending to establish the effect of the oil being drunk by the live stock in the Salt Creek pastures, in that it had a tendency to cause diarrhea in some animals; but there was likewise stronger evidence that the alkali, admitted to be in the waters of Salt creek, produced even more pronounced results along this line than did the oil, so that this particular element of damage, in the opinion of the court, cannot well be considered as sustained by the evidence, especially in view of the fact that no item of particular damage, or rather the proof of it, was offered by the plaintiff upon the trial. This may likewise be stated as the fact with reference to the oil in the creek adhering to the animals and the wool of the sheep, for the plaintiff offered no evidence tending to prove damage in dollars and cents along this line.

The damage therefore to be considered for the purposes of deciding this case, both as to the quantity of damages and the injunction, will necessarily be limited to the damage caused to the Salt Creek pastures as pasture land.

I think it may be considered as proven from not only the testimony of plaintiff's witnesses, but from that of defendant, that large quantities of oil have at certain periods escaped into Salt creek and have been carried down that stream and in flood seasons, over and upon the lands of the plaintiff. Undoubtedly this oil in the nature of things adhered to trees, brush, vegetation, and grass for a longer or shorter period. It is true that the evidence is much in dispute as to what effect this oil had upon the grass in these pastures, available for the feeding of live stock. Some witnesses have testified that the oil so adhered to the grass that it left a kerosene taste and smell, so that live stock would not eat it unless in a more or less starving condition. On the other hand, witnesses have testified that they have repeatedly inspected the grass within the pastures, and that it had no such smell or taste as claimed for it by the plaintiff, and that stock of various kinds had been seen feeding in the pastures during the period for which plaintiff claims damage. The matter of the pools of oil being deposited in the low places is not largely in dispute from the evidence, as it is admitted that these pools have been found and have been burned at various places in the pastures, and I believe it may be considered as fairly well established that the burning of these pools of oil, if in places where grass has previously grown, would retard the growth of that grass. It is manifestly a fact that a highly inflammable material like oil would create a fire more intense when applied to the soil than would a fire which would consume merely the inflammable grass and vegetation naturally growing there. The photographs introduced in evidence show that the oil has adhered to trees and other vegetation as well as the grass suitable for grazing purposes, and undoubtedly would leave, at least upon occasions, its distasteful substances. It may therefore be considered as proven in this case that the plaintiff was damaged by the oil carried upon its lands by Salt creek during the flood seasons, but the

measure of that damage will necessarily have to be deferred in its determination until the next question in the logical pursuit of the real issues in this case can be determined.

The question is: Did the defendant cause the damage suffered by the plaintiff?

A general outline of the location of the Salt Creek oil field and the development of the operations in this field have already been touched upon. The operations, as before stated, began in their more intensified form about the year 1911. It was not, however, until the year 1914, that the defendant company took over the operations in that field. From the year 1914 up to the present time those operations have been continually increased each year, there being a substantial number of wells drilled, some by the defendant and others by independent companies. The testimony, however, discloses that the chief operations in the oil field during the period since 1914 to the present time have been by the defendant company, and while a considerable number of wells have been drilled by independent companies the operation of these have largely been taken over by the defendant company. In other cases the wells are operated by independent companies and the product disposed of to the defendant company. This was necessarily the case owing to the fact that the defendant company owned and operated the only carrying pipe lines for the disposition of the product of the field to the refineries located at Casper, a distance of approximately 40 miles. The court has not attempted to establish the percentage of the entire number of wells in the field operated by the defendant company and that operated by the independent companies, as it would seem immaterial for the purposes of this case to establish this exact ratio. Suffice it to say that perhaps as high a percentage as 90 per cent. of the wells in the field are operated by the defendant company. From the defendant's own admissions the oil produced from the field from its operation has increased from 2,300,000 barrels in 1914 to 8,600,000 barrels in 1920.

There has been a vast amount of evidence introduced on behalf of the defendant tending to show that the oil fields, so far as this defendant is concerned, have been, at least since the commencement of this action, operated under the latest approved methods, and that the best-known methods in preventing the loss of oil have been employed. Nevertheless, during the shooting of wells in close proximity to Salt creek, or any of its tributaries, some oil was necessarily lost. Likewise, regardless of the effects of the defendant to prevent loss, with the construction of reservoirs and sumps, during the period of heavy rains and cloud-bursts, the reservoirs necessarily washed out and broke, thereby causing a loss of some oil which, on account of the topography of the country, drained into Salt creek; but as to the quantity of this lost oil the plaintiff and defendant are far from being in harmony.

With this brief suggestion of the trend of the testimony, considering the intense operation of the defendant company as compared with other operators, taking into consideration the increased oil upon the stream as the operations have developed, the evidence leads the court to the conclusion that the damage suffered by the plaintiff has been caused chiefly by the operation of the defendant.

If the theory of the plaintiff is correct in this case, that the action is based upon a continuing trespass, which amounts to a nuisance, and which theory we are bound to adopt upon the previous ruling of the court in overruling the motion to dismiss upon the ground that the complaint did not state sufficient facts to constitute a cause of action, in which ruling, I state in passing, I concur, then the conclusion reached by the court at this point is that the damage to the plaintiff, so far as fixing responsibility in this case is concerned, was caused by the defendant.

[1] The point discussed upon the arguments as to whether or not there are other defendants contributing to that damage has been disposed of by the courts in this kind of a case. Where there are joint tort-feasors and a continuing trespass in the nature of a nuisance is maintained, an action will lie against any one of the tort-feasors who helped to maintain the nuisance. City of Cushing v. High (Okl.) 175 Pac. 229. Other authorities have been cited, but it is such a well-settled proposition of law that it will not be considered necessary to dwell upon it for the purpose of deciding this case.

We must now revert to the damage alleged to have been suffered by the plaintiff, which has already been discussed but only in so far as it tends to establish damage suffered, which may be merely nominal or substantial, damages for which plaintiff has an adequate remedy at law, or great and irreparable, so as to influence the court in first fixing that damage and then applying the rule governing injunctions in cases of this nature.

The next question therefore to be decided is the amount of damage in dollars and cents suffered by plaintiff, which leads us, in the opinion of the court, to the most important question in the case. What is the proper measure of damages and the proof sustaining that measure to be adopted in this case?

Two distinctly different rules have been suggested by the parties to govern, first the introduction of testimony, and then the sufficiency of the testimony to bring it within the rule.

The plaintiff earnestly contends that the measure of damage is the usable value of the Salt Creek pastures to the plaintiff, and under this rule that this usable value is measured by the loss of profits which it is alleged the plaintiff suffered on account of the action of the defendant in permitting oil to escape and flow upon the pastures. Defendant contends that the measure of damages is the rental value of the lands in controversy. Objections were made by the defendant to the introduction of testimony by plaintiff upon plaintiff's theory of the proper rule governing the measure of damages, and the plaintiff objected to the introduction of testimony by defendant under its theory of the proper rule as outlined above. In order to conserve time, and particularly the time of numerous witnesses in waiting, so that an argument might not be necessary upon the point during the trial, the ruling of the court was reserved on both objections and the argument upon them consolidated with the main argument in the cause; and for the further reason that the testimony might be perpetuated, thereby permitting the court to adopt whichever theory it might be advised in reaching

what it conceived to be the proper rule to follow after giving the matter mature consideration.

Numerous cases have been cited by counsel to support their different contentions as to the rule governing the measure of damages in this case. I have examined all these cases and have come to the conclusion that the proper rule is practically governed by the individual circumstances in each case; that is to say, that peculiar circumstances proving damage, as in the case at bar, might bring that damage within the rule contended for by plaintiff, or might leave it within the rule contended for by defendant.

I shall therefore first briefly discuss the usable value rule of damages contended for by plaintiff, as supported by the courts, and then the facts of this case as being governed or not being governed by this rule. Following this, a brief analysis of the rule of damages contended for by defendant and the facts of the case as being governed or not being governed by that rule.

The so-called usable value rule or measure of damages is simply whatever damage the plaintiff may suffer from the loss of the use of the property by the acts of the defendant; and in applying this rule of the measure of damages itself, as it has generally been adopted by the courts and is contended for by the plaintiff in this case, it covers the loss of prospective profits by the plaintiff directly caused by the continuing trespass resulting from defendant's acts.

One case has been confidently relied upon by both plaintiff and defendant to support their various contentions; by the plaintiff to establish the proper measure of damages, and by defendant to establish the fact that, if the rule in this case laid down be the proper measure of damages, the proofs of plaintiff are not sufficient nor of the proper character to bring it within the rule.

This case is Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244. It is a decision of the Circuit Court of Appeals of the Eighth Circuit, and in which the opinion of the court was voiced by Judge Sanborn, now the presiding judge of this circuit. This case has since frequently been cited by several of the federal courts, including the United States Supreme Court, with approval, and I think may safely be considered as the leading case upon the question at issue in the case at bar.

I believe it will be enlightening at this point to quote at length from this case for the purpose, in the first instance, of securing the proper basis which should govern the proof of damage in a case where the loss of prospective profits is claimed.

On page 98 of 111 Fed., on page 246 of 49 C. C. A., it is said:

"The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations

of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. [Cases cited.] There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. [Cases cited.] And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In Goebel v. Hough, 26 Minn. 252, 258, 2 N. W. 847, 849, the Supreme Court of Minnesota said:

"'When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are.'

"The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. * * *

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption

of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from which the jury could reasonably infer that the business was profitable before, less profitable or profitless after, the plaintiff's withdrawal from the club. Much less were there any facts established which made the amount of the expected profits lost reasonably certain."

One other leading case in which the rule of damages based upon the loss of prospective profits was approved by the United States Supreme Court is that of Weinman v. De Palma, 232 U. S. 571, 34 Sup. Ct. 370, 58 L. Ed. 733, sustaining the ruling of the Supreme Court of New Mexico, found in 15 N. M. 68, 103 Pac. 782, 24 L. R. A. (N. S.) 423.

In the last-cited case the damage claimed for the plaintiff resulted from an excavation along the side of a building occupied by plaintiffs as a retail drug store. Owing to the excavation the abutting wall of the store gave way, causing the building to crumble and the contents to be destroyed. The plaintiffs were not the owners of the real estate or the building, but of the contents of the store which were used in conducting the business aforesaid. Plaintiffs claimed damages for a prospective loss of profits, inasmuch as it became necessary for them to move to another location, as well as the actual loss of the property so destroyed. Upon the first trial the judgment in favor of the plaintiffs was reversed as to the award for loss of prospective profits, upon the ground that the proofs were not sufficiently specific to take the damage outside the realm of speculation, as no books or specific figures showing what the profits were prior to the time that the damage occurred. Upon the retrial of the case specific testimony was offered covering this point and judgment was awarded for the loss of prospective profits, which judgment was sustained by the Supreme Court of New Mexico; the decision being later sustained by the Supreme Court of the United States in the case cited. Mr. Justice Pitney announces the rule in the following language, in 232 U. S. at page 575, 34 Sup. Ct. at page 371 (58 L. Ed. 733):

"In our opinion, the court correctly held that where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude) forms a proper element for consideration in awarding compensatory damages."

[2] The conclusion of this court is, therefore, that the damage to a going business by another, either on account of negligence or the commission of a continuing trespass, may be the loss of prospective profits providing they are proved with reasonable certainty so as to take them out of the realm of speculation, uncertainty, and remoteness.

An analysis of the testimony offered by the plaintiff to sustain its claim for damages in this case will now be necessary for the purpose of ascertaining whether or not the proofs bring the damage within the rule laid down.

The testimony of the plaintiff along this line is offered for the purpose of proving two specific elements of damage: First, the damage to the pasture land as making it unsuitable and unusable by plaintiff in its business as a lambing ground in the spring; and, second, the damage to the pasture land as making it unsuitable and unusable as a pasture for weak cattle in the fall.

Upon the first contention of plaintiff, evidence was offered tending to prove that before the floods carrying oil over the lands began, the pastures in controversy were used by the plaintiff as a lambing ground in the spring, and that after the oil came down with the floods in substantial quantities it was not available for such use. It might be said in passing that the proof in the light of defendant's testimony and the cross-examination of plaintiff's witnesses is far from satisfactory in its being conclusive that the plaintiff did use the Salt Creek pastures for a lambing ground consistently and continuously before the oil came down in substantial quantities. The witness H. W. Davis, on cross-examination, was unable to testify directly as to where the lambing of the plaintiff had been done during all the years prior to the year 1911 or 1912, when the first oil floods began. It was proven, however, that during some of the years prior the plaintiff had used creeks, rivers, and draws other than Salt creek, which leaves this element of the case in an uncertain condition of proof, such as should be necessary to sustain a damage claim for loss of prospective profits. But in addition to this element no testimony is offered by plaintiff in any way tending to prove the number of sheep which were lambed on Salt creek prior to the oil floods, compared with the number of sheep which plaintiff failed to lamb or was compelled under his contention to lamb elsewhere after the oil floods began and continued during the period for which plaintiff might be entitled to damage. No books of account, either as to what number of sheep run by plaintiff or the profits realized from the running of those sheep before or after the oil floods, were offered by plaintiff. The testimony was that these books, except loose memoranda kept by plaintiff, which were not produced in evidence, were kept by a firm in Denver, which received the moneys from the sale of sheep and disbursed moneys to plaintiff for the necessary expense of carrying on plaintiff's business, and even the books of this concern were not introduced in evidence by the plaintiff.

The same condition prevails, substantially, as to the damage alleged to have been sustained by plaintiff on account of loss of the use of pastures for weak cattle. There is no evidence as to the number of weak cattle that the plaintiff did pasture prior to the oil floods, as compared with the diminished number of cattle which plaintiff did run after the oil floods, as the testimony shows that plaintiff had a varying number of cattle in the different years before the oil floods as well as after them. Supporting this varying number, both of cattle and of sheep, were the assessment returns of the plaintiff during the years in con-

troversy which, in connection with the uncertain testimony of the witness Davis, president and chief owner of the capital stock of plaintiff, impresses the court to the conclusion that the number of sheep and cattle of the plaintiff must necessarily have been governed by other circumstances than the so-called oil floods.

The direct proof of monetary damages on account of the loss of the pastures as a lambing ground was offered upon the basis that the wool clip from the sheep paid the running expenses of the business, and that the profits accruing from the business resulted from the sale of wether lambs and old ewes. Figuring from this basis the additional herd it might be possible for the plaintiff to run with the use of the Salt Creek pastures and the average price generally received for the sale of sheep by those who have been engaged in the sheep business, the plaintiff arrives at a figure of loss each year aggregating $10,687.50.

Likewise, plaintiff's proof of loss for use of pasture for weak cattle is arrived at by testimony which first assumes the capacity of the pasture in the fall and winter for weak cattle, then the average number of weak cattle in an average herd, and then the number of the additional herd of cattle which plaintiff would be able to run, based upon this number of weak cattle. The ultimate conclusion of the plaintiff is that the profits from this supposed herd of cattle would be a certain amount per head, considering the average profits in the cattle business. It must be borne in mind that the testimony of the plaintiff was not that its profits were actually these, either in sheep or cattle. What the testimony tended to show were the average profits in these two classes of business.

In addition to the testimony of the witness Davis, president of the plaintiff company, other witnesses were introduced by the plaintiff as experts to testify to what was considered a fair and average profit per head in the sheep and cattle business in the community in which the business of the plaintiff was located.

[3] I cannot conceive of any class of testimony which would bring the proof of damage more within the realm of speculation than does this class. It is a matter of common knowledge that success in business, and thereby the derivation of profits therefrom, depends upon many varying circumstances. Some of the constituent elements of this success in the class of business being considered in this case must be the business acumen of the principal; the market prices of stock to be sold; the quantity and quality of pasture available to the business, both as to owned lands and outside lands used for grazing purposes; the quality of the stock raised; loss through the elements or other unfortunate circumstances; loss through disease; the condition of the labor market; the efficiency of labor; and the attention or lack of attention of the owner to his business. All these elements make for success in any business.

It may be that the conclusion of the witnesses for the plaintiff, covering the average profits in the sheep or cattle business in a certain community, under similar conditions, which include all or the greater portion of all the business ventures in that community, would bring to the people so engaged a net profit such as has been testified to; but certainly

no witness would attempt to testify that all the men so engaged in that community had made just this profit and not more, or that some so engaged had not made much less or had not failed in business utterly. The adoption therefore of such a rule in this case would be to give the plaintiff, without proof as to his own profits either before or after the oil floods, the advantage and benefit of a profit such as is the average profit in this class of business, when it is as fair to assume that the plaintiff is one who has failed to make a success in his particular line of business. There is no proof in the case whatever that the profits of plaintiff prior to the oil floods, considering the amount of stock run, netted the plaintiff the amount contended for as profits in either the sheep or cattle business, or that his profits since the oil floods and within the time for which damage is claimed were diminished pro rata. There is likewise no proof as to the accumulation of wealth to the plaintiff in the two classes of business in which it has been engaged during the periods before and after the oil floods, and yet damages are asked in this case in the aggregate covering the period of four brief years which, considering the size of plaintiff's business, would be fairly commensurate, in the opinion of the court, with the savings of a lifetime or generation. As was aptly said by Judge Sanborn in Central Coal & Coke Co. v. Hartman, supra:

"Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."

Another element which may be mentioned briefly in passing, which would seem to have a bearing upon the issues in this case, is the extent of the so-called outside range upon which the plaintiff must depend, according to its own testimony, in maintaining large herds of cattle and sheep. It is undisputed in the testimony that this so-called outside range is continually being taken up by homesteaders, and particularly has this been true during the last five or six years. The testimony shows that a considerable number of homesteads outside the pastures of the plaintiff on Salt creek and on either side have been so taken up by homesteaders, thereby diminishing the grazing land of the plaintiff. It cannot be assumed in the face of this testimony that it would be possible for the plaintiff during the last four years to have maintained as large herds of cattle and sheep as under conditions in which the entire outside range was open to these herds for grazing purposes. This must also be taken as an element which would have a direct bearing upon the element of damage to plaintiff in maintaining his contention that as large herds could be maintained by him during the last four years as could have been maintained previous to the oil floods.

The only conclusion to which this court can come by this analysis of the testimony is that the plaintiff by its proof has not brought itself within the rule laid down by the courts in governing damage claimed by reason of the loss of prospective profits.

[4] This leads us to a consideration as to the measure of damages suggested by the defendant, to wit, the rental value of the lands in controversy. As has been suggested, it is the opinion of the court that the proper rule must be determined by the circumstances of the individual case. In this case, by the above conclusion of the court, the

proof of plaintiff having failed to bring the case within the rule of loss on account of the usable value of the land, it seems that a court of equity should consider any proof in the case which would tend to be sufficient to sustain a decree awarding damages to the plaintiff. Several cases have been cited which would tend to be sufficient to sustain a decree awarding damages to the plaintiff. Several cases have been cited by the defendant in which the rental value of the lands have been adopted as the proper rule of damage in cases of this or of a similar character.

In the case of City of Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626, the rule is succinctly stated in the syllabus as follows:

"Where land is wrongfully overflowed so as to deprive the owner of its use, the true measure of damages is its fair rental value. The supposed value of what might have been raised on the same had it been cultivated, less the cost of cultivation and marketing, is too remote and speculative."

To the same effect, although in a different class of cases, is Jackson v. Chicago, S. F. & C. Ry. Co. (C. C.) 41 Fed. 656.

Without citing other cases, it may be said generally that this measure has frequently been adopted by the courts as the rule of damages in cases of this class or of a similar character, and in this case is urged by the defendant as the proper measure of damages. Considering therefore that proof is before the court as to the damage sustained by the plaintiff under this rule, it will be adopted by the court as the rule in this particular case, if the evidence is sufficient to justify the court in assessing damages upon this basis.

[5] The only evidence offered was by the defendant through the witness Wheeler, who qualified as an expert witness in proving the rental value of pasture lands, such as the Salt Creek pastures in that community, for grazing purposes. The witness testified that the fair rental value of the pasture would be from 5 to 40 cents per acre per annum. The comparatively large fluctuation in the maximum and minimum price, according to the subsequent explanation of the witness, was on account of taking into consideration the connection of the pastures with the remaining ranch property of the plaintiff. As the testimony showed that these pastures were adjacent to and used in connection with the remaining ranch lands and property of the plaintiff, it would be fair to assume that their rental value under these circumstances would reach the maximum figure suggested by the witness, or 40 cents per acre per annum. Using this therefore as the basis for computing the damage in dollars and cents, on the basis of the acreage in the pastures testified to by plaintiff's witnesses of 1,800 acres, it would lead to a conclusion of the fair rental value of the pastures at $720 per annum. This therefore will be adopted by the court as the proof of damage in this case, and it will be allowed upon this basis for the four years prior to the 4th day of August, 1920, upon which date the complaint in this case was filed, and amounting to $2,880, for which the plaintiff may have a decree.

[6] The view of the case on the question of damages as adopted in this memorandum leads to the disposition of the objections to the testimony covering the basis of damage in the following manner: As

the rule, as heretofore stated, may be governed by the individual circumstances in each case, it was impossible for the court to determine the proper rule until all the evidence upon the question was presented. As the evidence under plaintiff's theory failed, although it might have been accepted if sufficient and of a proper character to sustain the contention, the evidence was properly admitted, and as the other rule which has been adopted by the court is the only rule left under which damage might be assessed, and has been used by the courts in cases of similar character, the evidence under this rule was also properly admitted, and the objections of both plaintiff and defendant will be overruled.

The remaining question in the case is that of the injunction prayed for, and in view of the conclusion reached by the court as to the damage proved by plaintiff, it cannot be said to appeal to the good conscience of the court in exercising the extraordinary arm of the law in the nature of an injunction to restrain the operations of the defendant, which are of such a far-reaching character. One of the main issues in the case earnestly presented by counsel, on both sides, was the question of so-called "comparative injury," as an element entering into the right of plaintiff for injunctional relief. Certainly, in view of the conclusion which the court has reached upon the question of damage, a permanent injunction, under all the circumstances, could not reasonably be expected to follow. As to whether or not there is such a doctrine as "comparative injury" in cases of injunction seems to be a matter much in dispute between opposing counsel in this case, and only for the purpose of disposing of some of the reserved rulings on the admission of testimony, and applying a rule of equity which the court feels permissible in preventing continued litigation between the parties, will it be discussed.

If I am able to analyze the opinion properly in the case of Arizona Copper Co. v. Gillespie, 230 U. S. 46, 33 Sup. Ct. 1004, 57 L. Ed. 1384, the court here leaves the question open for a determination upon the individual circumstances in each case as to whether or not this rule in any case should be applied. The court in its opinion say:

"Whether upon a bill such as this a court of equity will restrain the acts of the party complained of, or leave the plaintiff to his action at law for damages, must depend upon the nature of the injury alleged, whether it be irremediable in its nature, or whether an action at law will afford an adequate remedy, and upon a variety of circumstances, including the comparative injury by granting or refusing the injunction."

To substantially the same effect is the decision in Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414, and Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

[7] Therefore the evidence offered by the defendant touching the injury which would ensue to the defendant in the event an injunction should issue restraining the operations of the defendant in the oil field was properly admitted, in order to allow the court to ascertain, in view of all the circumstances surrounding the element of damage, whether or not the injunction should issue. The several objections to this class of testimony will therefore be overruled.

This theory of the rule as adopted in this case should not be under-

stood as going so far as to mean that the court might establish itself as a tribunal to exercise without authority of statute the right of eminent domain against any person, as under no circumstances could it be assumed that without such a right established by statute could a court presume to take from a man of lesser financial worth his property and assign it for the use and benefit of one of greater financial worth. Any such construction would be subversive of the rights guaranteed by our Constitution. It does mean, however, that in each case, in the opinion of the court, all circumstances may be taken into consideration which appeal to the court in its broad sense of discretion in the administration of justice and equity as to what should be the rule to govern each particular case. So far as "comparative injury" is concerned, it is directly implied by the well-established rule to govern courts in awarding injunctions. It is an extraordinary remedy and can only be invoked when the party petitioning has no adequate remedy at law and when a great and irreparable injury has been or will be committed.

[8] There is a rule recognized by some of the courts which has been applied in the alternative sense; that is, if the party against whom the damage is found to have been committed shall pay that damage that an injunction will not issue. On the contrary, if the party against whom the damage is found neglect or fail to pay the damage assessed, that the injunction shall issue. It seems to this court that under the circumstances of the case and the damage proven, this damage is sufficient to invoke this rule as against the defendant, and also to provide a way in the future by which the plaintiff may be relieved from being compelled each year to seek damages in a court so long as the trespass of the defendant may continue. This rule was placed in operation in the case of McCleery v. Highland Boy Gold Min. Co. (C. C.) 140 Fed. 951, and also in New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.

The decree in this case may therefore provide that if within 60 days the defendant pay or tender to plaintiff the damages assessed in the sum of $2,880, and pay the costs of this suit, and further pay or tender to plaintiff the sum of $720, the annual rental of said land for the year ending August 4, 1921, said injunction will not issue, but otherwise said injunction may issue restraining the defendant from the commission of the trespass upon plaintiff's lands. And the decree may further provide that unless the defendant shall pay or tender to plaintiff the sum of $720 each year, on or before the 4th day of August following, so long as the trespass shall continue in manner and in form as shown by the evidence in this case, this court will entertain a petition of the plaintiff for an injunction as prayed for in the complaint before the court.

[9] The other objections to the introduction of testimony upon which the court reserved its ruling, so far as they are remembered at this time, are the offer of pictures taken of the Muddy Oil field, in which the objection of the defendant will be sustained, for the reason that it nowhere appears in the evidence that the conditions surrounding operations in this field are the same or similar to the conditions surrounding the operations in the Salt Creek field.

The ruling of the court reserved as to the question of laches will be to overrule the objection of plaintiff and allow the testimony to stand, as it appears from the view which the court has taken that its consideration was not necessary to the proper disposition of the case, and, in addition, the evidence showed a series of conferences between the parties looking to a settlement which did not materialize.

Other reserved rulings, if there are any such, should follow the general opinion of the court as set forth in this memorandum.

A decree may be prepared consistent with this memorandum, containing proper findings of fact and conclusions of law, and reserving to both parties proper exceptions to protect their rights upon appeal.

POE et al. v. MUNICH REINSURANCE CO. et al.

(District Court, D. Maryland. December 27, 1921.)

1. Insurance ⟸681—Reinsurer, who terminated contract, cannot require continuation of business.

A corporation, which had agreed with a liability and surety company to assume one-third of the latter's risks for one-third of the receipts, but who had given notice under the provisions of the agreement to terminate the relationship, cannot insist that the other company shall continue in business after such termination, but can only insist that it exercise good faith to keep the losses under the business written before the termination as low as possible.

2. Insurance ⟸679—Final settlement of liability reinsurance contract held to mean determination of original liability.

In the contract for reinsurance of the liability of a surety company, containing a provision that after the final settlement of claims outstanding, when the preliminary accounting was had on termination of the agreement, the reinsurer will be paid any difference in its favor, and will pay any difference in favor of the surety company, the term "final settlement" does not mean payment, but merely means the fixing by agreement or judicial determination of the amount due by the surety company on the bonds or policies for which it was reinsured.

In Equity. Suit by Edwin W. Poe and others, as receivers of the United Surety Company, against the Munich Reinsurance Company, a corporation, and Francis P. Garvan, Alien Property Custodian. Decree rendered for an accounting.

Joseph C. France, J. Kemp Bartlett, and Stuart S. Janney, all of Baltimore, Md., for complainants.

R. E. Lee Marshall, of Baltimore, Md., for defendant Munich Reinsurance Co.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for defendant Garvan.

ROSE, District Judge. The plaintiffs are the receivers of the United Surety Company, a Maryland corporation. They and it will both be referred to as the United, unless there is occasion to distinguish between them. The principal defendant is the Munich Reinsurance

Company, a corporation of Bavaria. The Alien Property Custodian, who holds its American property, does not raise any defense peculiar to himself, and may in this discussion be ignored.

The United was chartered in 1906. Within a few months after its organization, it concluded with the Munich a participation agreement, upon which this suit is brought. As early as November 1, 1906, the latter sought to rescind on the ground that its assent had been procured by fraudulent misrepresentations. The United replied with a request for an accounting, for what was due to it under the contract. It was not until 1910 that the case reached the Court of Appeals of Maryland. Munich Reinsurance Co. v. United Surety Co., 113 Md. 200, 77 Atl. 579. It was then held that the Munich, having waived its right to rescind, must account. Before the decision was handed down, it had, as the agreement authorized, given a year's notice of its election to cancel the contract as of January 1, 1911.

The five years of the United's life were short and troubled. Its business grew, it is true, and at times appeared to be profitable; but the event showed that the unfavorable judgment of some of the shrewder of those who came into actual contact with it was abundantly justified. It had trouble with the insurance commissioners of some of the states, and its licenses to do business in two or three important commonwealths were revoked. In the closing months of 1910 it unavailingly tried to get some one to take over its business. The sands of its life were fast running out, and it looked as if there would soon be a chance for some one to earn an undertaker's fee.

In the latter part of December, 1910, a bill to put it into the hands of a receiver on the ground of insolvency was filed in a state court of equity. At that time the company was not quite sure that it was dead, and the individuals interested in its management wished to have something to say as to who should bury it when the end came. Then, on the 11th of January, 1911, the insurance commissioner of Maryland forbade it to do further business here. It was still unwilling to have its obsequies taken charge of by those whom, the month before, had seemed unduly solicitous to perform the last offices for it, so it went into another state court having equity jurisdiction. It there told the chancellor that it was solvent, but life was to it no longer worth living. It asked that its dissolution should be decreed and the claims against it liquidated. It was in this last-named proceeding that the present plaintiffs were appointed.

In much of the subsequent litigation, the court continued to assume that it was solvent, as it had alleged itself to be. Preston v. Poe, 116 Md. 1, 81 Atl. 178; Vandiver v. Poe, 119 Md. 348, 87 Atl. 410, 46 L. R. A. (N. S.) 187, Ann. Cas. 1914D, 435; U. S. v. Poe, 120 Md. 89, 87 Atl. 933. Nevertheless there does not appear to be any question that at the present time it owes more than it is or ever will be able to pay, a result to which the litigation in which it has been engaged may perhaps have contributed. In addition to the cases already mentioned, its affairs have been before the Court of Appeals of Maryland in Poe v. Philadelphia Casualty Co., 118 Md. 347, 84 Atl. 476; Beilman v. Poe, 120 Md. 444, 88 Atl. 131; Munich Reinsurance Co. v. United

Surety Co., 121 Md. 479, 88 Atl. 271; Poe v. Munich Reinsurance Co., 126 Md. 520, 95 Atl. 164; Schlens v. Poe, 128 Md. 352, 97 Atl. 649; Barber Asphalt Co. v. Poe et al. (decided June 29, 1921) 115 Atl. 24; Schlens v. Poe, 131 Md. 182, 101 Atl. 688; and perhaps in others, which have escaped my notice.

Doubtless, however, its present plight was inherent in the nature of things. A complete stoppage of almost any enterprise entails serious losses, and this is peculiarly true of a company whose business is that of becoming a surety, not only for the fidelity of employees, but upon court, official, and contract bonds as well. It is difficult to fix any point of time subsequent to which claims against it may not arise out of obligations incurred many years before. All sorts of difficult questions come up, and undue expense, if not dissipation of assets, is an almost inevitable consequence.

There has already been an accounting between the United and the Munich in the manner directed in some of the opinions already cited. That accounting, however, could not, in the view of the Court of Appeals, do more than ascertain what was payable by the Munich to the United on January 1, 1911. In the present proceeding, the plaintiffs are seeking to recover certain sums which they think became due after that date, and the right to recover which, when due, was expressly recognized, if not decided, in some of the cases to which reference has already been made.

In substance, the bargain between the United and the Munich was that the latter should have a third share in certain classes of risks constituting the bulk of the business done by the former. It was to get one-third of the receipts, and to accept a one-third share of the amount insured or renewed under every bond, policy, or guaranty which should be issued by the United in this country, for indemnification against loss under surety, fidelity, and burglary insurance. The contract expressly declared that in each and every case the liability assumed by the Munich should be one-half of that retained by the United.

To make sure that in the end this result should be completely and exactly attained, a method of accounting was somewhat elaborately prescribed. There were to be annual accounts, and another was to be stated two years after the agreement had come to an end. In order that balances might be promptly struck, certain items were to be estimated in ways specified. Two years later there was to be another accounting, in which there were still to be some, although fewer, arbitrary assumptions. But the end was not yet, for it was recognized that there would be claims outstanding even after the expiration of two years from the termination of the agreement, and the contract expressly declared that, after the final settlement of each claim outstanding at the time of the last accounting, the Munich would be paid any difference in its favor, and would pay any difference in favor of the United.

It is not questioned that if, by the phrase "final settlement," is meant the agreed or adjudged determination of the amount due on bonds written during the existence of the contract, as distinguished from

their payment, the difference is in favor of the United, and this proceeding is brought to ascertain and recover its amount.

[1] One defense of the Munich goes to the root of the United's case. It is based upon the undoubted fact that the receivers, shortly after their appointment, busied themselves in bringing about a cancellation of all outstanding risks, and for that purpose returned or released premiums for unexpired terms and so extinguished the possibility of liability subsequently arising. They succeeded in canceling six-sevenths or more of the aggregate insurance outstanding at the time of their appointment. The Munich points out that it was to continue, even after the termination of the notice of cancellation, to participate in all insurance granted or renewed by the United during the currency of such notice, as well as to remain liable for its share of the claims arising out of such insurance, and out of insurance in force at the time the notice was given. It says that, if nothing had happened to the United, the latter, after January 1, 1911, would have received premiums in which it would have been entitled to share, and that by the United's failure to continue business and the cancellations of policies therefrom resulting, it is deprived of the consideration, or a part of the consideration, moving to it in return for its assumption of liability, and it relies upon the doctrine laid down in Central Trust Co. v. Chicago Auditorium, 240 U. S. 581–591, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, as applicable and therefore controlling.

There until bankruptcy came, the contract was still alive, and all the obligations of each party were still in full force. Under it the bankrupt had services to render. That was not the situation in the instant case. By the election of the Munich, the contract ended on January 1, 1911, except for the settlement by one or the other of the obligations already incurred. Thereafter the Munich had no interest in any new insurance which the United might write. It had no right to require that the United should continue in the business in which it had of its own free will declined to have lot or part. After the expiration of the notice of termination, the United was free to decide for itself whether it would go on, and the Munich had no right to complain that the decision was in the negative. When such a concern ceases to do new business, it must, either in one form or another, reinsure its outstanding risks, or do what it can to terminate, so soon as may be, its liability upon them. To keep up its complete organization for the mere purpose of handling insurance already written and such renewals as might be brought about, would be ruinous, and no such contract as this between insurance companies can reasonably be interpreted as binding either of the parties to such waste of money.

The United tried to reinsure, but, so far from being able to do so, it could not find anybody willing to assume its liabilities in exchange for its assets; that is, in the judgment of the other companies who had, at its instance, examined its books with a view of taking over its business, it had already incurred obligations which would seemingly entail a loss upon it exceeding the amount of its capital. For a third of the larger part of these losses, the Munich would be liable. In that state

of things, all that the Munich could justly require was that the United should, in good faith, exercise reasonable care to wind up its business to the best advantage, and that, so far as the record discloses, is precisely what the receivers did.

The Munich was to pay one-half of the net liability retained by the United. There was no limitation as to the amount for which it might become bound. When the contract was made, it was quite possible that the obligations which in five years the United might assume would ultimately entail a liability exceeding its capital and surplus. In that event, it would have to close its doors and liquidate its business, and, if it did, according to the Munich's present contention, the latter would be discharged; that is to say, if the United's losses were very great, the Munich would be released from obligation to pay any of them. Such a claim is its own best answer. It is therefore unnecessary to decide whether, as the United asserts, the Munich has estopped itself from setting up a defense which has, on other grounds, been held bad. The litigation between the two companies continued for years after the United went into receivers' hands, and after the latter had done all in their power to bring about a cancellation of the outstanding risks.

Never, until the institution of these proceedings, did the Munich raise the point upon which it now seeks to rely. It allowed all the other courts to assume that it did not dispute its obligation to account at the proper time and in the appropriate proceeding. If for the purposes of this case it be assumed that all this did not work a technical estoppel, it at least shows that the present defense had not then suggested itself to the ingenuity of any of the able, astute, and experienced counsel who appeared for the Munich. It is difficult to resist the conclusion that it would not so long have escaped their attention, had there been anything of substance in it.

[2] The United is therefore entitled to an accounting. Even so, the Munich says that, when such an accounting is had, it can be charged only with one-third of the sums actually paid out upon the bonds or policies upon which it had, in the language of the agreement, "assumed liability." It bases this contention upon that portion of article 13 of the agreement which, having provided for an accounting not later than two years after the expiration of the contract, says:

"If claims are still outstanding, the proper reserve shall be charged, and, after the final settlement of each of such claims, the Munich will be paid any difference in its favor, and pay any difference in favor of the United."

It argues that final "settlement" here means payment. So to hold would run counter to the whole scheme of the agreement between the companies. What the Munich assumed was one-third of the liability, and there is nothing anywhere to suggest that the parties intended that the lapse of time should in any wise change this obligation. The words "final settlement," as used in this contract, must be held to mean the fixing by agreement or judicial determination of the amount due by the United on the bonds or policies for which the Munich assumed a one-third liability.

A decree in accordance with these conclusions may be submitted.

Ex parte AIRD.

(District Court, E. D. Pennsylvania. December 15, 1921.)

No. 8626.

1. **Aliens ⇐50—Immigration statute; "labor" means manual labor.**
In Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918. Comp. St. Ann. Supp. 1919, § 4289¼b), excluding aliens coming to the United States under contract, agreement or inducement "to perform labor in this country of any kind, skilled or unskilled," the word "labor" is to be construed in its generally understood meaning as applying to manual labor.

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

2. **Aliens ⇐50—Designer of marine machinery held to belong to a "learned profession."**
An alien educated in a technical school as a marine engineer and trained and experienced in the designing of marine steam turbines who was induced to come to the United States to enter the employment of a shipbuilding company, where he was made a "class A draftsman," whose duty it was to design machinery for vessels to conform to general plans and specifications for the particular vessel, and to direct the work of draftsmen under him, *held* a person "belonging to a recognized learned profession" within the exception in Immigration Act Feb. 5, 1917, § 3 (Comp St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), and not subject to deportation as a contract laborer.

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

3. **Words and Phrases—"Draftsmen" defined.**
The term "draftsmen" in the marine engineering profession is used to specify a man who designs the various parts of vessels and other machinery in the different departments.

Habeas Corpus. On petition of David M. Aird for writ to secure discharge from custody under deportation warrant. Granted.

George Wharton Pepper, of Philadelphia, Pa., and Cravath, Henderson, Leffingwell & De Gersdorff, of New York City, for plaintiff.

Truman D. Wade, Asst. U. S. Atty., of West Chester, Pa., and George W. Coles, U. S. Atty., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The relator was arrested and is being held for deportation under a warrant issued by the Assistant Secretary of Labor upon the ground that, from proofs submitted after due hearing before an immigrant inspector, the Assistant Secretary became satisfied that, having landed in the United States on April 22, 1920, he has been found here in violation of Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), to wit:

"That he was a contract laborer at the time of his entry, having been induced, assisted, encouraged, or solicited to migrate to this country by an offer or promise of employment, or in consequence of an agreement, oral, written, or printed, express or implied, to perform labor of any kind, skilled or unskilled, in the United States."

From the record of the hearing before the immigrant inspector and the testimony taken at the hearing upon the writ of habeas corpus the undisputed facts are found to be as follows:

The relator is a British subject and was born at Edderton, Scotland, in May, 1888. He was educated in the public schools and the Tain Royal Academy, where his course of study included English, Latin, French, mathematics, physics, chemistry, and machine drawing. At the age of 17 he entered the Glasgow Technical College and covered whatever was necessary to obtain certificates of proficiency in various engineering subjects required to qualify him as a marine engineer. While attending Glasgow Technical College, he served four years in the shops as an apprentice engineer and in the drafting office during the last year.

Having obtained a certificate of proficiency in the various engineering subjects, he taught engineering at a high school. Prior to coming to the United States he was employed by shipbuilding and engineering companies, where his work was in designing marine steam turbines. The method of work was as follows: His superintendent would inform him of the size and type of vessel for which an engine was needed as well as the approximate size of the engine to be installed, and his duty consisted in planning and designing so as to combine most satisfactorily economy in cost and efficiency in operation; the details of construction and arrangement of engines being left entirely to him.

During 1920 Aird learned that men of his qualifications were needed by the Bethlehem Shipbuilding Corporation at Bethlehem, Pa., and communicated with one Capt. Smith, the London representative of that concern. He was informed that there were openings for men of his class at Bethlehem and that he could probably obtain employment. Aird informed Capt. Smith that he had decided to go to the United States to seek employment with the Bethlehem Shipbuilding Company, and his fare was paid by Capt. Smith.

On arriving in the United States, he went at once to Bethlehem and was given employment as a "class A draftsman." His duties were substantially similar to those performed by him in Scotland.

It is apparent that Aird was induced, assisted, encouraged, and solicited to migrate to this country by an offer of employment. The first question is whether he came here to perform either skilled or unskilled labor within the intent of the law, and, if that is answered in the affirmative, whether he was outside of the classification of contract labor by reason of belonging to a recognized learned profession.

The rightful exclusion of the relator from the United States depends, not upon his qualifications for performing certain kind of employment, but upon the kind of employment he was induced, assisted, encouraged, or solicited to migrate to this country to perform, under an offer or promise of employment. It is apparent from the evidence in the case that he came here to get work of the sort which he actually did obtain —that is, as a "class A draftsman." In the finding of the immigrant inspector, he quotes from section XVII of the agreement for classifying salaries, known as the "Macey award," as follows:

"Draftsmen, Grade A. Man laying out and developing work completely from specifications. Must have had two years' experience as draftsman in grade B, or five years drafting or equivalent experience outside of a shipyard, or be a graduate of a technical college in the course of engineering or architecture and in addition have one year's experience in a shipyard."

The department of the Bethlehem Shipbuilding Corporation, in which the relator was employed, is headed by a technical manager under whom are an assistant technical manager, a chief naval architect, and a chief engineer. Under the chief naval architect are three assistants, one in charge of government work, one in charge of merchant work, and one special assistant in charge of electrical work. Under these respective architects and engineers are chief draftsmen known as "class A draftsmen," of whom the relator was one.

[3] The term "draftsmen" in the marine engineering profession is used to specify a man who designs the various parts of vessels and other machinery in the different departments. Under the chief, or class A, draftsmen are class B and class C draftsmen. In arranging the drafting force, the engineering department is governed by the man's education and experience; the holding of a degree having little bearing. The Technical College of Glasgow, from which the relator holds his certificates, is the recognized and foremost technical college in Scotland, and has a high standing among the technical colleges of the world.

There is no standard type of plans and specifications for marine vessels. After ascertaining from the proposed owner the tonnage, the nature of the trade, or the purpose for which the vessel is to be used, specifications are developed to meet its requirements, and there is designed a general arrangement showing the profile, the midship section, the arrangement of the decks, and the accommodations for the location of the machinery and other equipment. The technical manager, the naval architect, and the chief engineer supervise this work as it is being developed, but the actual work of designing is done by the chief draftsmen under respective superiors, they in turn directing the draftsmen working under them. In case the vessel is ordered, this general plan with the specifications showing the character of construction is then distributed to the engineering force of the various departments to originate and carry out the details of the plan. This whole work is done in the engineering division. What is done by a draftsman of the type of the relator is described in the testimony of the witness Hendry, sales agent, and former assistant to the technical manager of the Bethlehem Shipbuilding Corporation as follows:

"Q. For instance, if, in the distribution of the work, the creation of a certain unit to fit into the scheme is allotted to a man of Aird's type, what does he do? A. He has got to go on his own experience and his own original thought of what is going to be the best type of design of machine, or whatever the piece of apparatus is, that will give the results required in that particular piece of mechanism.

"Q. When he has reached his conclusion, based upon his experience and the use of his ingenuity and creative abilities, what does he do? Does he make a plan of the unit? A. Yes. He may not make the completed plan in itself, but he will design, he will outline what is to be done and he may turn over to a junior the thing simply to develop and trace so we can make

blueprints, but men of Aird's character have to design these various parts, and it is no mere repetition of something that has gone before. It is an intelligent application of engineering formula and a matter of experience and original thought that is called for."

In construing the earlier contract labor law of 1885 in the case of Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, the circuit court had held that, giving effect to the well-settled rule of statutory interpretation, the proviso (excepting actors, artists, lecturers, singers, and domestic servants) is equivalent to a declaration that contracts to perform professional services except those of actors, artists, lecturers, singers, or domestic servants are within the prohibition of the preceding section.

The Supreme Court, reversing the circuit court, held, in view of the title of the act, the evils to be remedied, and the apparent intention of Congress, that the act applied only to the work of the manual laborer as distinguished from that of the professional man; that Congress had in its mind no purpose of staying the coming into this country of ministers of the gospel or indeed of any class whose toil is that of the brain.

In the case of the United States v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151, section 5 of the act of 1885 (23 Stat. 333) had been amended by Act March 3, 1891, § 5 (26 Stat. 1085) adding to the exempted class "persons belonging to any recognized profession," and the Supreme Court held that a chemist who had come to this country to act as superintendent on a sugar plantation was a member of a recognized profession.

[1] The acts of 1907 (34 Stat. 898, § 2) and 1917, the latter of which is involved here, differ in part from the former acts in that the words "labor in this country of any kind, skilled or unskilled," are substituted for the words "labor or service of any kind." "Labor or service of any kind" is apparently broader in its significance than "labor of any kind, skilled or unskilled." Whether skilled or unskilled, it is still the performance of labor which the act includes within the agreements or contracts for employment which may debar a person from landing. There is nothing in the act to indicate a change of the purpose of the legislation from that declared by the Supreme Court in Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, 38 Sup. Ct. 28, 62 L. Ed. 189, to have been adopted in the Holy Trinity Church Case, namely, "to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant."

I think the Scharrenberg Case disposes of the construction adopted by the District Court in Ex parte Kunijiro Toguchi, 238 Fed. 632, and this was the conclusion of the Circuit Court of Appeals of the Second Circuit in an opinion by Judge Ward in the case of United States v. Union Bank of Canada (C. C. A.) 262 Fed. 91, 8 A. L. R. 1438.

That the words "laborer" or "labor" have a generally adopted, accepted meaning as applying to manual labor is shown by the cases collected through the industry of counsel for the relator, and cited in his

brief: Teeithdass v. Pohoomul Bros., 13 Philippine Reports, 605; Galveston, Houston & San Antonio Ry. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049; Wakefield v. Fargo, 90 N. Y. 213; Leinau v. Albright, 10 Pa. County Ct. R. 171; Ericsson v. Brown, 38 Barb. (N. Y.) 390.

[2] It is clear that the relator, in the employment he entered this country to perform, was not engaged in labor, skilled or unskilled, within the accepted meaning of those words. He was a "brain toiler"; his work required technical training, skill, and learning in various branches of science. What he did, he did not perform with his hands or merely as a skilled mechanic would through application of mere mechanical skill. His employment, in designing marine turbine engines or auxiliary machinery connected with them, is one in which the planning and working out of the details must be originated in the mind of the designer. The court says in U. S. v. Laws, supra:

"One definition of a profession is an 'employment, especially an employment requiring a learned education, as those of divinity, law and physic.' Worcester's Dictionary, title Profession. In the Century Dictionary the definition of the word 'profession' is given, among others, as 'a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes.'"

Notwithstanding his designation as a draftsman, the relator, as a class A draftsman in the Bethlehem Shipbuilding Corporation, possessed and was required to apply learning and skill in marine engineering, and thus comes within the special exemption to persons belonging to a recognized learned profession. He should be discharged upon either ground.

It is ordered that he be discharged.

POSTAL TELEGRAPH CO. v. STATE HIGHWAY COMMISSION et al.

(District Court, D. Oregon. December 12, 1921.)

No. 8578.

1. Telegraphs and telephones ⇐10(2)—Congressional grant of right to construct inapplicable to combined telegraph and telephone line.

Comp. St. § 10072, authorizing any telegraph company to construct, maintain, and operate telegraph lines along any of the post roads of the United States, gives no authority to construct telegraph and telephone lines in combination.

---

2. **Telegraphs and telephones ⟸10(2)—Authorized to construct lines under state laws, subject to supervision of highway commission.**
Under Or. L. § 6005, Laws Or. 1917, c. 237, Laws Or. 1917, c. 295, § 2, and Laws Or. 1917, c. 299, § 3, a telegraph company has a right to construct and maintain combined telegraph and telephone lines on state highways; but such right is subservient to a reasonable supervisory power of the state highway commission as to the mode, manner, and locality of construction and maintenance.

3. **Highways ⟸165—Statutes of Oregon contemplate two kinds of roads.**
Or. L. § 6005, Laws Or. 1917, c. 237, Laws Or. 1917, c. 295, § 2, and Laws Or. 1917, c. 299, § 3, provide for two characters of public roads; one being state highways, and the other county roads.

4. **Highways ⟸153—County courts without authority over state highways.**
Under Laws Or. 1917, c. 237, providing for a system of state highways, and in view of article 2, § 9, as amended by Laws 1919, c. 182, the county court is without jurisdiction, power, or authority to regulate, control, or designate the location of service utilities on state highways, and whatever authority it formerly possessed in that particular, if any, is now vested in the state highway commission.

5. **Highways ⟸153—Commission may prevent encroachment, etc., on state highways.**
The power and authority of the state highway commission to superintend, construct, and maintain the state highways includes the authority to preserve from destruction or deterioration, and the authority also to forestall and prevent encroachment that would prove deleterious to the highways, or detrimental to the use thereof by the general public.

6. **Telegraphs and telephones ⟸10(11)—Commission cannot arbitrarily deny use of state highways.**
As Or. L. § 6005, grants public service corporations the right to construct and operate telegraph and telephone companies along the public roads of the state, the state highway commission cannot so exercise its authority over state highways as to deny such privilege arbitrarily, but must exercise its judgment on the suitableness, safety, etc., of the places, poles, and wires by the criteria that would be applied by all persons skilled in such affairs, who would seek to reconcile the welfare of the public with the installment of the plant.

7. **Telegraphs and telephones ⟸10(11)—Refusal to allow construction injuring scenic beauty of highway not arbitrary.**
Where a state highway possessing scenic perspective had been constructed at great expense, the refusal of the state highway commission to permit the construction of a telegraph and telephone line on a side of the highway, where in its opinion the scenic beauty would be marred, was not arbitrary, though construction of the line on the other side of the road would be more expensive.

8. **Telegraphs and telephones ⟸10(11)—Evidence held to show highway commission's requirement as to construction not unreasonable.**
Evidence as to the practicability of constructing a telegraph and telephone line on a state highway on the poles of an existing line *held* to show that the refusal of the state highway commission to permit its construction on the other side of the road, where it was claimed it would mar the scenic beauty, was not unreasonable.

9. **Telegraphs and telephones ⟸10(11)—Findings of Public Service Commission not binding on highway commission.**
The finding of the Oregon Public Service Commission, in an investigation made at the request of the state highway commission, that it was impracticable and unreasonable to require a telegraph and telephone line to be constructed on the poles of an existing line, *held* not res judicata, but merely advisory to the highway commission.

In Equity. Suit for an injunction by the Postal Telegraph Company against the State Highway Commission and others. Injunction denied.

Dey, Hampson & Nelson and Geo. L. Buland, Jr., all of Portland, Or., for plaintiff.

J. M. Devers, of Salem, Or., and L. A. Liljeqvist, of Portland, Or., for defendants.

WOLVERTON, District Judge. This is a suit for an injunction restraining the state highway commission and J. M. Devers, who is an assistant to the Attorney General of the state of Oregon, from interfering with the plaintiff in its proposed construction of a telegraph line along and upon the right of way of the Columbia River Highway, extending from Goble to Astoria, in the state of Oregon. By the complaint it appears that plaintiff is proposing to construct a telegraph line only; but by the testimony adduced at the hearing it appears that the poles are to be used for maintaining, not only a telegraph line, but two telephone lines, to be used in connection with its telegraph system.

The highway commissioners are frank to aver that the commission declined to permit the construction of plaintiff's system on the north side of the highway for the reason that it would interfere with the scenic beauty thereof, but is not averse to its construction and maintenance on the south side of the highway, if constructed in connection with the Pacific Telephone & Telegraph system, and the inquiry first presented is whether the highway commission has any power to interfere with the construction by plaintiff of its line upon and along the highway.

Plaintiff claims authority for constructing and maintaining its line under two statutes; one being an act of Congress and the other an act of the Legislative Assembly of the state. Under the former act, any telegraph company is accorded the right to construct, maintain, and operate lines of telegraph over and along any of the military and post roads of the United States, to be so constructed and maintained as not to interfere with the ordinary travel upon such roads. Section 10072, U. S. Comp. Stat. The state act grants the right and privilege to construct, maintain, and operate telegraph lines and telephone lines, for the purpose of conveying electric power or electricity, along the public roads and highways of the state, provided that the county courts of the several counties through which the lines may be constructed shall have power and authority to designate the location upon such roads and highways where such fixtures may be placed. Section 6005, Olson's Laws of Oregon.

[1] The right and authority to construct, maintain, and operate under the congressional act is limited to telegraph lines, and does not extend to the construction, maintenance, and operation of telephone lines. Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. Under plaintiff's complaint, if we should look to that alone, plaintiff's right would be clear

to construct and maintain a telegraph line along the highway in question—it being a post road—so that it did so in a manner not to interfere with the ordinary travel thereon. But the testimony shows that plaintiff's purpose is to construct, not only a telegraph line, but to maintain, in connection therewith, telephone lines also. This is without the pale of the federal statute, and the combined service cannot be so maintained by its authority.

[2] As it pertains to the state act, I am impressed that plaintiff's right is clear to construct and maintain the combined lines over and along the public roads and highways of the state; but that right is subservient to a reasonable supervisory power of the highway commission as to the mode, manner, and locality of construction and maintenance, for reasons following:

The Legislative Assembly of the state, by its act approved February 19, 1917 (chapter 237, Gen. Laws 1917), entitled "An act to provide a general system of construction, improvement and repair of state highways and for the administration and operation thereof," etc., provides for the construction and maintenance of a system of state highways; the purpose being, among others, to conform to the requirements of Congress in extending to the states government aid in the construction and maintenance of post roads. The term "state highway," as defined by the act, "shall be taken and deemed to mean any road or highway designated as such by the commission or by law." The act provides for the creation of a "state highway commission," and accords to the commission certain powers, among which are to "have general supervision over all matters pertaining to construction of state highways," etc., and to "designate, construct or cause to be constructed a system of state highways within the state of Oregon," which shall be designated as pointed out. So it is conceded, by direct declaration of the complaint, that the commission is "authorized and empowered, among other things, to construct, operate, and maintain a system of state highways in the state of Oregon." It is under this authority that the Columbia River Highway was constructed at great expense, and is now being maintained.

State highways are to be differentiated from county roads. Prior to the authorization for the construction of this class of highways, there were no such roads in the state. Whatever roads existed were known as county roads, except that, earlier in the history of the country, there were certain highways known as toll roads, and certain others known as territorial roads. By statute, however, all territorial roads were declared to be county roads. Section 38, tit. 1, c. 47, General Laws of Oregon 1845–1864. By the same title (section 1) it was declared that all county roads shall be under the supervision of the county court of the county wherein the road is located, and that none such shall be altered or vacated except by authority of such court of the proper county.

By a recent statute, adopted at the same session of the Legislature as was the State Highway Act, supra, which seems to be a recasting of the laws touching county roads, it is again declared that all county

roads shall be under the supervision of the county court of the county wherein the road is located, and it is further declared that each county court within the state shall have the authority, and it shall be its duty, to supervise, control, and direct the laying out, opening, establishment, locating, relocating, changing, alteration, straightening, working, grading, maintenance, and keeping in repair of all such roads. Section 2, c. 295, Laws of Oregon 1917. By a still later statute, adopted at the same session of the Legislature, it is again declared that—

"The establishment, construction, improvement and maintenance of all county roads shall be entirely under the jurisdiction and control of the county court." Section 3, c. 299, Laws of Oregon 1917.

[3, 4] It is plain, therefore, that the law provides for two characters of public roads; one being the state highways, and the other county roads. The highway commission is charged with the supervision, construction, and maintenance of the first, and the county courts of the second. While the law provides for concurrent acts of the county courts and the highway commission in some instances, in the procedure in establishing state highways, it would seem that the superior authority, as it pertains to such highways, rests with the commission, as witness section 9, article 2, of the Highway Act, supra, by which it is provided that rights of way shall be acquired by the county through condemnation if necessary, and that, if the county court refuses to act, the highway commission may condemn, through the exercise of the right of eminent domain, on its own account. This section has been amended (chapter 182, Laws of Oregon 1919), but only to define more clearly the authority of the commission to exercise the right of eminent domain in the premises. See Rockhill v. Benson, 97 Or. 176, 191 Pac. 497.

Thus it will be seen that the county court is without jurisdiction, power, or authority to regulate, control, or designate the location of service utilities upon state highways, and whatever authority it formerly possessed in that particular, if any, is now relegated to the highway commission.

[5, 6] The power and authority of the highway commission to superintend, construct, and maintain state highways includes the authority to preserve from destruction or deterioration, and, if this be so, the authority also to forestall and prevent encroachment thereon by any person or corporation that would prove deleterious to such highways or detrimental to the use thereof by the general public. I think this follows from the general power and authority accorded the highway commission. However, as the right and privilege are granted to public service corporations to construct, maintain, and operate telegraph and telephone lines along the public roads of the state, the highway commission cannot so exercise its authority as to deny arbitrarily such corporations that right or privilege; but it does possess the power and authority of reasonable regulation as to these lines—that is, as to the manner of their construction and the place of location as they may affect the highways and their use by the public. Western Union Tele-

graph Co. v. Richmond, 224 U. S. 160, 168, et seq., 32 Sup. Ct. 449, 56 L. Ed. 710.

The commission, paraphrasing the language of the court, is to exercise its judgment on the suitableness, safety, etc., of the places, poles, and wires by the criteria that would be applied by all persons skilled in such affairs who should seek to reconcile the welfare of the public and the installment of the plant. And it might be said here, as was said in the case just cited, that, except in a "negative sense," the statute according the right and privilege of constructing public service lines of the kind over public highways "is only permissive, not a source of positive rights." The court was there speaking of the Act of Congress of July 24, 1866 (U. S. Comp. St. § 10072), supra.

So it is that the highway commission may exercise this power of regulation, within reasonable bounds, to conserve both the service utilities and the public welfare, and such utilities must submit to its designation of the place of locating their lines and the manner of their construction, so long as the acts of the commission in this respect are not a denial of their right to construct and maintain along the highway, and are not tantamount to an arbitrary exercise of its power and authority in the premises.

[7] Much has been said respecting the commission's position that to allow construction on the north side of the highway would mar, and in some measure destroy, its scenic beauty. I cannot say that this is a wholly arbitrary position. The highway has been constructed at great expense, and that it possesses scenic perspective cannot be denied. Many persons, no doubt, are induced to travel it because of that fact. Why should it not be preserved, so far as practicable, consonant with the rights and privileges of those concerned? So of the extra expense that might attend a location designated by the commission, while it is a matter to be taken into consideration in the interest of the plaintiff, yet it should be considered along with the great expense attending the construction of the highway, and how best to conserve its utility in the interest of the public welfare.

[8] Much testimony has been adduced, a good deal of it of an expert character, touching the supposed difficulty of combining the Postal lines with the Pacific Telephone & Telegraph Company's lines, which are now constructed and being maintained on the south side of the highway. It can serve no purpose of particular advantage to attempt to set forth in detail the testimony bearing upon the subject. The several witnesses who were called for plaintiff seem to concur in the view that it would be possible for the plaintiff to overbuild the Pacific lines, but not practicable—some say not desirable—owing to the added expense of construction and maintenance. Underbuilding is discussed by them, but they seem to think that overbuilding would be the more feasible, if the lines are to be combined. On the other hand, Mr. Hennessy, telephone and telegraph engineer for the O.-W. R. & N. Company, an entirely disinterested witness, with large experience in the construction and maintenance of telegraph and telephone lines, both singly and in combination, is of the firm opinion that the lines can be

most economically utilized in combination. I merely stop to quote an excerpt from what he has to say on the subject:

"Q. Then you think, do you, that it would be preferable to underbuild than to parallel the Pacific people between their line and the highway, do you? A. If there was room, it would be better to parallel.

"Q. Well, knowing the width of the highway there, with possible widening in the near future, would you suggest as the most preferable way the underbuilding? A. I would suggest, as the most feasible and practicable way, for them both to go on together on the same pole line.

"Q. And you think that could be easily done? A. I cannot see anything to prevent it. We have the same thing.

"Q. (cross) Would you still feel, Mr. Hennessy, that going on the same pole line was the most feasible and practicable thing, if you knew that the Public Service Commission of Oregon, which has jurisdiction to order that, had made an investigation of it, by hearing testimony and through its engineers, and had come to the conclusion that it was impracticable and unfeasible and more expensive? A. For them both to go on together?

"Q. Yes. A. Why, I cannot see where it would be more expensive to go on on a joint line. It would be cheaper for both companies, I should think.

"Q. And that feeling is very real on your part—you would maintain it still, even though you knew that the Public Service Commission, through its engineers and commissioners, had looked into the question, on the application of the state highway commission, and had come to the conclusion that it was uneconomical and impractical? A. Well, my experience in the business for the length of years I have spent in it, there's thousands of lines on joint pole lines, and working fine—telephone and telegraph. It would be ridiculous for me to get up here and deny that, or to say it was impossible, from my experience and knowledge."

Mr. Yeon, one of the commissioners, has indicated in a forceful way why he insists upon the combination. He says:

"My hope was that there could be a joint agreement between the two pole lines—the two telephone people, rather—to use the present set of poles, without adding any more to the highway. That was my main ambition, that it should be done. In looking over the matter, I find that in Los Angeles county they have eliminated 30,000 poles from the county in doing that very thing, and it has proven to be cheaper for both companies to operate on one pole line as much as they possibly can, rather than have two or three.

"Q. (by the Court). Does that include telephone and telegraph lines in combination? A. Yes, sir; the whole thing, all the way through. And that is the line that we have been working on."

[9] True, the Public Service Commission has found that it is impracticable and unreasonable to require the Postal Company to occupy the Pacific lead. The examination, it must be said, also, took place at the request of the highway commission. While great respect must be accorded the findings of the Public Service Commission, I am not persuaded that its findings in the present instance are to be regarded as res judicata, and as settling the matter for all time. They are rather to be considered as advisory to the highway commission. Notwithstanding, the highway commission still insists that plaintiff's lines should go on the south side of the highway, and that they should be constructed in combination with the Pacific lines. The highway commission possesses, as we have seen, a regulatory discretion in the premises, and, so long as it does not exercise that discretion arbitrarily and unreasonably, to the denial of plaintiff's rights, the court cannot interpose to direct its judgment.

I conclude, from a survey of the whole testimony bearing upon the subject, that the highway commission's position is not unreasonable, nor does it arbitrarily deprive plaintiff of its right and privilege of occupying the highway with its lines.

Injunction denied.

BOWLING GREEN TRUST CO. v. VIRGINIA PASSENGER & POWER CO. et al. METROPOLITAN TRUST COMPANY OF CITY OF NEW YORK v. RICHMOND PASSENGER & POWER CO. et al. DAVIS v. VIRGINIA RY. & POWER CO. et al.

(District Court, E. D. Virginia. November 29, 1921.)

1. **Street railroads ⟸52—Bondholder held entitled to follow diverted funds.** Recovery by a street railway bondholder seeking to follow income improperly diverted from mortgage security by trustee under the mortgage prior to institution of receivership suit and by receiver appointed by the court, both of whom occupied a fiduciary relationship, is not limited to the date of institution of the receivership suit, but from time of the diversion of the property.

2. **Appeal and error ⟸1195(1)—Decision on appeal law of case.** Federal District Court is bound by decisions of the Circuit Court of Appeals in the case before it.

In Equity. Suit by the Bowling Green Trust Company, trustee, against the Virginia Passenger & Power Company and others, in which Charles Hall Davis intervened; and by the Metropolitan Trust Company of the City of New York against the Richmond Passenger & Power Company and others. Decree for intervener.

See, also, 271 Fed. 38.

W. H. Mann & Son, of Petersburg, Va., and Mann & Tyler, of Norfolk, Va., for Davis, petitioner.

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

WADDILL, Circuit Judge. This cause is now before the court on the questions arising on the petition of Charles Hall Davis, filed on the 12th day of March, 1910, and especially upon the exceptions of the Virginia Railway & Power Company and others to the report of Special Master Addison L. Holladay, filed herein on the 7th day of April, 1920, in regard to said claim.

The cause was first heard in this court upon the petition of said Davis, which in brief set forth that he was the owner of certain debenture bonds of the Richmond Passenger & Power Company secured by a mortgage of that company, covering an issue of $1,000,000, to the Metropolitan Trust Company of the City of New York, trustee; that the Virginia Passenger & Power Company, having acquired by purchase the property of the Richmond Company, subject to certain existing liens thereon, including the debenture mortgage aforesaid, and in addition assumed especially the payment of the $1,000,000 issue of

bonds secured by the last-named mortgage, the Virginia Company in the matter of the ownership and operation of the property of the Richmond Company occupied to the bondholders secured by the mortgage, of which petitioner was one, the relation of trustee; that it had failed to discharge its fiduciary duty in this respect, and on the contrary neglected the same, and diverted and participated in the diversion of certain property belonging to the Richmond Company, to wit, the amount and value of the good will, customers, and property of said Richmond Company, which was subject to the lien of the debenture mortgage, and caused the same to be transferred to the Virginia Company, and included in the mortgage executed by the Virginia Passenger & Power Company to secure its indebtedness, which resulted in the loss of the property so diverted from the Richmond Company, and the same was subsequently sold in these foreclosure proceedings on account of the Virginia Company, and transferred to the Virginia Railway & Power Company, the purchaser of the combined properties.

This court, without a formal opinion, by order entered on the 17th day of January, 1914, having concluded that no such fiduciary relation existed between the bondholders of the Virginia Company and those of the Richmond Company, as contended, and that no recovery could be had by the petitioner on account of the property in question, dismissed the petition. From this order, an appeal was taken to the Circuit Court of Appeals for the Fourth Circuit, and that court in an elaborate opinion (229 Fed. 633, 144 C. C. A. 43) reversed this court's action in its entirety, holding that the fiduciary relation existed, and that the property sought to be reached, if the diversion was established, was subject to the payment of petitioner's claim, and that by reason of petitioner's diligence he was entitled to be paid the amount of his bonds, to the exclusion of all other lienors or creditors of the Richmond Company. In this decision of the Circuit Court of Appeals will be found a full history of the litigation, which makes it unnecessary for further repetition here, and to that opinion reference is likewise made for the reasons controlling the appellate court.

Subsequent to this decision establishing the fiduciary relation, an order was entered on the 15th day of August, 1916, directing the special master to pursue his investigation in reference to the alleged diversions from the Richmond Company to the Virginia Company, and all other matters alleged in the bill of complaint of the Metropolitan Trust Company and the petition of the said Charles Hall Davis and the answers to said bill and petition. The special master was directed to report the facts, with his conclusions and recommendations not theretofore fully reported, as established by the testimony already taken in the consolidated cause, as well as such additional testimony as should be adduced. The court certified to the master a copy of the opinion of the Circuit Court of Appeals, as answering questions submitted by the master to the court in his former report of the 24th day of July, 1908, prior to the dismissal of the Davis petition, and as instructing him upon the questions of law in that proceeding. These questions are as follows:

"1. The value of the good will and accounts of the Richmond Company, covered by its debenture mortgage, which have been transferred to the Virginia Company and brought under the provisions of its mortgage of June 18, 1902.

"2. Whether the Virginia Company should be treated as holding said property as trustee for the Richmond Company; and, if so, the measure of relief which should be granted to the Richmond Company in respect to (a) income derived from said property during the receivership, and (b) the proceeds to arise therefrom upon a foreclosure under the Virginia mortgage?

"3. Whether new business naturally belonging to the Richmond Company was improperly diverted therefrom and taken in the name of the Virginia Company; and, if so, what relief, if any, should be granted."

These questions this court did not answer, but dismissed the petition, being of opinion that the fiduciary relation did not exist and that petitioner's claim was without merit, which action of this court as above stated was reversed. Upon the recommittal of the cause to the master, after a most elaborate hearing, he reported that the petitioner Davis was the owner of 71 bonds, secured under the debenture mortgage of the Richmond Company, of $1,000 each; that he was entitled to recover for the entire 71 bonds, 27 of which had theretofore been hypothecated by him as collateral security with the American Bank & Trust Company, on account of an indebtedness due by him to said company; that said petitioner was entitled to interest on said bonds at the rate of 5 per centum per annum from the 1st of July, 1904, to January 1, 1920, to wit, the sum of $55,025, and likewise to 71 coupons of $25 each, to wit, $1,775, together with interest thereon at the rate of 5 per cent. from July 1, 1904, to January 1, 1920, namely, $1,375.62, making in the aggregate, principal and interest, due the petitioner, $129,175.62. The master likewise held that the evidence established diversions and withdrawals of property by the Virginia Company from the Richmond Company, subject to the lien indebtedness of the latter company, caused by the erroneous carrying of collections from customers of the Richmond Company, thereby causing the same to be credited to the Virginia Company, and treated as its property, when they should have been credited to the Richmond Company as its property, and that the amount of collections thus diverted from the Richmond Company to the Virginia Company was covered by the mortgage of the latter company, and passed to the purchaser of the property of said company under the foreclosure proceedings herein.

The master held that these diversions caused by the manner of keeping the accounts of the two companies amounted, principal and interest, to $134,015.28, as of January 1, 1920, of which $14,889.81 occurred prior to the receivership, and $119,125.47 after the receivership. The master in his report treats these latter accounts as "undenied diversions," and in another portion of his report he found what he termed "further diversions" in different classes, particularly described in his report, including interest as of January 1, 1920, amounting to $278,420.91, which he likewise held was diverted by the Virginia Company and its receivers from the Richmond Company and its receivers, and withdrawn from the debenture mortgage of the Rich-

mond Company, and carried to and brought under the mortgage of the Virginia Company, by which action the bondholders of the Virginia Company received the benefit of that fund. The master reports that these two funds referred to as "undenied diversions" and "further diversions," the first being for $134,015.28 and the other for $278,-420.91, aggregating $412,436.19, arose from "diversion of earnings, income, customers and property, including good will of the Richmond Passenger & Power Company and its receivers, to the Virginia Passenger & Power Company and its receivers," which the bondholders of the Virginia Company, to the prejudice of the debenture mortgage bondholders received; and that so much of said sum as was necessary was applicable to the payment of petitioner's claim, as ascertained and set out in article 4, par. 2, of his report, to wit, for the sum of $129,-175.62 as of January 1, 1920; and that said petitioner had the right to enforce his claim to its full extent against all the property of the Virginia Railway & Power Company, purchased and acquired by that company under the decree of foreclosure herein and conveyance thereunder, as a lien prior and superior to all liens and incumbrances created by said purchaser, and personally against the Virginia Railway & Power Company, not to exceed the value of such property so purchased and acquired by it.

The master referred to other alleged diversions, but did not report finally thereon, being of opinion that those mentioned were ample to answer petitioner's claim, and that to make further investigation would consume a large amount of time and unnecessary expenditure of money.

The respondent the Virginia Railway & Power Company, both before the master and by exceptions to his report, and also the Equitable Trust Company of New York, substituted trustee, as fully set forth before said master, and in their written exceptions, raised many legal questions covering every phase of the litigation affecting their liability, including the fact that the petitioner Davis was not the lawful owner of all the bonds sued for; that he was estopped by his own relationship to the litigation from raising the question of diversion; that assuming the fiduciary relation existed, there were no such diversions of the property of the Richmond Company by the Virginia Company as would entitle him to recover or hold exceptants subject to an accounting for waste, his right in this respect being limited to an actual diversion of tangible property, and the good will annexed to it, from the mortgaged estate of the Richmond Company to the mortgaged estate of the Virginia Company; and that such tangible property and good will annexed was embraced in the foreclosure sale as a part of the property of the Virginia Company, and thus passed to the purchaser at the foreclosure sale, of which respondent insisted there was no proof. The respondent further insisted that there could be no recovery by the petitioner on account of income diverted prior to the possession of the mortgaged property by the receivers appointed in the Metropolitan suit.

The court does not feel, for the purpose of reaching the merits of the case, that it is necessary to pass upon many of the questions raised

by the exceptions, and before the master, though many of them involve close questions of law and fact. On the contrary, in the light of the decision of the Circuit Court of Appeals, and the findings of the master upon the reference thereunder, the court feels that it can reach what seems to it the proper conclusion, by passing upon the more material questions, as follows:

[1] First. As to the right of the petitioner to recover income arising from operation of the property prior to the receivership, undoubtedly it could not, that is to say, in an ordinary creditor's suit, having for its purpose the subjecting of property to payment of debts, and the possession thereof pending the litigation. The profits arising from the operation prior to the institution of the suit by the creditor would not be affected by the receivership, or at least would not be accounted for in such litigation; the owner or operator of the property being entitled to retain possession of it. Galveston R. R. v. Cowdrey, 78 U. S. (11 Wall.) 459, 483, 20 L. Ed. 199; Gilman v. Illinois & M. Telegraph Co., 91 U. S. 603, 23 L. Ed. 405; Dow v. Memphis & Little Rock R. Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565. While the doctrine contended for, and which has the support of the cases cited, is undoubtedly correct, and under those decisions the petitioner would have no claim to recovery prior to the institution of the suit by the Metropolitan Trust Company in these proceedings, the suit here, and at least certainly the claim of the petitioner Davis, is not of the character contemplated by those cases, namely, a suit in which it is sought to subject property to the payment of debts in the ordinary course of litigation. The petitioner in this case is seeking to recover for property alleged to have been improperly diverted from the mortgaged security, liable for the payment of the mortgage debt, and to prove such diversion by the trustee under the mortgage prior to the institution of the receivership suit, and by the receivers appointed by the court in the progress of the litigation, and both of whom it is settled occupied a fiduciary relationship so far as the creditors of the Richmond Company are concerned. In this class of cases, if diversion can be established, the petitioner's right of recovery is not limited to the date of the institution of the receivership suit, but from the time of the diversion of the property. Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357; Chicago, etc., v. Third Nat. Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; Hollins v. Brierfield, etc., 150 U. S. 371, 383, 14 Sup. Ct. 127, 37 L. Ed. 1113; Linder v. Hartwell, etc. (C. C.) 73 Fed. 322, 323, 324.

Second. The respondents claim that the petitioner Davis cannot recover for the 27 bonds alleged to have been hypothecated by him, and that he is estopped by his connection with the transaction involved in the litigation from raising the question of diversion of assets, is not, in the judgment of the court, well taken, especially in view of the fact that both matters largely depend upon the correct determination of the facts bearing upon them, and as to each of which the master has taken considerable testimony, and determined them in favor of the petitioner Davis, which finding the court approves.

[7] Third. Considering the question of the diversion of assets, and whether the same are such as can be the subject of diversion, for which the petitioner can maintain a right of recovery, and the legal relation the parties bear one to the other, the court feels that whatever may have been its conclusion in the past, and its present conviction on the subject, it is bound by the decision of the Circuit Court of Appeals respecting the same, and that court having held that a fiduciary relationship did exist between the Richmond and Virginia Companies, it seems entirely clear that that court had in mind the right of the petitioner to recover for diversions of the character found by the master.

The decision of the Circuit Court of Appeals on these two questions being binding on the court, there only remains for determination, so far as the merits are concerned, whether the facts warrant the master's finding as to the diversion. The court has no idea that the respondents meant to concede that there were "undenied diversions" in the sense that they admit that there were such, for which a liability on them existed; still, that the testimony showed the diversion of assets as reported by the master, by reason of the erroneous manner of keeping the accounts, as set forth in the table in said report headed "Undenied Diversions," aggregating $134,015.28 as of January 1, 1920, there seems but little doubt. Certainly the testimony taken by the master is such as would forbid the substitution by the court of its judgment for that of the master, and the same may possibly be said of the finding of "further diversions" under article 6 of the report, aggregating $278,420.91. As to this latter finding, the court does not desire to pass specifically or express any opinion, since it seems unnecessary in the light of the present status of the case, the first finding of the master of the error arising from incorrect bookkeeping of $134,015.28, being ample to cover the indebtedness and claim of the petitioner.

Fourth. The petitioner Davis is entitled to a decree against the Virginia Railway & Power Company for the full amount of $129,175.62, with interest on $72,775 from the 1st of January, 1920, at 5 per cent. per annum until paid. On the entry of the decree, however, the rights of the American Bank & Trust Company, holder of the 27 bonds of $1,000 each as collateral, and 27 coupons of $25 each, with interest from January 1, 1920, at 5 per cent. per annum, will be preserved and protected.

Fifth. To the extent herein mentioned, and for the reasons stated, the master's report will stand approved and confirmed, and in all other respects action thereon for the time being will be deferred.

A decree in accordance with the above will be entered on presentation.

W. W. SLY MFG. CO. v. PANGBORN CORPORATION.

(District Court, D. Maryland. November 25, 1921.)

1. **Patents ⟸314—Petition to reopen case in infringement suit denied.**
A petition by defendant in an infringement suit, filed after an interlocutory decree for complainant, and after an accounting of profits has been taken and reported, for leave to reopen the entire case to introduce evidence of anticipating patents, will not be granted, where no good reason is shown why such evidence could not have been known at the time of the hearing.

2. **Patents ⟸318(6)—Defendant held not entitled to interest on capital invested in manufacture of infringing articles.**
A defendant, on accounting for profits of infringement, is not entitled to an allowance of interest on the capital invested in the manufacture of the infringing articles, where that was only a part of its business, and it is impossible to satisfactorily apportion the interest between the kinds of business.

3. **Patents ⟸318(6)—Credit allowance to infringer for excess profit taxes paid.**
A defendant, on accounting for profits of infringement, where manufacture and sale of the infringing article was only part of its business, *held* entitled to allowance for excess profit taxes paid, computed on the amount of the profits found at the same rate that its entire tax paid bore to all its taxable profits, but with a proviso in the decree securing to complainant a reduction of said allowance by any sum that might thereafter be deducted from the taxes defendant would otherwise have to pay by reason of its payment of the decree.

In Equity. Suit by the W. W. Sly Manufacturing Company against the Pangborn Corporation. On settlement of final decree.

Frank V. Moale and Hull, Smith, Brock & West, all of Cleveland, Ohio, for plaintiff.

Edwin F. Samuels, of Baltimore, Md., and William F. Hall, of Washington, D. C., for defendant.

ROSE, District Judge. It has been about 20 months since in this case an opinion was handed down (263 Fed. 394), holding that the patent in suit, No. 710,624, issued October 7, 1902, to William W. Sly, was valid, and that the defendant had infringed its second claim. On the 3d of May, 1920, an accounting was accordingly decreed, but, as the patent had by that time expired, no injunction was granted. On the 3d of June, 1920, the defendant filed the statement required by the decree, which showed that the gross sum received from the sale of the infringing device had been quite large, exceeding $220,000, although, according to defendant's calculation, made in the same return, the net profit was comparatively small, being less than $20,000.

The plaintiff declined to accept as conclusive the defendant's return and on the 26th of June, the parties stipulated in writing that, instead of the usual master being appointed, the court should name a certified accountant to examine the defendant's books, vouchers, and other pertinent records, for the purpose of ascertaining the profits made by the defendant in the manufacture and sale of screen dust

arresters, covered by the return already mentioned. They further agreed that they would abide by the report of the accountant as to the facts found by him, either party reserving the right, upon its coming in, to submit to the court questions of law as to the propriety of any items considered by the accountant in arriving at defendant's profits. Thereupon one Raymond C. Reik was appointed special examiner, for the purposes above named.

Nevertheless, on the 4th of August, 1920, the defendant moved to reopen the case, for the purpose of taking testimony to establish such laches on the part of the plaintiff as would deprive it of all right to an accounting. The petition was denied, and that for two reasons:

(1) The facts supposed to sustain it had long been known to defendant's president. It is true that the affidavit supporting the request for leave to take further testimony stated that he had been ill at the time of the hearing and for an appreciable period before; but, as the same ground of defense was set up in the answer, counsel must have known of its existence, or at least some of the facts relied on to sustain it; otherwise, they could scarcely have advised their client to swear that it existed. So far as the record shows, and as my recollection goes, there was no application for a postponement of the final hearing on the ground of the unavoidable absence of an important witness, and at it no effort to show laches was made.

(2) It did not appear that, if the defendant had been permitted at the rehearing to prove all that it had tendered itself ready to prove, the result would have been different. Its infringements were of comparatively small extent until some time in 1916. Before that time, they may well either have escaped plaintiff's notice or have been, so far as it learned of them, too trifling to justify litigation.

On the day the court denied the petition for rehearing, the defendant filed a motion in which it asked leave to take substantially the same testimony before the special examiner in the accounting. The grounds upon which the first petition for rehearing was denied were equally applicable to the second, and there was the additional reason that the examiner had been selected by the court and the parties for his skill in accountancy, and not for any supposed experience in passing upon such questions as those involved in the investigation of laches in the institution of infringement suits.

The examiner filed his report and account on January 25, 1921. On the 6th of April the defendant moved for leave to take additional testimony to show that other devices were available to it at the time it made and sold the infringing screens. This motion appeared to be in the teeth of the agreement of the parties that the accountant's findings should be final as to the facts, only questions of law being reserved for the determination of the court.

[1] On May 28th counsel for the defendant filed a petition for leave to file a supplemental bill, and by it to reopen the entire case for the purpose of setting up two patents that had not been introduced at the original hearing. The petition alleged that these patents were discovered as the result of a visit to a concern from which, some

13 years before, defendant had purchased dust arresters. The fact that such purchases had been made, and from whom, had been testified at the original hearing. Apparently an investigation at that time would have unearthed all which it is now said was discovered so recently, and would have saved a great waste of time and money to everybody concerned. The patents, which it sought to bring in, if admitted, would seemingly not justify a finding of anticipation. At least, that is the impression that their examination makes upon my mind. So long as a court has a case within its control, it will be indisposed to shut its ears to any information which shows that it has done, or is about to do, injustice to any one; but, on the other hand, the pressure on the available time of all judicial tribunals is now so great that in fairness to the many litigants at their bar, to some of whom delay of justice is tantamount to a denial of it, one who asks for a rehearing must be required to bring himself within the long-established rules governing such applications. It does not appear that the defendant has done so. The application for leave to file a supplemental bill is accordingly denied.

[2] The special examiner found that, during the six years next preceding the institution of the suit, the defendant had realized from the manufacture and sale of the infringing device net profits to the amount of $50,543.08. The defendant objects that it was not given credit for interest on its capital invested in the making and selling of the infringing device, nor for the amount it paid out of its profits for income and excess profit taxes. Each of these objections require consideration.

Proper credit has been given to defendant for depreciation in building, plant, machinery, tools, etc., and also for all interest upon money borrowed by it. The examiner reports that the obstacles to making a fair and equitable apportionment of capital employed in the dust arrester business seem to be insurmountable, but that, at the request of defendant's counsel, he ascertained that, if the entire capital of the defendant invested in its business were apportioned in the ratio of the sale of dust arresters to total sales, interest at 6 per cent. on the proportion of capital so assumed to have been used in the dust arrester business would amount to $6,549.48. In his report he points out that such an apportionment would necessarily ignore such vital elements as that only a small part of the physical plant might have been used in the manufacture of dust arresters and the major portion for other business, or vice versa; that raw materials and supplies for use in making dust arresters might comprise much or little of the inventories on hand; that the accounts receivable might contain a great or little amount due from purchasers of dust arresters; that money borrowed on mortgage or notes payable might or might not have been used in the dust arrester portion of the business, etc.

The defendant relies upon two Circuit Courts of Appeals decisions —one, Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 C. C. A. 486, in the Seventh Circuit; and the other, Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 C. C. A. 578, in the second—

to which may be added two earlier cases in the Circuit Courts for the Northern District of New York and Vermont, respectively, viz. Troy Iron & Nail Factory v. Corning, Fed. Cas. No. 14,196, and Steam Stonecutter Co. v. Windsor Mfg. Co., Fed. Cas. No. 13,335. The plaintiff counters with Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566, with the holdings of the Circuit Courts of Appeals for the Sixth and Eighth Circuits respectively, in Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91–94, 59 C. C. A. 221, in which the opinion was written by Mr. Judge, afterwards Mr. Justice, Lurton, and Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 561, 166 C. C. A. 626, and with Expanded Metal Co. v. General Fireproofing Co. (D. C.) 247 Fed. 899, in the Northern District of Ohio.

There is, of course, no question that in Rubber Co. v. Goodyear, supra, the Supreme Court flatly denied that interest on infringer's capital should be allowed as a part of his expense of doing business, because to do so would be to permit the wrongdoer to make a profit on his money. Legal interest is as large a return as most people can obtain from their investments. The opposite conclusion, reached by the Circuit Court of Appeals for the Seventh Circuit, in Western Glass Co. v. Schmertz, supra, is expressly based upon the assumption that it was but giving practical application to the views expressed by the Supreme Court itself in the later case of Seabury v. Am. Ende, 152 U. S. 561, 14 Sup. Ct. 683, 38 L. Ed. 553, where, although the refusal of the court below to allow interest was affirmed, it was said:

"We do not wish to be understood as holding that, in no case where the plaintiff's damages are measured by the defendant's profits, ought there to be an allowance, in the latter's favor, of interest on the money invested in the plant. Nor do we say that such an allowance may not be properly made, even where the use of the plant is not wholly restricted to making the infringing article. *But the evidence, in such a case, should enable the matter to satisfactorily apportion the interest between the several kinds of business.*" (The italics are mine.)

That is precisely what the master has reported in this case he cannot do, and that he cannot, would seem, in view of the latest utterances of the Supreme Court on the subject, to be conclusive. Walker on Patents (5th Ed.) 812.

The defendant's exceptions to the examiner's report, in so far as they are based on his failure to allow interest on the capital employed in making and selling the infringing device, is therefore overruled.

Income and Excess Profit Taxes.

[3] The defendant claims to be entitled to deduct from those profits of its infringement, which it must pay over to plaintiff, the sums laid out by it for excess profit and income taxes upon those profits. The earlier rule, as followed by no less eminent authority than the present Chief Justice, was that no allowance would be made to infringer for the taxes he had paid. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C.) 95 Fed. 994. Subsequently, in the case of Carborundum Co. v. Electric Smelting & Aluminum Co., 203 Fed. 985, 122 C. C. A. 276, the Circuit Court of Appeals for the Third Circuit,

while recognizing that ordinarily allowance cannot be made for taxes and insurance premiums, held that as the case before it was exceptional, in that the patentee was entitled to all the profits realized from defendant's business during the accounting period, the defendant should be permitted to deduct the taxes it had actually paid. The Circuit Court of Appeals for the Second Circuit in Gordon v. Turco-Halvah Co., 247 Fed. 492, 159 C. C. A. 541, carried the exception a step further. There three-fourths of the defendant's business consisted in making and selling the infringing device, and it was given an allowance for three-fourths of the taxes. The court said:

"General charges of the character of insurance and taxes can only be apportioned upon that part of the profits which the infringing device affects; but, when this can be accurately done, it is in accordance with equity and good sense that the defendant should get credit for what was a necessary condition to the creation of profits at all."

It was with ordinary property taxes that the courts were concerned in the cases cited. They do not appear to have been considerable in amount. Whether an allowance may be made for excess profit or income taxes in patent accounting has not before been raised in any reported case, so far as I know. Whether credit should be given an infringer for such taxes is a problem at once far more important and far more difficult than those heretofore dealt with. In the case at bar, if an allowance is to be made at all, it will be relatively large. By one method of calculating it, it would amount to 54 per cent. of all the net profits from the infringement, an illustration, by the way, of how heavy modern taxes are as compared with any with which we were familiar in ante bellum days.

There is no easy or sure way of determining the amount of the allowance to be made defendant, if it is entitled to any. Then there is a high probability that, if it pays the plaintiff any considerable sum, it will ultimately get back in effect an appreciable portion of the tax the government has heretofore exacted. The operation of the surtax gives opportunity for almost endless dispute. For example, the defendant says that it should be allowed for the excess of tax it paid over what it would have paid had it made no profit out of dust arresters. The plaintiff answers that under no circumstances should the deduction exceed the amount which would have been payable on the infringing profits, if they had been the only profits defendant made. Plaintiff argues that it should not be penalized because the other business of the defendant was, in proportion to the investment of capital therein, so profitable as to subject defendant to a high surtax.

A simple test would seem to show that neither of these contentions is logically sound. Let a case be assumed of a defendant whose sole business consisted in the infringement of three distinct patents, each of which is owned by one who had no interest in either of the others. He is separately sued by each patentee, and is required to account in each case. If he received an allowance in each of these accountings, calculated in the way for which defendant here contends, the aggregate would greatly exceed his payments to the government. On the other

hand, if the plaintiff's rule was applied, he would be credited with less than he was actually out of pocket on tax account.

The special examiner, in determining what allowance, if any, should be made, uses a method not open to either of the objections above set forth. He calculated the percentage the tax paid by the defendant was of all defendant's taxable profits, and then applied it to the portion of the profits he had already ascertained to have been derived from the infringing device. The result was $23,725.36, or more than 46 per cent. of the net profits from the infringement. He declined to make any allowance on account of these taxes, partly because, for the reasons already stated, it was not possible to apportion defendant's total tax payments to the infringing and noninfringing portions of its business by any methods not open to criticism, principally perhaps because, under the existing tax system, defendant, if it paid such decree as should be here made against it, would almost certainly get back in effect some portion of the tax the government had already received from it, and conceivably might have it all returned. In the year in which it paid the decree, the amount so paid would be a business loss or expense deductible from whatever profits it otherwise would be taxed for. If there is no change in our tax laws before such payment is made, and the year in which it is made happens to be one otherwise profitable to the defendant, the credit might reduce its taxes to an amount fully equal to all that it has heretofore paid. On the other hand, if during the 12 months in which it satisfied the decree, it has made no profit at all, no part of the tax paid by it would come back, either in form or in fact. So far as one can now foresee, the larger part of it is not likely to be returned.

In a case in which as many questions have been raised as in this, any decree will almost certainly be appealed. There is no probability of its being satisfied before 1922, at the earliest. The excess profit tax will apparently expire with the current calendar year. Thereafter corporations, such as defendant, will pay taxes at a rate which will not in all probability exceed 12½ per cent. and may be less. If so, and the defendant pays the plaintiff the full amount the special examiner finds to be due, the most it can recover, in the form of a reduction in its taxes, will be 12½ per cent. of $50,543.08, or $6,317.88. To make any allowance at all, in the face of the many uncertainties which attend any determination of the amount to be allowed, will be to take a step, and a long step at that, beyond anything authorized by any decided case. Nevertheless, I cannot help feeling that, in view of the high taxes now levied upon business profits, it would be utterly unfair to ignore them in determining the amount of the net gain which an infringing defendant should turn over to a plaintiff. If a patentee is damaged by a defendant's infringement, and proves the extent of it in dollars and cents, the defendant must reimburse him, and that without regard to whether the wrongdoer has otherwise made a loss by his actions; but where the owner of the patent seeks to charge the infringer, as a trustee, with the profit made, no arbitrary rule should require him to turn over a sum greatly exceeding any profit the law has allowed him to keep

for himself. Only equity can award profits, and, in equity, equity must be done. Under the facts at bar, what is equity?

In the first place, the deduction to which defendant would be entitled, if there was no chance of getting back any of the taxes, would be $23,725.36, as ascertained by the special examiner in the manner already stated. But there is a chance, and a very good chance at that, that defendant, as the result of the payment of the decree in this case, will in effect get back some of this $23,726.36 in the form of a reduction in its tax bill for the year in which the decree is paid. If we now knew the amount of that reduction, and when defendant would get the benefit of it, it would be equitable to ascertain its worth as of the date of the coming in of the examiner's report, and deduct such worth from the taxes already paid, and take the difference from the $50,543.08 the special examiner found to be due by the defendant, and for the balance enter a decree in plaintiff's favor. We do not know what allowance, if any, on its future tax bills, defendant will get in consequence of its payment of the decree to be here passed.

Even under such circumstances, it is not impossible to do exact justice. That result can be attained by entering a decree that the defendant shall pay plaintiff $50,543.08, with interest thereon from January 25, 1921, when the special master's report came in, but with the proviso that such decree shall be released upon the doing by defendant of both of two things, namely: (1) The payment to the plaintiff of the difference between $50,543.08 and $23,725.36, that is to say, $26,617.72, with interest thereon from January 25, 1921, until paid. (2) The delivery to the plaintiff of a bond, with sufficient surety, acceptable to the plaintiff or approved by the court, in the penalty of $23,725.36, conditioned for the payment to the plaintiff of the equivalent of whatever sum, if any, shall be hereafter deducted from the taxes the defendant would otherwise have to pay the United States in consequence of the payment by it of said sum of $26,617.72.

It is possible that some other and simpler form of decree to accomplish the same end may suggest itself to the parties, or either one of them. If so, it can be adopted. In any event, it is likely that the decree will take an unusual form. Equity, however, never becomes too old to conceive and bring forth new remedies or new variants of old.

The defendant is here asking the chancellor, in view of the novel conditions created by our latter-day taxing system, to protect it from the rigidity of old rules. This may be done only upon condition that the aid given defendant shall not take from the plaintiff anything which rightfully belongs to it. The defendant has done the wrong, and it may not profit by its action.

CRITTENDEN v. BARKIN.

(District Court, S. D. New York. November 7, 1921.)

1. **Courts ⇐344—Privilege of attending witness determined in federal court by law of state court attended.**

The privilege from process of an attending witness is not the witness', but to secure prompt administration in the court attended, and the federal courts will not apply a rule affording the prosecution attended in a state court a greater protection than the courts of that state regard as necessary; so that, where defendant in an indictment in the New York state court had pleaded and been released on bail, and, the prosecution coming on for trial, had come to New York from his residence in Iowa, to attend upon it and in discharge of his bail, and while in New York a subpœna from the United States court to attend before a notary and be examined under Rev. St. § 863 (Comp. St. § 1472), was served on him after an adjournment of court, but before termination of trial, he could not object, on rule nisi to enforce the subpœna, that he was privileged because of his attendance at the trial, although this is the rule of the federal courts, for the New York rule, that such a witness is not privileged, would apply.

2. **Witnesses ⇐29—Nonresident, subpœnaed in district, allowed mileage only from place where temporarily sojourning.**

Nonresident witness, while temporarily within the district, subpœnaed for examination under Rev. St. § 863 (Comp. St. § 1472), is entitled to mileage only from the place where he is temporarily sojourning, and not from the place of his residence.

At Law. Action by William J. Crittenden against Samuel Barkin (the name "Samuel" being fictitious, the real first name of the defendant being unknown to plaintiff). On rule nisi to compel witness to attend examination. Motion granted.

The witness was the defendant in an indictment in the state court, had pleaded, and had been released on bail. His residence was Des Moines, Iowa, and the prosecution coming on for trial he came from there to New York to attend upon it and in discharge of his bail. While here a subpœna was served upon him after an adjournment of court, but before the termination of the trial. The service was in all respects regular, but the fees offered and refused by him were $1.50 attendance fee and 25 cents mileage. The witness resists, urging two objections: First, that he is privileged because of his attendance at the trial; second, because the mileage tendered was not enough.

John B. Doyle and A. Gordon Murray, both of New York City, for the motion.

William J. Fallon, of New York City, opposed

LEARNED HAND, District Judge (after stating the facts as above). [1] The rule in New York favors the petitioner. Netograph, etc., Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333, 134 Am. St. Rep. 886. The rule in the federal courts is otherwise. U. S. v. Bridgman, Fed. Cas. No. 14,645; Kaufman v. Garner (C. C.) 173 Fed. 550, 554; Feister v. Hulick (D. C.) 228 Fed. 821; Church v. Church, 270 Fed. 361, 50 App. D. C. 239. I attach no importance to the fact that, except in Feister v. Hulick, supra, the defendant in the indictment was not yet on bail, but attended to plead. He could have been involuntarily removed to the place of trial, if he had

refused, and this quite as involuntarily as though his bail had arrested him and delivered him to the court.

However, the question, though, of course, not one of New York law, depends upon what the New York courts regard as necessary protection to their own prosecutions. Had the respondent here been under indictment in this court, I should have quashed the writ, yet it would be absurd to do so in protection of a criminal prosecution in a New York court, when a subpœna out of a civil court of that state would have stood. The privilege is not the witness's, but to secure prompt administration in the court in which the first proceeding arises. Hence the first point is not good in the case at bar.

[2] On the second point it is strangely hard to find any law. In The Sunnyside, 5 Ben. 162,[1] Judge Benedict, without discussion, refused to tax any mileage in such a case. In Re Addis (D. C.) 28 Fed. 794, Judge Simonton, allowed mileage to a foreign witness who was subpœnaed, though already on bail under an indictment, but it did not appear that the subpœna was served within the jurisdiction. Chief Justice Savage of the New York Supreme Court ruled as Judge Benedict in Bank of Niagara v. Austin, 6 Wend. (N. Y.) 548.

The statute (Rev. St. § 863 [Comp. St. § 1472]) cannot, of course, mean that a foreign witness shall be allowed his mileage from the place of his residence, if that be more than 100 miles away because the result would be preposterous. For example, a witness from England or California would receive $300 mileage, which would be far more than compensation for any actual expenses of traveling, if he were already within the jurisdiction. Indeed, even though a witness has traveled more than 100 miles to the place of trial, the party calling him may only tax mileage for that distance. The statute clearly supposes that witnesses will be subpœnaed at their place of residence, and has not provided for service while they are temporarily within the district. I think that the simple rule is to interpret it in such cases as meaning that they shall have mileage from the place where they are temporarily sojourning. While this conceivably might operate harshly in protracted cases, it must be a rare one in which they will be caught and held here long. And in any case a witness from within the district may be obliged to subsist himself for days at the attendance charge of $1.50. His mileage covers only the actual traveling expenses.

The motion is granted.

PUBLIC SERVICE RY. CO. v. BOARD OF PUBLIC UTILITY COMMISSIONERS.

(District Court, D. New Jersey. October 12, 1921.)

1. Courts ⇐262(4)—Questions in issue on application for preliminary injunction to restrain enforcement of state statute or order.

Under Judicial Code, § 266 (Comp. St. § 1243), providing that an application to a District Court for an interlocutory injunction to restrain enforcement of a state statute, or an order of a board or commission acting under a state statute, shall be heard and determined by three

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

[1] Fed. Cas. No. 13,619.

judges, a court so convened has to do solely with the allowance or dis allowance of a preliminary injunction; all other questions being reserved until after trial. On the hearing of such an application in a suit by a street railroad company to restrain, as confiscatory, an order of a state commission fixing passenger rates, the court will not consider whether the company is overcapitalized or overbonded, whether its management is or is not efficient, or whether the rate fixed is in itself just and reasonable, but only the question whether the rate is confiscatory of the company's property, because based on a valuation of the property less than its worth at the present time.

2. **Carriers ⟸12(9)—Franchise contracts fixing rates subject to reserved power of state.**

Municipal franchise ordinances, prescribing rates to be charged by public service companies, are subject to the reserved power of the state to change such rates, and under the law of New Jersey, as settled by decisions binding on the federal courts, the power of the state Board of Public Utility Commissioners, created by statute, to fix rates to be charged by a street railway company, is not limited nor affected by franchise contracts with municipalities.

3. **Carriers ⟸12(7)—Presumption in favor of rate fixed by state board overcome only by showing beyond just or fair doubt that action was confiscatory.**

To overcome the presumption in favor of the validity of a rate of fare for a street railroad company fixed by an administrative board, after a full hearing, the company, on an application for a preliminary injunction, must show beyond any just or fair doubt that the action of the board was in fact confiscatory.

4. **Carriers ⟸12(5)—Rate fixed by state board held confiscatory.**

Rates of fare prescribed by the Board of Public Utility Commissioners of New Jersey to be charged by a street railroad company *held* confiscatory, and enforcement of the order enjoined.

5. **Carriers ⟸18(6)—Court, enjoining statutory rate, may fix conditional rate.**

While a court of equity has no power to fix rates of fare to be charged by a street railroad company, it may, on granting a preliminary injunction restraining as confiscatory a rate established by a state board, name a rate as a condition of the injunction, beyond which the company may not go pending final adjudication and the determination of a just rate by a proper body, with provision for refunding of any excess above the board rate in case that rate is finally sustained.

Davis, Circuit Judge, dissenting.

In Equity. Suit by the Public Service Railway Company against the Board of Public Utility Commissioners. On application for preliminary injunction. Granted.

Frank Bergen, of Newark, N. J., for Public Service Ry. Co.
L. Edward Herrmann, of Jersey City, N. J., for Board of Public Utility Com'rs.
Bleakly & Stockwell, of Camden, N. J., for city of Camden.
Albert O. Miller, Jr., of Passaic, N. J., for city of Passaic.
Randal B. Lewis, of Paterson, N. J., for city of Paterson.
Thomas J. Brogan, of Jersey City, N. J., for city of Jersey City.
Jerome T. Congleton, of Newark, N. J., for city of Newark.

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

WOOLLEY, Circuit Judge. This action concerns the lawfulness of a rate fixed for a public utility under authority of a state statute.

The plaintiff is the Public Service Railway Company, a corporation organized under agreements of consolidation between many street railway companies, entered into by virtue of an act of the legislature of the State of New Jersey providing for the formation of traction companies and their regulation, approved March 14, 1893 (P. L. p. 302).

The defendant is the Board of Public Utility Commissioners, created by an act of the legislature of the State of New Jersey, establishing such a board and conferring upon it power fully to regulate and control public utilities, approved April 21, 1911 (P. L. p. 374). O'Brien v. Board of Public Utility Commissioners, 92 N. J. Law, 44, 105 Atl. 132; Id., 92 N. J. Law, 587, 106 Atl. 414.

The intervening defendants are the cities of Jersey City, Newark, Passaic, Paterson, Elizabeth, and Camden, municipalities through whose streets the plaintiff Railway Company operates certain lines and between whom and the Company there exists, it is alleged, rights and duties arising from ordinances, franchises, and contracts, which in their relation to the subject matter of this litigation, are separate and apart from any interests represented by the Board of Public Utility Commissioners and the Attorney General.

Given in bare outline, the events which lead up to this controversy are the following:

Public Service Railway Company controls, through consolidations, stock ownership and leases, sundry street railway corporations, which in turn control other railway corporations, and they in turn still others running back to the day of horse railways, through whose lines, on being connected and combined into an unitary system, it operates 2,649 passenger cars over 850 miles of track in 146 municipalities in the State of New Jersey, including interurban lines in several counties, serving, without limitation by municipal boundaries, a population of more than two million.

Speaking always in round numbers, the capital stock of the Company issued and outstanding is $48,700,000, of which $39,200,000 was issued in exchange and payment for stock of underlying railway corporations, and $9,500,000 was issued and sold for cash at par.

Prior to the consolidations by which the Company was created, the constituent or lessor companies had mortgaged their properties for the payment of bonds to the amount of $80,600,000. By virtue of the consolidation agreements these bonds, as well as the rentals reserved by the several leases, became direct obligations of the Company, requiring it to pay interest amounting to $3,700,000 and rentals amounting to $1,160,000 annually.

The Company pays annually more than $21,700,000 in maintenance and operating expenses, about $5,000,000 in fixed charges for interest on its bonded obligations and rentals for leased properties, and more than $2,000,000 for taxes. It now pays no dividend on its stock.

Prior to 1916, the Company charged a 5 cent fare throughout its system, a rate commonly regarded as just and reasonable for the service rendered. For a year or two prior to 1917 there was, as every one knows, a progressive increase in the cost of maintenance and operation of street railways growing out of the greatly increased cost of materials and increased wages and taxes, due to war.

Under this increased cost of maintenance and operation a surplus of $1,180,000 which the Company has accumulated up to the year 1917 was in 1918 changed into a deficit of $300,000. This deficit increased until 1920 it amounted to $743,000. The difference between income and outgo during these later years, the Company says, was not sufficient for it to meet its operating expenses, pay its fixed charges, and maintain its property in a state of efficiency. It was therefore compelled, during the years from 1917 to 1920, to borrow more than $2,348,000 for the purchase of new rolling stock.

Believing it impossible further to maintain and operate its property on a 5 cent fare, the Company, in March, 1918, filed with the Board a rate of 7 cents and charges for transfer. In July, 1918, the Board, refusing the increase, continued the base rate at 5 cents but allowed 1 cent for each initial transfer. Finding the income still inadequate, the Board, in September, 1918, fixed a rate of 7 cents and 1 cent for a transfer for a period limited to March, 1919. In May, 1919, the Board reinstated the rate of 7 cents plus 1 cent, where it remained until July 14, 1921.

The validity of the increase of this rate was reviewed by the Supreme Court and the Court of Errors and Appeals of the State of New Jersey in an action brought by Charles F. X. O'Brien, a citizen and rider, with the result that the courts sustained the increase and held that the Board may raise the rate of a public utility without evidence of the value of the property of the utility when the justice and reasonableness of the rate can be determined without first ascertaining the value of the property. 92 N. J. Law, 44, 105 Atl. 132; Id., 92 N. J. Law, 587, 106 Atl. 414.

During the controversy between the Board and Company with reference to the fixation of rates which would give a fair return on the property devoted to the public service, the legislature of the State of New Jersey passed an act entitled "An Act providing for the valuation of street railway property in this State." Laws of 1920, chapter 351. By this act the Governor, State Treasurer, and State Comptroller were constituted a commission for the purpose of ascertaining and determining the value of all properties of street railway companies of New Jersey. The act required the commission to select a competent electrical or mechanical engineering concern, equipped and organized for and experienced in the work of valuing street railway properties. The act, as later amended by the Act of 1921 (P. L. p. 954), also provided that the report of the engineering concern and "the value of the property as set forth in said report shall be accepted by the Board of Public Utility Commissioners of this State as presumptive evidence of the value of said property, as of the date specified in said report in any

rate proceeding under any law of this State to the extent that the value of said property is a factor in the fixing of a rate."

Pursuant to the Act of 1920 the Commission retained the engineering firm of Ford, Bacon & Davis, of New York, who at once set about the valuation of the Company's properties. By their report, in April 1921, they placed the valuation at $125,000,000 based, it is claimed, largely on pre-war prices.

Prior to the official valuation made by Ford, Bacon & Davis, the Company, for its own information, employed Mortimer E. Cooley, Dean of the College of Engineering and Architecture of the University of Michigan, to inventory and appraise its properties. This expert, aided by Professor H. C. Anderson, with a force of one hundred and fifty assistants, arrived at a valuation as of May 31, 1921, based on post-war prices, amounting so far as the property alone is concerned to $149,900,000 to which was added 30 per cent. for going value, or $44,900,000, making a total of $194,900,000.

Without reciting all the moves made by the Company and the Board in this protracted controversy, the next important step was the Company's act of filing with the Board a 10 cent rate. The Board declined to allow this rate. The matter went to the Supreme Court, which, on July 1, 1921, 114 Atl. 323 set aside the action of the Board and remanded the proceeding in order that the Board might fix a just and reasonable rate on the evidence. The evidence then before the Board was the newly filed report and valuation of Ford, Bacon & Davis, as well as the valuation of Cooley. Thereupon the Board proceeded to make its own valuation of the Company's properties as a basis on which to grant the Company an increase of fare. It began by making an estimate of the cost of the physical property new. In doing this it excluded "intangibles and everything else except pure physical cost." Physical costs (with the same matters excluded), had been estimated by the experts as follows:

Cooley, cost new, approximately	$69,000,000
Ford, Bacon & Davis, cost new, approximately	70,000,000
Wolff (expert for municipalities) cost new (historical)	72,700,000

The Board valued the property (on a cost new basis) at $70,000,000 reckoned on pre-war prices. From this basic figure it made one deduction and to it three additions, as follows:

Physical cost or value	$70,000,000
Loss depreciation	13,500,000
Sub-total	$56,500,000
Add appreciation	12,000,000
Add working capital	1,500,000
Add going value	12,000,000
Total	$82,000,000

With $82,000,000 as its estimate of the present-day value of the Company's properties devoted to the public service, the Board next determined the number of fares which will probably be paid during

the year to be 361,130,000 first fares, 5,300,000 school fares and 75,000,000 transfer fares.

In determining a just rate on the valuation of the Company's properties, considered with reference to the probable number of fares for the on-coming year, the Board, with the evident purpose of being fair to all concerned, made these findings: That the value of the property of the Company "used and useful in the public service" is $82,000,000; that the operating expenses of the Company, including taxes and depreciation (but taking no account of interest charges, rentals, or dividends on its stock) will not exceed $21,708,000; that the estimated number of fares at the base and transfer rates of 7 cents plus 2 cents, and at the school rates, will yield a gross revenue of $27,550,641; that this sum will cover costs of operation, taxes and depreciation stated above and will give the Company $5,842,500, which, being slightly over 7 per cent. on the property value, the Board regarded as a fair return for its property in public service. It then made its order of July 14, 1921, fixing rates at these figures.

The Company asserting a valuation of its property about double that of the Board and claiming the need of a 10 cent fare to produce a return on that valuation, seeks relief against this last order of the Board by this action. Raising federal questions, it challenges the constitutionality of the statute under which the Board was created (later abandoned) and the constitutionality of the action of the Board in fixing rates, which, it charges, are not commensurate with the service rendered and are, therefore, confiscatory, illegal, and void and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Company prays that it be granted writs of injunction, both temporary and permanent, restraining the Board from interfering with the Company putting into effect the 10 cent rate of fare previously filed and from enforcing against the Company its order of July 14, 1921, fixing a rate of 7 cents plus 2 cents for an initial transfer.

As to the law of the matter under immediate consideration there is not dispute. The highest courts of the State of New Jersey and the Supreme Court of the United States have repeatedly given expression to the same views. Briefly they are these:

The State has a right to control private corporations whose business necessarily monopolistic in character, is affected with a public interest. In the exercise of that control, when, as in this instance, it extends to the fixation of rates, the state, acting through its governmental agency (in this instance the Board of Public Utility Commissioners), must consider both the rights of the public and the rights of the corporation. Out of this situation it must evolve what the law terms a just and reasonable rate, which when made by compulsion of public authority can never exceed the value of the service to the consumer and cannot be made so low as to confiscate the property devoted to that service. Or, as expressed by the Supreme Court of the United States in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the reasonable worth of the service rendered is the maximum of the permissible rate

and a fair return on the value of the property employed for the public convenience is the minimum. It must fall between these two extremes. In applying the test of a minimum, the Courts have held that the rates should be sufficiently high to enable the corporation from its earnings to pay taxes, to meet operating expenses, keep its property unimpaired, induce the investment of money in the business, and make a fair return on the capital invested, Neither the public nor the corporation is entitled to anything more. Public Service Gas Co. v. Public Utility Board, 84 N. J. Law, 463, 87 Atl. 651, L. R. A. 1918A, 421; O'Brien v. Public Utility Board, 92 N. J. Law, 44, 105 Atl. 132; Public Service Railway Co. v. Board of Public Utility (N. J. Sup.) 114 Atl. 323; Philadelphia City Passenger Railway Co. v. Public Service Commission (Pa.) 114 Atl. 642.

While this test, as defined by both state and federal courts, is directed to the value of the corporation's property devoted to public service, the Courts of New Jersey have said in O'Brien v. Public Utility Board, supra, that in fixing a rate it is not necessary that there be evidence before the Board of the value of the property of the public utility where the justice and reasonableness of a rate can be determined without first ascertaining the value of the property. Whether it is the law of New Jersey that the Board may, in every instance, fix rates for a public utility without first valuing its property is a question not pertinent to the issue arising on this application for a preliminary injunction. We are concerned only with what the Board did under the law of the State of New Jersey and with the validity of its action considered with reference to guarantees of the Federal Constitution. Certain it is that the law of New Jersey (Act of 1920) provides for the valuation of the properties of public utilities; that pursuant to that law a valuation of the Company's property was formally made; to that valuation as evidence the Board gave consideration and on it based a valuation of its own from which it evolved the rate in dispute.

[1] In order to show what questions the Court has to decide at this stage of the case, it seems necessary from the drift of the argument first to point out very definitely some of the matters with which the Court, just now, has nothing to do.

By its bill of complaint the Company charges, inter alia, that the action of the Board of July 14, 1921, fixing the rates last named, was unlawful because in contravention of the Fourteenth Amendment to the Constitution of the United States (which forbids a State to "deprive any person of life, liberty, or property, without due process of law"), and prays an injunction, temporary and permanent, restraining the enforcement of that action. When a question of this kind arises, it is the law of the United States (Section 266 of the Judicial Code [Comp. St. § 1243]) that no interlocutory injunction restraining the enforcement of an order made by an administrative board acting pursuant to a statute of a state shall be granted by a District Court of the United States, unless the application for the same be heard and determined by three judges, at least one of whom shall be a Justice of the Supreme Court or (as in this case) a Circuit Judge. Thus it is clear that the

Court as presently constituted has to do solely with a question of allowance or disallowance of a preliminary injunction; the final decision is postponed until after trial. In determining that question the Court has no concern with and therefore will give no consideration to such questions as whether the capitalization of the plaintiff Company is excessive; whether its bonded indebtedness is out of proportion to the value of its property; whether its rental obligations under its leases are greater than the worth of the properties leased; or whether the management of the Company has been good or bad, honest or dishonest. Nor is the Court presently called upon even to inquire whether the 10 cent rate filed by the Company is just and reasonable. The Court is concerned with only one question, which is—whether the rate of 7 cents plus 2 cents for a transfer, last fixed by the Board, is confiscatory of the Company's property because based on a valuation of the property less than its worth at the present time. If it is confiscatory, then the Federal Constitution has been violated and this Federal Court will afford relief.

[2] Before discussing the issue whether the rate in contest is invalid because confiscatory, we shall dispose of the contention of the intervening municipalities that the rate is invalid because higher than rates prescribed by ordinance of municipalities under which, in part, the Company operates its lines. These ordinances contain provisions for 5 cent fares or fares not in excess of 5 cents. Whatever obligation an ordinance locating street railway tracks and prescribing rates of fare may create between a municipality and an utility company, it does not bind the State. Ordinances raising such obligations are enacted, and franchises thereunder are accepted, subject to the reserved power of the State to act on its own behalf in a manner which may in effect nullify them. This power the State of New Jersey exercised by the Act of 1911, and, through the Board there created, it continues to exercise by regulating rates at will. Indeed, in the last of several cases in which this question was involved, the Court of Errors and Appeals of the State of New Jersey said that its previous decisions "foreclose any further discussion relating to the power of the legislature to fix reasonable rates to be charged by a public utility company, notwithstanding the fixing of a maximum rate by a consenting ordinance." O'Brien v. Board of Public Utilities, 92 N. J. Law, 587, 589, 106 Atl. 414. We regard the decisions by the Courts of New Jersey as dispositive of the question of law raised by the intervening municipalities in this case. Collingswood Sewerage Co. v. Collingswood, 91 N. J. Law, 20, 102 Atl. 901, affirmed 92 N. J. Law, 509, 105 Atl. 209; Atlantic Coast Line Electric Ry. Co. v. Public Utility Board, 92 N. J. Law, 168, 104 Atl. 218, 12 A. L. R. 737; Public Service Ry. Co. v. Board of Public Utility Commissioners, 85 N. J. Law, 123, 88 Atl. 818, affirmed 86 N. J. Law, 696, 92 Atl. 1087; Edison Storage Battery Co. v. Public Utility Board, 93 N. J. Law, 301, 108 Atl. 247; O'Brien v. Utility Board, 92 N. J. Law, 587, 106 Atl. 414.

Turning to the issue of confiscation, this court understands that in appraising the value of the Company's properties, all parties agree that

physical cost of the properties may be taken as the base figure. This cost the Board placed at $70,000,000. The intervening municipalities say this figure is too high. The plaintiff Company says it is too low, yet (for the purpose of the present discussion) it admits it to be correct. After giving careful consideration to the contention of the municipalities the Court finds that they have not sustained the burden (which the law places upon them) of overcoming the presumption of correctness which the law gives to the Board's calculation. Therefore, this Court, for present purposes, accepts the Board's costs figure of $70,000,000.

From the physical cost of $70,000,000 (at pre-war prices) the Board deduced the present value (at post-war prices) by making one deduction and three additions. The deduction was $13,500,000 for depreciation.

As the property is no longer new, all agree, of course, that it has depreciated in value. Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244. The municipalities contend that the deduction of $13,500,000 is too small. The Company maintains that it should not be charged with depreciation in this sum, or in any other sum, because the depreciation of its property was the fault of the Board in denying it rates sufficient to maintain its property in a state of efficiency.

The next item is $12,000,000 added for appreciation. No one questions that appreciation to property of public utilities is a lawful factor in estimating its value when appreciation has actually occurred. Willcox v. Consolidated Gas Co. 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Minnesota Rate Cases, 230 U. S. 458, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. But the municipalities say that no figure for appreciation should be added to the resultant of the physical cost less depreciation because none exists in the circumstances. The Company urges that while its properties have manifestly depreciated by use since pre-war days, it is equally manifest that their value has appreciated in the great rise of commodity prices which all know took place during the war. The Company maintains that there is a disproportion between the appreciation allowed (about 20 per cent.) and the increase in commodity prices (over 100 per cent.), and that, in consequence, the figure of $12,000,000 allowed for appreciation is grossly unfair. In this connection the Company maintains that the Board failed to give the Ford, Bacon & Davis report the presumptions to which, as evidence, it is entitled by force of the statute and disregarded other evidence in the case.

Passing without contest the item of working capital, the Company next charges error in the Board's figure of $12,000,000 for going value.

All agree that, in the language of the Board's report:

"It is settled law in this State and in the United States that the question of making an allowance for going value is no longer open to discussion. That a going concern has a value over and above the value of the physical property employed is self evident." Des Moines Gas Co. v. Des Moines, 238 U. S. 153,

35 Sup. Ct. 811, 59 L. Ed. 1244; Denver v. Denver Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649.

But the municipalities say that no item of going value should be allowed because all items validly embraced within such a heading are already included in the base figure of physical cost. The Company contends that the allowance for going value is grossly inadequate, representing that in making an estimate of such value consideration should be given to service and economies of an unitary system over the disadvantages and costs of independent systems individually operated in separate communities. While admitting that such value may include many things very much according to the judgment of the men who appraise them, it urges that it includes the cost of developing the business to its present state of efficiency not returned in earnings, which here is estimated at $1,500,000; losses incident to running new and unprofitable lines; cost of consolidating many separate units and producing the advantages of one comprehensive system with a consequent reduction of fares, extension of transfer systems and increased convenience to the traveling public, estimated by Ford, Bacon & Davis at $5,000,000; obsolescent and superseded property, estimated by the same firm at $4,700,000 and by Wolff, municipal expert, at $9,464,000. In fixing going value the Company asks that consideration be given to cost of obtaining money, testified here to have been between $3,500,000 and $6,000,000, and maintains finally that the Board in allowing a going value of $12,000,000 gave a value for the system and wholly excluded many of the items specifically given in evidence as going value of the properties, or, if it did not, then it included portions of the specified items and wholly excluded any value for the property as a system.

Instead of an allowance of about 14 per cent. on the physical cost the Company claims 30 per cent., the figure allowed for going value by the Board in Public Service Gas Co. v. Board, 84 N. J. Law, 463, 467, 87 Atl. 651, L. R. A. 1918A, 421.

In addition to its attack upon the items named in the Board's table of calculations, the Company charges that the Board wholly omitted the value of the Company's contract with the Public Service Electric Company, the source of the Railway Company's electric energy, estimated by Ford, Bacon & Davis to be worth a figure between a minimum of $11,194,000, based on pre-war prices, and a maximum of $19,149,000, based on present-day prices.

The Company also contends that the Board ignored the fact that the Railway Company, because of insufficient fares in the past, has been unable to pay the Electric Company for electricity in the sum of $2,500,000; that the Board rejected as an element of value moneys expended in procuring capital for the work of construction; that the rate established does not make the procuring of new capital possible; that it does not provide for reimbursement for past deficiency in operation; that it does not permit recoupment of unearned profits during the past three years; that the increase of 1 cent per transfer has demonstrated the error of the Board's calculation that it would produce $715,000 annually, in that the test from August 4 to September 6

shows that it produced an increase (over the corresponding period of last year) of $1,227.64 per day, and that at that rate it will produce only $448,088 per annum; that the amount allowed for accident liability is insufficient; and that the amount allowed for taxes is underestimated. For these many reasons the Company charges confiscation of its properties. Some of these reasons we regard as sound, others merely persuasive, and still others without merit. The Board and the municipalities combat all of them:

[3] On this showing the question is, shall a preliminary injunction issue? In reaching a decision on this question we have been guided by several principles. The first is, that except in very clear cases courts should not, and will not, interfere with rate regulation under state statutes. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. The next is, that in a question of rate making there is a strong presumption in favor of the conclusions reached by an administrative body after a full hearing. Darnell v. Edwards, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. Ed. 1317. Indeed, one court has gone so far as to say that on an application for a temporary injunction against the enforcement of a rate made by a statutory body every presumption is in favor of the validity of the rate. Kings County Lighting Co. v. Barrett, 276 Fed. 1006, P. U. Rep. N. Y. 1921A, 729.

[4] Without stopping to discuss its precise weight, it is sufficient to say that we have recognized such a presumption and have applied to it the test given in Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, which is: That to overcome the presumption of the validity of the established rate, the plaintiff Company, praying for a temporary injunction must show "beyond any just or fair doubt" that the action of the Board was "in fact confiscatory." With this test constantly in mind, we have studied and weighed the evidence. Realizing very clearly that we are called upon to exercise a delicate and dangerous power, we have approached the consideration of every point with a keen sense of our responsibility. In our endeavor to administer exact justice we have laid aside all matters urged against the Board's valuation that are open to debate, however persuasive they may appear, and in arriving at our conclusion we have been influenced only by those matters, which, as we view them, have been established by the Company "beyond any just or fair doubt." In estimating these several items we have used the lowest figures in the circumstances. It is not necessary at this stage of the case to discuss the particular matters which have controlled our judgment. It is sufficient to say that we have been constrained to find, first, that the Board either underestimated or wholly excluded from its valuation certain of the Company's properties; second, that the rates names by the Board provide no return for the service of the properties excluded; and third, that the rates fixed are to that extent confiscatory.

[5] On this finding it follows that a temporary injunction must issue. The next question is, what shall be its character? The Com-

pany asks that the injunction shall do two things: First, restrain the Board from interfering with it putting into effect the 10 cent rate previously filed; and second, from enforcing against it the Board's order fixing a rate of fare at 7 cents plus 2 cents for an initial transfer.

As the court is not presently concerned with the lawfulness of the 10 cent rate, no temporary injunction affecting that rate will be awarded. As the court has found against the lawfulness of the rate of 7 cents plus 2 cents, it is clear that the injunction must restrain the enforcement of that rate. But if the court were to do nothing more, the effect of such an injunction would be to annul the rate of 7 cents plus 2 cents, thus re-establishing the previous rate of 7 cents plus 1 cent or leaving established no rate at all. This would be doing injury rather than equity to the complaining party. Anticipating that the court might name a new rate as a condition of an injunction against the old one, counsel for the Board have quite pertinently called the court's attention to the fact that it is not a rate-making body and have made the point that if the court name a rate as a condition for graning an injunction, it would, in effect, fix a new rate and would thereby exceed its function. That it would exceed its function as a rate-making body is very true, because, not being such a body, it has no such function. But that in so doing it would exceed its power as a court of equity is not true. Injunction is one of the equitable remedies over which the court has jurisdiction. The remedy of injunction may be granted in the terms of the prayer or it may be granted only upon condition that the party seeking equity shall do equity, as in this instance, that the Company shall consent to charge a fare no greater than what the court deems necessary to avoid confiscation. If the naming of a condition is in effect the fixing of a rate, the sanction for the court's act is in the injunction and in the circumstances that make injunction imperative. This rule is ancient and of wide application. Walden v. Bodley, 14 Pet. 156, 164, 10 L. Ed. 398; State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; People's National Bank v. Marye, 191 U. S. 272, 282–288, 24 Sup. Ct. 68, 48 L. Ed. 180; Amarillo v. Southwestern T. & T. Co., 253 Fed. 638, 165 C. C. A. 264; Toledo v. Toledo R. & L. Co., 259 Fed. 450, 458, 170 C. C. A. 426; Consolidated Gas Co. v. Newton (D. C.) 267 Fed. 231, 273, 274.

To this end the court will award an injunction against the Board of Public Utility Commissioners restraining it temporarily from putting into effect its orders of July 14, 1921, upon the condition, however, that until otherwise directed by the court the Public Service Railway Company shall charge and collect over its various routes a school fare not exceeding the prevailing rate, a base fare not exceeding 8 cents, shall issue and accept as base fares four tickets or tokens for not more than 30 cents and shall charge not more than 1 cent for an initial transfer, and shall give to every rider paying a base fare of 8 cents a receipt for 1 cent, and to every rider purchasing four tickets or tokens for 30 cents a receipt for 2 cents, transferable by hand, and

redeemable by the Company on presentation if the rate named in this condition for injunction is not sustained by the court on final hearing.

Let a decree be prepared.

DAVIS, Circuit Judge (dissenting). This Court has found that:

1. The Board either underestimated or wholly excluded from its valuation certain of the Company's properties.

2. The rates named by the Board provide no return for service of the properties excluded.

3. The rates fixed are to that extent confiscatory.

The history of this case is well told and the questions involved admirably stated in the clear opinion of Judge WOOLLEY. About these there is no contention. The Company complains of the action of the Board in appraising the physical cost of the properties at $70,000,000 (though for the purpose of this application it accepts this valuation); in deducting $13,500,000 for depreciation; in adding only $12,000,000 for appreciation; in allowing only $12,000,000 for going value; in not giving specific instead of potential value to the power contract; in not allowing fares sufficient to enable the Company to pay its debt of $2,500,000 to the Electric Company; in rejecting as part of the cost of reproducing the properties the amount expended in procuring capital required for the work of construction; in not allowing a rate sufficient to enable the Company to procure new capital, to reimburse deficiencies for past operation, to recoup past unearned profits; in estimating the amount 1 cent per transfer would produce and in not allowing a larger amount for accident liability and taxes for the ensuing year. The Court found that the Board underestimated or wholly rejected some of these properties for the reason that if all the properties, which the Company claims were not taken into account in making up the physical cost, be given the lowest value that the experts, Dean Cooley and Ford, Bacon & Davis, placed upon them, they aggregate a larger amount than was allowed for appreciation and going value combined in which alone they could be included, if considered at all.

It would not be profitable to discuss every contention, either of the Company or of the intervening municipalities, concerning the various properties alleged to have been underestimated or wholly excluded. The important contentions relating to appreciation and going value which materially affect the final valuation will illustrate the character of all contentions on both sides of this question and the treatment of them by the Board.

The Board found that the physical cost of the properties in 1915 was $70,000,000, less depreciation of $13,000,000, leaving the actual cost value at that time $56,500,000. The Company admits for the purpose of this application that $70,000,000 is the value of its properties, but strongly urges that no depreciation whatever should be deducted from that valuation. The intervening municipalities accept the valuation of $70,000,000 as correct, but contend that the depreciation was far greater than $13,500,000.

During the war prices advanced generally and the Company strenu-

ously contends that the value of its properties increased at least $43,000,000. The intervening municipalities urge that, while prices have advanced and properties appreciated, yet these prices are fluctuating and transitory, and so cannot be made the basis of valuation for the purpose of fixing rates. In this contention they were supported by the affidavits of Milo R. Maltbie and Edward W. Bemis, experts of wide reputation and large experience in appraising public utility properties. The Company is entitled to a fair return upon the reasonable value of its properties at the time they are being used for the public convenience. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; Stanislaus County v. San Joaquin & Kings River, Canal & Irrigation Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406; Lincoln Gas Co. v. Lincoln, 223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466. But the Supreme Court recognized as an exception to this rule that it would be unfair to the public to base a return on enormously increased values. Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134. That Court has not yet been called upon to determine how great an increase must be before it would be unjust to the public to base a rate upon it. but this has been done by other courts and public utility commissions.

Hon. Charles E. Hughes, former Justice of the Supreme Court of the United States and the present Secretary of State, and the writer of the opinion in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, was master in 1918 in the case of Brooklyn Borough Gas Company v. Public Service Commission of the State of New York, P. U. R. 1918F, 335, 347, 348, and in that case on an application to increase rates he said:

"To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices, due to exceptional conditions, would be manifestly unfair to the public. * * * It would be difficult to find any basis more just than the appraisal carefully made by public authority and based on reproduction cost before the outbreak of the European war, with proper consideration of the actual investments since that time."

The Supreme Court of the District of Columbia in an opinion rendered on March 2, 1920, when prices were advancing and six months before they reached their peak, quoted approvingly the opinion of Mr. Justice Hughes in the Brooklyn Borough Gas Company Case, supra, and in speaking of valuation of the capital invested and used for public convenience as the basis of fair and just rates said:

"It [valuation] would lose all value if made as of an abnormal period when prices were abnormally low or high. To be of any assistance or real use, it must be made as of a normal time and the unit cost as applied thereto should extend over a sufficient number of years to show a normal trend of prices. * * * The large utilities whose service and rates are supervised by this commission have not considered it a wise policy to even suggest that considerable accretions be taken into account in arriving at proper rate schedules. * * * It is quite possible that by the time the first case is presented which

embodies in full the controverted question, the need for the decision will, in large part, at least, be gone."

It is evident that the valuation of property used for public convenience must be valued when conditions are normal and prices permanent. This is the only course fair both to public utilities and to the public. In abnormal times, when prices advance, public utilities suffer. In periods of depression, when prices become abnormally low, utility companies have the advantage. In the present year the Public Utility Commission of Illinois, in the case of In re Public Service Company of Northern Illinois, Pub. U. Rep. 1921B, 439, said:

"It would be equally as unfair to the consumer to fix the rate at a figure which would produce a reasonable income on a value determined by the cost of reproduction new at a time when the cost of construction was abnormally inflated, as it would be unfair to the public utility to compel it to serve the public for a rate that would produce a reasonable income on a value determined by the cost of reproduction new at a time when the cost of construction was abnormally low."

Within a month, the Public Service Commission of the State of New York refused to allow the New York State Railways to increase its fare beyond six cents on the ground that—

"It would be grossly unfair to the public to use the extraordinary dislocation in prices due to a world war as the groundwork for the fixation of a proper rate base."

If Mr. Justice Hughes was right in 1918, when prices were increasing by leaps and bounds, in saying:

"It would be difficult to find any basis more just than the appraisal carefully made by public authority and based upon reproduction cost before the outbreak of the European War."

—a fortiori, at this time, when prices have been falling for more than a year, is it unjust to use the appreciated value of the Company's properties of a year, six months or even three months ago, as the basis upon which to fix a fair and just rate of return. The evidence shows, in my judgment, that prices are not yet permanent but transitory. Within a week the following quotations on common material appeared:

	To-day.	A Year Ago.
Wheat	$ 1.17	$ 2.07½
Corn	.49	.90¼
Oats	.35¾	.56¼
Rye	.96	1.62¾
Steel billets (open hearth)	29.00	55.00
Sugar	5.39	11.75

It was alleged at the hearing, and not denied, that copper is even lower than it was before the war. Unskilled labor is gradually approaching pre-war prices. Skilled labor, however, is trying to maintain war prices, and as a result building operations are comparatively at a standstill. While a general average reduction on all commodities may not be based on these prices, yet it is common knowledge that

they are approximately correct, and indicate that prices generally are in a procession downward, and are not 119 per cent. above pre-war prices, as they were alleged to be in September, 1920. It is unfair to base a return upon transitory prices, either high or low, for the basis of the proposed rate may disappear before it is put into effect. Consequently the Board might have authoritatively said that it would be unfair to the public to base rates upon appreciated valuation due to abnormal war prices but it did not and in its effort to be fair, allowed $12,000,000 appreciation to go into the final valuation for the purpose of fixing a rate of return.

The next large item over which there is a sharp contention between the Company and the intervening municipalities is the amount allowed by the Board for "going value." The Board said:

"It is settled law in this State and in the United States that the question of making an allowance for going value is no longer open to discussion. That a going concern has a value over and above the value of the physical properties employed is self-evident."

The Company contends that going value includes the cost of developing the business to its present efficiency, not returned in earnings; losses incident to running unprofitable lines in rural districts; cost of consolidating many separate lines into a unitary system under one management; the value of obsolescent or superseded properties. The Company declares that—

"Here is a discrepancy evolved out of the minds of the members of the Board of $31,000,000 on this item alone."

The municipalities, on the other hand, contend that while $70,000,000 represented the pure, physical cost of the properties new, this was a cost of the properties as a going concern, as a unitary system, and not as bare, disconnected, junk value, and that all constituent elements which the Company seeks to have embraced under going value, and which can properly be so embraced, were included in the physical cost. They contend, therefore, that no allowance should have been made for going value and cite the case of Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244, in which going value was disallowed by the Supreme Court as supporting their contention. There is confusion and uncertainty as to whether some of the elements properly embraced in going value were not included in the physical cost of the properties by the Board. The case is so involved in a mass of contradictory affidavits and evidence that it is impossible to determine, without serious doubts, in this preliminary application just what was included by the Board of physical cost and going concern value. Again the Board sailed between Scylla and Charybdis and allowed $12,000,000 for going value. The Board did not give specific value to the power contract, but did consider its potential value, counsel says, in fixing going value, just as it considered every property in fixing physical cost, appreciation or going value. In making these valuations the Board did not accept fully the opinions of opposing experts, but doubtless considered what all said and used its own judgment.

If, however, some of the properties have been underestimated, or even excluded, when the Board's action as a whole is considered, does its order at this time amount to confiscation within the meaning of the Fourteenth Amendment to the federal Constitution? This court does not mean to increase the return of slightly over 7 per cent. on the properties valued. It does not declare that a return of 7 per cent. is confiscatory. It has sought to provide a return on the properties it has found to be used in serving the public and underestimated or wholly excluded by the Board in its valuation. The Court's order will permit the Company to charge 8 cents for a single fare and 30 cents for 4 tickets or tokens and one cent for a transfer. This is an increase of 1 cent on a single fare and one-half cent on a fare if tickets or tokens are purchased, and a reduction of 1 cent on a transfer. Assuming that riders will generally buy tickets, one-half cent on each of 361,130,000 estimated fares for the ensuing year, exclusive of school fares, which are to remain the same as before, amounts to $1,805,650. If this amount is reduced by $715,000, the amount the Board estimated 1 cent on a transfer would return, the yearly increase in consequence of the court's order will be $1,090,650. The increase as a matter of fact would be greater, because some persons riding only one time would pay a single, flat fare of 8 cents. If, to account for these single fare riders, enough is added to make the aggregate increase $1,400,000, this amount is 7 per cent. on $20,000,000, which must represent the extent of the value of the underestimated or wholly excluded properties. This sum, added to the valuation of $82,000,000, makes a valuation of the properties, according to the Court, as I gather the basis of its conclusion, of $102,000,000. After paying all operating expenses and taxes, the rate allowed by the Board will give a return to the Company of $5,842,500, which is 5.727, or nearly 5¾ per cent. on the increased valuation. After paying all operating expenses, not including taxes, the return would be nearly 7¾ per cent. on the new valuation, without increasing the rate of fare above that allowed by the Board. The Interstate Commerce Commission, composed of men of ability and experience and having at their command an advisory board of noted experts, allows the railroads a return of only 5½ per cent. If the court in this case is right, the Interstate Commerce Commission has confiscated the property of every railroad in the country—a most unlikely assumption. Assuming that the Board did underestimate or wholly exclude the properties to the extent of $20,000,000, in view of the rate of return that the Board's order permits, I should hesitate to say on a preliminary application, without the benefit of a full hearing, with many questions in doubt, that it was confiscatory.

It is apparent that the Company has sought to magnify the valuation of the various constituent elements of its properties and the municipalities, on the other hand, have sought to minimize them. As I have studied this record and weighed the opposing arguments, I have been profoundly impressed with two facts: First, the difficulty of the task which the Board has performed under unusual conditions and trying circumstances; and, second, its earnest effort to make a

valuation of the properties and promulgate a rate of return which would at the same time be fair and just to the Company and to the public. The determination of this question has called for the exercise of the Board's best business judgment, and I am persuaded that with a strong desire to be fair it has conscientiously done its best. Its order is presumptively right and should not be disturbed, unless it clearly appears to be wrong. Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 271; Phœnix Railway Co. v. Geary, et al., 239 U. S. 277, 36 Sup. Ct. 45, 60 L. Ed. 287; Darnell v. Edwards, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. Ed. 1317. As was said in the case of Des Moines Gas Co. v. Des Moines, supra:

"While this case is close to the border line, I cannot say on the whole case that the evidence, beyond any just and fair doubt, satisfied me that the rates (provided in the Board's order) will prove confiscatory."

And I therefore, with regret, am constrained to dissent from the conclusion of my colleagues.

CITY OF WINONA v. WISCONSIN-MINNESOTA LIGHT & POWER CO.

(District Court, D. Minnesato, First Division. March 5, 1921.)

1. **Gas ⇐14(1)—Cost of reproduction not sole basis of value.**
   The valuation of a gas plant on which the rates are to be based is the reasonable value of the property employed at the time it is being used for the public, and the cost of reproduction at the time of the use, less depreciation, is not necessarily that value, but such cost is only one of several factors to be considered in determining the value.
2. **Gas ⇐14(1)—Valuation must be based on reasonable judgment under all circumstances.**
   There can be no mathematical certainty in fixing the valuation of a gas plant on which the owner is entitled to a fair return, nor can any formula be used in all cases; but the question is to be determined by a reasonable judgment based on proper consideration of all relevant facts.
3. **Gas ⇐14(1)—Valuation by master based on cost of reproduction held excessive.**
   The valuation placed by the master on a gas plant, which was based on the cost of reproduction of the plant, less depreciation, *held* excessive under the evidence, especially in view of the tendency toward lower cost prices manifest since the master considered the case and which was still continuing.
4. **Gas ⇐14(1)—Normal price not basis for valuation.**
   In ascertaining the value of a gas plant on which the company is entitled to a fair return, the cost of reproduction is not to be figured on a normal price for materials and labor, since experience shows there is no such thing as a normal price to which the costs of material and labor tend to return after each departure.
5. **Gas ⇐14(1)—Depreciation should be determined by inspection, not by theory.**
   The depreciation of a gas plant which is to be deducted from its cost in determining the present value should be the actual depreciation as determined by an inspection of the plant to ascertain its present efficiency, and not any theoretical depreciation.

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

6. Gas ⟸14(1)—**Cost of financing not element of value without evidence of expenditure.**
In determining the cost of reproduction of a gas plant to aid in fixing a reasonable rate, where there was no evidence of any expenditure in financing the original construction of the plant, no item for cost of financing should be included in the cost of reproduction, though such item would be proper if the evidence showed such cost had been originally incurred.

7. Gas ⟸14(1)—**Overhead items included in the cost of reproduction without evidence of expenditure.**
In estimating the cost of reproduction of a gas plant, overhead items which were of such a nature that it was practically certain they were actually incurred in the original construction of the plant may be allowed, though there was no evidence they were incurred.

8. Gas ⟸14(1)—**Cost of rate litigation not considered in determining rate.**
The cost of the litigation by which the rate a gas company is entitled to charge is fixed should not be considered in determining the rate.

9. Gas ⟸14(1)—**Quarterly adjustment of rate based on net holder cost approved.**
In the report of a master fixing the rate which a gas company is entitled to charge, a provision that the rate thereby fixed should be adjusted quarterly on the basis of the variation in the net holder cost is proper.

10. Gas ⟸14(1)—**Provision for revaluation every five years proper.**
A decree fixing the price a gas company is entitled to charge for its gas, with a provision for a revaluation of the gas plant every five years, is practicable and fair.

In Equity. Suit by the City of Winona against the Wisconsin-Minnesota Light & Power Company. On exceptions to the master's report. Exceptions sustained in part and overruled in part, and decree directed, fixing the rate which defendant might charge for gas.

R. A. Randall, of Winona, Minn., and O'Brien, Young, Stone & Horn, of St. Paul, Minn., for plaintiff.

Butler, Mitchell & Doherty, of St. Paul, Minn., for defendant.

BOOTH, District Judge. This cause came on for hearing upon exceptions to the report of the special master heretofore appointed in the cause to take and report to the court the evidence in the case, to examine the evidence, make the necessary computations, find and state the facts, and make a report to the court of the facts as found and of the results of such computations, and to recommend to the court in the report a form of proper decree.

The exceptions are voluminous and cover practically the whole range of the master's findings. It will not, however, be necessary to take them up and discuss them in detail. Among the master's findings the following appear:

"That the ordinance, a copy of which is Exhibit E, attached to the complaint, entitled 'An ordinance to amend an ordinance entitled "An ordinance relative to lighting the city with gas,"' passed August 1, 1870, and the ordinances amendatory thereof, are violative of the Fourteenth Amendment to the Constitution of the United States, and are therefore void and of no effect; and I would further find that the price and rate for gas as fixed

in said ordinances, i. e., $1.45 per thousand cubic feet, is unreasonable, confiscatory, and void."

"The ordinance, a copy of which is Exhibit F attached to the complaint, entitled 'An ordinance establishing maximum charges to be made for gas in Winona,' passed January 24, 1920, was passed without authority; that the same is in violation of the Fourteenth Amendment to the Constitution of the United States and is therefore null and void; and that the rate therein prescribed, namely, $1.45 per thousand cubic feet for gas, is unreasonable, confiscatory, and void."

These findings are approved.

In reference to operating expenses of the company, valuation of its property, and the rate of return:

The master found that a proper allowance for operating expenses of the company for the ensuing year was $105,373.97, which would be equivalent to	$1.463	
per thousand cubic feet of gas sold;		
That the excess leakage in the system amounted to.....	.046	Per M cu. ft.
per thousand cubic feet, which deducted as a penalty from the operating expenses left	$1.417	
as net operating cost.		
The master found that an amount should be set aside for depreciation reserve equivalent to	.13	
of gas sold.		
He further found that the rate of return which would be reasonable was 8 per cent., and he found that the valuation upon which the return should be computed was $577,043, equivalent to.....	.60	
of gas sold.		
Total rate recommended as reasonable.....	$2.15.	

As to the operating expense: After examination of the evidence I am of opinion that the master's findings are in the main sustained, and with minor corrections made as suggested by counsel, the operating expenses are allowed at $1.41 per M cubic feet of gas sold.

The method adopted by the master of handling the city contract for gas appears to be justified, and is approved.

As to depreciation reserve: The rate allowed by the master was 2½ per cent. on the value of physical property depreciated, less the value of land and of benches. This in figures was 2½ per cent. on $386,225, making $9,655, equivalent to 13 cents per thousand cu. ft. of gas sold.

After examination of the evidence I am of opinion that the rate of allowance for depreciation reserve was justified by the evidence, and was fair and reasonable. But inasmuch as the valuation made by the master should in my judgment be revised, the resultant figures as to depreciation reserve will be changed, and will be given later on. As pointed out by the master, this general depreciation reserve is exclusive of a special depreciation reserve for relining benches, which latter is included in operating expenses.

As to the rate of return: The evidence in my opinion justifies fully the rate, adopted by the master, of 8 per cent.

As to valuation of the property: The master adopted the method of cost of reproduction new less depreciation. Four estimates were submitted for consideration, as appears from the evidence:

Classification.	No. 1. City's Estimate Normal Pre-War Construction Cost.	No. 2. Company's Estimate Reproduction New Cost, 5-Year Average Price Basis Ending May 1, 1919.	No. 3. Company's Estimate Reproduction New Cost, Current Price Basis For May 1, 1919.	No. 4. Company's Estimate Reproduction New Cost, Current Price Basis For March 1, 1920.
Land	$ 8,960	$ 8,960	$ 8,960	$ 8,960
Transmission and distribution	140,454	216,415	294,095	323,504
Buildings and miscellaneous structures	17,268	24,822	32,668	35,935
Plant equipment	73,795	101,338	136,440	163,728
General equipment	3,964	6,385	8,146	8,961
Paving (actually disturbed)	878	1,463	1,742	1,916
Total physical property not including overhead charges.	245,319	359,383	482,051	543,004

NOTE.—The estimates above set forth include contractor's profit, but do not include any sum or amount to cover "overheads"; i. e., legal organization, or general expense, engineering or superintendence, interest during construction, taxes during construction, omissions or contingencies, nor any allowance for working capital, cost of financing, or going value. The company claims and will offer proof to show that proper allowances should be made, and that appropriate sums or amounts should be included to cover each and all of these items.

The land values in all cases were taken on the basis of current values.

The master also adopted the estimate No. 3, representing cost of reproduction new of the physical properties at prices prevailing May 1, 1919. He then made a deduction for depreciation of 12 per cent., and thereafter made additions for overheads, cost of financing, working capital, and going value, and finally reached the figure $577,043.

These figures of the master are the subject of exceptions by the city and by the company, both as to the basic figures adopted and as to the various additions and deductions made by the master.

[1] I can see no valid objection to adopting the method of cost of reproduction new as a help to arriving at present reasonable value, provided proper revision be made whenever necessary, and providing other relevant facts are not ignored. Such method has been quite common, although not exclusive of other methods. But there must be ever kept in mind the ultimate purpose of the investigation, and also certain guiding principles laid down by the Supreme Court of the United States. The purpose of the inquiry is plainly indicated by the court in the case of San Diego Land Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 811 (43 L. Ed. 1154), where it is said:

"What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

The guiding principles are stated in a large number of cases in varying language, but in meaning substantially the same. The following citations will suffice:

In Smyth v. Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 434 (42 L. Ed. 819), the court said:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use * * * than the services rendered by it are reasonably worth."

In Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 29 Sup. Ct. 192, 200 (53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034):

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

In the Minnesota Rate Cases, 230 U. S. 353, 434, 33 Sup. Ct. 729, 754 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), the court said:

"The basis of calculation is the 'fair value of the property' used for the convenience of the public, * * * or as it was put in San Diego Co. v. Na-

tional City, * * * 'what the company is entitled to demand in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.' * * * The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts"—citing with approval Smyth v. Ames.

[2] As I understand the ruling of these cases, it is that the utility company is entitled to have a fair return upon the reasonable value of the property used and useful in rendering the service, and as of the time the service is rendered. This does not mean that the reasonable value is necessarily the same as the cost of reproduction new less depreciation estimated as of the time of the inquiry with additions made for overheads, etc.; nor does it mean that the reasonable value is necessarily the same as the original cost of construction less depreciation with similar additions; nor does it mean that cost of reproduction new less depreciation based on average prices for any series of years is necessarily controlling. But it does mean that all of these methods and others may be resorted to as aids in forming a judgment as to what is the present reasonable value. That there can be no mathematical certainty in such a judgment goes without saying. Nor does any formula exist which can be used in all cases. The most that can be expected is, quoting the language of Justice Hughes in the Minnesota Rate Cases, "a reasonable judgment having its basis in a proper consideration of all relevant facts." Hence the necessity of not being confined in the inquiry to unit prices prevailing on any given date, but of including in the consideration unit prices of the past as well as those of the present, and also the trend of unit prices as well as the reasons for the trend, and the probability or improbability of a change of trend. Hence also the necessity of considering the past history of the utility company, especially in fixing the value of such items as overheads, cost of financing, going value, and working capital.

The statement in Smyth v. Ames, 169 U. S. 546, 18 Sup. Ct. 418, 434 (42 L. Ed. 819), as to matters worthy of consideration in fixing reasonable value, has been approved in later cases, though the particular weight to be given to the several matters depends, of course, upon the facts in each particular case. That statement is as follows:

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

[3] After carefully considering the evidence in the present case, I have reached the conclusion that the master in taking as his basic figures for valuation of the physical property of the company that estimate representing the cost of reproduction new, based on prices prevailing May 1, 1919, and building up from those basic figures, has

arrived at a final valuation higher than can be considered reasonable in view of all the facts.

Apparently the master went upon the theory that cost of reproduction new should be the controlling factor, and that judgment was to be exercised mainly in selecting the date at which cost of reproduction should be calculated. In his report he states:

"The concensus of authorities is that the present value, i. e., the time when the valuation is being made for rate-making or other purposes, is the time at which the value of the property is to be determined, or to state the rule in another way, the reproduction cost new at the time the estimate is being made is the basis of valuation for the making of rates. This rule has been modified to the extent of diminishing the reproduction cost new by the ascertained amount of depreciation."

I do not exactly so understand the decisions of the Supreme Court; but, on the contrary, that all relevant facts are to be considered in reaching a judgment of what is a reasonable present value, and that cost of reproduction new, whether at the present time or at some other time, is but one of the relevant facts to be considered. Other relevant facts to be considered in the present case were: Original cost of the property, as nearly as it could be ascertained. No direct evidence as to this was introduced by either side, the city stating that it had been unable to obtain it, the company making no statement in regard to the matter so far as I have been able to learn from the record. Total capital invested in the property down to the present time, as nearly as it could be ascertained; this according to the evidence amounts approximately to $244,000. Rate of return earned by the company upon investment during past years; this according to the evidence has averaged 12.4 per cent. during the past ten years, including depreciation reserve. Evidence as to these last two matters was introduced by the city. Its accuracy and value are attacked by the company, but it is noticeable that the company offered no evidence itself in regard to these matters. The company did, however, introduce evidence showing that the amount available for depreciation and return on invested capital for the year ending December 31, 1919, was $28,185. Stocks and bonds outstanding: It appears from the evidence that the original capital stock was $60,000, later increased to $100,000. In 1905 this stock was sold for $175,000. In July, 1905, a mortgage for $300,000 was made. The amount of bonds issued or now outstanding does not appear. The present company, the defendant, purchased the property in 1912. Evidence as to the financial history of the prior companies, and of the present defendant company so far as it relates to the Winona properties, is extremely meager, so much so that it raises a suspicion of studied omission. Other facts and matters proper to be considered in connection with the estimates of the cost of reproduction are: The causes of the high prices since 1914; also, whether these causes still exist, and will continue for a considerable period; or whether there has already set in a decline in prices.

In connection with the inquiry as to recent decline in prices, it is to be noted that one of the expert witnesses for the company at the time of the hearing before the master testified that a fall in prices had already commenced and was expected to continue in materials at least.

It is also worthy of mention that since the hearing before the master and while this hearing on review has been pending, the decline in prices of commodities in general has been so continuous and so marked that the court will take judicial notice of the same. The materiality and importance of this decline in prices are shown by the following testimony of one of the witnesses for the company:

"The price variations on commodities in general I found, after many investigations of this kind, to be closely indicative of price variation in commodities used in the construction of gas plants, and as a matter of fact of utility plants in general."

It is but fair to add that the recent decline in prices of general commodities had not become marked at the time of the hearing before the master. It should also be added that the decline has not as yet materially affected the elements going to make up the holder cost of gas. Whenever such decline occurs it will be taken care of by the plan of periodical adjustment.

[4] The city's valuation: I do not think that the city's valuation, built up from the estimate of $175,031 as the value of the physical property, as of May 1, 1919, is fair and reasonable. The estimate is based on so-called "Normal Pre-War Construction Cost Depreciated"; and to this estimate is added 25 per cent. to get present value, and further additions are made for the actual items purchased subsequent to May 1, 1919, and for land and working capital, making a total of $251,697. The inherent vice in the method is the assumption that there is such a thing as a "normal construction cost." If this phrase means a cost of construction which in general conforms to a standard, and that variations in the cost of construction tend to correct themselves, and thereby bring the cost of construction back to the standard, then in my judgment the assumption is false. When analysis is made of the term "normal construction cost," it is apparent that it means construction at normal prices of labor and materials. The fact is that a study of standard charts of prices of material or of labor extending over a long period of years (long enough to get a broad survey) will convince the most skeptical that there is not now, and never has been, such a thing as normal prices, in the above sense, either for labor or materials. Prices of labor and materials are constantly changing, and therefore cost of construction of anything into which labor and materials enter will inevitably change also. So that while one may properly speak of average prices, or average cost of construction during a given period, the term "normal cost of construction" is entirely misleading.

The figures used by the city represent neither the average prices for a period nor prices at a particular date, but simply an opinion as to what should have been "normal" prices during a selected period. Depreciation figures of the city are grossly excessive.

After considering the various estimates as to valuation before the master and the evidence as to the same, and the past history of the company, and the amount of capital actually invested, and the rate of return earned by the company during the past ten years upon such investment, and all other matters deemed relevant, I have reached the

conclusion that the following estimate should be adopted as the present reasonable value of the properties of the company at Winona:

Valuation of total physical property, less land	$350,000
Overhead, 15 per cent	52,500
	$402,500
Depreciation, 12 per cent	48,300
	$354,200
Land	8,960
	$363,160
Working capital	25,000
	$388,160
Going value, 6 per cent	23,289
Total present reasonable value	$411,449

An 8 per cent. return on this valuation would give $32,915.92, which would be equivalent to 43 cents per thousand cubic feet of gas sold.

Much has been said on the part of counsel for the plaintiff as to the propriety of following the method adopted by the master in the Minneapolis Gas Company case in arriving at a fair valuation. It may be of interest to note that a valuation made up by following the method of the master in that case as nearly as practicable, making due allowance for differences in the character and location of the plants and the history, etc., of the two companies, amounts to a figure only about $40,000 less than the figures which I have above adopted.

[5] In the foregoing table I have adopted the percentages used by the master as to overheads, depreciation, and going value, and also the master's figures as to working capital. I have some doubt whether 12 per cent. for depreciation is not too great, in view of the evidence as to the present efficiency of the plant, my view being that depreciation is something to be concretely determined by inspection, rather than by a theoretical yardstick, and that present efficiency is a very important factor; that even though the life of some of the elements of the physical property will not long continue, yet that this is a matter to be taken care of by depreciation reserve; and that, if the plant is practically as efficient as a new plant, the deduction from valuation on account of depreciation should be very slight. However, there is evidence of some present inefficiency, and I have concluded to allow the 12 per cent. in the present case, as did the master.

[6] I have eliminated entirely the item of cost of financing. Not but what such an item is proper in cases where the evidence shows such expense was incurred, but I have been unable to find any such evidence in the present record. There is evidence as to what the cost of financing would be in a reproduction of the present plant on the different bases proposed but in my judgment this is not enough. The reproduction method may theoretically call for such an item as cost of financing, but in making a reasonable valuation for rate-making purposes, I do not think that items which are theoretical only, so far as the case in hand is concerned, should have any place. In my judg-

ment the cost of financing stands on the same basis as a theoretical replacement of pavement which has never in fact been disturbed. The exclusion of the latter item was approved in the case of Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 35 Sup. Ct. 811, 59 L. Ed. 1244.

[7] It might be said that the foregoing criticism on cost of financing would apply equally to some of the items included in "overheads." To some extent this is true, and I should feel much better satisfied if the evidence had shown that all of the items of expense included in overheads had been actually incurred in the construction of the Winona plant and placed in capital account.

There is this to be said, however, that it is practically certain from the very nature of the items included in overheads that expense items of such nature were actually incurred, whereas in respect to the item, cost of financing, it seems practically certain in my mind that in the construction of this small plant at Winona no such item of expense was actually incurred.

The depreciation reserve computed at the rate found by the master, 2½ per cent. upon $286,569, the value of the total physical properties, less land and less benches, will be $7,164.20, equivalent to 9 cents per M cubic feet of gas sold and used.

[8] The costs of this litigation should not in my judgment be included among the items going to make up the rate for gas sold. Each party should pay one-half the master's fees and of the court costs. Other expenses and disbursements should be borne by the party incurring the same.

The rate built up of the foregoing figures will be as follows:

Operating cost	$1.41
Return on present reasonable value	.43
Depreciation reserve	.09
Total	$1.93

[9] The master has recommended that the price of gas be adjusted at intervals of four months, based upon variations in the net holder cost of gas during the preceding four months. I approve this recommendation; such a plan has been followed in the Minneapolis Gas Case, and is working satisfactorily. Making a needful change in the master's figures, pointed out by counsel, due to a different method of handling leakage, the net holder cost is found to be 95 cents per M cubic feet of gas sold. In my judgment this variable element should be reduced by deducting the items of current maintenance or repairs, included in such net holder cost. These are as follows:

Maintenance of boilers, per M cu. ft. of gas sold	.008
Maintenance of benches	.035
Maintenance of coal gas apparatus	.020
Maintenance of gas buildings	.009
Total	.07.

These amount to 7 cents per M cubic feet of gas sold, which being deducted from 95 would leave the variable element on which to base

the adjustments each four months 88 cents. The reason for eliminating the items of current repairs is to avoid disputes likely to arise each four months on the question whether certain items of expense should be classed with the repair items included in the net holder cost, or with the maintenance items covered by the depreciation reserve fund.

[10] Finally, in my opinion there should be, as suggested by the master, an opportunity for revaluations of the properties of the gas company when circumstances warrant; but not oftener than each five years, each valuation to be used as a basis upon which a return should be made during a succeeding period. An inventory has already been taken. Additions thereto can easily be made from time to time, and unit prices are readily obtainable. Such readjustments of valuation need not interfere with readjustments of rates based on changes in net holder cost. Though I recognize that such a plan is not free from objections, yet I believe that a rate, adjustable each four months, in accordance with variations in net holder cost of gas, less repairs, and further adjustable, when necessary, in accordance with variations in property values, would be practicable and fair to all parties concerned.

Except as disposed of in the foregoing decision, the several exceptions by plaintiff and by defendant to the master's findings and report are hereby overruled, and exceptions allowed.

Decree in accordance with the foregoing views will necessarily be somewhat different from the form of decree recommended by the master. A decree, therefore, may be drawn by counsel, and submitted to the court for approval. If counsel cannot agree upon the form, their differences may be submitted to the court. It should be borne in mind that the decree to be entered, though called a final decree, is effective, so far as rates are concerned, only until a valid gas rate applicable to the defendant company is promulgated by the city of Winona or by some competent authority.

KINGS COUNTY LIGHTING CO. v. BARRETT et al.

(District Court, S. D. New York. December 30, 1920.)

1. **Constitutional law ⇐48—Every presumption favors legislative act fixing gas rate.**

When application is made to the statutory court, pursuant to Judicial Code, § 266 (Comp. St. § 1243), for a temporary injunction to restrain the enforcement of a gas rate made by the Legislature, every presumption is in favor of the validity of the legislative action.

2. **Gas ⇐14(1)—Temporary injunction should not provide remunerative income for utility.**

When the rate fixed by the Legislature for charges by a gas company is attacked as unconstitutional, the only relief that should be granted on preliminary injunction is one that will relieve the more acute cruelties of the situation, and yet not give the plaintiff a remunerative income.

3. **Gas ⇐14(1)—Rate injunction can be dissolved for inequitable charges.**

After a final decree restraining the enforcement of the statutory rate for gas charges, the Legislature should adopt a new schedule of charges which will be valid; but, if it fails to do so, and the gas company takes advantage of the situation to collect an inequitable rate, the injunction

can be vacated, under the power reserved in the decree to vacate or modify.

4. Gas ⇐14(1)—Defendant has burden of showing rate substituted for enjoined rate is inequitable.
On motion to vacate a permanent injunction against the enforcement of the statutory rate for gas, the burden is on defendant, who made the motion, to show that the rate charged by the gas company in lieu of the statutory rate is inequitable.

5. Gas ⇐14(1)—Inequitable rate, requiring dissolution of injunction, must shock the conscience.
A rate charged by a gas company in lieu of the statutory rate, against which injunction was issued, which would entitle the defendant to a vacation of the judgment because it is inequitable, must be a rate so obviously wrong that it shocks the conscience.

6. Gas ⇐14(1)—Rate yielding 25 per cent. profit held not unconscionable.
After a gas company had obtained a permanent injunction against the enforcement of a statutory rate as confiscatory, the establishment of a new rate which yields a 25 per cent. profit is not so grossly inequitable as to shock the conscience of a decent man, and does not require the vacation of the injunction.

In Equity. Suit by the Kings County Lighting Company against Alfred M. Barrett and others. On defendants' motion for vacation or modification of injunction. Motion denied.

Ingraham, Sheehan & Moran, Francis M. Scott, and Samuel F. Moran, all of New York City, for plaintiff.

Ely Neumann, of New York City, for defendant Public Service Commission.

Wilbur W. Chambers, Deputy Atty. Gen., for defendant Newton.

HOUGH, Circuit Judge. Discursively, perhaps, but with sufficient plainness, I am entirely ready to dispose of this motion now, and shall proceed to do it. A great deal of time has been spent in talking about what one side describes as a defiance of the law of the state of New York, and what the other side describes as oppressive conduct on the part of public officials of the state of New York, in respect of the management of this plaintiff's business. I have already intimated, and I wish to say again, that the bill of complaint in this case presented exactly one point to this court; one point which was thought to be competent for this court to answer, namely, whether the statutory rate prescribed by one or both of two connected statutes of the state of New York was, or was not, violative of the Fourteenth Amendment of the national Constitution. That is the only point that could be brought to this court. It has been held that they did so violate the national Constitution; and, that having been decided, the fact that allegations are made that one side of this litigation feels somewhat inclined to press the vantage of its victory, and the other side of the litigation feels disposed to sullenly contest the legitimate consequences of the main victory, is not a matter of any moment to this court. As a citizen, one may have his opinion; as a court, I have nothing to say.

[1] I am ready to dispose of this motion, because it appears to me to have been brought under a misconception of the nature or effect of the final decree in a rate-making case. When application is made to what has come to be known as the statutory court, pursuant to section 266 of the Judicial Code (Comp. St. § 1243), for a temporary injunction in rate-making applications, every presumption (and the emphasis cannot be too strong on the "every") is in favor of the rate, is in favor of the validity, and every other laudatory abstract noun that can be applied to the legislative action. The plaintiff, in such a case, can obtain no relief until he has affirmatively swept away the enormous advantage with which the rate-making authority enters upon such litigation.

[2] One can find numerous examples in this court, and recently, of victorious plaintiffs, yet it is my opinion (and here I speak as a member of the bar humbly entitled to my opinion, not altogether shared by my colleagues on the bench) that the only measure of relief that should be granted on preliminary injunction is one that will, it is hoped, relieve the more acute cruelties of the situation, yet certainly not put the plaintiff in a position of enjoying a remunerative income, to the end that the plaintiff (although victorious temporarily in overthrowing the enormous advantages of the rate-making authority) may still be under the sting of financial necessity to go ahead and try its case and prove it.

In this case the plaintiff has prevailed on final hearing, and I know of no reason why the consequences generally following a final decree in a cause such as this, and in ordinary litigation, also, should not ensue, viz. that the plaintiff was right and the defendants were wrong. That has passed in rem judicatam; that the rate was wrong. That it was unjust, that it was unremunerative, that it was unconstitutional has also passed in rem judicatam; and such rate is dead until that judgment is reversed. What is the result? The result ought to be that the rate-making authority should immediately make another rate that was fair. Yet I am informed by the affidavit prepared by Mr. Chambers that—

> "It is not to be assumed that the Legislature of this state will, because of an inflation in prices now conclusively proven to be temporary, abandon its long-established practice of itself fixing the rates to be charged for gas."

I most heartily agree. The actions of the last few years have proved it. In other words, speaking as a citizen, it can now be seen as the deliberate practice of the only rate-making authority existing in the state of New York, namely, its Legislature, to cause one of two things to occur: Either the public utilities, in the position of the present plaintiff, must perish or become emaciated by financial disease, or else that condition of regulatory chaos shall be encouraged, which is the necessary and inevitable result of any effort on the part of judicial bodies to fix rates. They may do no more than pronounce upon the results of an existing rate.

[3] That is all I am judicially interested in, and I put that in the opinion in this case. I did say that, if this plaintiff "endeavors to

charge and collect a rate which is inequitable, this court could vacate its injunction." That passed into final decree, not in those words, but substantially in the ordinary form, viz.:

"That any of the parties defendant may apply upon notice at the foot of the decree to vacate or modify the foregoing injunction, if it can be shown that by change in conditions the statutory rate is no longer confiscatory in its effect under such new conditions."

Viewed, then, in its most generous aspect, the opinion, plus the decree, gave leave to proper parties either to apply in the strict language of the decree which I have just read, or upon the larger, looser ground, that the successful plaintiff was acting in an inequitable manner.

[4] But whether such application be made in one form or another, the fact remains that the burden of proof, the obligation to affirmatively show its right, rests upon the moving party, just as it did upon the plaintiff when the action was begun. It is an error, a fundamental error, to come into this court and nibble at this and that sum of money. It is all an endeavor to make out of the court a rate-making body; to supply the neglect, the omission, which the state of New York has for some years deliberately chosen to create, maintain, and extend, in respect of rate-making powers within this commonwealth.

So, in view of the proof offered upon this hearing, which is inadequate, unsubstantial, and insufficient to maintain the affirmative in the cause of action substantially propounded by the moving papers, I have no hesitation in denying the motion.

I will go somewhat further, because as a trier of facts I am not much moved either by the present ex parte criticism on the part of the moving defendants or the ex parte showing on the part of the answering plaintiff. It was my duty to listen to exhaustive argument on the master's report in this case. Since then it has been my further duty to listen to extensive argument with respect to the affairs of (I forget how many) other gas companies within the southeastern corner of this state.

[5, 6] I consider the word "inequitable," in the present connection, to mean something so obviously wrong that it shocks the conscience of a fairly decent man, who happens to be the chancellor. I believe that, at the present time and for a time in the future concerning which I cannot venture to even form an opinion, the most favorably situated gas-making concern within the limits of the city of New York cannot reasonably expect to make and distribute gas and pay interest (at rates now ridiculously low) upon the money it has borrowed in the past, for less than $1.20 per unit; and this gas company, I am sure, is by no means the most favorably situated within the city's limits.

2. I am also of the opinion that a 25 per cent. profit (which is the difference between $1.20 and $1.50) is as a profit on anything, not so grossly inequitable as to shock the conscience of a decent man.

For those reasons, the motion is denied.

COCA-COLA CO. v. STEVENSON et al.

(District Court, S. D. Illinois, S. D. January Term, 1920.)

No. 47.

1. **Trade-marks and trade-names and unfair competition ⟸18—"Coca-Cola" valid trade-mark.**

   Coca-Cola Company *held* to have a valid trade-mark in the name "Coca-Cola" as applied to the beverage widely known by that name.

2. **Trade-marks and trade-names and unfair competition ⟸79—Equity has jurisdiction to grant appropriate relief against infringement.**

   Equity has jurisdiction to grant appropriate relief against infringement of a valid trade-mark and to that end may compel the Secretary of State of a state to cancel the registration under a state statute of an infringing trade-mark which constitutes a cloud on the title of the true owner of the trade-mark.

3. **Trade-marks and trade-names and unfair competition ⟸70(3)—"Coca-Cola" held infringed.**

   Labels for a beverage, registered under a state trade-mark statute containing the words "a genuine Coca and Cola flavor," printed in four horizontal lines, "Coca and Cola" constituting one line with the words "Coca" and "Cola" in large colored letters and the word "and" in small type so that it would readily be mistaken for complainant's trade-mark "Coca-Cola," *held* an infringement of such trade-mark.

4. **Trade-marks and trade-names and unfair competition ⟸45—Registration under state statute confers no exclusive rights.**

   The trade-mark statute of Illinois (Hurd's Rev. St. 1919, c. 140) does not purport to confer any exclusive rights, and the registration of trade-marks thereunder has no effect in giving them the quality of trade-marks if not already such.

5. **Trade-marks and trade-names and unfair competition ⟸42—State statutes are in affirmance of common-law rights.**

   State statutes providing for registration of trade-marks are in affirmance of the common law, and remedies given by such statutes are either declaratory or are cumulative and additional to those recognized and applied by the common law.

6. **Trade-marks and trade-names and unfair competition ⟸45½, New, vol. 7A Key-No. Series—Owner entitled to cancellation of fraudulent registration of infringing trade-marks.**

   Where defendant by false and fraudulent representations procured the registration with the Secretary of State of Illinois under the state statute, knowing that they were infringements on complainant's trade-mark, complainant *held* entitled to join the Secretary of State with defendant in a suit in equity for the purpose of establishing its rights and procuring the cancellation of such registrations.

7. **Trade-marks and trade-names and unfair competition ⟸41—Trade-mark rights not limited by state statute.**

   A valid trade-mark, long used in interstate commerce, cannot be limited by denying it effect in a state because not registered under a state statute permitting such registration.

In Equity. Suit by the Coca-Cola Company of Delaware against Lewis G. Stevenson and others. Decree for complainant.

The Coca-Cola Company of Georgia, substituted pending the action by the Coca-Cola Company of Delaware, sued to enjoin the defendants, John D. Fletcher, a citizen of the state of Texas, and the National Carbonating Syrup

Company, a Delaware corporation, doing business at the city of Evansville, Ind., from further infringing upon the trade-mark of the plaintiff; also, seeking an order directing the Secretary of State of the State of Illinois, Lewis G. Stevenson, and his successor Louis L. Emmerson, to cancel the registration of the purported trade-marks of defendants Fletcher and the National Carbonating Syrup Company, on the ground that the registration was falsely and fraudulently procured.

The plaintiff and its predecessors had been engaged in the manufacture of a syrup for an aerated beverage and had caused the beverage itself to be bottled under direction and supervision by the plaintiff known as "Coca-Cola," since 1886. A vast sum of money had been expended in advertising the trade-mark "Coca-Cola" as indicating plaintiff's syrup and the aerated beverage bottled therefrom. In the year 1916, $1,943,178.40 had been expended in bringing the syrup and the beverage manufactured and sold under the trade-mark "Coca-Cola" to the attention of the trade in interstate commerce. The production of the syrup increased from 25 gallons in 1886 very rapidly until the annual output had, in 1916, reached 9,715,892 gallons; the trade-mark "Coca-Cola" had become favorably and familiarly known everywhere; and the rights of the plaintiff were repeatedly affirmed by adjudications in the United States courts. The trade-mark was the subject-matter of two registrations in the United States Patent Office and prior thereto and since had been used by the plaintiff in interstate commerce.

On March 16, 1916, plaintiff made application to the Secretary of State of Illinois for the registration of its trade-mark "Coca-Cola" under the provisions of the Revised Statutes of Illinois (Chapter 140), fully complying with all the terms and provisions of that statute. The application, however, was rejected by the Secretary of State because of prior registrations by defendant John D. Fletcher, as follows:

"John D. Fletcher's Coca and Cola Carbonating Syrup, Chicago, Illinois," the same being inclosed in a red circular band and registered July 24, 1914. Also, the words,

"John D. Fletcher's Carbonated Syrup, A Genuine Coca and Cola Flavor," the same being inclosed in a broad corrugated wheel or circular band of blue and registered October 6, 1914. Also,

"Tri-Pure. A Genuine Coca and Cola flavor. 7 Fl. Oz. Purest Drink in the World"—inclosed in a broad corrugated wheel or circular band and registered March 10, 1916. Also,

"Trico. Genuine Coca and Cola Flavor. 6½ Fl. Oz. Purest Drink in the World"—inclosed in a red corrugated wheel or circular band and registered September 25, 1916; all of said registrations being in the office of the Secretary of State of Illinois.

And the registrations of John D. Fletcher were permitted to remain on record in the office of the Secretary of State, thereby becoming clouds upon the title and the exclusive right of the plaintiff to the enjoyment of its trade-mark in Illinois.

Defendant Fletcher was formerly a resident of Nashville, Tenn., and on or about February 15, 1911, organized a corporation under the laws of Tennessee, under the name of Nashville Syrup Company. He was president, general manager, and one of the principal stockholders of the company. Prior to the registrations in Illinois, a bill of complaint was filed in the Circuit Court of the United States for the Middle District of Tennessee by the plaintiff against the Nashville Syrup Company, praying an injunction against the defendant for infringing plaintiff's trade-mark "Coca-Cola." Upon a hearing upon the pleadings in the case, on July 29, 1912, a final decree was entered perpetually enjoining the Nashville Syrup Company, its agent, servants or employes, from further infringing plaintiff's trade-mark. An appeal was prosecuted from the decree to the Circuit Court of Appeals for the Sixth Circuit, and on June 13, 1914, the decree of the Circuit Court was affirmed. Coca Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 157; Nashville Syrup Co. v. Coca Cola Co., 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358.

Fletcher knew of the suit and the adjudication in the United State Circuit Court in Tennessee and aided in the defense interposed to the bill. At the

time he filed his several applications for registration of trade-marks in Illinois, defendant Fletcher knew that the trade-mark "Coca-Cola" belonged to the plaintiff and referred to and meant to the trade plaintiff's syrup and the nonalcoholic beverages made therefrom under plaintiff's supervision, and that the use of the alleged trade-marks by Fletcher was unlawful and his acts and representations in procuring the registrations of his alleged trade-marks in Illinois, embodying the trade-mark "Coca-Cola" in various forms, was a fraud upon plaintiff's rights.

The National Carbonating Syrup Company's rights to the trade-marks registered in Illinois were acquired through defendant Fletcher.

The applications of Fletcher for the registration of the trade-marks in question with the Secretary of State of Illinois were in due form of law. The statute authorizing the registration of trade-marks, labels, etc., required the applicant to make a showing under oath that he had the right to the use of the trade-marks, the registration of which he sought, and that no other person, firm, organization, union, or corporation had the right to such use either in the identical form or in any such near resemblance thereto as might be calculated to deceive. In making this representation required by the statute, defendant Fletcher disregarded plaintiff's rights to the trade-mark "Coca-Cola." The registrations procured were procured by reason of the representations made, and upon a hearing the court found that the representations were untrue and fraudulent, and that they are a cloud upon the title to plaintiff's property.

It was contended upon the part of defendants Fletcher and National Carbonating Syrup Company that the plaintiff was without remedy in equity on the ground of unclean hands, for the reason that at one time, many years ago, it had been convicted of marketing a syrup that contained slight traces of ingredients offensive to the pure food laws, and citing, after submission, the opinion of the Circuit Court of Appeals for the Ninth Circuit in Koke Co. of America v. Coca Cola Co., 255 Fed. 894, 167 C. C. A. 214; that plaintiff had no trade-mark rights in the name "Coca-Cola" for either syrup or beverage; that the mark was appropriated by plaintiff for a beverage and never was applied; that it could have no common-law trade-mark because the name arose and was used to describe the ingredients in plaintiff's product, i. e., extracts of coca leaves and cola nuts, and being descriptive, even if registered by plaintiff under the Act of February 20, 1905, it would only remove it on the class of merchandise to which it had been appropriated by the declaration and actually used; the declaration appropriated the mark to the class known as beverages and as it was never used on beverages, the descriptive disability has never been removed; that whatever rights the plaintiff may have had in the trade-mark had become a nullity; that plaintiff's trade-mark never attained a secondary meaning as the name of plaintiff's product; that defendants have always acted in good faith; that their product is distinctively and truly flavored with coca and cola, which are common products of the soil; that defendants' product is Trico, and their trade-mark distinctive; that the state or any other sovereignty has the right to say how, when, and under what terms a mark may be used within the limits of that sovereignty; that plaintiff's product is not a beverage.

Defendant Secretary of State attacked the multifariousness of the bill.

Allen, Humphreys & Converse, of Springfield, Ill., and Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for plaintiff.

Graham & Graham, of Springfield, Ill., and Edward C. Henning, of Evansville, Ind., for defendants Fletcher and National Carbonating Syrup Co.

Andrew J. Brundage, Atty. Gen., of Illinois, and Clarence M. Boord, Asst. Atty. Gen., for defendant Secretary of State.

FITZHENRY, District Judge (after stating the facts as above). [1] The very recent decision of the Supreme Court in Coca-Cola Co. v.

Koke Co. of America et al., 254 U. S. 143, 41 S. Ct. 113, 65 L. Ed. ——, has conclusively disposed of the defense of "unclean hands" interposed by the defendants in this case, upon the authority of Koke Co. of America v. Coca-Cola Co., 255 Fed. 894, 167 C. C. A. 214 (C. C. A. 9th Cir.). While the exact question in that case is not presented here, yet the same principle is involved. It is claimed that none of the chemical elements suggested by the name "Coca-Cola" were in fact to be found in plaintiff's syrup, and therefore it was a fraud upon the public. The language of the Supreme Court in disposing of that case is especially apt here:

"The name [Coca-Cola] now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words, 'Coca-Cola' probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in United States v. Coca-Cola Co., 241 U. S. 265, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer, but to which the producer is entitled."

This very recent decision of the United States Supreme Court settled many of the questions involved in this case. The opinion of the Circuit Court of Appeals of the Ninth Circuit which was reversed was submitted to this court for its consideration upon the issues raised here, by the personal and corporate defendants, upon the theory that the identical plaintiff in this case had been adjudicated in the Circuit Court of Appeals to be of such unclean hands that it should be denied all relief in equity. The opinion disposes of the question of ownership of the trade-mark and recognizes that it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer, but to which the producer is entitled.

[2] It is well established that equity has jurisdiction to: (1) Cancel fraudulent instruments affecting titles; (2) to quiet title; (3) to remove a cloud on title; and (4) to enjoin clouding a title. If at the time of Fletcher's adoption and use of the trade-marks which he registered in Illinois the plaintiff had title to and was as far as possible, with this kind of property, in possession of the trade-mark "Coca-Cola," then any user or claim by another to that mark or a simulation thereof was such a wrong and trespass upon plaintiff's trade field, as to bring the question within the perview of equitable relief. 1 Storey's Equity, § 700; Coel v. Glos, 232 Ill. 142, 83 N. E. 529, 15 L. R. A. (N. S.) 413; Hemstreet v. Burdick, 90 Ill. 444; Glos v. Goodrich, 175 Ill. 20, 51 N. E. 643; Langlois v. Stewart, 156 Ill. 609, 41 N. E. 177; Bradley v. Bell, 142 Ala. 382, 38 South. 759; Grove v. Jennings, 46 Kan. 366, 26 Pac. 738; Hamilton v. Batlin, 8 Minn. 403 (Gil. 359) 83 Am. Dec. 787.

In a case of this character, where it is clear that the legal remedy in the premises, mandamus, is utterly inadequate to protect plaintiff's rights, equity has full jurisdiction over the Secretary of State to decree the plaintiff the relief to which it is entitled and to compel the Secretary of State to carry out the court's mandates by canceling any

wrongful registrations of the defendants which constitute a cloud upon plaintiff's title and to permit the registration of plaintiff's trade-mark. Greene v. L. & I. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; L. & N. R. Co. v. Bosworth (D. C.) 230 Fed. 191; Ill. Central R. Co. v. Bosworth (D. C.) 209 Fed. 465; Same v. Greene, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. Ed. 1309; St. Louis & S. F. R. Co. v. Cross (C. C.) 171 Fed. 480; Harrison v. St. L. & S. F. Ry. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187; Phil. Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440.

[3] In the trade-marks registered by defendant Fletcher and attached to his answer, Exhibit A contains the words "JOHN D. FLETCHER'S COCA and COLA Carbonating Syrup Chicago, Illinois." B contains the words "JOHN D. FLETCHER'S CARBONATING SYRUP A Genuine Coca and Cola Flavor." C contains the words "TRIPURE PUREST DRINK IN THE WORLD A Genuine Coca and Cola Flavor. 7 Fl. Oz." D contains the words "TRICO PUREST DRINK IN THE WORLD Genuine Coca and Cola Flavor 6½ Fl. Oz." In Exhibit A the words "Coca" and "Cola" are in type about twice the size of the largest type in the label. The letters are outline type, printed in two colors, blue and red. In Exhibits B and C the words "A Genuine Coca and Cola Flavor" form four horizontal lines, the words "Coca and Cola" being the longest line in the center of the trade-mark, while the center of Exhibit D is arranged almost exactly the same as C, with the exception of the word "A," so that in all four of the registrations the catchy display line which would naturally be the first to attract the eye is "Coca and Cola." In Exhibit A the word "and" in the display line "Coca and Cola" is printed in type probably one-fourth as large as the type used in "Coca" and "Cola," so that the word "and" might readily be mistaken for the dash in plaintiff's trade-mark "Coca-Cola." All of the labels now claimed by defendant Fletcher as his trade-marks, and which were registered by him, display a manifest purpose on the part of the designer to attract the eye of and interest the public in the two words "Coca" and "Cola."

In the light of these facts, it is quite natural that the Secretary of State should have held, when the plaintiff endeavored to register its trade-mark, that it was so similar to those already registered as to require him to deny registration. There could be no better or more convincing evidence of the infringement than the official action of the Secretary of State upon plaintiff's application. The addition of the word "genuine" and the adding of the word "flavor" and the substitution of the word "and" for the dash in plaintiff's trade-mark do not relieve defendant Fletcher from his culpability as an infringer, but rather by the arrangement of the labels, the registration of which he procured, makes the conclusion the more irresistible that he clearly intended to appropriate to his own use the benefits of plaintiff's trade-mark in Illinois. Added words and their embellishment do not destroy property rights in a trade-mark. Coca Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153–155, 200 Fed. 157–160, affirmed 215

Fed. 327, 132 C. C. A. 39; Coca-Cola Co. v. Am. Druggists' Syndicate (D. C.) 200 Fed. 107; Fuller v. Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; De Long v. De Long Hook & Eye Co., 10 Misc. Rep. 577, 32 N. Y. Supp. 203; Clark Thread Co. v. Armitage, 74 Fed. 936, 21 C. C. A. 178; Beecham v. Jacobs, 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

Virtuous intentions cannot be attributed to defendant Fletcher in his infringement upon the plaintiff's rights. He personally procured the registrations; he is the president of the corporation defendant, National Carbonating Syrup Company, and he was the president, general manager, and one of the largest stockholders of the Nashville Syrup Company, which was enjoined from infringing upon the plaintiff's trade-mark by the decree of the United States Circuit Court for the Middle District of Tennessee (Coca Cola Co. v. Nashville Syrup Co [D. C.] 200 Fed. 153; 215 Fed. 327, 132 C. C. A. 39), and was one of the persons who come within the rule that an officer, director, or stockholder of a corporation is bound and estopped by judgment against the corporation, when he has full knowledge and participates in the defense (Hancock Natn'l Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; United States v. United States Shoe Machinery Co. [D. C.] 234 Fed. 127). So we conclude that in designing the trade-marks, the registration of which Fletcher procured, his purpose to use plaintiff's trade-mark was not only clear and deliberate, but with full knowledge of plaintiff's rights. The character of defense interposed strengthens this view, for it is contended, practically, that inasmuch as the trade-mark "Coca-Cola" was not registered, anybody could register it and that the first person to do so would be the legal owner thereof and entitled to its use. This, of course, is a mistaken view of the Illinois statute. Registration does not and cannot create or bestow the exclusive right to use a trade-mark, nor does the statute so provide.

[4] There is nothing in the Illinois statute requiring registration preliminary to a suit, or the making of the certificate anything more than evidence of adoption, nor does it provide that registration shall confer any exclusive right, nor is any means provided for the settling of contested priority claims in the office of the Secretary of State between two applicants. Where a similar statute of New York was under consideration, the Court of Appeals said:

"It may be observed, however, that the Legislature by this statute has not attempted to confer trade-mark rights, but merely to more effectively regulate existing common-law trade-marks and to afford an additional speedy remedy for the violation thereof, and to prevent fraud and imposition on the public, which are matters within the police power of the state." Prest-O-Lite Co. v. Ray, 162 App. Div. 62, 147 N. Y. Supp. 138.

Only the owner of a trade-mark has the right to register it. Defendant Fletcher must now be held to have known that the plaintiff here and its predecessors owned the trade-mark "Coca-Cola" by adoption and use since 1886, and this ownership and the rights of the plain-

tiff to it have been adjudicated so frequently in the federal and state courts that it has become a matter of such common knowledge as to make the citation of authorities entirely unnecessary.

In the light of this situation, it is not difficult for the court to conclude as to which of the contending parties judicial protection should be granted. Carroll & Son v. McIlvaine & Baldwin (C. C.) 171 Fed. 125.

Where it was contended that registration created rights, the Supreme Court of the United States said:

"This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550.

Registration cannot confer a title to a trade-mark, if some other individual has acquired a prior right by adoption and use; nor can it vest a title in the registrant as against another's common-law title. Carroll & Son v. McIlvaine & Baldwin (C. C.) 171 Fed. 125.

[5] The general rule adopted by the courts on this subject is that the state statutes providing for registration of trade-marks are in affirmance of the common law; that the remedies given by such statutes are either declaratory or are cumulative and additional to those recognized and applied by the common law. Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550. The registering of defendant Fletcher's trade-marks with the Secretary of State has no effect in giving them the quality of trade-marks if not already such. Oakes v. St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

Business good will and trade-marks indicative thereof are property rights and considered and treated as such. Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713. The plaintiff here and its predecessors had used the trade-mark "Coca-Cola" in interstate commerce since 1886 and had used it in connection with its business in intrastate commerce in Illinois for a great many years before the recording of defendant Fletcher's trade-marks with the Secretary of State. The good will of the public and the trade-mark indicative thereof in Illinois were plaintiff's property at the time of the filing of the trade-marks by Fletcher and were entitled to the protection which the law gives.

[6] Section 3 of the Trade-Marks Act of Illinois provides:

"Every such person, association or union that has heretofore adopted or used, or shall hereafter adopt or use, a * * * trade-mark * * * as provided in section 1 of this act shall file the same for record in the office of the Secretary of State, by leaving two copies * * * with said Secretary, and by filing therewith a sworn statement specifying the name or names of the person * * * on whose behalf such * * * trade-mark * * * shall be filed, the class of merchandise and particular description of the goods to which it has been or is intended to be appropriated; that the party so filing, or on whose behalf such * * * trade-mark * * * shall be filed, has the right to the use of the same, and that no other person, firm, association, union or corporation has the right to such use either in the identical form or in any such near resemblance thereto as may be calculated to deceive,

and that the fascimile copies or counterparts filed therewith are true and correct." Ill. R. S. c. 140, § 3, 6 J. & A. Ann. Stat. 6335.

Defendant Fletcher undoubtedly made the proof required by this statute, and in doing so he knew, by reason of the prior adjudication of plaintiff's trade-mark in Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 157, as well as by his experience and knowledge of plaintiff's business and trade-mark, evidenced by the manifest purpose of the design of the trade-marks, the registration of which he procured, the showing which he made to the Secretary of State in compliance with the statute was false and fraudulent.

There can be no question as to the right of the plaintiff even though a foreign corporation to enter a forum in the state of Illinois for the purpose of protecting its property rights (Peck Bros. & Co. v. Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81); nor that the Secretary of State is a proper party to plaintiff's bill, and that mandamus would be an inadequate remedy (People v. Rose, 219 Ill. 46, 76 N. E. 42; People v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; Bender v. Bender, 178 Ill. App. 203; International Committee of Y. M. C. A. v. Y. W. C. A., 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888). The Attorney General of Illinois on behalf of the Secretary of States presses the point of multifariousness. The bill comes clearly within Equity Rule 26 (198 Fed. xxv, 115 C. C. A. xxv).

The record shows that the Secretary of State was misled into recording Fletcher's trade-marks by reason of the false showing made in connection with the application. In other words, the joint effect of Fletcher's misconduct which resulted in the Secretary's official action based thereon constitute a cloud upon the title of plaintiff's property which equity will remove. Rule 26 (198 Fed. xxv, 115 C. C. A. xxv) does not drive the plaintiff into a circuity of actions, first, to resort to equity to establish its property rights over defendant Fletcher's claims and then to bring a separate action against the Secretary of State to cancel the illegal and unlawful registrations which constitute a cloud upon plaintiff's title and to procure the registration of plaintiff's trade-mark. Equity will avoid a multiplicity of suits.

The claim that "Genuine Coca and Cola Flavor" is truthfully descriptive of the flavor of defendant's product is disposed of by Coca Cola Co. v. Koke Co. of America, 254 U. S. 143, 41 Sup. Ct. 113, 65 L. Ed. ——; Davids Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046; Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 157. And this would be true even in the absence of the stipulation in this case that "Coca-Cola" has a secondary or distinctive meaning.

[7] To adopt the contention of the defendants as to territorial limitations would be to recognize an unlawful burden upon or interference with or obstacle to interstate commerce, in contravention of the long line of authorities upon that subject which hold that such a burden is unlawful, regardless of whether it is an attempt by reason of a regulatory statute, a license tax, or the enforcement of a trade-mark registration act. The case upon which defendants rely, Hanover Star Milling Co. v. Metcalf, 240 U. S. 103, 36 Sup. Ct. 357, 60 L. Ed. 713,

is inapplicable to sustain their position as no registration of a trade-mark was under discussion in that case by the Supreme Court. That decision disposed of the rights of the parties as to common-law trade-marks.

Defendants make the point that because the plaintiff itself does not bottle the beverages made from its syrup, but permits others to do so under supervisory bottling contracts, takes this case out of the rule with reference to adoption and user, for the reason, it is charged, that plaintiff's trade-mark is only used upon the syrup. The courts have held that the sufficiency of plaintiff's supervisory contracts over its bottlers justify the employment of plaintiff's trade-mark "Coca-Cola" on the bottled product. Coca-Cola Co. v. Deacon Brown Bottling Co. (D. C.) 200 Fed. 105; Coca-Cola Co. v. J. G. Butler (D. C.) 229 Fed. 224. In the latter case equity enjoined a bottler from using the syrup and beverage made therefrom without supervision, against the plaintiff's wishes. The court held the same in Coca-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449.

The personal and corporate defendants earnestly contend that their trade-mark is "Trico" and not a "Genuine Coca and Cola Flavor," but simply the word "Trico," which describes its syrup and the beverage made from it. This court can see no objection to a full enjoyment of the benefit of any trade-mark by the defendant if properly limited, but in equity and good conscience it should not be permitted to use a combination of the words or symbol which constitute plaintiff's trade-mark in any combination of words which will mislead the public into believing that it is getting a beverage which contains the "Coca-Cola" flavor. To permit defendants to do so would be to permit them to apply to their own use, the benefit of the stupendous sums of money which have been appropriated and expended for advertising plaintiff's goods throughout the length and breadth of the country; to cause confusion, and, in a way, to permit the public to deceive itself, to the detriment of the plaintiff, who, undoubtedly, owns the trade-mark and all rights concerning it, as well as the good will of the business and who is entitled to the full enjoyment of it. As the Supreme Court so recently said:

"It hardly would be too much to say that the drink characterizes the name as much as the name the drink."

The name, it must be conceded, is owned by the plaintiff.

A decree will be entered in line with these views and the facts heretofore found.

PHILADELPHIA & R. RY. CO. et al. v. LAUREL COAL MINING CO.

(District Court, E. D. Pennsylvania. January 11, 1922.)

No. 7682.

1. **Parties ⇐14—On demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both have a remedial interest in the cause of action asserted.**
   On demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both plaintiffs have a remedial interest in the cause of action asserted.
2. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Federal agent proper party to sue on claim accruing to government during federal control.**
   The effect of Federal Control Act, §§ 1, 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a, 3115¾*l*), was to vest the railway operating income during federal control in the United States, so that, in suit on a claim accruing to the United States during such control, the Director General, appointed under Transportation Act 1920, § 211, is the proper party plaintiff, and the carrier, having no remedial interest, is improperly joined as a plaintiff.

At Law. Action by the Philadelphia & Reading Railway Company and John Barton Payne, Director General and Agent for the Philadelphia & Reading Railway Company, against the Laurel Coal Mining Company. On statutory demurrer for misjoinder of plaintiffs. Statutory demurrer sustained, with leave to amend statement of claim. Motion to strike off demurrer denied.

George Ellis and John F. Whalen, both of Pottsville, Pa., for plaintiffs.

A. S. Olmsted, Jr., and William A. Glasgow, Jr., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This suit was brought in the court of common pleas of Schuylkill county, Pa., September 11, 1920. The defendant procured a removal order to this court upon the ground of diversity of citizenship. The principal ground of demurrer is the misjoinder of the parties plaintiff.

The suit is based upon the following allegations: The defendant, during the period of federal control, made shipments of coal over the Philadelphia & Reading Railway from its colliery in Schuylkill county, Pa., consigned to a consignee at Port Reading, N. J. An embargo had been placed on shipments of the sizes of coal consigned, and was in force when the shipment was made. The plaintiffs requested other shipping instructions, and, not receiving them, the coal, after being weighed, was held by the plaintiffs, whereby demurrage charges accrued. Demand was made upon the defendant for the freight charges, demurrage charges, and war tax thereon. The charges not having been paid, the Director General of Railroads caused the coal to be sold for the charges. The proceeds of the sale not being sufficient to pay the charges, this suit was brought for the difference between the proceeds of sale and the amount of the freight and demurrage charges, the war tax, and the costs of the sale.

[1] Upon a demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both plaintiffs have a remedial interest in the cause of action asserted. While the suit was brought after the termination of federal control, it is based upon a claim for moneys derived from operation of the carrier during such control.

The effect of sections 1 and 12 of the Federal Control Act of March 21, 1918 (Comp. St. Ann. Supp. 1919, §§ 3115¾a, 3115¾*l*), was to vest the railway operating income and moneys derived from operation of the carriers during federal control in the United States. Upon a claim accruing to the United States, the Director General, appointed pursuant to section 211 of the Transportation Act of February 25, 1920 (41 Stat. 469), is, under the practice followed and universally approved by the courts under the Federal Control Act of 1918, the proper party plaintiff, as is clearly demonstrated in the opinion of Judge Westenhaver, of the Northern District of Ohio, in the case of Hines v. Struthers Furnace Co. (D. C.) 271 Fed. 792, and without further discussion or comment I concur in Judge Westenhaver's ruling. The carrier, having no remedial interest, is improperly joined.

There is no recital in the statement of claim that John Barton Payne was, when suit was brought, the duly appointed Director General of Railroads, nor is it stated in what respect he sues as Agent for the Philadelphia & Reading Railway Company, so that the theory upon which he is designated as agent for the carrier in the caption does not appear.

The statutory demurrer is sustained, with leave to amend the statement of claim. The motion to strike off the demurrer is denied.

In re BRAYTON.

(District Court, N. D. New York. January 7, 1922.)

1. Bankruptcy ⟸228—Findings of referee in bankruptcy held not binding on court.

The findings of a referee in bankruptcy as to facts in testimony are not binding on the court.

2. Bankruptcy ⟸166(4)—Test for validity of conveyances by bankrupt to creditors stated.

In considering a preference of creditors by a bankrupt, the intent of the bankrupt to prefer is not material; but the test is whether the creditor charged with having received the preference had, at the time of receiving it, such information as ought to have led a reasonably prudent man to the conclusion that a preference had thereby been intended.

3. Bankruptcy ⟸165(4)—Transaction held not a substitution of securities.

Where a bankrupt had given a creditor a chattel mortgage, which was void as against creditors and subsequent purchasers in good faith because of failure to refile within a year, as required by Lien Law N. Y. § 235, giving a new mortgage to the creditor did not amount to a substitution of securities, so as to avoid a preference of the creditor.

4. Bankruptcy ⟸166(4)—Mortgage given by bankrupt held void as a preference of a creditor.

Where the officers of a bank knew that a bankrupt, who had previously carried a large balance, had overdrawn his account 28 times in the two

---

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

months preceding, and in the month in which a mortgage was given to the bank, and on the day on which the mortgage was given could not pay a note for $15 without renewing part of it, and with such knowledge the bank's officers took a mortgage on the bankrupt's stock, the mortgage is void as a preference of a creditor.

In Bankruptcy. In the matter of Buel G. Brayton, bankrupt. On review of an order of the referee holding a chattel mortgage given by the bankrupt to the Glens Falls Trust Company to be valid. Order reversed, and chattel mortgage declared void.

Chambers & Finn, of Glens Falls, N. Y. (Walter A. Chambers, of Glens Falls, N. Y., of counsel), for trustee.

Edward M. Angell, of Glens Falls, N. Y., for Glens Falls Trust Co.

COOPER, District Judge. This is a review of an order of the referee, holding a chattel mortgage given by Buel G. Brayton, the bankrupt, to the Glens Falls Trust Company, to be valid.

The bankrupt conducted a meat business, doing substantially all his banking with the Glens Falls Trust Company. In 1916 he gave to said company a chattel mortgage covering his stock, and in March, 1919, gave the mortgage in question, which, it is claimed, was the renewal mortgage to the one in 1916. Within a month thereafter Brayton filed a voluntary petition in bankruptcy.

[1] It is claimed that the findings of the referee as to the want of knowledge of insolvency, etc., is binding upon this court. There being no dispute as to the testimony, the court is just as competent as the referee to draw the inferences from the testimony and the conclusions of the referee are not in any way binding upon the court. In re McClelland (D. C.) 275 Fed. 576.

[2-4] There can be no doubt but that Brayton was hopelessly insolvent, and knowledge thereof must have come to the bank. The financial condition of the bankrupt was the same at the time of the filing of the petition as it was for at least a year prior thereto. The bankrupt could not pay his debts, and could not meet his obligations to the bank, and certainly the bank knew, when it took the only assets of the bankrupt, that it created a preference. The intent of the bankrupt to prefer is no longer material. In re Jacobson (D. C.) 181 Fed. 870. The test is whether a creditor, who is charged with having received a voidable preference, had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference had thereby been intended. In re Pfaffinger (D. C.) 154 Fed. 528; In re W. W. Mills Co. (D. C.) 162 Fed. 42.

The bank, above all others, knew the financial status of the bankrupt. He overdrew his account in the bank 17 times in the two preceding calendar months, and 11 times during the calendar month (March) in which the chattel mortgage was given, whereas, in former times, he carried a large balance. On the day, March 20th, when the chattel mortgage was given, a note of the bankrupt for $15 became due, to retire which the bankrupt paid $5 in money and gave a renewal note for $10. It was on this day that the bank's representative went to the bankrupt's place of business and had him execute the chattel mortgage

in question. It was evidently the fear that the bankrupt was in a bad way and a desire to get all the protection possible against his threatened insolvency which prompted this action.

While a substitution of securities does not create a preference, in this case there can be no such substitution. The mortgage given in 1916 was void as against creditors and subsequent purchasers in good faith, because of failure to refile within a year. See Lien Law (Consol. Laws N. Y. c. 33) § 235; Stich v. Pirkl, 100 Misc. Rep. 594, 166 N. Y. Supp. 440; Benedict v. Zutes, 88 Misc. Rep. 214, 150 N. Y. Supp. 147; In re Watts-Woodward Press, 181 Fed. 71, 104 C. C. A. 105.

The transfer, while the bankrupt was hopelessly insolvent, being for an antecedent debt, and given within four months prior to the bankruptcy, under circumstances which must have given the bank reasonable cause to believe that a preference would thereby result, is void.

The order of the referee should be reversed, and the chattel mortgage declared void. An order may be entered accordingly.

MEMORANDUM DECISIONS

BAYLES SHIPYARD, Inc., v. PERSONS. (Circuit Court of Appeals, Second Circuit. November 7, 1921.) No. 18. In Error to the District Court of the United States for the Southern District of New York. Proceeding between the Bayles Shipyard, Inc., and James O. Persons. Judgment for the latter, and the former brings error. Affirmed. Phelan Beale, of New York City (Dudley Davis, of New York City, of counsel), for plaintiff in error. Joseph P. Nolan, of New York City (Frederick V. Watson and Edward J. Garity, both of New York City, of counsel), for defendant in error. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment and order appealed from affirmed.

GONZALES v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 6, 1921.) No. 3675. In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge. Thomas C. Gonzales was convicted of conspiracy to receive and conceal imported intoxicating liquors and of receiving and concealing such liquor, and he brings error. Affirmed. David E. Hume, of Eagle Pass, Tex., for plaintiff in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment in this case is affirmed.

In re GURVITZ et al.

(District Court, D. Massachusetts. September 15, 1921.)

In Bankruptcy. Order of referee denying petition of claimants to reclaim certain goods sold by them to alleged bankrupts.

Order of referee reversed in 276 Fed. 931.

Bergson, Ford & Bergson, of Boston, Mass. (Harry Bergson, of Boston, Mass., of counsel), for claimant.

Joseph Michelman, of Boston, Mass., for alleged bankrupts.

OLMSTEAD, Referee. This was a petition to reclaim certain goods sold to the debtors by the claimants, Pfeiffer, Wood & Co. I find that in the fall of 1920 there was a large drop in the value of men's shoes, and that the debtors had, notwithstanding the adverse condition of the market, continued to do business and were paying their bills up to the filing of the petition on the 17th day of May, 1921. Mr. Isenberg, the active man who kept the books of the debtors, testified that he did not know that the concern was insolvent about the 1st of May, and Mr. Gurvitz, the other partner, who had put in $10,000 as the capital of the concern located at 27 Albany street, and having two other stores in Salem and Holyoke, testified that he was surprised when a keeper was put in the store, and that he had thought that they were all right. Mr. Wood, one of the claimants, testified that the debtors wanted the goods in question, because they had a customer for them, and accordingly the goods were shipped on or about the 10th and 12th of May, although they had been ordered previously. Mr. Gurvitz testified that he thought he could pay in 10 days, and Mr. Isenberg said that he would take 15 days. The claimants had got a report from the Shoe & Leather Mercantile Agency to the effect that, if Mr. Gurvitz would O. K. the bill, it considered them good.

From all the evidence before me I find that the debtors were not hopelessly insolvent, and that they were doing business in the usual course of trade, and had hoped to overcome any temporary embarrassment. Even if the debtors had known that they were insolvent, this fact would have been sufficient to set aside a sale made to them. Watson v. Silsby, 166 Mass. 58, 43 N. E. 1117; In re Berg (D. C. Mass.) 183 Fed. 885, 25 Am. Bankr. Rep. 170, 175. I therefore entered an order on the 15th day of September, 1921, denying the petition to reclaim.

In re LOCUST BLDG. CO., Inc. AMERICAN TRUST CO. Petitioner. (Circuit Court of Appeals, Second Circuit. November 7, 1921.) No. 52. Petition to Revise Order of the District Court of the United States for the Eastern District of New York. In the matter of the Locust Building Company, Incorporated, bankrupt. On petition by the American Trust Company to revise order (272 Fed. 988) denying motion to vacate stay of proceedings for foreclosure of a third mortgage. Order affirmed. George B. Davenport, of Brooklyn, N. Y., for petitioner. Samuel Silbiger, of Brooklyn, N. Y. for trustee. Before ROGERS, MAYER, and MACK, Circuit Judges.

PER CURIAM. Order affirmed.

MURRAY et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. October 18, 1921.) No. 156. Appeal from the District Court of the United States for the Eastern District of New York. Prosecution by the United States against John Murray (alias Michigan Shorty), John O'Brien (alias Hostile Johnny), and another. From an order dismissing a writ of habeas corpus, defendants appeal. Order affirmed, and appeal dismissed as to last-named defendant. See, also, 271 Fed. 534; 273 Fed. 522. Robert M. Moore, of Malone, N. Y., for appellants. Leroy Ross, of Brooklyn, N. Y., for the United States. Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. Order affirmed in open court, but as to defendant O'Brien appeal dismissed.

END OF CASES IN VOL. 276

INDEX-DIGEST

THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and Prior Reporter Volume Index-Digests

---

ABATEMENT AND REVIVAL.

II. ANOTHER ACTION PENDING.

⚖8(2) **(U.S.C.C.A.Cal.)** Pendency of private suit for possession of land not a bar to suit by United States to cancel patent.—Cramer v. U. S., 78.

ACTION.

See Abatement and Revival; Dismissal and Nonsuit.

II. NATURE AND FORM.

⚖25(4) **(U.S.D.C.Pa.)** In action on note, defendant may set up equitable defense.—Ohio Savings & Trust Co. v. Harman, 759.

ADJOINING LANDOWNERS.

See Boundaries.

ADMIRALTY.

See Collision; Maritime Liens; Salvage; Seamen; Shipping.

I. JURISDICTION.

⚖1 **(U.S.D.C.N.Y.)** Not bound by strict rules of common law.—Atlantic Fruit Co. v. Red Cross Line, 319.

May enforce rights created by state statutes.—Id.

⚖4 **(U.S.D.C.Va.)** Court has jurisdiction of suit in rem for collision occurring in Portugese waters.—The West Cherow, 585.

⚖22 **(U.S.D.C.N.Y.)** Tort causing deviation within jurisdiction of admiralty court.—The Poznan, 418.

⚖25 **(U.S.D.C.Me.)** Amendment denying jurisdiction because of receivership not allowed as too late.—The Snetind, 139.

II. REMEDIES IN PERSONAM AND IN REM.

⚖26 **(U.S.D.C.N.Y.)** State arbitration statute gives remedy not enforceable.—Atlantic Fruit Co. v. Red Cross Line, 319.

IX. APPEAL.

⚖105 **(U.S.C.C.A.N.Y.)** When sufficiency of answer not questioned, it is too late on appeal to claim allegations not answered.—The Parthian, 903.

ADULTERATION.

⚖4 **(U.S.D.C.Mich.)** Hog feed *held* misbranded.—U. S. v. 426 Bags of Economy Special Hog Feed, 34.

Shipment of misbranded goods not for sale violation of Food and Drugs Act.—Id.

ADVERSE POSSESSION.

I. NATURE AND REQUISITES.

(F) Hostile Character of Possession.

⚖62(3) **(U.S.C.C.A.Ky.)** Possession adverse to landlord cannot be initiated without open renunciation of his title.—Combs v. Haley Coal Co., 342.

⚖84 **(U.S.C.C.A.P.R.)** No title acquired under void deed of minor's property.—Martorell v. Ochóa, 99.

AGENCY.

See Principal and Agent.

AGRICULTURE.

⚖16 **(U.S.C.C.A.Okl.)** Label on seed must state month and year of testing.—Whitehurst v. D. M. Ferry & Co., 18.

Label on seed must use word "germination" and not word "viable."—Id.

Label on container of seeds must give approximate germination and not less.—Id.

ALIENS.

III. IMMIGRATION.

⚖44 **(U.S.C.C.A.N.Y.)** Department cannot make regulations beyond powers delegated.—The Parthian, 903.

⚖50 **(U.S.D.C.Pa.)** Immigration statute; "labor" means manual labor.—Ex parte Aird, 954.

Designer of marine machinery *held* to belong to a "learned profession."—Id.

⚖58 **(U.S.C.C.A.N.Y.)** Penalty for permitting unlawful landing not recoverable on proof of nonproduction of alien at immigration station.—The Parthian, 903.

Government has burden of showing unlawful landing, for which penalty sought.—Id.

IV. NATURALIZATION.

⊂=60 (U.S.D.C.Mo.) Naturalization not a right, but a matter of grace.—U. S. v. Kichin, 818.

⊂=68 (U.S.C.C.A.Or.) Claim of exemption from military duty as alien *held* material on application for naturalization.—Hauge v. U. S., 111.

⊂=71½ [New, vol. 7 Key-No. Series] (U.S.D.C.Mo.) One living in concealed bigamous relation when naturalized not law-abiding within statute.—U. S. v. Kichin, 818.

⊂=71½ [New, vol. 7 Key-No. Series] (U.S.D.C.Mont.) Notice *held* insufficient to give jurisdiction of suit to revoke citizenship.—U. S. v. Sharrock, 30.

Clear proof required to revoke naturalization.—Id.

ANTI-TRUST LAWS.

See Monopolies, ⊂=17.

APPEAL AND ERROR.

See Criminal Law, ⊂=1036–1188.

For review of rulings in particular actions or proceedings, see also the various specific topics.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

⊂=69(1) (U.S.C.C.A.N.D.) Order refusing to confirm sale not appealable.—Spangelo v. Northern Dakota Ry. Co., 26.

⊂=71(3) (U.S.C.C.A.Ga.) Order transferring cause to law side, which in effect denies an injunction, appealable.—Banco Mercantil Americano de Cuba v. Taggart Coal Co., 388.

⊂=71(3) (D.C.) Interlocutory injunction not appealable, unless it affects possession of property.—Chas. McCaul Co. v. Harr, 633.

Order restraining payment by third person until rights are established is not appealable.—Id.

⊂=76(1) (U.S.C.C.A.Wyo.) "Final decree," reviewable by appeal, defined.—U. S. v. Bighorn Sheep Co., 710.

⊂=80(6) (U.S.C.C.A.Wyo.) Order dismissing one or more of several causes of action not appealable.—U. S. v. Bighorn Sheep Co., 710.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

⊂=148 (U.S.C.C.A.N.D.) Purchaser under decree not a party who may appeal.—Spangelo v. Northern Dakota Ry. Co., 26.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(B) Objections and Motions, and Rulings Thereon.

⊂=204(1) (U.S.C.C.A.Tex.) Admission of evidence not objected to not ground of reversal.—Hudson v. Hudson, 547.

⊂=216(1) (U.S.C.C.A.Ga.) Failure to request an instruction waiver of error.—Tennessee, A. & G. R. Co. v. Drake, 393.

(C) Exceptions.

⊂=254 (U.S.C.C.A.Colo.) Ruling on demurrer reviewable without an exception.—Rocky Mountain Fuel Co. v. Consolidated Coal & Coke Co., 661.

⊂=263(1) (U.S.C.C.A.Ga.) Failure to except to charge waiver of error.—Tennessee, A. & G. R. Co. v. Drake, 393.

VI. PARTIES.

⊂=323(2) (U.S.C.C.A.Ga.) Shareholders' liability being several, any may appeal without joining others.—Hightower v. American Nat. Bank of Macon, 371.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

⊂=359 (D.C.) Discretionary appeal not permitted to review interlocutory order preventing payment pending determination of right to fund.—Chas. McCaul Co. v. Harr, 633.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

⊂=436 (U.S.C.C.A.Mo.) Jurisdiction of Circuit Court of Appeal after party has taken an appeal and sued out a writ of error to the Supreme Court.—Cochran v. Becker, 280.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⊂=790(1) (U.S.C.C.A.N.Y.) Appeal dismissed if effectual relief cannot be given.—Vidal v. South American Securities Co., 855.

⊂=799 (U.S.C.C.A.N.Y.) Extrinsic evidence admissible to show issue moot.—Vidal v. South American Securities Co., 855.

XVI. REVIEW.

(A) Scope and Extent in General.

⊂=856(1) (U.S.C.C.A.Neb.) Ruling sustained if correct on any ground.—Wineinger v. Union Pac. R. Co., 65.

(E) Presumptions.

⊂=927(7) (U.S.C.C.A.Wis.) Favorable view of plaintiff's evidence taken on review of motion for directed verdict.—Payne v. Colvin, 15.

⊂=931(1) (U.S.C.C.A.Tenn.) Conclusions of trial judge presumptively correct.—Dunaway v. Puryear, 209.

(F) Discretion of Lower Court.

⊂=954(1) (D.C.) Error in denying temporary injunction to preserve status quo may be corrected.—Phillips v. Sager, 625.

(G) Questions of Fact, Verdicts, and Findings.

⊂=997(3) (U.S.C.C.A.Ga.) Verdict directed on request of both parties not reviewable if sustained by any evidence.—South Atlantic Packing & Provision Co. v. York Mfg. Co., 509.

⊂=997(3) (U.S.C.C.A.Okl.) Appellate court must review ruling refusing peremptory instruction.—Interstate Compress Co. v. Agnew, 882.

⊂=999(1) (U.S.C.C.A.N.Y.) Jury finding conclusive.—Elias v. Wright, 908.
⊂=1003 (U.S.C.C.A.Tenn.) Weight of evidence not reviewable.—Atlantic Ice & Coal Corporation v. Van, 646.
⊂=1009(4) (U.S.C.C.A.Tenn.) Conclusions of trial judge presumptively correct, and conclusive unless evidence clearly preponderates against them.—Dunaway v. Puryear, 209.

(H) Harmless Error.

⊂=1050(1) (U.S.C.C.A.Okl.) Testimony as to analysis of water *held* prejudicial.—Interstate Compress Co. v. Agnew, 882.
⊂=1064(1) (U.S.C.C.A.Wis.) Error in instruction on defendant's capacity to earn livelihood for himself and family *held* harmless.—Payne v. Colvin, 15.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(D) Reversal.

⊂=1170(1) (U.S.C.C.A.Tex.) Technical errors not ground for reversal.—Southern Oil Corporation v. Waggoner, 487.
⊂=1176(6) (U.S.C.C.A.Mass.) Appellate court may direct dismissal of bill on appeal from interlocutory order.—Susquehanna Coal Co. v. Pratt & Young, 919.

(F) Mandate and Proceedings in Lower Court.

⊂=1195(1) (U.S.D.C.Va.) Decision on appeal law of case.—Bowling Green Trust Co. v. Virginia Passenger & Power Co., 965.
⊂=1201(7) (U.S.C.C.A.Okl.) Amendment to substitute real party in interest as plaintiff allowable after reversal.—Reed v. Atchison, 888.

APPEARANCE.

⊂=9(3) (U.S.D.C.Or.) To move to quash service gave court no jurisdiction, except to pass on motion.—Bramwell v. Owen, 36.
⊂=9(6) (U.S.D.C.Or.) Filing of petition for removal not general appearance.—Bramwell v. Owen, 36.

ARGUMENT OF COUNSEL.

See Criminal Law, ⊂=729–730.

ARMY AND NAVY.

⊂=40 (U.S.C.C.A.Okl.) Description of property in indictment to purchasing from soldier sufficient.—Trope v. U. S., 348.
Property in possession of soldier *held* "furnished" within meaning of statute.—Id.

ASSIGNMENTS.

III. RIGHTS AND LIABILITIES OF PARTIES.

⊂=97 (U.S.D.C.N.Y.) Assignor contracts that he will do no act to deprive assignee of benefit of thing assigned.—P. N. Gray & Co. v. Cavalliotis, 565.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Trusts for Creditors.

⊂=34 (U.S.D.C.Ala.) Deed accompanied by note reciting extension of time, and subject to mortgage, *held* void.—In re Guyton, 616.

ASSUMPTION OF RISK.

See Master and Servant, ⊂=204–226.

ATTACHMENT.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

⊂=1 (U.S.D.C.Del.) Proceedings statutory.—In re Dukes, 724.

II. PROPERTY SUBJECT TO ATTACHMENT.

⊂=61 (U.S.D.C.Del.) Debt or chose in action not attachable at common law.—In re Dukes, 724.

III. PROCEEDINGS TO PROCURE.

(C) Security.

⊂=132 (D.C.) General provision for bonds by parties *held* not to repeal provision for attachment bond.—Tri-State Motor Corporation v. Standard Steel Car Co., 631.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

⊂=177 (U.S.D.C.Del.) Attachment fi. fa. binds property from time laid.—In re Dukes, 724.

ATTORNEY AND CLIENT.

See Criminal Law, ⊂=729–730; District and Prosecuting Attorneys.

II. RETAINER AND AUTHORITY.

⊂=100 (U.S.C.C.A.Ala.) Attorney for next friend *held* not authorized to collect judgment.—Southern Ry. Co. v. McKinney, 772.
Payment to attorney for next friend *held* not a satisfaction.—Id.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

⊂=58 (U.S.C.C.A.Tex.) Description of offense in bond by well-known name is sufficient.—Rheiner v. U. S., 803.
Averment in bail bond that act was done fraudulently *held* equivalent to one that it was done with intent to defraud.—Id.

BAILMENT.

See Pledges.

⊂=14(1) (U.S.C.C.A.Okl.) Compress company *held* only liable for gross negligence for loss occasioned by fire.—Interstate Compress Co. v. Agnew, 882.
⊂=31(3) (U.S.C.C.A.Okl.) Evidence *held* insufficient to show gross negligence in providing

equipment for putting out fires.—Interstate Compress Co. v. Agnew, 882.

Evidence insufficient to support finding of "gross negligence" of compress company in maintaining system to protect cotton against fire.—Id.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

⇐60 (U.S.C.C.A.Neb.) Appointment of receiver as "act of bankruptcy."—Missouri Valley Cattle Loan Co. v. Alexander, 266.

⇐60 (U.S.D.C.Mich.) Application for receiver by insolvent corporation *held* an "act of bankruptcy."—Petition of France Foundry & Machine Co., 757.

⇐76(1) (U.S.C.C.A.Neb.) Petitioners *held* not shown to be creditors.—Missouri Valley Cattle Loan Co. v. Alexander, 266.

(D) Warrant and Custody of Property.

⇐117(2) (U.S.D.C.Mont.) All parties to concealment of property by bankrupt are liable to estate.—Gunther v. Home Ins. Co., 575.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⇐140(2) (U.S.D.C.Mass.) Purchase by insolvent, on promise to pay not capable of honest fulfillment, *held* fraudulent.—In re Gurvitz, 931.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⇐161(2) (U.S.D.C.Del.) Prior equitable lien not a "transfer"; "present consideration."—In re New York & Baltimore Inland Transp. Co., 145.

⇐165(4) (U.S.D.C.N.Y.) Transaction *held* not a substitution of securities.—In re Brayton, 1020.

⇐166(4) (U.S.D.C.N.Y.) Test for validity of conveyances by bankrupt to creditors stated.—In re Brayton, 1020.

Mortgage given by bankrupt *held* void as a preference of a creditor.—Id.

⇐178(3) (U.S.D.C.Ala.) Deed of trust granting extension of time and made subject to first mortgage to one creditor *held* void as evading Bankruptcy Law.—In re Guyton, 616.

⇐188(3) (U.S.D.C.Del.) Trustee vested with title freed from liens enforceable only against bankrupt.—In re New York & Baltimore Inland Transp. Co., 145.

⇐191(1) (U.S.D.C.Pa.) Distraint by landlord not dissolved by bankruptcy "obtained through legal proceeding."—In re Abbruzzo, 404.

⇐200(3) (U.S.D.C.Del.) Judgment in garnishment *held* "lien" within Bankruptcy Act.—In re Dukes, 724.

⇐217(1) (U.S.C.C.A.Tex.) Court *held* without power to enjoin foreclosure suit in state court.—Duncan v. Girand, 554.

⇐217(3) (U.S.C.C.A.N.Y.) Order vacating stay of action in state court *held* proper.—In re Rosenstein, 704.

(D) Administration of Estate.

⇐228 (U.S.D.C.N.Y.) Findings of referee in bankruptcy *held* not binding on court.—In re Brayton, 1020.

⇐274 (U.S.C.C.A.Wis.) Accountant *held* not to have agreed to forfeit compensation, if report not completed on time.—In re Kroeger Bros. Co., 8.

(E) Actions by or Against Trustee.

⇐288(3) (U.S.D.C.Ala.) Referee had jurisdiction in summary proceeding to divest title of trustee under deed of trust where bankrupt in possession.—In re Guyton, 616.

⇐293(1) (U.S.D.C.Mont.) Bankruptcy court has jurisdiction of any proceeding to recover property of estate taken from its constructive possession.—Gunther v. Home Ins. Co., 575.

⇐302(4) (U.S.D.C.N.Y.) Bill of sale not set aside because not filed in town clerk's office or followed by early transfer of possession.—Blue v. Herkimer Nat. Bank, 559.

⇐303(3) (U.S.C.C.A.Tenn.) Receiver *held* not liable for loss incurred in operation of manufacturing plant.—Evans v. Williams, 650.

⇐303(3) (U.S.D.C.N.Y.) Evidence *held* insufficient to show assignments of moneys due bankrupt made to defraud creditors.—Blue v. Herkimer Nat. Bank, 559.

Evidence *held* to show bill of sale security for loan, not absolute transfer.—Id.

Evidence *held* insufficient to show bill of sale executed to defraud creditors.—Id.

(F) Claims Against and Distribution of Estate.

⇐339 (U.S.D.C.Pa.) Payment involved where claim is filed in bankruptcy court.—In re Thompson, 313.

Judgment may be collaterally attacked by trustee in bankruptcy.—Id.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

⇐399(3) (U.S.C.C.A.Mich.) Bankrupt, who has concealed property of greater value, not entitled to exemption.—In re Shuman, 292.

⇐409(2) (U.S.C.C.A.Mass.) Refusal of discharge proper where books of corporation controlled by bankrupt not produced.—Simon v. Massachusetts Trust Co., 391.

⇐413(3) (U.S.D.C.Mich.) Objections to discharge must conform to rules of court.—In re Dynamic Mfg. Co., 408.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

⇐440 (U.S.C.C.A.Neb.) Order denying petition to set aside adjudication not appealable.—Missouri Valley Cattle Loan Co. v. Alexander, 266.

⇐440 (U.S.C.C.A.Tenn.) Order reviewable by appeal or petition to revise.—Evans v. Williams, 650.

⇐442 (U.S.C.C.A.Mich.) Findings of referee not reviewable on record in appellate court.—In re Shuman, 292.

BANKS AND BANKING.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

⇐145 (U.S.D.C.Or.) Bank certifying check entitled to disregard subsequent conditional indorsement.—Keeler Bros. v. School Dist. No. 25 of Gilliam County, Or., 755.

Conditional indorsement of check inferred, subsequent to certification, when contrary not alleged.—Id.

IV. NATIONAL BANKS.

⇐250(4) (U.S.C.C.A.Ga.) Shareholders of a corporation *held* proper parties in a suit to enforce stockholders' liability on the stock held.—Benton v. American Nat. Bank of Macon, 368.

⇐250(5) (U.S.C.C.A.Ga.) Evidence *held* to show bank a creditor of another bank entitled to enforce stockholders' liability.—Hightower v. American Nat. Bank of Macon, 371.

⇐257(1) (U.S.C.C.A.Tex.) Charge of offense by officer of national bank *held* sufficient.—Rheiner v. U. S., 803.

BILLS AND NOTES.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

⇐155 (U.S.D.C.Del.) Extension agreement made with third person immaterial to negotiability of notes.—Hanssen v. Pusey & Jones Co., 296.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

⇐351 (U.S.D.C.Del.) Overdue paper negotiable.—Hanssen v. Pusey & Jones Co., 296.

VIII. ACTIONS.

⇐443(3) (U.S.D.C.Del.) Indorsement of note to agent transfers title.—Hanssen v. Pusey & Jones Co., 296.

BOUNDARIES.

I. DESCRIPTION.

⇐3(4) (U.S.C.C.A.Tex.) Calls for river as natural boundary prevail over calls for courses and distances.—Cordell Petroleum Co. v. Michna, 483.

Survey calling for river as boundary sustained.—Id.

BROKERS.

IV. COMPENSATION AND LIEN.

⇐52 (U.S.C.C.A.Tex.) Delivery of acceptance by telegram to a telegraph company, the agreed transmitting agent, *held* sufficient under option contract, so as to entitle broker to commissions.—North Texas Oil Co. v. Fuller, Reaser & Co., 708.

Transmission of option acceptance to vendor's broker *held* sufficient to entitle brokers to commissions.—Id.

CANCELLATION OF INSTRUMENTS.

II. PROCEEDINGS AND RELIEF.

⇐34(1) (U.S.C.C.A.Tex.) Right to cancellation for fraud lost by failure to use diligence.—Miller v. Rush, 641.

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

⇐12(5) (U.S.D.C.N.J.) Rate fixed by state board *held* confiscatory.—Public Service Ry. Co. v. Board of Public Utility Commissioners, 979.

⇐12(7) (U.S.D.C.N.J.) Presumption in favor of rate fixed by state board overcome only by showing beyond just or fair doubt that action was confiscatory.—Public Service Ry. Co. v. Board of Public Utility Commissioners, 979.

⇐12(9) (U.S.D.C.N.J.) Franchise contracts fixing rates subject to reserved power of state.—Public Service Ry. Co. v. Board of Public Utility Commissioners, 979.

⇐18(6) (U.S.D.C.N.J.) Court, enjoining statutory rate, may fix conditional rate.—Public Service Ry. Co. v. Board of Public Utility Commissioners, 979.

II. CARRIAGE OF GOODS.

(F) Loss of or Injury to Goods.

⇐113 (U.S.C.C.A.Ala.) Cotton, when destroyed by fire, *held* not in possession of railroad company as carrier.—Harris, Cortner & Co. v. Louisville & N. R. Co., 277.

(H) Limitation of Liability.

⇐160 (U.S.C.C.A.Ga.) Action for short delivery *held* barred by limitation in bills of lading.—Leigh Ellis & Co. v. Davis, 400.

CHAMPERTY AND MAINTENANCE.

⇐7(4) (U.S.C.C.A.Okl.) Deed by one out of possession invalid only against adverse occupants.—Reed v. Atchison, 888.

CHANCERY.

See Equity.

CHARITIES.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

⇐45(2) (U.S.C.C.A.N.M.) Association maintaining hospital as charity not liable for negligence of employés.—Deming Ladies' Hospital Ass'n v. Price, 668.

CHATTEL MORTGAGES.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

⇐6 (U.S.D.C.Mich.) Instrument *held* a chattel mortgage, not a conditional sale.—In re Nader, 123.

CHILDREN.

See Infants; Parent and Child.

CLERKS OF COURTS.

⇐54 (U.S.D.C.N.Y.) Clerk, receiving commission on transmuting money into government

certificates, may not have further commission on distribution.—The Lord Ormonde, 846.

COLLISION.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⊂=70 (U.S.C.C.A.N.Y.) Need not cease navigating until obstructing vessel is removed.—The Lady of Gaspe, 900.

Vessel movable by hand cannot require tug to be furnished.—Id.

⊂=71(2) (U.S.C.C.A.N.Y.) A gentle contact with lighter obstructing navigation *held* not a fault.—The Lady of Gaspe, 900.

⊂=72(1) (U.S.D.C.Va.) Between vessels at anchor due to faults of both.—The West Cherow, 585.

⊂=74 (U.S.C.C.A.N.Y.) Evidence *held* not to show vessel had anchor projecting.—The Lady of Gaspe, 900.

IX. FOG OR THICK WEATHER.

⊂=82(2) (U.S.D.C.Va.) Vessel holding speed in fog *held* at fault for collision with vessel signaling.—The Ansaldo Savoia, 719.

Vessel which failed to stop on hearing fog signals of other vessel *held* at fault.—Id.

⊂=84 (U.S.D.C.Va.) Vessel giving signal indicating stop, but continuing, *held* to have burden of proving fault did not cause collision.—The Ansaldo Savoia, 719.

⊂=85 (U.S.D.C.Va.) Evidence *held* to show operation of vessel at immoderate speed in fog.—The Ansaldo Savoia, 719.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⊂=90 (U.S.C.C.A.N.Y.) Duty to another vessel obstructing navigation stated.—The Lady of Gaspe, 900.

⊂=95(1) (U.S.C.C.A.N.Y.) Both tugs *held* at fault for collision in Hudson river.—The Welsh, 912.

⊂=102 (U.S.C.C.A.N.Y.) Tug backing out of slip and tug coming up river on left-hand side, with heavy tow, *held* both at fault.—McWilliams Bros. v. Payne, 917.

⊂=105 (U.S.C.C.A.Ga.) Overtaking vessel *held* in fault.—The Hampden, 399.

XI. SPECIAL CIRCUMSTANCES AND ERRORS IN EXTREMIS.

⊂=107 (U.S.C.C.A.N.Y.) Tug backing out of slip *held* bound to notice load and course of approaching tug, ordinary rules not applying.—McWilliams Bros. v. Payne, 917.

XII. SUITS FOR DAMAGES.

(C) Evidence.

⊂=125 (U.S.C.C.A.N.Y.) Evidence *held* to support a finding as to identity of tug which collided with barge while attempting to move it.—Berwind-White Coal Mining Co. v. Flannery Towing Line, 814.

COMMERCE.

II. SUBJECTS OF REGULATION.

⊂=27(7) (U.S.C.C.A.N.J.) Conductor killed in movement of cars in shop yard *held* not killed while engaged in "interstate commerce."—Schauffele v. Director General of Railroads, 115.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

See Public Service Commissions.

CONDEMNATION.

See Eminent Domain.

CONSPIRACY.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

⊂=25 (U.S.C.C.A.Cal.) Provision of Lever Act against conspiracy to limit transportation facilities *held* constitutional and valid.—Fannon v. U. S., 109.

(B) Prosecution and Punishment.

⊂=45 (U.S.C.C.A.Ohio) Evidence *held* competent on charge of conspiracy to illegally transport.—Reid v. U. S., 253.

⊂=46 (U.S.C.C.A.Okl.) Evidence *held* competent to show overt act.—Baker v. U. S., 283.

Evidence *held* competent to prove conspiracy.—Id.

⊂=47 (U.S.C.C.A.N.J.) Evidence *held* not to sustain conviction.—Einziger v. U. S., 905.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⊂=12 (U.S.D.C.N.C.) That which is implied is as much a part of the Constitution as that which is expressed.—Drexel Furniture Co. v. Bailey, 452.

⊂=47 (U.S.D.C.N.C.) Court will disregard form and look at substance of act in ascertaining whether it interferes with state's control of domestic affairs.—Drexel Furniture Co. v. Bailey, 452.

⊂=48 (U.S.D.C.N.Y.) Every presumption favors legislative act fixing gas rate.—Kings County Lighting Co. v. Barrett, 1006.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

⊂=70(3) (U.S.C.C.A.Wis.) Relief from federal safety appliance act if impractical must come from legislative and not judicial branch of government.—Payne v. Colvin, 15.

CONTEMPT.

See Injunction, ⊂=221–223.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

⊂=54(4) (U.S.C.C.A.Ill.) Motion of party not ground for punishment of stranger for criminal contempt.—McCauley v. First Trust & Savings Bank, 117.

CONTRACTS.

See Assignments; Bills and Notes; Champerty and Maintenance; Sales; Specific Performance.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

⇐10(1) (U.S.C.C.A.Tenn.) Contract *held* not lacking in mutuality.—Dunaway v. Puryear, 209.
⇐10(4) (U.S.C.C.A.N.J.) Mutual agreements in contract *held* valid consideration for each other.—General Supply Co. v. Marden, Orth & Hastings Co., 786.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐147(1) (U.S.C.C.A.N.J.) Cardinal rule of construction to determine intention of parties.—General Supply Co. v. Marden, Orth & Hastings Co., 786.
⇐147(2) (U.S.C.C.A.N.J.) Intention determinable from language.—General Supply Co. v. Marden, Orth & Hastings Co., 786.
⇐169 (U.S.C.C.A.N.J.) Surrounding circumstances may be considered.—General Supply Co. v. Marden, Orth & Hastings Co., 786.

(B) Parties.

⇐187(4) (U.S.D.C.N.Y.) Party assuming grantor's liabilities may be proceeded against by creditor of grantor.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 613.

(D) Place and Time.

⇐217 (U.S.C.C.A.N.J.) For manufacture of war products *held* terminable on notice after close of war.—General Supply Co. v. Marden, Orth & Hastings Co., 786.

V. PERFORMANCE OR BREACH.

⇐314 (U.S.D.C.N.Y.) Party who puts it out of his power to perform is liable for damages caused thereby.—P. N. Gray & Co. v. Cavalliotis, 565.

CONVERSION.

See Trover and Conversion.

COPYRIGHTS.

I. NATURE AND ACQUISITION.

⇐5 (U.S.D.C.N.Y.) Cable code book *held* subject of copyright; "writing of an author."—Reiss v. National Quotation Bureau, 717.

CORPORATIONS.

See Banks and Banking; Carriers; Gas; Public Service Commissions; Railroads; Street Railroads; Telegraphs and Telephones.

II. CORPORATE EXISTENCE AND FRANCHISE.

⇐40 (U.S.C.C.A.Wash.) In absence of objection to its validity, amendment to articles *held* sufficient to authorize conveyance.—Korn v. Spokane & Eastern Trust Co., 68.

IV. CAPITAL STOCK AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

⇐65 (U.S.C.C.A.N.Y.) Shares of stock not "chattels" and have situs in different places.—Vidal v. South American Securities Co., 855.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

⇐182 (U.S.C.C.A.Wash.) Agreement *held* not fraudulent as to minority stockholders.—Korn v. Spokane & Eastern Trust Co., 68.
Stockholders not entitled to cancellation of conveyance to mortgagee without an offer to return amount of taxes, etc., paid by mortgagee.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⇐388(2) (U.S.C.C.A.Wash.) Corporation and stockholders *held* estopped by receiving benefits from asserting conveyance ultra vires.—Korn v. Spokane & Eastern Trust Co., 68.

(B) Representation of Corporation by Officers and Agents.

⇐426(1) (U.S.C.C.A.Pa.) Must ratify or repudiate contract as entirety.—Laughner v. Schell, 241.
⇐426(11) (U.S.C.C.A.Wash.) Directors *held* to have ratified unauthorized conveyance.—Korn v. Spokane & Eastern Trust Co., 68.
⇐432(4) (U.S.D.C.Del.) Presumed seal was affixed by authorized person.—In re New York & Baltimore Inland Transp. Co., 145.

(C) Property and Conveyances.

⇐439 (U.S.C.C.A.Wash.) Conveyance *held* not ultra vires.—Korn v. Spokane & Eastern Trust Co., 68.

(D) Contracts and Indebtedness.

⇐477(2) (U.S.D.C.Del.) Resolution *held* to authorize mortgage.—In re New York & Baltimore Inland Transp. Co., 145.
⇐478 (U.S.D.C.N.Y.) Parties *held* to intend to bring after-acquired property in as security.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 152.

VIII. INSOLVENCY AND RECEIVERS.

⇐553(6) (U.S.D.C.Del.) Necessity for receivership shown by transfer of control of corporation.—Hanssen v. Pusey & Jones Co., 296.
⇐556 (U.S.D.C.Del.) Suit to have receivers appointed maintainable by general creditor.—Hanssen v. Pusey & Jones Co., 296.
⇐557(5) (U.S.D.C.Del.) Showing of insolvency *held* sufficient.—Hanssen v. Pusey & Jones Co., 296.

X. CONSOLIDATION.

⇐590(4) (U.S.D.C.N.Y.) Successor of defendant purchasing its assets and assuming its debts pending accounting for infringement of patent could be joined as defendant.—Phila-

delphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⊂590(4) (U.S.D.C.N.Y.) Successor of defendant pending accounting for infringement of patent liable notwithstanding denial of obligation.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 613.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⊂618 (U.S.C.C.A.Cal.) Delaware corporation *held* to have power after dissolution to redeem property from execution sale.—Big Sespe Oil Co. v. Cochran, 216.

⊂619 (U.S.C.C.A.Ohio) On voluntary dissolution under Ohio statute directors hold assets first for benefit of creditors.—Macneale v. Lalance & Grosjean Mfg. Co., 491.

XII. FOREIGN CORPORATIONS.

⊂642(6) (U.S.D.C.Cal.) Isolated transaction is not "doing business" within state.—Walton N. Moore Dry Goods Co. v. Commercial Industrial Co., 590.

⊂665(3) (U.S.D.C.Del.) Courts have no jurisdiction over internal affairs of foreign corporation.—Hanssen v. Pusey & Jones Co., 296.

⊂668(4) (U.S.D.C.Cal.) Service on stockholder or agent casually in state *held* not to give jurisdiction over foreign corporation.—Walton N. Moore Dry Goods Co. v. Commercial Industrial Co., 590.

COSTS.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⊂240 (D.C.) Taxed to intervener after abandonment by appellant.—Kellogg v. Winchell, 463.

COURT RULES CITED.

Equity Rule 22.—276 F. 388.
Equity Rule 26.—276 F. 600.
Equity Rules 30, 31.—276 F. 855.

COURTS.

See Clerks of Courts; Contempt; Removal of Causes.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

⊂189(7) (D.C.) Landlord's statement in municipal court must advise tenant of grounds for relief.—Davis v. Taylor, 619.

⊂190(3½) (D.C.) Ground not alleged in municipal court complaint not available.—Davis v. Taylor, 619.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

⊂262(4) (U.S.D.C.N.J.) Questions in issue on application for preliminary injunction to restrain enforcement of state statute or order.—Public Service Ry. Co. v. Board of Public Utility Commissioners, 979.

⊂264(4) (U.S.C.C.A.Tex.) Federal court has ancillary jurisdiction to enjoin suit in state court to relitigate matters determined by its decree.—Wilson v. Alexander, 875.

Federal court should enjoin suit in state court to alter effect of its decree.—Id.

⊂269 (U.S.C.C.A.N.Y.) Stocks and bonds "property" within statute relating to jurisdiction of federal courts.—Vidal v. South American Securities Co., 855.

Suit must be one to enforce lien upon or claim to property to give jurisdiction.—Id.

"Lien." within statute giving court jurisdiction of action against nonresident having property in district, defined.—Id.

Plaintiff *held* not to have lien on property giving District Court jurisdiction of action; "profit."—Id.

"Claim" as used in statute giving federal District Court jurisdiction against nonresident, defined.—Id.

What constitutes suit to remove incumbrance or cloud upon title to property to give federal District Court jurisdiction.—Id.

⊂270 (U.S.C.C.A.N.Y.) Alien may sue citizen, but must sue in district of residence.—Vidal v. South American Securities Co., 855.

⊂274 (U.S.C.C.A.N.Y.) Corporation cannot without its consent be sued by an alien outside of state where incorporated.—Vidal v. South American Securities Co., 855.

⊂276 (U.S.C.C.A.N.Y.) Pleading to merits not waiver of objection to jurisdiction.—Vidal v. South American Securities Co., 855.

⊂280 (U.S.C.C.A.Cal.) Burden of defeating jurisdiction of federal court, properly averred is on defendant.—Big Sespe Oil Co. v. Cochran, 216.

⊂280 (U.S.C.C.A.Ohio) Burden of disproving jurisdictional allegations on defendant.—Auto Acetylene Light Co. v. Prest-O-Lite Co., 537.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

⊂307(1) (U.S.C.C.A.N.Y.) Jurisdiction of federal court limited to controversies between citizens of different states.—Vidal v. South American Securities Co., 855.

⊂321 (U.S.C.C.A.N.Y.) Alien entitled to sue in federal court.—Vidal v. South American Securities Co., 855.

(E) Procedure and Adoption of Practice of State Courts.

⊂340 (U.S.C.C.A.Tex.) Conformity statute subject to specific provisions of federal statutes.—Southern Oil Corporation v. Waggoner, 487.

⊂344 (U.S.C.C.A.Tex.) Federal courts required to ignore merely formal defects in pleadings or process.—Southern Oil Corporation v. Waggoner, 487.

⊂344 (U.S.D.C.Me.) Attested copy of order is "certified copy."—Doherty v. McDowell, 728.

Shares of stock have situs within state of organization for purpose of acquiring jurisdiction over nonresident defendants.—Id.

Bill *held* to allege equitable claim to specific property for purpose of serving process on nonresident defendants.—Id.

Jurisdiction does not depend on statute allowing service on defendants outside of district.—Id.

⊂344 (U.S.D.C.N.Y.) Privilege of attending witness determined in federal court by law of state court attended.—Crittenden v. Barkin, 978.

⇐347 (U.S.C.C.A.Ga.) Allowance of amendments largely discretionary.—South Atlantic Packing & Provision Co. v. York Mfg. Co., 509.

⇐351½ (U.S.C.C.A.N.Y.) Counterclaims treated as original bills, and not dismissed.—Vidal v. South American Securities Co., 855.

⇐354 (U.S.C.C.A.Cal.) Decree entered pursuant to order of trial judge, but signed by succeeding judge, *held* valid.—Majestic Electric Development Co. v. Westinghouse Electric & Mfg. Co., 676.

(F) State Laws as Rules of Decision.

⇐366(14) (U.S.D.C.Mich.) Bankruptcy court *held* bound by decisions of state court as to construction of contract.—In re Nader, 123.

⇐368 (U.S.D.C.Mich.) Binding effect of state court decisions not affected by prior inconsistencies.—In re Nader, 123.

⇐375 (U.S.D.C.Mich.) Local laws govern limitations.—Fellows v. National Can Co., 309.

⇐375 (U.S.D.C.Mo.) Federal courts recognize, but are not conclusively bound, by state limitation statutes.—U. S. v. Kichin, 818.

(H) Circuit Courts of Appeals.

⇐405(3) (U.S.C.C.A.Mo.) Order denying application to be admitted to citizenship not appealable to Circuit Court of Appeals.—Marx v. U. S., 295.

⇐405(5) (U.S.C.C.A.Mass.) Appeal from District Court's decree dismissing suit for infringement of patent *held* properly taken in Circuit Court of Appeals.—I. T. S. Rubber Co. v. Essex Rubber Co., 478.

⇐405(12) (U.S.C.C.A.S.D.) Circuit Court of Appeals without jurisdiction to review order granting new trial.—Ft. Dodge Portland Cement Corporation v. Monk, 113.

⇐405(18) (U.S.C.C.A.Mo.) Bills of review not entertained in courts of appeal.—Cochran v. Becker, 280.

⇐406(2) (U.S.C.C.A.Ala.) Circuit Court of Appeals may modify judgment of District Court.—Southern Ry. Co. v. McKinney, 772.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

⇐508(1) (U.S.D.C.Cal.) Right to injunction pending appeal does not authorize federal court to enjoin proceedings in state court.—Marblehead Land Co. v. Los Angeles County, 305.

⇐508(5) (U.S.D.C.Cal.) Federal court may not enjoin proceedings to enforce state condemnation judgment.—Marblehead Land Co. v. Los Angeles County, 305.

Federal court will not determine propriety of state court's action in issuance of writ enforcing its judgment.—Id.

(D) Different United States Courts.

⇐518 (U.S.D.C.N.Y.) Infringement by articles made for government not subject of suit in District Court.—Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 834.

CRIMINAL LAW.

See Adulteration; Bail, ⇐58; Conspiracy, ⇐25–47; Extradition; Homicide; Indictment and Information; Larceny; Perjury.

X. EVIDENCE.

(C) Other Offenses and Character of Accused.

⇐369(6) (U.S.C.C.A.Or.) Evidence *held* admissible, though tending to prove different offense.—Basich v. U. S., 290.

⇐371(12) (D.C.) Evidence of previous robbery and killing admissible to show motive for killing officer.—McHenry v. U. S., 761.

⇐374 (D.C.) Evidence as to previous offense *held* not objectionable as giving details.—McHenry v. U. S., 761.

(D) Materiality and Competency in General.

⇐394 (U.S.D.C.Mass.) Information obtained by unlawful seizure of liquor inadmissible.—O'Connor v. Potter, 32.

⇐395 (U.S.C.C.A.Cal.) Seizure by police officers called for disturbance of peace not violation of federal Constitution and liquors could be used as evidence.—Herine v. U. S., 806.

⇐395 (U.S.D.C.Mass.) Liquor unlawfully seized inadmissible.—O'Connor v. Potter, 32.

(E) Best and Secondary and Demonstrative Evidence.

⇐400(2) (U.S.C.C.A.Ill.) Transcript of testimony *held* best evidence.—Venlinio v. U. S., 12.

(F) Admissions, Declarations, and Hearsay.

⇐409 (D.C.) Offer to admit *held* not sufficient to exclude testimony as to motive.—McHenry v. U. S., 761.

XII. TRIAL.

(A) Preliminary Proceedings.

⇐619 (U.S.C.C.A.Cal.) Cases *held* properly consolidated.—Vesely v. U. S., 693.

(B) Course and Conduct of Trial in General.

⇐651(1) (U.S.C.C.A.Ohio) Permitting view of premises by jury *held* not error.—Reid v. U. S., 253.

(C) Reception of Evidence.

⇐676 (U.S.C.C.A.Or.) Limitation of witnesses discretionary.—Hauge v. U. S., 111.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

⇐695(2) (U.S.C.C.A.Ohio) Objection to admission of evidence must be specific.—Yaffee v. U. S., 497.

⇐697 (U.S.C.C.A.Ohio) Exception to admission of evidence must be specific.—Yaffee v. U. S., 497.

(E) Arguments and Conduct of Counsel.

⇐729 (D.C.) Improper remark withdrawn by counsel, *held* not prejudicial.—McHenry v. U. S., 761.

⚖730(1) (U.S.C.C.A.Mo.) Statement of district attorney in argument *held* not prejudicial. —Little v. U. S., 915.
⚖730(10) (U. S. C. C. A. Tex.) Improper remarks of prosecuting attorney *held* not ground of reversal.—Lanier v. U. S., 699.

(F) Province of Court and Jury in General.

⚖762(2) (U.S.C.C.A.Mo.) Judge in federal court may express opinion on facts.—Little v. U. S., 915.
⚖767 (D.C.) Court need not apply law to the facts.—Price v. U. S., 628.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚖822(11) (U.S.C.C.A.N.Y.) Instruction *held* not to place duty on defendant of testifying, or create presumption against himself.—Friedman v. U. S., 792.
⚖823(1) (U.S.C.C.A.Mo.) Statement of court in instructions *held* not prejudicial.—Little v. U. S., 915.

(H) Requests for Instructions.

⚖829(5) (D.C.) Requested charge on defense of habitation *held* covered by charge on self-defense.—Price v. U. S., 628.
⚖829(9) (U.S.C.C.A.N.Y.) Refusal to charge as to giving defendant benefit of favorable construction of evidence not error, in view of instructions given.—Friedman v. U. S., 792.
⚖829(16) (U.S.C.C.A.N.Y.) Refusal to charge as to disregarding testimony *held* justified, where court had charged on credibility of witnesses.—Friedman v. U. S., 792.

(K) Verdict.

⚖878(4) (U.S.C.C.A.Cal.) Verdict of guilty on one count and not guilty on another embracing the first *held* inconsistent.—Rosenthal v. U. S., 714.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

⚖980(1) (U.S.C.C.A.Pa.) Sentence *held* not authorized under information.—Healey v. U. S., 711; Daley v. U. S., 713; Felmun v. U. S., 713.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⚖1036(8) (U.S.C.C.A.Okl.) Question of sufficiency of evidence not reviewable unless raised in trial court.—Trope v. U. S., 348.
⚖1038(3) (U.S.C.C.A.Cal.) Request for modification below is necessary for hearing objection on appeal.—Cabiale v. U. S., 769.
⚖1038(4) (U.S.C.C.A.N.Y.) Refusal to restate law in language of oral request, not presented as required by rules, and to which no exception was taken, not reversible error.—Friedman v. U. S., 792.
⚖1044 (U.S.C.C.A.Ohio) Order granting leave to file information may not be first attacked in appellate court.—Yaffee v. U. S., 497.
⚖1056(1) (U.S.C.C.A.Cal.) Exception to charge below is necessary for hearing objection on appeal.—Cabiale v. U. S., 769.
⚖1056(1) (U.S.C.C.A.N.J.) No reversal for defect in instruction in absence of exception. —U. S. v. Schwartz, 397.
⚖1056(1) (U.S.C.C.A.N.Y.) Refusal to restate law in language of oral request, not presented as required by rules, and to which no exception was taken, not reversible error.—Friedman v. U. S., 792.
⚖1059(2) (U.S.C.C.A.Ohio) Instructions will not be reviewed except on specific exceptions. —Yaffee v. U. S., 497.

(G) Review.

⚖1144(15) (D.C.) Not presumed jurors allowed to separate saw objectionable headline. —McHenry v. U. S., 761.
Newspaper headline *held* not to require reversal, if seen by jurors.—Id.
⚖1149 (U.S.C.C.A.Ohio) Leave to file information within discretion of court.—Yaffee v. U. S., 497.
⚖1155 (D.C.) Court has discretion to permit separation of jury in capital cases.—McHenry v. U. S., 761.
⚖1159(2) (U.S.C.C.A.Ohio) Weight of evidence not reviewable by appellate court.—Reid v. U. S., 253.
⚖1166½(6) (U.S.C.C.A.Cal.) No complaint of court's excusing juror.—Vesely v. U. S., 693.
⚖1169(1) (U.S.C.C.A.Ill.) Evidence *held* competent, but its admission harmless, if immaterial.—Venlinio v. U. S., 12.
⚖1169(5) (D.C.) Statement relating to defendant's prison record *held* not prejudicial.—McHenry v. U. S., 761.
Testimony as to previous offense, admitted to show sanity, *held* not reversible.—Id.
⚖1169(9) (U.S.C.C.A.Ill.) Rejecting nonexperts on handwriting *held* harmless.—Venlinio v. U. S., 12.
⚖1172(2) (U. S. C. C. A. N. J.) Instructions which authorize conviction on proof of offense other than that charged *held* erroneous.—Einziger v. U. S., 905.

(H) Determination and Disposition of Cause.

⚖1186(4) (U.S.C.C.A.Okl.) Instructions not substantially erroneous not ground of reversal. —Trope v. U. S., 348.
⚖1188 (U.S.C.C.A.Ohio) Appellate court may remand for appropriate sentence.—Gray v. U. S., 395.

CUSTOMS AND USAGES.

⚖6 (U.S.C.C.A.Mo.) Custom need not be shown to have become a rule of the common law.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.
⚖12(1) (U.S.D.C.Md.) Contract to carry grain to foreign port construed with reference to known custom of the trade.—The Manhattan, 823.

CUSTOMS DUTIES.

VII. VIOLATIONS OF CUSTOMS LAWS.

⚖125 (U.S.C.C.A.N.Y.) Act of smuggling *held* fully executed.—Newman v. U. S., 798.
⚖129 (U.S.C.C.A.N.Y.) Statute imposing penalty *held* applicable to importation of aigrettes, etc.—Friedman v. U. S., 792.

⟸129 (U.S.C.C.A.Wash.) Master of ship not liable for failing to include intoxicating liquor in manifest.—U. S. v. Hana, 817.

DAMAGES.

I. NATURE AND GROUNDS IN GENERAL.

⟸5 (U.S.C.C.A.N.Y.) General damages presumed to have ensued from breach.—Elias v. Wright, 908.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

⟸40(3) (U.S.D.C.Wyo.) Prospective profits recoverable for damage to going business if proven with reasonable certainty.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

⟸45 (U.S.C.C.A.N.Y.) Cost of muslin placed in windows to preserve interior, on contractor's failure to glass in windows, *held* recoverable.—Elias v. Wright, 908.

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

⟸120(3) (U.S.C.C.A.N.Y.) Measure for breach of contract to put in glass in construction of building stated.—Elias v. Wright, 908.

Overhead charge of 6 per cent., allowed as item of damages for breach of contract, *held* reasonable.—Id.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

⟸141 (U.S.C.C.A.N.Y.) Pleading of particulars of damage unnecessary.—Elias v. Wright, 908.

(B) Evidence.

⟸190 (U.S.D.C.Wyo.) Evidence insufficient to show loss of prospective profits from damage to pasture land by oil.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(D) Pleading and Evidence.

⟸54 (U.S.C.C.A.Utah) Consent of widow to action by administrator must be question by plea.—Bingham Mines Co. v. Bianco, 513.

DEEDS.

See Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

⟸17(1) (U.S.C.C.A.Tenn.) Deed *held* not lacking in consideration.—Dunaway v. Puryear, 209.

(E) Validity.

⟸70(5) (U.S.C.C.A.Tenn.) Contract and conveyance *held* not unconscionable.—Dunaway v. Puryear, 209.

Unconscionableness must be tested by conditions existing at time.—Id.

⟸71 (U.S.C.C.A.Tenn.) Grantee of interest in land and mortgagees *held* not guilty of oppression.—Dunaway v. Puryear, 209.

⟸75 (U.S.C.C.A.Tex.) Right to cancellation for fraud *held* lost by ratification.—Miller v. Rush, 641.

DESCENT AND DISTRIBUTION.

See Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

⟸84 (U.S.C.C.A.Idaho) Administrator, procuring distribution to himself and others, *held* chargeable with fraud.—Diamond v. Connolly, 87.

DISMISSAL AND NONSUIT.

See Appeal and Error, ⟸790–799; Equity, ⟸363.

I. VOLUNTARY.

⟸43(4) (U.S.D.C.Pa.) Affidavit of defense, though not indorsed, *held* to entitle defendant to reinstatement after discontinuance.—Ohio Savings & Trust Co. v. Harman, 759.

DISTRICT AND PROSECUTING ATTORNEYS.

⟸8 (U.S.D.C.Mo.) United States district attorney *held* without color of authority to order arrest of person without warrant.—Ex parte Swift, 57.

DISTRICT OF COLUMBIA.

⟸22 (D.C.) Commissioners of District can regulate, but not prohibit, driveway across sidewalk.—Brownlow v. O'Donoghue Bros., 636.

Decision of Commissioners in regulating sidewalk use not disturbed, unless arbitrary.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

ELECTION OF REMEDIES.

⟸12 (U.S.D.C.Mich.) Assumpsit for royalties barred by limitations as to items *held* not to right to sue in debt.—Fellows v. National Can Co., 309.

EMINENT DOMAIN.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

⟸106 (D.C.) Lot owner's right to access across street cannot be taken without compensation.—Brownlow v. O'Donoghue Bros., 636.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

⟸239 (D.C.) Commissioners of district can demand jury on setting aside Commissioners' report.—Beyer v. Brownlow, 460.

Provision for action by District does not exclude right to jury.—Id.

⚖249 (U.S.D.C.Cal.) Court may issue writ of assistance to place plaintiff in possession.—Marblehead Land Co. v. Los Angeles County, 305.

IV. REMEDIES OF OWNERS OF PROPERTY.

⚖273 (U.S.C.C.A.Tex.) Remedy at law *held* adequate for closing street.—Burroughs v. City of Dallas, 810.

EQUITY.

See Cancellation of Instruments; Injunction; Specific Performance; Subrogation.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⚖20 (U.S.C.C.A.Ga.) Bill alleging lien *held* to state cause of action for equitable relief.—Banco Mercantil Americano de Cuba v. Taggart Coal Co., 388.

(B) Remedy at Law and Multiplicity of Suits.

⚖48 (D.C.) Remedy at law for breach of warranty and of contract to build a house is adequate.—Roberson v. Gordon, 638.

IV. PLEADING.

(A) Original Bill.

⚖150(1) (U.S.C.C.A.Ga.) Bill joining all bank stockholders *held* not multifarious.—Benton v. American Nat. Bank of Macon, 368.

VII. DISMISSAL BEFORE HEARING.

⚖363 (U.S.D.C.Me.) Doubtful issue on merits not decided on motion to dismiss.—Doherty v. McDowell, 728.

X. DECREE AND ENFORCEMENT THEREOF.

⚖415 (U.S.C.C.A.Cal.) Not necessary to make all findings to sustain decree.—Big Sespe Oil Co. v. Cochran, 216.

⚖415 (U.S.C.C.A.N.Y.) Rights of parties not within jurisdiction not to be determined.—Vidal v. South American Securities Co., 855.

⚖427(3) (D.C.) Prayer for general relief authorizes only relief permissible under pleadings.—Kellogg v. Winchell, 463.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

Descent and Distribution; Life Estates; Wills.

ESTOPPEL.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

⚖62(5) (U.S.C.C.A.Cal.) United States not estopped by unauthorized acts of officers.—Cramer v. U. S., 78.

(B) Grounds of Estoppel.

⚖63 (U.S.D.C.N.Y.) Party who voluntarily put it out of his power to perform cannot set up embargo as defense to action for breach.—P. N. Gray & Co. v. Cavalliotis, 565.

EVIDENCE.

See Criminal Law, ⚖369–409; 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.

Reception at trial, see Criminal Law, ⚖676–697; Trial, ⚖59.

I. JUDICIAL NOTICE.

⚖21 (U.S.D.C.Va.) Judicial notice that stockbroker gets stock certificate indorsed in blank from seller.—Cothran & Connally v. U. S., 48.

VII. ADMISSIONS.

(D) By Agents or Other Representatives.

⚖245 (U.S.C.C.A.Ark.) Sheriff's advertisement *held* competent as admission against attaching creditor.—Leavenworth v. Bank of Gillett, 24.

IX. HEARSAY.

⚖317(11) (U.S.C.C.A.Okl.) Testimony as to analysis of water, *held* hearsay.—Interstate Compress Co. v. Agnew, 882.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

⚖354(8) (U.S.C.C.A.Utah) Time book and reports of master *held* admissible against him.—Bingham Mines Co. v. Bianco, 513.

⚖359(3) (U.S.D.C.Wyo.) Pictures inadmissible in absence of showing of similar circumstances.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(D) Construction or Application of Language of Written Instrument.

⚖459(2) (U.S.C.C.A.Ohio) Evidence *held* admissible on question of construction of contract.—Sloat-Darragh Co. v. General Coal Co., 502.

⚖461(1) (U.S.D.C.Mich.) Preliminary intentions merged in written contract.—In re Nader, 123.

EXECUTION.

VII. SALE.

(B) Title and Rights of Purchaser.

⚖265 (U.S.C.C.A.Cal.) Sale of personalty *held* in trust for defendant does not convey title.—Big Sespe Oil Co. v. Cochran, 216.

⚖281 (U.S.C.C.A.Cal.) Purchaser wrongfully in possession accountable for rents and profits.—Big Sespe Oil Co. v. Cochran, 216.

(C) Redemption.

⚖293 (U.S.C.C.A.Cal.) Right of redemption *held* assignable.—Big Sespe Oil Co. v. Cochran, 216.

⇐301 (U.S.C.C.A.Cal.) Demand for accounting by judgment defendant entitled to redeem *held* sufficient.—Big Sespe Oil Co. v. Cochran, 216.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

EXTRADITION.

II. INTERSTATE.

⇐21 (U.S.D.C.Or.) Right of asylum pertaining to extradition from a foreign country does not obtain as between the states.—Bramwell v. Owen, 36.

⇐41 (U.S.D.C.Or.) One extradited exempt from service of process.—Bramwell v. Owen, 36.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⇐5 (U.S.C.C.A.Minn.) Forcible removal from state *held* actionable.—Meints v. Huntington, 245.

Extrajudicial restraint constitutes "false imprisonment."—Id.

⇐10 (U.S.C.C.A.Minn.) Consent no defense.—Meints v. Huntington, 245.

Intent to prevent similar wrong by others no defense.—Id.

⇐15(1) (U.S.C.C.A.Minn.) Joint liability not dependent on conspiracy.—Meints v. Huntington, 245.

Persons chargeable liable for acts of others in execution of common purpose.—Id.

(B) Actions.

⇐25 (U.S.C.C.A.Minn.) Evidence of reputation of parties *held* incompetent.—Meints v. Huntington, 245.

FIXTURES.

⇐9 (U.S.C.C.A.Cal.) Oil wells, derricks, tanks and pump, and camp houses *held* "fixtures."—Big Sespe Oil Co. v. Cochran, 216.

FOREIGN CORPORATIONS.

See Corporations, ⇐642-668.

FRAUD.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⇐3 (U.S.C.C.A.N.M.) Elements stated.—Davis v. Wilson, 672.

II. ACTIONS.

(C) Evidence.

⇐58(1) (U.S.C.C.A.N.M.) Evidence *held* not to show fraud in sale of mineral land.—Davis v. Wilson, 672.

GAME.

⇐7 (U.S.D.C.Ga.) Treaty regulating killing of birds deals only with migratory birds.—U. S. v. Lumpkin, 580.

Mourning doves protected by migratory bird treaty, though particular doves do not migrate.—Id.

No defense that particular birds of migratory group did not migrate.—Id.

Mourning doves of Georgia are migratory birds. Id.

In prosecution for killing mourning doves, question whether they in fact migrated not in issue.—Id.

⇐9 (U.S.D.C.Ga.) Migratory character of mourning doves *held* not a question for the jury.—U. S. v. Lumpkin, 580.

No conviction for killing migratory birds unless they were mourning doves as charged in indictment.—Id.

GAS.

⇐14(1) (U.S.D.C.Minn.) Cost of reproduction not sole basis of value.—City of Winona v. Wisconsin-Minnesota Light & Power Co., 996.

Valuation must be based on reasonable judgment under all circumstances.—Id.

Valuation by master based on cost of reproduction *held* excessive.—Id.

"Normal" price not basis for valuation.—Id.

Depreciation should be determined by inspection, not by theory.—Id.

Cost of financing not element of value without evidence of expenditure.—Id.

Overhead items included in the cost of reproduction without evidence of expenditure.—Id.

Cost of rate litigation not considered in determining rate.—Id.

Quarterly adjustment of rate based on net holder, cost approved.—Id.

Provision for revaluation every five years proper.—Id.

⇐14(1) (U.S.D.C.N.Y.) Temporary injunction should not provide remunerative income for utility.—Kings County Lighting Co. v. Barrett, 1006.

Rate injunction can be dissolved for inequitable charges.—Id.

Defendant has burden of showing rate substituted for enjoined rate is inequitable.—Id.

Inequitable rate, requiring dissolution of injunction, must shock the conscience.—Id.

Rate yielding 25 per cent. profit *held* not unconscionable.—Id.

GOOD WILL.

⇐5 (U.S.C.C.A.Wis.) Assignment *held* to transfer business as well as good will.—Gehl v. Hebe Co., 271.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

⇐3 (U.S.C.C.A.Mont.) Sufficiency of indictment not considered, where no objection below, nor writ of error.—Bechtold v. U. S., 816.

⇐4 (U.S.C.C.A.Mont.) Sufficiency of indictment not considered, where no objection below, nor writ of error.—Bechtold v. U. S., 816.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⇐45(4) (U.S.D.C.Mo.) Federal court without jurisdiction to discharge prisoner *held* by state officers without color of authority.—Ex parte Swift, 57.

HARMLESS ERROR.

See Appeal and Error, ⇐1050–1064; Criminal Law, ⇐1166½–1172.

HIGHWAYS.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

⇐113(4) (U.S.D.C.N.Y.) Assignments of moneys due contractor on road *held* properly filed.—Blue v. Herkimer Nat. Bank, 559.

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

⇐153 (U.S.D.C.Or.) County courts without authority over state highways.—Postal Telegraph Co. v. State Highway Commission, 958.
Commission may prevent encroachment, etc., on state highways.—Id.

(B) Use of Highway and Law of the Road.

⇐165 (U.S.D.C.Or.) Statutes of Oregon contemplate two kinds of roads.—Postal Telegraph Co. v. State Highway Commission, 958.

HOMICIDE.

VII. EVIDENCE.

(B) Admissibility in General.

⇐166(1) (D.C.) Court has considerable latitude in admitting evidence to show motive.—McHenry v. U. S., 761.

VIII. TRIAL.

(C) Instructions.

⇐300(3) (D.C.) Charge on self-defense *held* correct.—Price v. U. S., 628.
⇐302 (D.C.) Request to charge on right to have pistol *held* not required by facts.—Price v. U. S., 628.
⇐304 (D.C.) Evidence *held* not to require instruction on accidental shooting.—McHenry v. U. S., 761.

HUSBAND AND WIFE.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

⇐49½(6) (U.S.C.C.A.Tex.) Gift to wife not invalidated by subsequent joint use of property.—Hudson v. Hudson, 547.

IMMIGRATION.

See Aliens, ⇐44–58.

INDIANS.

⇐27(5) (U.S.C.C.A.Cal.) United States may maintain suit to protect rights of Indians in land.—Cramer v. U. S., 78.
⇐27(5) (U.S.C.C.A.Okl.) United States may maintain replevin for personal property *held* in trust for Indian.—Cochran v. U. S., 701.
⇐38(2) (U.S.D.C.Or.) United States has jurisdiction of offenses committed on site of Indian school.—U. S. v. Wurtzbarger, 753.

INDICTMENT AND INFORMATION.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

⇐3 (U.S.C.C.A.Ohio) Unlawful sale may be prosecuted by information "infamous crime."—Yaffee v. U. S., 497.
⇐3 (D.C.) Juvenile court can sentence to hard labor only after indictment.—Moreland v. U. S., 640.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

⇐40 (U.S.C.C.A.Ohio) Leave to file information not invalid because affidavit was made before notary public.—Yaffee v. U. S., 497.
⇐42 (U.S.C.C.A.Ohio) Information may be filed against person under bond for appearance before grand jury.—Yaffee v. U. S., 497.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⇐60 (U.S.C.C.A.Ill.) Test of sufficiency stated.—Venlinio v. U. S., 12.
⇐62 (U.S.C.C.A.Ohio) Presumption that money paid railroad employés was property of United States and need not be alleged in conspiracy indictment.—Morenkow v. U. S., 293.
⇐110(2) (U.S.C.C.A.Okl.) Need not follow very words of statute.—Trope v. U. S., 348.
⇐110(31) (U.S.C.C.A.Ill.) Indictment for maintaining nuisance *held* sufficient.—Brown v. U. S., 122.
⇐119 (U.S.C.C.A.N.Y.) Allegations as to date and steamer of unlawful importation *held* superfluous.—Friedman v. U. S., 792.

IX. ISSUES, PROOF, AND VARIANCE.

⇐167 (U.S.C.C.A.N.Y.) Allegations as to date and steamer of unlawful importation *held* superfluous, and not necessary to be proved.—Friedman v. U. S., 792.

INFANTS.

See Parent and Child.

III. PROPERTY AND CONVEYANCES.

⇐34 (U.S.C.C.A.P.R.) Alienation of propererty of minors authorized only by court of district of their domicile.—Martorell v. Ochoa, 99.
⇐34 (U.S.C.C.A.P.R.) Power to authorize sale of property of minors exclusive in District Court of district where property situated.—Agenjo v. Agenjo, 105.

INJUNCTION.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

⇐26(3) (U.S.C.C.A.Mass.) A defendant *held* not entitled to an injunction to restrain action at law.—Susquehanna Coal Co. v. Pratt & Young, 919.
⇐26(6) (U.S.C.C.A.Mass.) Action at law will not be enjoined where the issues can as well be determined therein as in equity.—Susquehanna Coal Co. v. Pratt & Young, 919.

(B) Property, Conveyances, and Incumbrances.

⇐36(1) **(U.S.C.C.A.Tex.)** Not granted where right is doubtful.—Burroughs v. City of Dallas, 812.

⇐37 **(U.S.C.C.A.Tex.)** Not granted where injury is trifling.—Burroughs v. City of Dallas, 812.

(C) Contracts.

⇐63 **(U.S.C.C.A.Ohio)** Will be granted to restrain encouragement of breach of contract.—Auto Acetylene Light Co. v. Prest-o-Lite Co., 537.

III. ACTIONS FOR INJUNCTIONS.

⇐129(1) **(U.S.D.C.Cal.)** Suit in federal court to enjoin proceedings in state court dismissed without prejudice.—Marblehead Land Co. v. Los Angeles County, 305.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

⇐137(4) **(D.C.)** Granted to preserve status quo to avoid irreparable injury to plaintiff though right is not clear.—Phillips v. Sager, 625.

⇐146 **(D.C.)** Denial of charges of fraud and insolvency not conclusive in determining right to temporary injunction.—Phillips v. Sager, 625.

⇐152 **(D.C.)** Showing for injunction to preserve status quo need only be sufficient on its face.—Phillips v. Sager, 625.

VI. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT.

⇐208 **(U.S.D.C.Wyo.)** Issuance of writ conditioned on defendant's failure to pay damages.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

VII. VIOLATION AND PUNISHMENT.

⇐221 **(U.S.C.C.A.Ill.)** Binding on strangers to suit only after actual notice.—McCauley v. First Trust & Savings Bank, 117.

⇐223(1) **(U.S.C.C.A.Ohio)** Against unfair competition *held* violated.—Auto Acetylene Light Co. v. Prest-O-Lite Co., 534.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

INSTRUCTIONS.

See Criminal Law, ⇐762–829; Trial, ⇐ 253–296.

INSURANCE.

XIX. REINSURANCE.

⇐679 **(U.S.D.C.Md.)** Final settlement of liability reinsurance contract *held* to mean determination of original liability.—Poe v. Munich Reinsurance Co., 949.

⇐681 **(U.S.D.C.Md.)** Reinsurer, who terminated contract, cannot require continuation of business.—Poe v. Munich Reinsurance Co., 949.

INTERNAL REVENUE.

⇐2 **(U.S.C.C.A.Ark.)** Special tax on liquor dealers repealed by Prohibition Act.—Bailey v. U. S., 27.

⇐2 **(U.S.C.C.A.Ohio)** Statutory provisions *held* repealed by Prohibition Act.—Gray v. U. S., 395.

⇐2 **(U.S.D.C.Ala.)** Rev. St. § 3450, not repealed by Prohibition Act.—The Tuscan, 55.

⇐2 **(U.S.D.C.Ga.)** Provision for forfeiture of vehicle used to defraud government of tax not repealed.—U. S. v. One Essex Touring Automobile, 28.

⇐2 **(U.S.D.C.N.C.)** Child Labor Act *held* unconstitutional.—Drexel Furniture Co. v. Bailey, 452.

⇐2 **(U.S.D.C.R.I.)** Statute not superseded by regulations.—Polk v. Page, 128.

⇐8 **(U.S.C.C.A.Cal.)** Inheritance tax only on property of deceased.—Wardell v. Blum, 226.

Interest subject to inheritance tax determined by law of state where property is situated.—Id.

Only one-half of community property in California subject to inheritance tax.—Id.

⇐8 **(U.S.D.C.Md.)** Transfer taxes levied on an estate *held* excessive.—Dugan v. Miles, 401.

Count for refund of taxes *held* based on wrong theory.—Id.

⇐8 **(U.S.D.C.Md.)** Reserved interest of decedent in securities transferred only *held* subject to estate tax.—Curley v. Tait, 840.

Estate Tax Act not retroactive as to property transferred.—Id.

⇐8 **(U.S.D.C.Md.)** State inheritance tax deductible before computing federal estate tax.—Curley v. Tait, 845.

⇐9 **(U.S.D.C.Mass.)** A Massachusetts trust *held* not subject to tax on capital stock imposed by Revenue Acts of 1916 and 1918.—Hecht v. Malley, 830.

⇐9 **(U.S.D.C.Va.)** "Broker" *held* to include warehouseman.—Cothran & Connally v. U. S., 48.

⇐19(1) **(U.S.D.C.Pa.)** All forms of security issued by corporations expressive of indebtedness taxable.—Fidelity Trust Co. v. Lederer, 51.

Car trust certificates issued under Philadelphia plan *held* subject to stamp tax.—Id.

Executive and judicial departments cannot levy tax, but must give effect to act of Congress not clearly expressed.—Id.

⇐24 **(U.S.C.C.A.Ky.)** Manufacturers and wholesale druggists only authorized to sell at wholesale.—Small Grain Distilling & Drug Co. v. Hamilton, 544.

⇐28 **(U.S.D.C.R.I.)** Time and manner of distraint for transfer tax is limited by Revenue Act alone.—Polk v. Page, 128.

Taxes due not always collectible immediately by distraint.—Id.

Statute, forbidding enjoining assessment or collection of tax, does not forbid restraining unauthorized distraint.—Id.

Enforcing collection 180 days before permissible *held* irreparable injury warranting injunction.—Id.

⇐38 **(U.S.D.C.Mass.)** Taxpayer's failure to formally protest payment *held* not to preclude recovery of amount paid, in view of previous

protest to payment of similar tax.—Hecht v. Malley, 830.

⇐38 (U.S.D.C.Md.) Count *held* sufficient to state cause of action for recovery of excess taxes.—Dugan v. Miles, 401.

Declaration in action to recover excess transfer taxes *held* demurrable for failure to allege duress.—Id.

⇐38 (U.S.D.C.N.C.) Child labor tax paid under protest recoverable on statute being *held* invalid.—Drexel Furniture Co. v. Bailey, 452.

INTOXICATING LIQUORS.

VI. OFFENSES.

⇐138 (U.S.C.C.A.Ohio) Permit cannot authorize transportation for beverage purposes.—Reid v. U. S., 253.

⇐146(1) (U.S.C.C.A.Ky.) Manufacturers and wholesale druggists only authorized to sell at wholesale.—Small Grain Distilling & Drug Co. v. Hamilton, 544.

VIII. CRIMINAL PROSECUTIONS.

⇐210 (U.S.C.C.A.Pa.) Information *held* to charge transportation.—Healey v. U. S., 711. Daley v. U. S., 713; Felmun v. U. S., 713.

⇐213 (U.S.C.C.A.Cal.) Information for unlawful maintenance of place for sale *held* sufficient.—Vesely v. U. S., 693.

⇐213 (U.S.C.C.A.Cal.) Indictment charging willful and unlawful keeping of intoxicating liquors *held* sufficient under National Prohibition Act.—Herine v. U. S., 806.

⇐213 (U.S.C.C.A.Cal.) Information charging maintenance of nuisance, contrary to National Prohibition Act, *held* sufficient.—Kathriner v. U. S., 808.

⇐215 (U.S.C.C.A.Cal.) Indictment *held* not defective for failure to allege sale of liquor for beverage purposes.—Cabiale v. U. S., 769.

⇐222 (U.S.C.C.A.Cal.) Information alleging that sale was in violation of Prohibition Act *held* to negative sale for legitimate purposes.—Cabiale v. U. S., 769.

⇐223(6) (U.S.C.C.A.Ohio) Evidence of sale by defendant's bartender *held* admissible.—Yaffee v. U. S., 497.

⇐233(1) (U.S.C.C.A.Cal.) In prosecution for violation of National Prohibition Act, admission of tags used in purchase *held* not error.—Cabiale v. U. S., 769.

⇐236(4) (U.S.C.C.A.Cal.) One selling intoxicating liquor *held* properly prosecuted as principal, maintaining a place for sale.—Vesely v. U. S., 693.

⇐236(9) (U.S.C.C.A.Cal.) Evidence *held* to justify convicts of violation of National Prohibition Act.—Herine v. U. S., 806.

⇐238(1) (U.S.C.C.A.Cal.) Evidence *held* to warrant denying motion for a directed verdict of not guilty.—Kathriner v. U. S., 808.

⇐238(1) (U.S.C.C.A.N.J.) Whether defendant manufactured intoxicating beverage after prohibition went into effect *held* for jury.—U. S. v. Schwartz, 397.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

⇐247 (U.S.C.C.A.Cal.) Seizure by police officers called for disturbance of peace not violation of federal Constitution and liquors could be used as evidence.—Herine v. U. S., 806.

⇐247 (U.S.D.C.Mich.) Conviction in federal court prerequisite to forfeiture of vehicle used in illegal transportation.—U. S. v. One Buick Roadster, 407.

⇐249 (U.S.C.C.A.Cal.) Search warrant *held* unnecessary, in view of evidence.—Kathriner v. U. S., 808.

⇐255 (U.S.D.C.Mass.) Person from whom liquor is unlawfully seized, but who does not claim ownership, not entitled to its return.—O'Connor v. Potter, 32.

JUDGMENT.

See Equity, ⇐415–427; Execution.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⇐17(9) (U.S.D.C.Or.) Void where service is void and defendant has not voluntarily appeared.—Bramwell v. Owen, 36.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⇐250 (U.S.D.C.N.Y.) Plaintiff entitled to relief, if complaint states good cause of action on any theory.—P. N. Gray & Co. v. Cavalliotis, 565.

IX. OPENING OR VACATING.

⇐346 (U.S.D.C.Ga.) Validity may be considered after close of term.—U. S. v. One Essex Touring Automobile, 28.

XI. COLLATERAL ATTACK.

(B) Grounds.

⇐516 (U.S.D.C.Pa.) Against bankrupt could be attacked collaterally by creditors defrauded thereby.—In re Thompson, 313.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

⇐527 (U.S.D.C.N.Y.) When opinion may be read to ascertain issues determined.—Imperial Machine & Foundry Corporation v. American Machinery Co., 436.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⇐590(4) (U.S.D.C.Mich.) Judgment in assumpsit *held* not res judicata in subsequent action to recover royalties for certain years.—Fellows v. National Can Co., 309.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(C) Matters Concluded.

⇐739 (U.S.D.C.Mich.) Judgment on one cause of action not res judicata upon different cause of action.—Fellows v. National Can Co., 309.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⇐951(4) (U.S.C.C.A.Okl.) Evidence *held* not to show wife estopped by judgment against husband.—Reed v. Atchison, 888.

JUDICIAL POWER.

See Constitutional Law, ⇐70.

LANDLORD AND TENANT.

IV. TERMS FOR YEARS.

(D) Termination.

⇐108(2) (D.C.) Tender of past-due rent at any time before execution defeats forfeiture.—Davis v. Taylor, 619.

⇐112(2) (U.S.C.C.A.P.R.) Right to forfeit lease not waived by landlord by acceptance of accrued rent after due.—Del Toro v. Juncos Central Co., 894.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

⇐157(6) (D.C.) Tenant not "owner entitled to beneficial use" required to erect fire escape, and cannot recover therefor.—Goldwyn Distributing Corporation v. Carroll, 63.

LARCENY.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

⇐40(4) (U.S.C.C.A.Tex.) Stealing goods moving in interstate commerce; diversion of shipment immaterial.—Lanier v. U. S., 699.

LEASE.

See Landlord and Tenant.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

⇐19 (U.S.C.C.A.Ga.) Newspaper article *held* not to convey impression that plaintiff was obscure.—Conklin v. Augusta Chronicle Pub. Co., 288.

II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.

⇐42(1) (U.S.C.C.A.Ga.) News item *held* not representation of collusion in divorce case.—Conklin v. Augusta Chronicle Pub. Co., 288.

Honest report of court proceedings "privileged communication."—Id.

⇐51(1) (U.S.C.C.A.Ga.) Lack of malice will prevent recovery in case of privileged communication.—Conklin v. Augusta Chronicle Pub. Co., 288.

LIENS.

See Maritime Liens.

⇐7 (U.S.D.C.Del.) Equitable lien created by acquisition of property under agreement to give mortgage therefor.—In re New York & Baltimore Inland Transp. Co., 145.

LIFE ESTATES.

⇐8 (U.S.C.C.A.Ky.) Possession under dower right inures to benefit of remainderman.—Combs v. Haley Coal Co., 342.

LIMITATION OF ACTIONS.

See Adverse Possession.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

⇐4(2) (U.S.D.C.Mich.) Statute absolutely barring right to bring action invalid.—Fellows v. National Can Co., 309.

(B) Limitations Applicable to Particular Actions.

⇐39(2) (U.S.D.C.Mich.) Ten-year statute applicable to cause of action for balance of royalty.—Fellows v. National Can Co., 309.

⇐39(9) (U.S.C.C.A.Cal.) Suit for accounting governed by four-year statute.—Big Sespe Oil Co. v. Cochran, 216.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⇐46(6) (U.S.D.C.Mich.) Cause of action for balance of royalty due for each year *held* to accrue after end thereof.—Fellows v. National Can Co., 309.

(H) Commencement of Action or Other Proceeding.

⇐127(5) (U.S.C.C.A.Ala.) Amendment not barred by limitation as stating new cause of action.—Newberry v. Central of Georgia Ry. Co., 337.

LIQUOR SELLING.

See Intoxicating Liquors.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) Under Maritime Law.

⇐2 (U.S.D.C.Me.) For supplies furnished in foreign country, libelants may invoke law of forum.—The Snetind, 139.

(B) Under Statutory Provisions.

⇐17 (U.S.D.C.Me.) Statute changes method of proof.—The Snetind, 139.

II. CREATION, OPERATION, AND EFFECT.

⇐29 (U.S.C.C.A.Penn.) Furnisher of supplies on order of agent of charterer *held* entitled to lien.—The Penn, 118.

⇐33 (U.S.D.C.Me.) Interest allowed from refusal of payment.—The Snetind, 139.

MARRIAGE.

See Husband and Wife.

MASTER AND SERVANT.

I. THE RELATION.

(B) Statutory Regulation.

⇐13 (U.S.C.C.A.Tex.) Telegraph office *held* not "continuously operated night and day," in violation of statute.—Baker v. U. S., 897.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⇐88(1) (U.S.C.C.A.Ala.) Employee may become third party's employee for special service.—Woodward Iron Co. v. Limbaugh, 1.

(B) Tools, Machinery, Appliances, and Places for Work.

⇐107(8) (U.S.C.C.A.Ala.) Reasonable care required to maintain brake on tramcar.—Woodward Iron Co. v. Limbaugh, 1.

⇐111(1½) (U.S.C.C.A.Ga.) Safety Appliance Act applicable to cars on curve.—Tennessee, A. & G. R. Co. v. Drake, 393.

⇐112(1½) (U.S.C.C.A.Wis.) Coupler required by federal Safety Appliance Act.—Payne v. Colvin, 15.

⇐129(6) (U.S.C.C.A.Ga.) Defective automatic couplers *held* "proximate cause" of injury to brakeman coupling by hand.—Tennessee, A. & G. R. Co. v. Drake, 393.

(C) Methods of Work, Rules, and Orders.

⇐135 (U.S.C.C.A.Mo.) Omission of customary signals negligence.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

⇐137(4) (U.S.D.C.Pa.) Trackwalker's injury by train *held* not actionable.—Davis v. Philadelphia & R. Ry. Co., 187.

⇐137(4) (D.C.) Railroad liable for negligence of employees required to look out for safety of another.—Washington Terminal Co. v. Callahan, 334.

(D) Warning and Instructing Servant.

⇐150(1) (U.S.C.C.A.Mo.) Omission of customary warnings negligence.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

(F) Risks Assumed by Servant.

⇐204(1) (U.S.D.C.Pa.) Assumption of risk defense under federal act.—Davis v. Philadelphia & R. Ry. Co., 187.

⇐216(6) (D.C.) Railroad employee does not ordinarily assume risk of negligence of fellow employees.—Washington Terminal Co. v. Callahan, 334.

⇐217(15) (U.S.C.C.A.Utah) Risk from unguarded electric wire assumed by miner knowing danger.—Bingham Mines Co. v. Bianco, 513.

⇐226(1) (U.S.C.C.A.Tenn.) Risk of unknown obstruction in way not assumed.—Atlantic Ice & Coal Corporation v. Van, 646.

(G) Contributory Negligence of Servant.

⇐235(4) (U.S.C.C.A.Tenn.) Constant lookout not required of employé.—Atlantic Ice & Coal Corporation v. Van, 646.

(H) Actions.

⇐258(10) (U.S.C.C.A.Ariz.) Allegation of negligence unnecessary under state Constitution.—Drazich v. Ray Consol. Copper Co., 801.

⇐258(18) (U.S.C.C.A.Mo.) Complaint *held* to plead locomotive engineer's duty to give signal.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

⇐261(3) (U.S.C.C.A.Ariz.) Allegation negativing contributory negligence necessary.—Drazich v. Ray Consol. Copper Co., 801.

⇐270(10) (U.S.C.C.A.Wis.) Evidence of impracticability of complying with federal Safety Appliance Act irrelevant.—Payne v. Colvin, 15.

⇐276(8) (D.C.) Evidence *held* to sustain finding servant was killed by train while at work on switch.—Washington Terminal Co. v. Callahan, 334.

⇐278(18) (D.C.) Evidence *held* to warrant inference of negligence of fellow employees.—Washington Terminal Co. v. Callahan, 334.

⇐284(2) (U.S.C.C.A.Ala.) Relation of parties *held* question for jury.—Woodward Iron Co. v. Limbaugh, 1.

⇐285(10) (U.S.C.C.A.Ala.) Proximate cause of injuries to mine employee's hand run over by tramcar *held* for jury.—Woodward Iron Co. v. Limbaugh, 1.

⇐286(30) (U.S.C.C.A.Mo.) Custom to give signal before increasing speed of train *held* for jury.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

⇐288(10) (U.S.C.C.A.Ala.) Railroad telegraph operator's assumption of risk of unsanitary office *held* for jury.—Newberry v. Central of Georgia Ry. Co., 337.

⇐289(1) (U.S.C.C.A.Ariz.) Miner's contributory negligence question for jury.—Drazich v. Ray Consol. Copper Co., 801.

MILITARY LAW.

See Army and Navy.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

⇐51(5) (U.S.C.C.A.Cal.) Willful trespasser *held* entitled to no allowances on accounting except for taxes paid.—Big Sespe Oil Co. v. Cochran, 216.

(C) Leases, Licenses, and Contracts.

⇐71 (U.S.C.C.A.Ohio) Right to mine on tract, given by lease contract *held* not exclusive.—Harbison-Walker Refractories Co. v. Portsmouth Refractories Co., 520.

Separate lessees on same tract *held* to have equal rights.—Id.

⇐77 (U.S.C.C.A.Okl.) Cessation of operation, lapse of time, and notice of nonproduction may show abandonment.—Tucker v. Canfield, 385.

Evidence *held* to sustain finding assignee had abandoned lease, when assignors acquired new lease.—Id.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

⇐112(4) (U.S.C.C.A.Alaska) Notice by lessor *held* sufficient to protect property from liens under Alaska statute.—Alaska Homestake Mining Co. v. Krampitz, 82.

MINORS.

See Infants.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

⇐17(1) (U.S.C.C.A.Ill.) Leasing containers for gasoline purchased from lessor for nominal rental *held* not "unfair method of competition."—Sinclair Refining Co. v. Federal Trade Commission, 686.

⇐17(1) (U.S.C.C.A.Ohio) Contracts under which tanks are furnished to purchasers of acetylene gas *held* not in restraint of trade.—Auto Acetylene Light Co. v. Prest-O-Lite Co., 537.

MORTGAGES.

See Chattel Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⇐32(1) (U.S.C.C.A.Tenn.) Contract and deed *held* absolute conveyance.—Dunaway v. Puryear, 209.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐101 (U.S.D.C.N.Y.) Words not treated as useless.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 152.

⇐106 (U.S.D.C.N.Y.) Surrounding circumstances considered.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 152.

(C) Property Mortgaged, and Estates of Parties Therein.

⇐131 (U.S.D.C.N.Y.) Intent of parties as to after-acquired property controls.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 152.

After-acquired property when covered by mortgage.—Id.

Mortgage covering after-acquired property creates equitable lien good against subsequent mortgagee with notice.—Id.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

⇐338 (D.C.) Temporary injunction granted to prevent sale under trust deed of property affected by fraudulent partnership dissolution.—Phillips v. Sager, 625.

MUNICIPAL CORPORATIONS.

See Street Railroads.

NATIONAL BANKS.

See Banks and Banking, ⇐250–257.

NATURALIZATION.

See Aliens, ⇐60–71½.

NEGLIGENCE.

See Master and Servant, ⇐88–289; Railroads, ⇐400.

NEGOTIABLE INSTRUMENTS

See Bills and Notes.

NEW TRIAL.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

⇐70 (U.S.D.C.Mont.) Verdict, not sustained by evidence showing liability of all defendants, set aside.—Gunther v. Home Ins. Co., 575.

(H) Newly Discovered Evidence.

⇐102(1) (U.S.C.C.A.Wis.) Newly discovered rule in railroad's books *held* not ground.—Payne v. Colvin, 15.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NUISANCE.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

⇐3(9) (U.S.C.C.A.Tex.) Scenic railway not nuisance per se.—Burroughs v. City of Dallas, 812.

⇐9 (U.S.D.C.Wyo.) Action maintainable against any joint tort-feasor.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

(C) Abatement and Injunction.

⇐33 (U.S.C.C.A.Tex.) Evidence *held* not to show substantial injury.—Burroughs v. City of Dallas, 812.

OFFICERS.

See Clerks of Courts; District and Prosecuting Attorneys; Public Service Commissions; Receivers; Sheriffs and Constables.

PARENT AND CHILD.

See Infants.

⇐8 (U.S.C.C.A.P.R.) Interests of minors carefully guarded by courts and without it neither parent of infant may sell or incumber property.—Martorell v. Ochoa, 99.

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.

I. PLAINTIFFS.

(A) Persons Who may or must Sue.

⇐7(2) (U.S.D.C.N.Y.) Agent in whose name contract is made may sue thereon as trustee of express trust.—P. N. Gray & Co. v. Cavalliotis, 565.

(B) Joinder.

⇐14 (U.S.D.C.Pa.) On demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both have a remedial interest in the cause of action asserted.—Philadelphia & R. Ry. Co. v. Laurel Coal Mining Co., 1019.

PATENTS.

II. PATENTABILITY.

(A) Invention.

⇐16 (U.S.C.C.A.N.Y.) Mere novelty is not invention.—Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co., 910.

⇐16 (U.S.D.C.Me.) No exact test to determine invention.—New Jersey Zinc Co. v. American Zinc, Lead & Smelting Co., 733.

⇐17 (U.S.C.C.A.Mass.) Test of "invention."—National Safety Lift Co. v. Anderson, 696.

⇐18 (U.S.D.C.Me.) Simplicity of device is not argument against invention.—New Jersey Zinc Co. v. American Zinc, Lead & Smelting Co., 733.

⇐28 (U.S.C.C.A.Cal.) Design patent must disclose invention.—Majestic Electric Development Co. v. Westinghouse Electric & Mfg. Co., 676.

Æsthetic effect is test of validity of design patent.—Id.

⇐35 (U.S.C.C.A.Cal.) Extensive use determinative of invention only in doubtful cases.—Majestic Electric Development Co. v. Westinghouse Electric & Mfg. Co., 676.

⇐36 (U.S.C.C.A.N.Y.) Prior efforts to fill want essential to commercial success as guide to invention.—Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co., 910.

⇐36 (U.S.D.C.Me.) Advance and improvement in art not invention in themselves.—New Jersey Zinc Co. v. American Zinc, Lead & Smelting Co., 733.

(D) Anticipation.

⇐62 (U.S.D.C.Pa.) Oral testimony *held* insufficient to establish prior use.—Pittsburgh Plate Glass Co. v. American Window Glass Co., 197.

⇐66 (U.S.D.C.N.Y.) Where separate patents are secured for process and the product one does not anticipate the other.—General Bakelite Co. v. General Insulate Co., 166.

⇐71 (U.S.C.C.A.Cal.) Rule as to anticipation applies to design patents.—Majestic Electric Development Co. v. Westinghouse Electric & Mfg. Co., 676.

III. PERSONS ENTITLED TO PATENTS.

⇐91(3) (D.C.) Evidence *held* to show that junior applicant made disclosure prior to senior.—Wahl v. Wright, 455.

Completion of machine *held* to establish diligence for required time.—Id.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

⇐109 (U.S.D.C.N.Y.) Substituted claims *held* within specification and not requiring supplemental oath.—Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 834.

⇐112(3) (U.S.C.C.A.Cal.) Later patent presumed for different invention from that of earlier patent.—Western Well Works v. Layne & Bowler Corporation, 465.

⇐112(3) (U.S.D.C.Pa.) Patent Office decisions reinforce presumption of validity.—Pittsburgh Plate Glass Co. v. American Window Glass Co., 197.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

⇐120 (U.S.D.C.N.Y.) Separate patents may be secured for process and the product.—General Bakelite Co. v. General Insulate Co., 166.

⇐120 (U.S.D.C.Pa.) Essentials of double patenting stated.—Pittsburgh Plate Glass Co. v. American Window Glass Co., 197.

VII. REISSUES.

⇐136 (U.S.C.C.A.Ohio) "Inadvertence" which authorizes reissue.—Van Kannel Revolving Door Co. v. Winton Hotel Co., 234.

⇐141 (U.S.C.C.A.Ohio) Whether reissue is for same invention not determined by claims of original patent.—Van Kannel Revolving Door Co. v. Winton Hotel Co., 234.

Claims may be either narrowed or broadened by reissue.—Id.

⇐144 (U.S.C.C.A.Ohio) Inadvertence authorizing reissue question primarily for Commissioner.—Van Kannel Revolving Door Co. v. Winton Hotel Co., 234.

⇐147 (U.S.C.C.A.Ohio) Invalidity of claims in reissue does not invalidate other claims.—Van Kannel Revolving Door Co. v. Winton Hotel Co., 234.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

⇐157(1) (U.S.D.C.N.Y.) "Flat" used in patent claims broadly construed.—Imperial Machine & Foundry Corporation v. American Machinery Co., 436.

⇐157(2) (U.S.D.C.N.Y.) Claims construed narrowly to give validity.—General Bakelite Co. v. General Insulate Co., 166.

⇐160 (U.S.D.C.N.Y.) File wrapper may be resorted to.—General Bakelite Co. v. General Insulate Co., 166.

(B) Limitation of Claims.

⇐165 (U.S.C.C.A.Cal.) Patentee limited by claims.—Western Well Works v. Layne & Bowler Corporation, 465.

⇐165 (U.S.C.C.A.Mo.) Claims are measure of right to relief.—Royal Co. v. Tweedie, 351.

Patent is disclaimer as to anything shown and not claimed.—Id.

⇐165 (U.S.D.C.N.Y.) No broader than claims.—General Bakelite Co. v. General Insulate Co., 166.

⇐167(1) (U.S.C.C.A.Neb.) Claims to be construed with specification and drawings.—Hudson Mfg. Co. v. Louden Machinery Co., 527.

⇐167(1) (U.S.D.C.N.Y.) Claims limited by disclosure.—General Bakelite Co. v. General Insulate Co., 166.

⇐167(1) (U.S.D.C.Tex.) Claims must be limited by specifications and drawings.—Murray v. Hodo, 740.

⇐167(2) (U.S.C.C.A.Mo.) Claims to be construed in light of specification.—Royal Co. v. Tweedie, 351.

⇐168(1) (U.S.D.C.N.Y.) Procedure in Patent Office may limit claims.—General Bakelite Co. v. General Insulate Co., 166.

⇐168(2) (U.S.C.C.A.Mo.) Claims narrowed in Patent Office cannot be expanded to cover what was rejected.—Royal Co. v. Tweedie, 351.

⇐168(2) (U.S.D.C.N.Y.) To determine state of art, disallowed claims may be looked to.—General Bakelite Co. v. General Insulate Co., 166.

⇐170 (U.S.D.C.N.Y.) Claims limited by prior art.—General Bakelite Co. v. General Insulate Co., 166.

⇐174 (U.S.D.C.Tex.) Claims for improvements not broadly construed.—Murray v. Hodo, 740.

⇐178 (U.S.D.C.N.Y.) Description of preferred construction not limitation.—Weser Bros. v. Paul, 747.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights of Patentees in General.

⇐182 (U.S.C.C.A.Ill.) Natural and statutory right of inventor are separate and independent.—Nye Tool & Machine Works v. Crown Die & Tool Co., 376.

(B) Assignments and Other Transfers.

⇐193 (U.S.C.C.A.Ill.) Right of action against single infringer assignable.—Nye Tool & Machine Works v. Crown Die & Tool Co., 376.

(C) Licenses and Contracts.

⇐206 (U.S.C.C.A.Pa.) Contract *held* a license, and not an assignment.—Russell v. Boston Card Index Co., 4.

Grant of anything short of the entire monopoly is a license.—Id.

⇐214 (U.S.C.C.A.Pa.) Contract for license may be forfeitable.—Russell v. Boston Card Index Co., 4.

⇐216 (U.S.C.C.A.Ohio) Seller of machines liable under contract for expense of defending infringement suit against purchaser.—Macneale v. Lalance & Grosjean Mfg. Co., 491.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⇐237 (U.S.C.C.A.Ohio) Structure may infringe patents for broad device and for improvements thereon.—Van Kannel Revolving Door Co. v. Winton Hotel Co., 234.

⇐246 (U.S.C.C.A.Cal.) One element of combination patent may be infringed.—Western Well Works v. Layne & Bowler Corporation, 465.

⇐259 (U.S.C.C.A.Mo.) Sale of single part for use in unpatented apparatus for carrying out patented process not contributory infringement.—Miller v. Electro Bleaching Gas Co., 379.

(C) Suits in Equity.

⇐280 (U.S.C.C.A.Ill.) Damages for infringement recoverable in suit in equity for injunction.—Nye Tool & Machine Works v. Crown Die & Tool Co., 376.

⇐287 (U.S.D.C.N.Y.) Successor of defendant purchasing its assets and assuming its debts pending accounting for infringement of patent could be joined as defendant.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⇐287 (U.S.D.C.N.Y.) Successor of defendant pending accounting for infringement of patent liable notwithstanding denial of obligation.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 613.

⇐289 (U.S.D.C.N.Y.) Patentee *held* not estopped from maintaining suit for infringement.—Imperial Machine & Foundry Corporation v. American Machinery Co., 436.

⇐290 (U.S.D.C.N.Y.) Successor of defendant purchasing its assets and assuming its debts pending accounting for infringement of patent could be joined as defendant.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⇐298 (U.S.C.C.A.Pa.) Relative injury and obvious infringement considered in temporary injunction ruling.—Rousso v. Barber, 552.

⇐301(6) (U.S.C.C.A.Pa.) Relative injury and obvious infringement considered in temporary injunction ruling.—Rousso v. Barber, 552.

⇐303 (U.S.C.C.A.Pa.) Discretion in ruling on application for preliminary injunction is judicial.—Rousso v. Barber, 552.

Refusal of temporary injunction *held* not abuse of discretion.—Id.

Judge need not decide issue between patents on application for preliminary injunction.—Id.

⇐312(1) (U.S.D.C.N.Y.) Defendant infringers have burden of showing separable profits.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⇐314 (U.S.D.C.Md.) Petition to reopen case in infringement suit denied.—W. W. Sly Mfg. Co. v. Pangborn Corporation, 971.

⇐318(3) (U.S.D.C.N.Y.) Rule of recovery for process infringement stated.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

Patented processes, not available to defendants, where not proper standard of comparison to ascertain defendant's profits.—Id.

Substitute process, not complete prior to date of infringement, not available standard of comparison to ascertain profits.—Id.

Accounting limited to the precise advantage derived.—Id.

Increased value of product dependent on process infringement *held* profits to be accounted for.—Id.

⇐318(5) (U.S.D.C.N.Y.) Interest allowed from date of decree awarding profits.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⇐318(6) (U.S.D.C.Md.) Defendant *held* not entitled to interest on capital invested in manufacture of infringing articles.—W. W. Sly Mfg. Co. v. Pangborn Corporation, 971.

Credit allowance to infringer for excess profit taxes paid.—Id.

⇐318(6) (U.S.D.C.N.Y.) Deduction from infringement profits of extra payments to officers not allowed.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

Deduction from infringement profits of legal and reorganization expenses not allowed.—Id.

Apportioning general expenses measurably discretionary.—Id.

Interest on capital invested to be deducted from profits.—Id.

⇐319(1) (U.S.D.C.N.Y.) Rule for recovery for infringement stated.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

⊂=319(3) **(U.S.D.C.N.Y.)** Damages in addition to ascertained net profits awarded in proper case, and punitive damages in court's discretion.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 600.

Infringement *held* not willful and wanton.—Id.

⊂=327 **(U.S.D.C.N.Y.)** Prior decree *held* not to render construction of patent claims res judicata.—Imperial Machine & Foundry Corporation v. American Machinery Co., 436.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

⊂=328. UNITED STATES.

DESIGN.

51,043. Electric heater, held not infringed, 276 F. 676.

51,253. Electric heater, held void, 276 F. 676.

ORIGINAL.

809,582. Vegetable peeling machine, claims 1, 2, 3, and 4, held infringed, 276 F. 436.

821,653. Well mechanism, claims 9, 13, and 20, held valid, but not infringed, 276 F. 465.

834,165. Glass drawing and shaping machine, held void, 276 F. 193, 849.

849,357. Passenger elevator, held void, 276 F. 696.

883,759. Nonrotating wire rope, held not infringed, 276 F. 286.

923,225. Player piano, held not anticipated and valid; claims 1, 2, 4, 5, and 26, held infringed, 276 F. 747.

931,815. Ore-roasting furnace, held not to disclose invention, 276 F. 733.

939,966. Method of making synthetic gums or resins, claims 1, 2, and 3, held valid and infringed, 276 F. 166.

942,699. Method of making synthetic gums or resins, claims 1, 2, and 4, held valid and infringed, 276 F. 166.

942,852. Method of making synthetic gums or resins, claims 5 and 6, held valid and infringed, 276 F. 166.

953,161. Nonrotating wire rope, held valid, but not infringed, 276 F. 286.

990,827. Cattle stanchions, claims 1, 2, and 3, held valid and infringed, 276 F. 527.

1,050,102. Method of manufacturing piston rings, held not infringed, 276 F. 357.

1,052,164. Boiler tube cleaner, held valid, and not infringed, 276 F. 274.

1,086,204. Cotton gin, claim 80, held not infringed, 276 F. 740.

1,153,977. Boot-top, held not infringed, 276 F. 351.

1,193,344. Cutting mechanism for casting machine, claim 13, held not infringed, 276 F. 921.

1,193,388. Cutting mechanism for casting machine, claims 32 and 38, held not infringed, 276 F. 921.

1,208,851. Method of drawing glass cylinders, claims 1–4, held valid, but not infringed, 276 F. 197; held not infringed, 276 F. 849.

1,222,415. Machine for making type-metal elements for printing forms, claims 1 and 2, held not infringed, 276 F. 921.

1,237,058. Process for making type-metal elements for printing forms, held not infringed, 276 F. 921.

1,245,084. Electric heater, held not infringed, 276 F. 682.

1,254,764. Method of delineating or reproducing pictures and designs, held not anticipated, valid, and infringed, 276 F. 260.

1,305,855. Chip receptacle for pencil sharpener, claims 1–4, held to lack invention, 276 F. 910.

1,340,423. Parachute claims 1, 4, 6, 10, and 13, held valid and infringed, 276 F. 834.

REISSUED.

14,255. Revolving door, claims 3, 23 and 24, held valid and infringed; claims 1, 2, 13, and 22, held void, 276 F. 234.

14,644. Method of manufacturing piston rings, held not infringed, 276 F. 357.

14,648. Charcoal burner, claims 5, 7, 8, and 9, held not infringed, 276 F. 93.

PAYMENT.

See Subrogation.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

⊂=19(2) **(U.S.C.C.A.Ill.)** Indictment *held* sufficient.—Venlinio v. U. S., 12.

⊂=32(8) **(U.S.C.C.A.Ill.)** Evidence *held* competent.—Venlinio v. U. S., 12.

⊂=32(8) **(U.S.C.C.A.Or.)** Signed admission competent evidence.—Hauge v. U. S., 111.

⊂=37(3) **(U.S.C.C.A.Ill.)** Instructions *held* to indicate degree of proof required—Venlinio v. U. S., 12.

PLEADING.

See Equity, ⊂=150.

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.

⊂=8(8) **(U.S.D.C.N.Y.)** Successor of defendant pending accounting for infringement of patent liable notwithstanding denial of obligation.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 613.

V. DEMURRER OR EXCEPTION.

⊂=193(8) **(U.S.D.C.Md.)** Declaration not bad because asking more than that to which pleader was entitled.—Dugan v. Miles, 401.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⊂=268 **(U.S.D.C.Pa.)** Affidavit of defense, though not indorsed, *held* to entitle defendant to reinstatement after discontinuance.—Ohio Savings & Trust Co. v. Harman, 759.

XI. MOTIONS.

⇐348 (U.S.D.C.Pa.) Affidavit of defense *held* sufficient against motion for judgment.—Rockford Republic Furniture Co. v. Thomas J. William Co., 828.

PLEDGES.

⇐2 (U.S.D.C.Pa.) Local laws govern.—In re Thompson, 313.

⇐25 (U.S.D.C.Del.) Lien dependent on possession.—In re New York & Baltimore Inland Transp. Co., 145.

⇐56(1) (U.S.D.C.Pa.) Pledgee cannot sacrifice property to injury of creditors of pledgor.—In re Thompson, 313.

⇐56(5) (U.S.D.C.Pa.) Pledgee, selling property, must comply strictly with terms of contract.—In re Thompson, 313.

Public sale contemplates competitive bidding.—Id.

⇐56(6) (U.S.D.C.Pa.) Authority of pledgee to become purchaser to be in plain terms.—In re Thompson, 313.

POISONS.

⇐9 (U.S.C.C.A.Cal.) Conviction for violation of Harrison Narcotic Act *held* based on sufficient indictments and supported by evidence.—Camou v. U. S., 120.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers.

I. THE RELATION.

(A) Creation and Existence.

⇐23(1) (U.S.C.C.A.N.M.) Agency cannot be established by declarations of alleged agent.—Deming Ladies' Hospital Ass'n v. Price, 668.

PROCESS.

II. SERVICE.

(D) Privileges and Exemptions.

⇐118 (U.S.D.C.Or.) Persons in attendance on court exempt from service of process.—Bramwell v. Owen, 36.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⇐164(4) (U.S.D.C.Me.) Return and amendment *held* to show service by deputy marshal.—Doherty v. McDowell, 728.

PROMISSORY NOTES.

See Bills and Notes.

PUBLIC LANDS.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

⇐29 (D.C.) Entry after relinquishment not permitted on lands withdrawn for reclamation construction.—U. S. v. Fall, 622.

⇐35(1) (D.C.) Restoration to entry does not validate previous void entry.—U. S. v. Fall, 622.

⇐40 (D.C.) Entry on reclamation lands after relinquishment not limited to purchasers of relinquishments.—U. S. v. Fall, 622.

(H) Grants in Aid of Railroads.

⇐75 (U.S.C.C.A.Cal.) Land occupied by Indians not embraced in railroad grant, "otherwise disposed of."—Cramer v. U. S., 78.

PUBLIC SERVICE COMMISSIONS.

⇐17 (D.C.) Increase in cost due to war should be considered in fixing value.—Potomac Electric Power Co. v. Public Utilities Commission of District of Columbia, 327.

Utility entitled to fair return on value at time of use.—Id.

⇐25 (D.C.) Court exercises independent judgment as to law and facts.—Potomac Electric Power Co. v. Public Utilities Commission of District of Columbia, 327.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Gas; Railroads; Street Railroads; Telegraphs and Telephones.

RAILROADS.

See Street Railroads.

I. CONTROL AND REGULATION IN GENERAL.

⇐5½ [New, vol. 6A Key-No. Series] (U.S.D.C.Fla.) Director General not suable for malicious prosecution.—Dougherty v. Payne, 451.

⇐5½ [New, vol. 6A Key- No. Series] (U.S.D.C.Pa.) Federal agent proper party to sue on claim accruing to government during federal control.—Philadelphia & R. Ry. Co. v. Laurel Coal Mining Co., 1019.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

⇐72(9) (U.S.C.C.A.Ga.) Measure of damages for breach of contract for water openings in embankment stated.—Clarke v. Aiken, 21.

X. OPERATION.

(G) Injuries to Persons on or near Tracks.

⇐400(1) (U.S.C.C.A.Neb.) Negligence and contributory negligence *held* questions for jury on evidence as to injury to soldier guarding bridge.—Wineinger v. Union Pac. R. Co., 65.

RECEIVERS.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⇐40 (U.S.D.C.Del.) Decision on merits not necessary to appointment pendente lite.—Hanssen v. Pusey & Jones Co., 296.

REMOVAL OF CAUSES.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

⇐79(1) (U.S.D.C.Or.) Time for filing petition for removal runs from valid service of summons.—Bramwell v. Owen, 36.

May be granted during pendency of motion to quash service of summons.—Id.

⇐79(2) (U.S.D.C.Or.) Not permitted on defendant's petition filed after expiration of time to plead.—Bramwell v. Owen, 36.

Defendant not required to plead or answer as a condition to removal.—Id.

VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

⇐114 (U.S.D.C.Or.) State court's order overruling motion to quash not res judicata as to validity of service in federal court.—Bramwell v. Owen, 36.

⇐118 (U.S.C.C.A.Ala.) That if made in state court it would have prevented removal not ground for refusing amendment.—Newberry v. Central of Georgia Ry. Co., 337.

REVIEW.

See Appeal and Error.

RIPARIAN RIGHTS.

See Waters and Water Courses, ⇐76, 77.

RISKS.

See Master and Servant, ⇐204–226.

ROADS.

See Highways.

RULES OF COURT.

See Court Rules Cited.

SALES.

I. REQUISITES AND VALIDITY OF CONTRACT.

⇐4(2) (U.S.C.C.A.Ohio) Contracts for sale of acetylene gas in tanks *held* to retain title to the tanks in the seller.—Auto Acetylene Light Co. v. Prest-O-Lite Co., 537.

⇐53(1) (U.S.C.C.A.Ohio) Whether defendant ordered shipments of coal as purchaser or as agent for seller *held* question for jury.—Sloat-Darragh Co. v. General Coal Co., 502.

II. CONSTRUCTION OF CONTRACT.

⇐71(4) (U.S.C.C.A.Colo.) Contract *held* to be for sale and purchase of entire product of coal mine during its term.—Rocky Mountain Fuel Co. v. Consolidated Coal & Coke Co., 661.

⇐83 (U.S.D.C.N.Y.) Seller *held* to have right to substitute vessel under contract for delivery of sugar.—Matthew Smith Tea, Coffee & Grocery Co. v. Lamborn & Co., 325.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

⇐172 (U.S.D.C.N.Y.) Embargo by foreign government does not excuse nonperformance of contract.—P. N. Gray & Co. v. Cavalliotis, 565.

Government embargo *held* not to relieve party from performance of contract.—Id.

⇐176(1) (U.S.C.C.A.Colo.) Seller *held* not to have waived right to sue for breach of contract.—Rocky Mountain Fuel Co. v. Consolidated Coal & Coke Co., 661.

VI. WARRANTIES.

⇐288(4) (U.S.C.C.A.Ga.) Failure to give notice of objection to machinery within time required by contract *held* acceptance.—South Atlantic Packing & Provision Co. v. York Mfg. Co., 509.

SALVAGE.

I. RIGHT TO COMPENSATION.

⇐7 (U.S.D.C.Va.) Service rendered to disabled vessel *held* salvage service.—The Manchester Brigade, 410.

⇐13 (U.S.C.C.A.Cal.) Towing steamship vessel into port *held* salvage service of low order.—U. S. v. Nelson, 706.

⇐15 (U.S.D.C.Va.) Dismissal before completion of service does not defeat right to salvage award.—The Manchester Brigade, 410.

II. AMOUNT AND APPORTIONMENT.

⇐26 (U.S.D.C.Va.) Lessening of danger of loss of ship by reason of wireless should be considered in awarding salvage.—The Manchester Brigade, 410.

⇐27 (U.S.D.C.Va.) Service rendered to disabled vessel *held* to merit one-fourth of amount to which the completed service would have entitled salvor.—The Manchester Brigade, 410.

⇐34 (U.S.C.C.A.Cal.) Award for salvage service sustained.—U. S. v. Nelson, 706.

SEAMEN.

⇐29(3) (U.S.C.C.A.Cal.) Failure to use trip line not attributable to ship.—The Frank D. Stout, 382.

Ship not liable for negligence of mate or winchman.—Id.

⇐29(5) (U.S.C.C.A.Cal.) No recovery on ground of negligence not pleaded.—The Frank D. Stout, 382.

Finding that owners were not negligent in using wire sling sustained.—Id.

⇐33 (U.S.D.C.Cal.) Not entitled to recover penalty for nonpayment of wages from fund belonging to mortgagee.—The Moshulu, 35.

SEARCHES AND SEIZURES.

⇐7 (U.S.C.C.A.Cal.) Seizure by police officers called for disturbance of peace not violation of federal Constitution.—Herine v. U. S., 806.

SENTENCE.

See Criminal Law, ⇐980.

SHERIFFS AND CONSTABLES.

IV. LIABILITIES ON OFFICIAL BONDS.

⇐171 (U.S.C.C.A.Ark.) Evidence as to attachment of plaintiff's property *held* for the jury.—Leavenworth v. Bank of Gillett, 24.

SHIPPING.

See Salvage.

III. CHARTERS.

⇐39 (U.S.D.C.N.Y.) Performance of arbitration agreement is not condition precedent to libel.—Atlantic Fruit Co. v. Red Cross Line, 319.

STATUTES CONSTRUED.

SPAIN.

CIVIL CODE.

LAW OF CIVIL PROCEDURE.

UNITED STATES.

CONSTITUTION.

BANKRUPTCY ACT.

Act 1898, July 1, ch. 541, 30 Stat. 544.

CRIMINAL CODE.

See Penal Code.

JUDICIAL CODE.

Act 1911, March 3, ch. 231, 36 Stat. 1087.

PENAL CODE.

Act 1909, March 4, ch. 321, 35 Stat. 1088.

STATUTES AT LARGE.

JOINT RESOLUTIONS.

REVISED STATUTES.

COMPILED STATUTES 1916 or 1918.

COMPILED STATUTES 1918.

OREGON.

OLSON'S OREGON LAWS.

§ 6005 958
§ 7831 755

LAWS.

1917, p. 447 958
1917, p. 454, art. 2, § 9. Amended by Laws 1919, p. 260 958
1917, p. 588, § 2 958
1917, p. 614, § 3 958
1919, p. 260 959

PENNSYLVANIA.

PENNSYLVANIA STATUTES 1920.

§§ 17194, 17195 759

LAWS.

1915, p. 483, §§ 14, 15 759

PORTO RICO.

CIVIL CODE.

§ 229 105
§ 1858 99

CODE OF CIVIL PROCEDURE.

§§ 76, 77 105

WASHINGTON.

REMINGTON & BALLINGER'S CODE.

§ 3679 68

STREET RAILROADS.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⇐52 (U.S.D.C.Va.) Bondholder *held* entitled to follow diverted funds.—Bowling Green Trust Co. v. Virginia Passenger & Power Co., 965.

SUBROGATION.

⇐7(1) (U.S.C.C.A.Ohio) Guarantor paying debt of another may maintain action at law thereon.—Sloat-Darragh Co. v. General Coal Co., 502.

⇐23(7) (U.S.D.C.Me.) One paying vessel's bills becomes subrogated to claims.—The Snetind, 139.

⇐41(4) (U.S.C.C.A.Ohio) Guarantor paying debt of another may maintain in its own name action at law thereon.—Sloat-Darragh Co. v. General Coal Co., 502.

TARIFF.

See Customs Duties.

TAXATION.

See Customs Duties; Internal Revenue.

TELEGRAPHS AND TELEPHONES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⇐10(2) (U.S.D.C.Or.) Congressional grant of right to construct inapplicable to combined telegraph and telephone line.—Postal Telegraph Co. v. State Highway Commission, 958.

Authorized to construct lines under state laws, subject to supervision of highway commission.—Id.

⇐10(11) (U.S.D.C.Or.) Commission cannot arbitrarily deny use of state highways.—Postal Telegraph Co. v. State Highway Commission, 958.

Refusal to allow construction injuring scenic beauty of highway not arbitrary.—Id.

Evidence *held* to show highway commission's requirement as to construction not unreasonable.—Id.

Findings of Public Service Commission not binding on highway commission.—Id.

TERRITORIES.

⇐20 (U.S.C.C.A.P.R.) Porto Rico has power to reject provisions of Spanish Civil Code.—Agenjo v. Agenjo, 105.

TORTS.

See Collision; False Imprisonment, ⇐5–25; Fraud, ⇐3–58; Libel and Slander, ⇐19–51; Nuisance, ⇐3–33; Trover and Conversion.

TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

⇐18 (U.S.D.C.Ill.) "Coca-Cola" valid trade-mark.—Coca-Cola Co. v. Stevenson, 1010.

II. TITLE, CONVEYANCES, AND CONTRACTS.

⇐34 (U.S.C.C.A.Wis.) Assignment *held* to transfer business as well as good will.—Gehl v. Hebe Co., 271.

III. REGISTRATION, REGULATION, AND OFFENSES.

⇐41 (U.S.D.C.Ill.) Trade-mark rights not limited by state statute.—Coca-Cola Co. v. Stevenson, 1010.

⇐42 (U.S.D.C.Ill.) State statutes are in affirmance of common-law rights.—Coca-Cola Co. v. Stevenson, 1010.

⇐45 (U.S.D.C.Ill.) Registration under state statute confers no exclusive rights.—Coca-Cola Co. v. Stevenson, 1010.

⇐45 (U.S.D.C.N.Y.) Trade-mark cannot be given validity by classification in Patent Office.—Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co., 447.

⇐45½ [New, vol. 7A Key-No. Series] (U.S.D.C.Ill.) Owner entitled to cancellation of fraudulent registration of infringing trade-marks.—Coca-Cola Co. v. Stevenson, 1010.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

⇐55 (U.S.C.C.A.Wis.) Good faith in selecting infringing trade-name no bar to relief.—Gehl v. Hebe Co., 271.

⇐59(5) (U.S.C.C.A.Wis.) "Meje" *held* infringement of "Hebe."—Gehl v. Hebe Co., 271.

⇐61 (U.S.D.C.N.Y.) Trade-mark for self-playing musical instruments *held* to extend to

phonographs in preparation for the market.—Wilcox & White Co. v. Leiser, 445.

(B) What Competition Unlawful.

⚖70(3) **(U.S.D.C.Ill.)** "Coca-Cola" *held* infringed.—Coca-Cola Co. v. Stevenson, 1010.

⚖71 **(U.S.D.C.N.Y.)** "Hudson," as applied to tires, *held* to have obtained secondary meaning referable to merchandise.—Hudson Tire Co. v. Hudson Tire & Rubber Corporation, 59.

⚖71 **(U.S.D.C.N.Y.)** Unfair competition by use of name on articles of similar general characteristics.—Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co., 447.

(C) Actions.

⚖79 **(U.S.D.C.Ill.)** Equity has jurisdiction to grant appropriate relief against infringement.—Coca-Cola Co. v. Stevenson, 1010.

⚖80½ **[New, vol. 8A Key-No. Series]** **(U.S.C.C.A.Ill.)** Leasing containers for gasoline purchased from lessor for nominal rental *held* not "unfair method of competition."—Sinclair Refining Co. v. Federal Trade Commission, 686.

⚖93(1) **(U.S.C.C.A.Wis.)** Proof of confusion of customers unnecessary where names suggest it.—Gehl v. Hebe Co., 271.

⚖95(1) **(U.S.D.C.Del.)** Temporary restraint of use of family name not granted on conflicting affidavits.—Kelly-Springfield Tire Co. v. Kelley Tire & Rubber Co., 826.

⚖98 **(U.S.C.C.A.Wis.)** Good faith in selection of infringing trade-name does not affect actual damage.—Gehl v. Hebe Co., 271.

⚖100 **(U.S.C.C.A.Wis.)** Reference decree *held* to leave open liability for infringement.—Gehl v. Hebe Co., 271.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Angelus."—Wilcox & White Co. v. Leiser (D. C. N. Y.) 276 F. 445.

"Coca-Cola."—Coca-Cola Co. v. Stevenson (D. C. Ill.) 276 F. 1010.

"Hebe."—Gehl v. Hebe Co. (C. C. A. Wis.) 276 F. 271.

"Hudson."—Hudson Tire Co. v. Hudson Tire & Rubber Corporation (D. C. N. Y.) 276 F. 59.

"Meje."—Gehl v. Hebe Co. (C. C. A. Wis.) 276 F. 271.

"Wearever."—Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co. (D. C. N. Y.) 276 F. 447.

TREATIES.

⚖2 **(U.S.D.C.Ga.)** Migratory bird treaty not beyond treaty-making powers, though there be doubt whether birds included have migrated.—U. S. v. Lumpkin, 580.

TRIAL.

See Costs; Criminal Law, ⚖619–878; 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.

II. DOCKETS, LISTS, AND CALENDARS.

⚖11(3) **(D.C.)** Where plaintiff might have remedy at law, he can transfer to law side.—Roberson v. Gordon, 638.

IV. RECEPTION OF EVIDENCE.

(B) Order of Proof, Rebuttal, and Reopening Case.

⚖59(2) **(U.S.C.C.A.Ohio)** Order of proof is within discretion of court.—Sloat-Darragh Co. v. General Coal Co., 502.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚖139(1) **(U.S.C.C.A.Okl.)** Scintilla of evidence not enough to take case to jury.—Interstate Compress Co. v. Agnew, 882.

⚖139(1) **(U.S.C.C.A.Tenn.)** Direction of verdict authorized only when evidence would not sustain opposite verdict.—Atlantic Ice & Coal Corporation v. Van, 646.

VII. INSTRUCTIONS TO JURY.

(D) Applicability to Pleadings and Evidence.

⚖253(4) **(U.S.C.C.A.Tex.)** Instructions which fail to submit material issues erroneous.—Pierce Oil Corporation v. Yoes, 549.

(E) Requests or Prayers.

⚖260(8) **(U.S.C.C.A.Mo.)** Refusal of instructions on railroad's negligence *held* not error in view of other instructions.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

(G) Construction and Operation.

⚖296(4,5) **(U.S.C.C.A.Mo.)** Instruction not erroneous as practically eliminating defenses in view of other instructions.—St. Louis & S. F. Ry. Co. v. Jeffries, 73.

TROVER AND CONVERSION.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

⚖11 **(U.S.C.C.A.Tex.)** Refusal of purchasers of lessees to deliver oil owned by lessor *held* a conversion.—Southern Oil Corporation v. Waggoner, 487.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Monopolies, ⚖17.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names and Unfair Competition, ⚖55–100.

UNITED STATES.

See Army and Navy; Territories; Treaties.

VENDOR AND PURCHASER.

See Sales.

VERDICT.

See Criminal Law, ⚖878.

WAR.

⚖10(1) **(U.S.D.C.Ohio)** Contract not invalid by reason of declaration of war.—Springer v. Garvan, 595.

⚖12 **(U.S.D.C.N.Y.)** Court has jurisdiction to compel transfer of corporate stock issued to alien enemy to Alien Property Custodian.—Garvan v. Certain Shares of International Agr. Corporation in the Name of Winter and von Metzsch, 206.

⚖12 **(U.S.D.C.N.Y.)** Alien Property Custodian may recover property determined by him to belong to alien enemy.—Miller v. Rouse, 715.

A demand by the Alien Proper Custodian for a legacy as due to an alien enemy only substitutes him in place of the legatee.—Id.

⚖12 **(U. S. D. C. Ohio)** Unliquidated claim against alien enemy not a "debt" within the Trading with the Enemy Act.—W. S. Tyler Co. v. Deutsche Dampfschifffahrts Gesellschaft Hansa, Bremen, Germany, 134.

⚖12 **(U.S.D.C.Ohio)** Debts enforceable against assets of alien enemy.—Springer v. Garvan, 595.

Debt arising from performance of contract with alien enemy after passage of Trading with Enemy Act not enforceable against assets.—Id.

⚖14 **(U.S.C.C.A.N.J.)** Market price, notwithstanding abnormal conditions, *held* "just compensation" for coal requisitioned.—U. S. v. New River Collieries Co., 690.

⚖29 **(U.S.D.C.N.Y.)** Sale of seized vessel under Merchant Marine Act *held* to cut off prior lien; Merchant Marine Act *held* valid.—The Nyanza, 415.

⚖33 **(U.S.C.C.A.Minn.)** Prosecution for violation of Espionage Act not abated by termination of hostilities.—Bentall v. U. S., 121.

⚖33 **(U.S.D.C.N.Y.)** Demand for property by Alien Property Custodian served after declaration of peace *held* ineffective.—Miller v. Rouse, 715.

WATERS AND WATER COURSES.

II. NATURAL WATER COURSES.

(C) Pollution.

⚖76 **(U.S.D.C.Wyo.)** Measure of damage for injury to land by oil escaping into stream depends upon individual case.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

Measure of damages for injury to pasture land by oil *held* rental value.—Id.

⚖77 **(U.S.D.C.Wyo.)** Evidence *held* admissible to determine proper measure of damages.—Sussex Land & Live Stock Co. v. Midwest Refining Co., 932.

Evidence as to damage to defendants from issuance of injunction *held* proper.—Id.

VI. APPROPRIATION AND PRESCRIPTION.

⚖130 **(U.S.D.C.Idaho)** Water escaping from irrigation system not subject to appropriation by another.—U. S. v. Haga, 41.

Statute regulating use applies only to public waters.—Id.

Government project *held* entitled to so much of its wastage water as could be identified in a creek.—Id.

⚖143 **(U.S.D.C.Idaho)** Appropriator who has applied water to irrigation is entitled to wastage.—U. S. v. Haga, 41.

⚖151 **(U.S.D.C.Idaho)** Appropriator who has applied water to irrigation is entitled to wastage, so long as not abandoned.—U. S. v. Haga, 41.

⚖152(2) **(U.S.D.C.Idaho)** Appropriator from stream can object to diversion from tributary only when actually injured.—U. S. v. Haga, 41.

WILLS.

See Descent and Distribution.

IV. REQUISITES AND VALIDITY.

(C) Execution.

⚖111(2) **(U.S.C.C.A.Idaho)** Instrument *held* inadmissible as testamentary disposition.—Diamond v. Connolly, 87.

VI. CONSTRUCTION.

(I) Actions to Construe Wills.

⚖697(1) **(D.C.)** Bill to construe not maintainable by person claiming no interest.—Kellogg v. Winchell, 463.

WITNESSES.

See Evidence.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

⚖29 **(U.S.D.C.N.Y.)** Nonresident, subpœnaed in district, allowed mileage only from place where temporarily sojourning.—Crittenden v. Barkin, 978.

III. EXAMINATION.

(A) Taking Testimony in General.

⚖255(4) **(D.C.)** Can refresh recollection by letter of another used in conversation with accused.—McHenry v. U. S., 761.

(C) Privilege of Witness.

⚖293 **(U.S.C.C.A.N.Y.)** Statute creating presumption as to possession of goods, not explained, does not compel defendant to testify.—Friedman v. U. S., 792.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(E) Contradiction and Corroboration of Witness.

⚖406 **(U.S.C.C.A.Utah)** Time book and report showing decedent's employment on stated date *held* admissible in contradiction.—Bingham Mines Co. v. Bianco, 513.

WORDS AND PHRASES.

"Act of bankruptcy."—Missouri Valley Cattle Loan Co. v. Alexander (U. S. C. C. A. Neb.) 266; In re France Foundry & Machine Co. (U. S. D. C. Mich.) 757.

"Broker."—Cothran & Connally v. U. S. (U. S. D. C. Va.) 48.

"Business agent."—Walton N. Moore Dry Goods Co. v. Commercial Industrial Co. (U. S. D. C. Cal.) 590.

"Certified copy."—Doherty v. McDowell (U. S. D. C. Me.) 728.
"Chattel."—Vidal v. South American Securities Co. (U. S. C. C. A. N. Y.) 855.
"Civil commotion."—The Poznan (U. S. D. C. N. Y.) 418.
"Claim."—Vidal v. South American Securities Co. (U. S. C. C. A. N. Y.) 855.
"Continuously operated night and day."—Baker v. U. S. (U. S. C. C. A. Tex.) 897.
"Debt."—W. S. Tyler Co. v. Deutsche Dampfschifffahrts Gesellschaft Hansa, Bremen, Germany (U.S.D.C.Ohio) 134.
"Demand."—Miller v. Rouse (U. S. D. C. N. Y.) 715.
"Disturbance."—The Poznan (U. S. D. C. N. Y.) 418.
"Doing business."—Walton N. Moore Dry Goods Co. v. Commercial Industrial Co. (U. S. D. C. Cal.) 590.
"Draftsmen."—Ex parte Aird (U. S. D. C. Pa.) 954.
"False imprisonment."—Meints v. Huntington (U. S. C. C. A. Minn.) 245.
"Final decree."—U. S. v. Bighorn Sheep Co. (U. S. C. C. A. Wyo.) 710.
"Fixture."—Big Sespe Oil Co. v. Cochran (U. S. C. C. A. Cal.) 216.
"Flat."—Imperial Machine & Foundry Corporation v. American Machinery Co. (U. S. D. C. N. Y.) 436.
"Fraud."—Davis v. Wilson (U. S. C. C. A. N. M.) 672.
"Furnished."—Trope v. U. S. (U. S. C. C. A. Okl.) 348.
"Fusion."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Germination."—Whitehurst v. D. M. Ferry & Co. (U. S. C. C. A. Okl.) 18.
"Gross negligence."—Interstate Compress Co. v. Agnew (U. S. C. C. A. Okl.) 882.
"Immovable property."—Big Sespe Oil Co. v. Cochran (U. S. C. C. A. Cal.) 216.
"Inadvertence."—Van Kannel Revolving Door Co. v. Winton Hotel Co. (U. S. C. C. A. Ohio) 234.
"Infamous crime."—Yaffee v. U. S. (U. S. C. C. A. Ohio) 497.
"Interstate commerce."—Schauffele v. Director General of Railroads (U. S. C. C. A. N. J.) 115.
"Invention."—National Safety Lift Co. v. Anderson (U. S. C. C. A. Mass.) 696.
"Just compensation."—U. S. v. New River Collieries Co. (U. S. C. C. A. N. J.) 690.
"Labor."—Ex parte Aird (U. S. D. C. Pa.) 954.
"Law-abiding."—U. S. v. Kichin (U. S. D. C. Mo.) 818.
"Lead."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Learned profession."—Ex parte Aird (U. S. D. C. Pa.) 954.
"Lien."—Vidal v. South American Securities Co. (U. S. C. C. A. N. Y.) 855; In re Dukes (U. S. D. C. Del.) 724.
"Moral."—U. S. v. Kichin (U. S. D. C. Mo.) 818.
"Obtained through legal proceeding."—In re Abbruzzo (U. S. D. C. Pa.) 404.
"Otherwise disposed of."—Cramer v. U. S. (U. S. C. C. A. Cal.) 78.
"Owner entitled to beneficial use."—Goldwyn Distributing Corporation v. Carroll (D. C.) 63.
"Point."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Pointwise dimension."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Present consideration."—In re New York & Baltimore Inland Transp. Co. (U. S. D. C. Del.) 145.
"Privileged communication."—Conklin v. Augusta Chronicle Pub. Co. (U. S. C. C. A. Ga.) 288.
"Process."—Miller v. Electro Bleaching Gas Co. (U. S. C. C. A. Mo.) 379.
"Profession."—Ex parte Aird (U. S. D. C. Pa.) 954.
"Profit."—Vidal v. South American Securities Co. (U. S. C. C. A. N. Y.) 855.
"Property."—Vidal v. South American Securities Co. (U. S. C. C. A. N. Y.) 855.
"Proximate cause."—Tennessee, A. & G. R. Co. v. Drake (U. S. C. C. A. Ga.) 393.
"Public land."—Cramer v. U. S. (U. S. C. C. A. Cal.) 78.
"Require."—Miller v. Rouse (U. S. D. C. N. Y.) 715.
"Rule."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Slug."—Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co. (U. S. D. C. Del.) 921.
"Subject."—Miller v. Rouse (U. S. D. C. N. Y.) 715.
"Trade."—Springer v. Garvan (U. S. D. C. Ohio) 595.
"Transfer."—In re New York & Baltimore Inland Transp. Co. (U. S. D. C. Del.) 145.
"Unfair method of competition."—Sinclair Refining Co. v. Federal Trade Commission (U. S. C. C. A.) 686.
"Viable."—Whitehurst v. D. M. Ferry & Co. (U. S. C. C. A. Okl.) 18.
"Writing of an author."—Reiss v. National Quotation Bureau (U. S. D. C. N. Y.) 717.

WRIT OF ERROR.

See Appeal and Error.

WRITS.

See Attachment; Execution; Habeas Corpus; Injunction; Process.

WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.