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

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This is a Key-Numbered Volume

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

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

JUDGES

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

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHARLES F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. GEORGE W. ANDERSON, Circuit Judge.....Boston, Mass.
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Hon. MARTIN T. MANTON, Circuit Judge.....New York, N. Y.
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Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
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Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania...Philadelphia, Pa.
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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.

FOURTH CIRCUIT

Hon. WILLIAM HOWARD TAFT, Circuit Justice.....Washington, D. C.
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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.

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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan....Grand Rapids, Mich.
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Hon. D. C. WESTENHAVER, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
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Hon. J. W. ROSS, District Judge, W. D. Tennessee.....Jackson, Tenn.

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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[a].....Chicago, Ill.

[a] Resigned March 1, 1922.

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.
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Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
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Hon. WALTER I. SMITH, Circuit Judge[4].....Council Bluffs, Iowa.
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Hon. ROBERT E. LEWIS, Circuit Judge.....Denver, Colo.
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Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
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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. ANDREW MILLER, District Judge, North Dakota[7].....Bismarck, N. D.
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Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
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Hon. TILLMAN D. JOHNSON, District Judge, Utah.....Salt Lake City, Utah.
Hon. T. BLAKE KENNEDY, District Judge, Wyoming.....Cheyenne, Wyo.

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Hon. WILLIAM W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM H. HUNT, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM H. SAWTELLE, District Judge, Arizona.....Tucson, Ariz.
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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] Died January 27, 1922.
[5] Appointed January 31, 1922, to succeed Hon. Walter I. Smith.
[6] Appointed February 21, 1922.
[7] Appointed February 2, 1922.

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CASES REPORTED

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

THIRD CIRCUIT.

FOURTH CIRCUIT.

FIFTH CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

DISTRICT OF COLUMBIA.

CASES

ARGUED AND DETERMINED

IN THE

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

PUGET SOUND POWER & LIGHT CO. v. ASIA et al. *

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921. Rehearing Denied January 9, 1922.)

No. 3724.

1. **Injunction ⟸26(3)—Equity held without jurisdiction to enjoin suit for construction of contract.**

   Equity *held* without jurisdiction to enjoin prosecution of a suit by taxpayers against a city and its officers to enjoin performance of a contract by the city under which it issued bonds in accordance with what plaintiffs in said suit allege is an erroneous construction of said contract, on the ground that such suit depreciates the market value of the bonds owned by complainant, where its title is not challenged and no fraud or corrupt motive is alleged.

2. **Courts ⟸508(1)—Federal court cannot enjoin suit in state court, which has priority of jurisdiction.**

   The power of a federal court to protect its jurisdiction by enjoining a suit in a state court is limited to cases where its jurisdiction is prior to that of the state court.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in equity by the Puget Sound Power & Light Company against S. B. Asia and others. Decree for defendants, and complainant appeals. Affirmed.

See, also, 271 Fed. 958.

The court below dismissed the appellant's amended bill of complaint for want of equity. The following is the substance of the complaint:

On March 31, 1910, the appellant sold and delivered to the city of Seattle a certain street railway system, in payment for which the city delivered to the appellant an issue of $15,000,000 of municipal street railway bonds, each bond payable, with interest, at 5 per cent. per annum, payable semi-annually on the 1st days of March and September. Each bond contained a covenant and obligation binding the city "to pay into the special fund created by the ordinance authorizing the issuance of this bond, and out of the gross

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⟸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. —.

revenues of such municipal street railway system, and all additions and betterments and extensions of such system hereafter acquired, even though the balance of such gross receipts thereafter remaining may be insufficient to pay the cost of maintaining and operating said system, and said additions and betterments thereto and extensions thereof, a sum equal to 5 per cent. per annum, payable semiannually, on all unpaid bonds of the issue of $15,000,000." The city has received gross revenues from the operation of the railway system sufficient to pay all charges and indebtedness, which were, by the terms of the bonds, made superior to the bonds, and in addition thereto has received gross revenues sufficient to pay, not only interest upon the bonds, but installments of principal which have not yet become payable, and there will be due and payable upon such bonds interest at the rate of 5 per cent. per annum, payable semiannually, which sum the city will pay unless, by reason of the acts of the defendants, the city is induced or compelled to breach its contracts and default in such payment, and divert the money applicable thereto to the payment of claims which are inferior in right to the bonds and the coupons attached thereto.

In order for the appellant to deliver clear title to the railway system, free from liens and mortgages, it was necessary for the appellant, immediately on receipt of the bonds from the city, to deliver the same to the trustees under certain mortgages, and those trustees held the same as collateral security for the debt which was secured by the mortgages so released, and the appellant is the owner of the equity of redemption in such bonds, and needs the amounts of interest payable on such bonds to apply upon the indebtedness secured by the mortgages, and, if interest be not paid upon the bonds, the entire issue will be deemed to be defaulted, causing to the appellant great and irreparable injury, for which there is no remedy at law.

The appellees have combined and confederated together to bring about a breach between the city and the appellant, and have greatly impaired the market value of the bonds, and, if default in payment of interest be caused by the appellees, then the market value of such bonds would be decreased millions of dollars. The appellees have instituted a suit against the city and the city treasurer and comptroller in the superior court of the state of Washington for King county, but have not joined the appellant as party defendant, which suit is without the jurisdiction of such superior court, because it is brought to set aside a judgment and decree rendered by the Supreme Court of Washington in favor of the appellant and the city of Seattle against Frank A. Twichell, plaintiff, and C. E. Horton, intervener, representing all the taxpayers of the city of Seattle. Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127. The appellees have combined and confederated together to induce and compel the city to divert a sufficient portion of the gross revenue to the payment of the cost of maintaining and operating the municipal street railway system and the depreciation thereof, before paying any part of such gross revenue into said special fund, and to prevent the city and its officers from paying any part of the interest or principal of such bonds from such special fund, until after the payment of all costs of maintenance, operation, and depreciation of the railway system. The appellees, pursuant to such combination and confederation, asserted and caused to be published that the appellant's bonds were payable out of the net revenues of the municipal street railway system, and that the pledging of the entire gross revenues thereof to the payment of the bonds was illegal and void.

Pursuant to their combination and confederation, and for the purpose of carrying the same into effect, they commenced the suit in the state court, and alleged in their complaint therein that the city treasurer was paying into the said fund the entire gross receipts of the railway, in lieu of using the money for payment of conductors, motormen, and laborers employed on the lines, and other operating expenses, and that those salaries and expenses are being paid by the issuance of warrants of the city, which are recognized by the city and its officers as valid claims against the city; that in truth the city and its officers have the right to pay the wages of said employés and other operating and maintenance expenses, by applying thereto earnings of

the street railway; that no provision had been made for paying depreciation charges out of the earnings of the street railway or otherwise, and it would be impossible to pay the same, or make replacement of the road, if the gross earnings of the system were used for paying the principal and interest on the bonds; that the prayer of the complaint was that the defendants therein be permanently enjoined from paying out of the street railway fund, or other funds of the city, the interest accruing on said bonds on March 1, 1921, until all of the wages of employés and cost of maintaining and operating said system, including depreciation charges, be first paid, and that the provisions of the ordinances, the contract and bonds, so far as they provide otherwise, be declared ultra vires, illegal, and void. Upon said complaint the said superior court issued a temporary restraining order as prayed for, and set for hearing on February 17, 1921, the plaintiff's application for a temporary injunction.

The appellees, in so attacking the bonds and in filing their complaint in the state court, acted in combination and confederation to bring about a breach of the contract between the plaintiff and the city, and for that purpose they sought and procured such restraining order, and the appellant was compelled to and did on February 1, 1921, and prior to the institution of the present suit, institute a suit against the city and its officers to enforce specific performance of the contract. The appellees continue to deny that the city was obligated to make payments into the special fund in case the gross earnings of the system were insufficient to pay, in addition to the cost of operation and maintenance of such system, the respective payments of principal and interest on the bonds. Such assertions and claims so continued to be made and published have greatly depreciated the bonds and constitute a cloud upon the title and rights of the appellant in such bonds, which assertions and claims are without justification or excuse, as the appellees well know.

The appellant prayed that a temporary injunction be issued, restraining the appellees and each of them from making such assertions and claims, or from doing any act which may result in inducing or causing a breach of the contract between the city and the appellant, or default in the payment of interest on the bonds as the same shall become due and payable, and the principal of such bonds as they shall become due and payable; that upon the final hearing a permanent injunction issue.

From the answer of the appellees to the original bill herein it appears that on February 23, 1921, the judge of the superior court of King county held that the appellant herein was a necessary party to the suit pending therein, and sustained the demurrer of the city and its officers, on the ground that the complaint did not state facts sufficient to constitute a cause of action; that on March 1, 1921, the city of Seattle paid to the appellant $375,000, which was the interest payment due that day upon the bonds; that the application for a temporary injunction in the cause in the state court was denied; and that on March 11, 1921, the appellees filed in that court an amended complaint. On the same day they filed in the United States District Court in the present suit their motion to dismiss and their answer to the original bill.

The appellant on the same day renewed its application for a temporary injunction, and the appellees moved to dismiss the suit. The application for injunction was denied, and the motion to dismiss was allowed. Thereafter, on April 11, 1921, the appellant filed its amended bill of complaint, which upon the motion of the appellees was dismissed for want of equity.

James B. Howe, Hugh A. Tait, and John H. Powell, all of Seattle, Wash., for appellant.

Stephen J. Chadwick, Otto B. Rupp, Wilmon Tucker, O. B. Thorgrimson, Tucker & Hyland, and Preston, Thorgrimson & Turner, all of Seattle, Wash., for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The burden of the appellant's amended complaint is, in brief, that the appellees insist and assert that the obligation of the city on its bonds to the appellant is less comprehensive than it is in fact, and as it has been adjudged to be by a decision of the state Supreme Court, and that thereby the appellees have impaired the market value of the appellant's bonds. The relief sought is that the appellees be enjoined from making such claims and assertions as to the construction and meaning of the contract. A broader aspect is attempted to be given to the amended bill by the allegation that the appellees combined and conspired to induce the city to breach its contract with the appellant; but the allegation adds nothing of substance to what is elsewhere set forth in the bill, for it must be measured by the averments which show specifically what the appellees are charged to have done and threatened to do. When thus measured by the facts alleged, there is nothing in the bill, other than the charge that the appellees brought suit in the state court against the city and its officers to enjoin action which they alleged would violate the terms of the contract, and that they assert and insist that the position which they took in that suit is sustained by the language of the contract.

We find no principle of equity upon which it can be held that an injunction should issue upon such a showing of facts. It is not a suit to remove a cloud upon the title of the appellant, as was the case in Thompson v. Emmett Irrigation District, 227 Fed. 560, 142 C. C. A. 192. The appellant's title to its bonds is in no way assailed. The facts alleged are not sufficient to bring the case within the equitable jurisdiction to enjoin vexatious litigation. The rights of the appellees herein have not been adjudicated in prior proceedings to which they were parties, nor are they pursuing a course which will necessarily result in a multiplicity of suits. Nor has equity jurisdiction on the ground that the acts and assertions of the appellees constitute slander of property. Kidd v. Horry, 28 Fed. 773; American Malting Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277; Citizens' Light, H. & P. Co., v. Montgomery, Light & W. P. Co. (C. C.) 171 Fed. 553; Singer Co. v. Domestic Co., 49 Ga. 70, 15 Am. Rep. 674; Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69, 19 Am. Rep. 310; Covell v. Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625; Consumers' Gas Co. v. K. C. Gaslight, etc., Co., 100 Mo. 501, 13 S. W. 874, 18 Am. St. Rep. 563; Marlin Firearms v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310.

Decisions of the Supreme Court sustain the proposition that, in the absence of an adequate remedy at law, equity will restrain one who maliciously interferes with a contract between two parties and induces one of them to break it, and that it is not necessary that actual malice, in the sense of personal ill will, shall exist, but that it is sufficient if there be a wanton disregard of the complainant's rights. Angle v. Chicago, St. P., etc., Ry., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. No case is

found, however, which sustains the right to such relief, unless the interference has been wrongful in a legal sense, or is accompanied by fraudulent conduct. There is no allegation in the amended bill that the appellees have used coercion, or have resorted to fraud or the corrupt use of means. All that they are charged with is their effort, by the use of legal means, to compel action by the city in accordance with their contention as to the true meaning of the contract. It is true that they are charged with knowledge of the decision of the Supreme Court in the Twichell Case, but it is not to be assumed that they expect the city and its officers, or the state court, to act in defiance of the final judgment of the Supreme Court of the state. Equity will not enjoin them from asserting, in court or elsewhere, that the construction which, in their complaint in the state court and in their answer to the original bill in the present case, they place upon the contract, is the true construction thereof, notwithstanding that they may thereby cause depreciation of the market value of the appellant's property.

[2] The appellant contends that, having instituted its suit (Puget Sound Power & Light Co. v. City of Seattle [D. C.] 271 Fed. 958), to enforce specifically its contract with the city, an injunction should have been granted in the present suit to prevent the appellees from defeating or interfering with the jurisdiction of the court to give that relief—citing, among other cases, the decision of this court in St. Louis Min. & Mill. Co. v. Montana Min. Co. (C. C.) 148 Fed. 450. In that case we held that section 720 of the Revised Statutes (Comp. St. § 1242), which forbids a federal court to grant an injunction to stay proceedings in a state court, does not prevent a federal court from enjoining the party to an action before it from prosecuting a suit in a state court, when such injunction is necessary to protect the federal court's prior jurisdiction. That doctrine is sustained by Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; and French v. Hay, 22 Wall. 250, note, 22 L. Ed. 857. But the difficulty in the way of its application here is that the suit brought by the appellees in the state court is prior in time to the suit brought by the appellant to enforce specifically its contract with the city, and it cannot be deemed in any sense an interference with the jurisdiction of the court in that case.

The decree is affirmed.

LEE LINE STEAMERS, Inc., v. MEMPHIS, HELENA & ROSEDALE PACKET CO.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1922.)

No. 3567.

1. Monopolies ⊜16(3)—Pooling contract between steamboat companies, as common carriers, held a monopoly.

Where two competing steamboat lines, common carriers, pooled their interests, agreeing to divide the earnings, and, if either carrier fail to make the allotted number of trips, such carrier should be charged on the

basis of average tons handled and the average price per ton received, etc., *held* to establish a complete monopoly in transportation in interstate commerce between given points.

2. **Monopolies ⟸16(3)—Cannot be justified on the ground of benefit to the public, where in violation of the Sherman Act.**
Where two common carriers by steamboat between points in different states pooled their interests and divided the proceeds, such monopolies cannot be justified on the ground that it is in fact beneficent, for the good of the public and of itself, for justice of rates, maintenance of service, and elimination of rate wars, since such is in violation of the Sherman Act.

3. **Monopolies ⟸21—Complaint by one steamboat line against another, based on pooling contract, held subject to demurrer.**
In an action by one steamboat line against another to recover money alleged due under a pooling contract, on which the complaint was based, *held*, that a demurrer to the complaint should be sustained, the contract being void and in violation of the Sherman Anti-Trust Law (Comp. St. § 8820 et seq.); the "rule of reason" being inapplicable to validate the agreement.

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

Suit by the Lee Line Steamers, Incorporated, against the Memphis, Helena & Rosedale Packet Company. Demurrer to complaint sustained, and complaint dismissed, and plaintiff brings error. Affirmed.

Lovick P. Miles, of Memphis, Tenn. (Wright, Miles, Waring & Walker, of Memphis, Tenn., on the brief), for plaintiff in error.

Chas. N. Burch, of Memphis, Tenn. (H. D. Minor and C. H. McKay, both of Memphis, Tenn., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error (called the Lee Line) and defendant in error (called the Adams Line) owned each a steamer engaged in public transportation on the Mississippi river between Memphis, Tenn., Helena, Ark., and Friar's Point, Miss. The two lines were thus engaged in interstate commerce. On September 1, 1919, they made an agreement, ending December 30, 1920 (with provision for extension for another year by mutual consent), for the division of the entire aggregate tonnage carried by the two lines, based on each steamer making two round trips each week—the earnings from the carriage of this aggregate tonnage to be settled for monthly on the basis of 50 per cent. for each line, after paying to the line carrying more than one-half the tonnage $1 per ton on such excess, as expense of handling the same. There was express provision that—

"If either carrier fails to make their allotted number of trips, then such carrier will be charged on a basis of the average tons handled, and the average price per ton received by such carrier, the same as if the actual number of schedule trips were made."

Provision was made for mutually selected landing keepers, or agents, at Helena and Friar's Point (whose salaries and expenses should be paid by the two lines in equal proportions); for the sale and conveyance

by the Lee Line to the Adams Line of a one-half interest in a lease acquired from the city of Helena, and for the sale and conveyance by the Adams Line to the Lee Line of a one-half interest in a certain warehouse, as well as for the enlarging or rebuilding of the warehouse at an equal charge to each of the two lines; for the furnishing by each line to the other of a printed record of tonnage handled each trip, showing the number of shipments, the weight of each, and the revenue received therefrom—these records to be "recorded" by a "mutually chosen" secretary and paid for by the lines in equal shares, and to be made the basis of the monthly settlements, and that "each party is to have access to all records for examination when requested by secretary." It is conceded that there were no other steamships engaged in the trade in question.

In July, 1920, the newly elected president of the Adams Line repudiated the agreement, on the ground that it was illegal. The Lee Line then instituted this suit for the recovery of a claimed balance of $11,805.67 on account of tonnage handled, plus $28,000 damages by reason of defendant's repudiation of the contract. It appears from the complaint that neither party had before the agreement in question made more than two round trips per week; that the river lines were in competition with steam interstate railroads for the handling of passengers and freight between the points served by the steamer lines, the railroad routes being shorter than the river routes, and the former maintaining "daily steam railroad freight and passenger service, with which the boats of the complainant and defendant were in competition." The complaint was demurred to on the ground that the contract sued upon was illegal and void, both at common law and under the Sherman Anti-Trust Law (Comp. St. § 8820 et seq.), and also contrary to the laws of Tennessee, Arkansas, and Mississippi, as in restraint of trade. The demurrer was sustained, and (plaintiff declining to plead further) the complaint was dismissed. Judge Peck, who presided on the hearing in the District Court, filed the following opinion:

"The action is for money alleged to be due under a pooling contract between the two lines of steamers, and for damages for the repudiation of the contract during the continuance by the defendant. The defendant demurs to the declaration, on the ground that the contract on which the plaintiff sues is illegal and void, both at common law and under the Sherman Anti-Trust Law, and also contrary to the laws of the states of Tennessee, Mississippi and Arkansas, as in restraint of trade. The gist of the second clause of the contract pleaded against which the demurrer is directed, is that the companies agreed to divide their gross receipts equally, after allowing the one carrying freight in excess of its proportion $1 per ton as the expense of handling the same.

"The declaration alleges that each party had been for some years engaged in the operation of a steamboat on the Mississippi river between Memphis, Tenn., Helena, Ark., and Friar's Point, Miss., and that this transportation was in competition with railroads; but it is not alleged that it was in competition with other steamboats. It is further alleged that the purposes of the agreement were to eliminate duplication of expenses at common points; to establish and maintain only such just and reasonable rates for the handling of freight and passengers as the public should pay for the services rendered, and which would make it financially possible for the parties to operate their respective boats, for which there has been and is a reasonable

demand; to insure the continuation in service between the points named of at least two river steamers operating in 'free, open, and unrestrained competition, upon different schedules, instead of making probable, without said agreement, the elimination of one of said steamers, a monopoly of the trade by one of the parties hereto, and the reduction of otherwise available steamboat service to the extent of 50 per cent.'; and to prevent discrimination in rates and accommodations between patrons of the parties, and the avoidance of rebates and preferences to and among shippers. It is alleged that it was never the purpose of the contract, nor its effect, to prevent the entry into the trade of any other boat operated by another, 'nor have the parties hereto acting under said contract ever combined to fix rates, or take any other action for the purpose of deterring the entry of any other boat into said trade.'

"It is inferred, from those allegations aforesaid which aver that the elimination of one of the boats would result in a monopoly for the other and a reduction of the available service by one-half, that there were no other steamboats operating in the trade. The court is assured in this interpretation of the pleading by the candid statement of counsel for both parties during the argument that such was indeed the fact. The question, therefore, is whether two steamship lines so situated may lawfully make an agreement to pool and divide their receipts. The contention of the plaintiff is that, notwithstanding they were to pool their receipts, the companies were free to compete for business, and would compete, because the contract was only to endure for a year, and thereafter as might be mutually determined, and that it was to the interest of each company to maintain its separate good will in anticipation of the time when its receipts from operation would once more be unrestrictedly its own. Plaintiff further insists that, unless the contract unduly restrained or unduly interfered with the free movement of interstate commerce, and so became prejudicial to the public interest, it was not invalid; that free and unrestricted competition as to the passenger business remains, the contract touching only the freight tonnage; and that avoidance of calamitous rate wars is in the public interest, and not a restraint of trade.

[1] "The elimination of all incentive to compete as to rates is the obvious effect of this agreement for the pooling and division of freight receipts, by the only lines of steamboats plying between the points on their routes. It resulted in the fixing of rates for the carriage of freight in interstate commerce by the combination so formed. This combination had a monopoly of the freight traffic. Such a contract, so resulting, is, in and of itself, an undue restraint of trade and interference with the free movement of such commerce, and is prejudicial to the public interest. The substance and effect are to be regarded; the garb is immaterial. United States v. American Tobacco Co., 221 U. S. 181, 31 Sup. Ct. 632, 55 L. Ed. 663. This contract is not to be compared with one by which trade in merchandise is to some slight extent impeded. No genuine question can arise here as to whether the restriction was reasonable or unreasonable, because on the facts pleaded the monopoly was complete. The establishment of a complete monopoly in transportation in interstate commerce, between given points, certainly cannot be justified. 'The defendants were common carriers, and it was their duty to compete, not combine; their duty takes from them palliation, subjects them in a special sense to the policy of the law.' Thomsen v. Cayser, 243 U. S. 66, 85, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322.

[2] "The other arguments advanced by the plaintiff to justify the monopoly on the ground that it is in fact beneficent; for the good of the public and of itself for justice of rates, maintenance of service and elimination of rate wars have been denied validity as against the Sherman Act by the Supreme Court. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. Union Pacific Railroad Co., 226 U. S. 87, 33

Sup. Ct. 53, 57 L. Ed. 124; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; United States v. American Tobacco Co., supra. Similar questions were ruled adversely to plaintiff in United States v. L. S. & M. S. Ry. Co. (D. C.) 203 Fed. 295; United States v. Great Lakes Towing Co. (D. C.) 208 Fed. 733.

[3] "Giving full scope to the rule of reason laid down in Standard Oil Co. v. United States, supra, invoked by counsel for plaintiff, it is concluded, nevertheless, that the facts set forth in plaintiff's declaration disclose a contract the effect of which was a combination in restraint of trade and an endeavor to create a monopoly in interstate commerce, and therefore void.

"The demurrer must be sustained."

We not only think the judgment of the District Court right, and that it should be affirmed, but are content to adopt Judge Peck's opinion as a sufficient statement of the reasons for our affirmance, with this very slight elaboration:

As affecting the validity of the agreement in question, it is not important that way-landing traffic was not included within the restriction, and that the agreement would not necessarily run more than a year. Although a natural inference that the parties contemplated a continuing agreement to monopolize is raised not only by the express provision for renewal of agreement, but by the allegation of the complaint that contracts of the same nature had been in existence between these same parties since the year 1909, it is enough to demonstrate the invalidity of the agreement that during at least the year in question a complete monopoly of existing facilities for freight river traffic between the points named was effected, not only potentially, but actually and intentionally. That a complete unification of river freight transportation between the points stated was contemplated and effected plainly appears by the terms of the contract, in connection with the concessions before referred to, including the provision for equal division of combined gross earnings, which effectually discouraged competition between the two lines with respect to furnishing facilities or bettering service—a monopoly made even the more certain by requiring the line failing to make its allotted number of trips to account to the other line on the basis of the average tonnage which it would have handled, and at the average price per ton which it would have received, if it had made the full number of scheduled trips. Plainly, the rights of the public were set entirely to one side, and it was left to the mercies of the combination. Against this situation allegations of good motives and intentions are futile. The facts asserted in the complaint, if made the subject of proof, could not avail to validate the monopoly. The record leaves no room for the application of the so-called "rule of reason" as validating the agreement; nor is there anything to suggest that the arrangement in question was justified as a reasonable protection against destructive rate wars.

The judgment of the District Court is affirmed.

KREETAN CO. v. WESTERN ASSUR. CO.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1921.)

No. 3551.

1. **Insurance ⟸402—Marine cargo policy held not to have attached.**
An open lake cargo policy issued to plaintiff, which on notice and payment of the premium covered any lumber cargo shipped by plaintiff during the season on a vessel classed 70 or better in the register of classifications of the American Bureau of Shipping, *held* not to have attached to a cargo loaded by plaintiff in November on a barge which plaintiff also owned, and which, though not classified in its annual register, was afterward, on plaintiff's application, inspected by the Bureau and given a classification of 75, and a certificate issued and delivered to plaintiff, but which certificate, as was common when a vessel was not deemed fit for navigation late in the season, expired by its terms on October 15.

2. **Insurance ⟸392(1)—Acceptance of premium held not to estop insurer to deny attachment of policy.**
Payment and acceptance of the premium for insurance of a cargo under an open policy *held* not to estop the insurer to deny attachment of the policy, because the vessel was not of the classification required by its terms, where it did not know such fact, but the insured did, or was chargeable with knowledge of it.

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Action at law by the Kreetan Company against the Western Assurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Frederick L. Leckie, of Cleveland, Ohio (McDonald & Kaltz, of Sault Ste. Marie, Mich., and Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, on the brief), for plaintiff in error.

Sherwin A. Hill and Carl V. Essery, both of Detroit, Mich. (Warren, Cady, Hill & Hamblen and Carl V. Essery, all of Detroit, Mich., and Davidson & Hudson, of Sault Ste. Marie, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error sued upon a policy of marine insurance to recover for the alleged total loss of a cargo of lumber, charged to have resulted from perils of the sea, and due directly to the foundering and sinking of the barge on which the cargo was loaded, while on a regular voyage, in tow of a steamer, from Drummond Island, Mich., to Saginaw, Mich. The policy was what is known as an "open lake cargo" policy. It did not insure the ship, but only the cargo. It was not limited to any one voyage, nor did it specify any ship, but expressly covered only lumber loaded on vessels classed 70 and better in the register of classifications of the American Bureau of Shipping, and sailing on or after the date of the policy (March 1, 1918) and before midnight of the 30th day of November following.[1] The case was tried to a jury. The District Judge, being of

[1] This is the provision of the main policy. Whether a rider thereon substitutes handbook for register will later be discussed.

opinion, not only that the policy did not attach to the cargo in question, but that the loss did not result from perils of the sea, as that term is used in maritime law, instructed verdict for defendant, on which judgment was entered. This writ is to review that judgment.

The American Bureau of Shipping is an organization engaged in inspecting and classifying all types of vessels on the Great Lakes, principally (but not solely) for insurance purposes. The underwriters, as such, are not financially interested in, and have no control over, the management or operation of the Bureau, although there are some underwriters on the Bureau's board. The Bureau issues each year a so-called register (usually early in the season) containing detailed information as to each vessel, including its official number, type, name, and port of hail, flag, material, tonnage, name of owner or manager, date, the size and dimensions, and when, where, and by whom built, as regards hull, engines, and boilers, respectively, as well as a table of classification showing the percentage of vessel rating, year, dates of issue, and expiration of certificate of classification and when vessel last seen. Register supplements are issued from time to time during the navigation season, covering changes since the main register was issued. The register and supplements are furnished only to subscribers to the classification system, which apparently include underwriters and owners generally, but not universally.

The Bureau also issues each year a hand-book of classifications (usually some weeks later than the register), as a "ready reference for shippers and underwriters," although a legend thereon states that it is "compiled for the exclusive use of the insurance companiees and their agents." It contains only the name of the vessel, its type, flag, materials, tonnage, when built, lumber deck load, and class. Supplements showing changes made since the issue of the main hand-book are issued usually every few weeks during the season, and are sent to the various subscribers to the register, and also to the various underwriters, who in turn send them to the various shippers. The hand-book supplements are not sent to vessel owners unless subscribed for. The main register for the year and its supplements together constitute the "register," and the main hand-book for the year and its supplements together constitute the "hand-book."

The class to which a vessel is assigned is based solely upon an inspection, and is determined by the vessel's condition. The certificate of class is sent to the vessel owner, and always contains an expiration date, which, in case of wooden vessels, is either the end of the current year or an earlier date. The class is sometimes limited to the summer season or to a fixed date—sometimes to a certain class of service, or is restricted to certain waters. A restriction to a given date indicates that the vessel is not regarded by the Bureau suitable in its then condition to navigate later in the season. Seventy was the lowest class.

The lumber in question was shipped on barge No. 1, which was owned by plaintiff, which also owned the steamer which towed the barge on the voyage in question, as well as other vessels. Plaintiff did not have the 1918 register. When the policy of insurance was issued, at the opening of navigation for 1918, and for some time previous, this barge

was not classified or listed in either register or hand-book. Under the conditions then existing the policy would not have covered the shipment in question. On April 11, 1918, an examination and survey of the barge was had by the Bureau at plaintiff's request, for the purpose of giving her a classification. Final action was delayed until certain repairs required by the examiner should be made.[2] The owner's report that the repairs had been made was received by the examiner, who about July 1st recommended a classification of 75, to expire October 15, 1918. On July 6th the Bureau approved the examiner's recommendation, except that it classified the barge at "75 C. F.," which meant "limited to coarse freight" (which term included lumber, but not perishable freight)—the class to expire October 15, 1918, as recommended by the examiner. The certificate was issued accordingly on July 13th and sent to the plaintiff company, which, on August 19th, paid the Bureau's expenses for the examination, survey, and issuing of certificate. The latter came ultimately into the hands of the vessel's captain.

The testimony that the certificate gave the date of the expiration (October 15, 1918), as well as the fact that plaintiff's general manager was informed of its receipt, is not denied. Whether plaintiff's manager actually saw the certificate itself is in dispute. The manager says he was told only of the class, and did not inquire further. The master says he was "real sure" he showed the certificate to the manager. Meanwhile, in the 1918 register, which was issued early in the season of 1918, and in the hand-book of that year, which was issued a few weeks later than the register, the barge was listed, but not classed. It was not contained in the register supplement No. 1 (covering the period from March 1st to June 15th), as no change had been made affecting this barge since the issue of the main register; but it did appear in the second register supplement (covering the period from June 15th to October 31st), with a class of 75 C. F., and a statement that the certificate was dated July 19, 1918, and would expire in October, 1918. It, however, does not clearly appear that the supplement was actually issued before the date of the shipment in question, which was November 7th. Meanwhile, the barge had been listed and classed in the first hand-book supplement (August 2d) as "75 C. F.," but without statement of the date of expiration of certificate of class. It was not contained in the second hand-book supplement (September 30, 1918), or in the third (October 21st), but was included in the fourth supplement (January 10, 1919), under heading "Class Withdrawn," with notation "Expiration of class."

The question is thus presented, as between plaintiff and defendant, whether the barge was on November 7th classed as 70 and better. If

[2] The Bureau's secretary testified: "As I recall, when I first received that report, I was very loath to give that vessel any class whatever, and I took it up with Mr. Bates [the inspector], and I also wrote to the owners that, if they would make certain repairs, we would give her a limited class—that is, up to this October 15th—as we felt that vessel was of such a low character that she was not fit to navigate after that time; that she was not a safe risk for either cargo or hull underwriting. And that is why I limited the class to October 15th." There was no denial of this testimony.

the register governs, plaintiff must fail, for the reason, if for no other, that its only showing of classification showed the latter's expiration before date of shipment. If the hand-book controls as between the parties, regardless of the actual fact of expiration of classification, verdict should not have been directed for nonattaching of insurance, provided the classification in the second supplement as 75 C. F., without statement of limitation of date of expiration of class, must, as between the insurer and the insured, be regarded as continuing throughout the season. It thus comes to this: That if plaintiff is allowed to recover it can be only because of the failure of the hand-book supplement to show that the certificate of classification would expire on October 15th.

The main policy states that the insurance is "on lumber * * * laden on steamers, schooners, and barges classed 70 and better in Great Lakes Registers for the current year," which was 1918. The American Bureau of Shipping, organized in 1916, succeeded the organization known as the Great Lakes Register in the publication of both register and hand-book, and followed the system of its predecessor. A stipulation contained in a rider attached to the policy recognizes this situation, and declares that wherever the words "Great Lakes Register" appear in the contract, or any of its attachments, they shall be construed as reading "Great Lakes Register and/or the American Bureau of Shipping Register"; and it was further stipulated that the "1917 Great Lakes Hand-Book of Classifications shall govern temporarily until the 1918 American Bureau of Shipping Hand-Book of Classifications is furnished"; also that "from and after the receipt by the insured, or its office, of copy of American Bureau of Shipping Hand-Book of Classifications for 1917 [1918] this contract shall not include or cover cargoes on or in board any vessel not classing 70 or better in said 1917 [1918] hand-book except," etc.[3]

Plaintiff, invoking the rules that the contract must be construed most strongly against the insurer, and that in case of conflict between the main policy and the rider the latter shall control, contends that the hand-book alone controls the question of classification; that inasmuch as the only hand-book for 1918, issued before the loss (and in which the barge was classed) contained no date of class expiration, the policy must be held to have attached to the cargo in question. The District Judge recognizing the general rules of construction invoked by plaintiff, was of opinion that both the main contract and the rider should be construed together; that, so construed, the contract requires that the classification appear in the register, and probably in the hand-book as well. He concluded that so far as appeared by the proof the classification terminated on the 15th day of October, and that the barge was not classed as 70 or better after that date—the only thing to the contrary being the "fact that the limitation does not appear in the hand-book."

[1] We do not find it necessary to determine what the result would have been, had plaintiff been the owner, not of the barge, but only of

[3] We have not stated these provisions in the order in which they are given in the rider.

the cargo, and had had no knowledge, other than that conveyed by the hand-book, as to the date when the certification of classification would expire.[4] We do not mean by so saying to imply disagreement with the views of the District Judge as applied to such case, but the actual situation is quite different. We cannot, without violence to the record, refuse to recognize the undisputed proof that the classification was in fact limited to October 15th, nor the imperative conclusion that plaintiff, by the receipt of the certificate containing that information, was legally charged with knowledge thereof, and whether or not its officers in fact observed the express words of limitation contained in the certificate. To hold otherwise would be to exalt form over substance and to substitute fiction for fact. In saying this, we may leave out of account the secretary's testimony given in note 2, supra. It is not a question of private records or secret determination of the Bureau. The listing of the barge in the main register and the main hand-book for 1918, without statement of class, was plainly not the "classing" contemplated by the policy. Nor are we impressed by the argument that a classification once made necessarily continued for the season, in spite of knowledge or notice to the contrary. We are also unable to assent to the proposition that the termination of the certificate did not mean the termination of the classification. The record is distinctly to the contrary.

The conclusion we have reached does not amount to defeating an affirmative and continuing hand-book classing by evidence outside that record to the prejudice of one relying, and entitled to rely, conclusively thereon. The most that can be said of the hand-book record is that it does not show when the certificate would expire. The Bureau's secretary testified that "it has never been customary to give the expiration date in that hand-book," but that "it is customary to give it in the main register." We have already said that the class is sometimes limited to the summer season, or to a certain kind of service, or is restricted to certain waters. Such facts appear in the hand-book. With this limitation, and assuming that the secretary's testimony just referred to means that it was not customary to show in the hand-book future expiration dates (these in fact do appear in the register), the testimony is not only borne out by the hand-book, but there is no testimony to the contrary. There is also nothing to the contrary in the fact that the hand-book supplements contain lists of vessels in "class withdrawn" (which plainly means already withdrawn or expired, and since the issue of the main hand-book or register, or possibly an earlier supplement), and of "continuation of class" (and under which, of course, the barge in question never appeared), this latter heading relating to vessels already classed in the register as under certificates expiring at a given date before the end of the season, and usually classed in the hand-book, but always there without date of expiration of certificate.

[4] It appeared without dispute that the 1918 hand-book was sent to plaintiff as owner, although there is no express testimony that plaintiff consulted the hand-book or had knowledge of the classification of the barge contained in the first supplement.

[2] But it is perhaps enough, in this connection, to say that the hand-book does not affirmatively show, and was not intended even prima facie to indicate, that the classification shown in the hand-book without date of expiration would continue throughout the navigation season, and thus contained nothing inconsistent with, or in any way weakening the effect of the direct and positive notice previously given the insured that the certificate of classification would expire on October 15th, and so before the shipment in question was made. Nor did the receipt by the underwriters of the premium rates for the shipment in question (or for other shipments, if any, after October 15th) upon the barge in question estop defendant from asserting that the certificate had expired. The proof is undisputed that the underwriters are not furnished with copy of the certificate of class, nor are they notified of change in class unless they so request; and there is no evidence that the underwriters had any knowledge until after the loss that the certificate had expired.

We therefore think the verdict was properly directed for defendant, for the reason that the insurance did not attach to the cargo. This conclusion makes it unnecessary to consider the other ground on which verdict was directed.

The judgment of the District Court is accordingly affirmed.

A. J. KRANK MFG. CO. v. PABST et al.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1921.)

No. 3554.

1. **Trade-marks and trade-names and unfair competition ⟸3(4)—"Lather Kreem" held descriptive of a shaving compound, and not the subject of a valid trade-mark.**

   The name "Lather Kreem," as applied to a shaving cream or paste, *held* purely descriptive, and not the subject of a valid trade-mark.

2. **Trade-marks and trade-names and unfair competition ⟸93(3)—Evidence held not to establish unfair competition.**

   Defendant *held* not chargeable with infringement of complainant's copyrighted label, on which its product, a shaving compound, is designated as "Kranks Lather Kreem," or with unfair competition by the use of label on a similar product, on which it is named "Twilight Lather Cream," where the labels and packages are not otherwise similar in appearance or coloring, and each shows prominently the name and address of the maker, and there is no evidence of purchasers having been deceived.

3. **Trade-marks and trade-names and unfair competition ⟸93(3)—Evidence as to actual deception to be considered in suit for infringement.**

   In a suit for infringement of trade-mark or unfair competition, while proof of actual deception is not essential, the lack of such proof may properly be taken into account, in connection with the appearance of the alleged infringing product, as not calculated to mislead.

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the A. J. Krank Manufacturing Company against Chris H. Pabst and others. Decree for defendants, and complainant appeals. Affirmed.

Frank A. Whiteley, of Minneapolis, Minn., for appellant.

J. D. Karns, of Columbus, Ohio (G. C. Brown, of Columbus, Ohio, on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff manufactures a shaving cream, which it markets under the name of "Lather Kreem"; its label (which contains the trade-name) being copyrighted. This suit is for alleged infringement of trade-mark and copyright, as well as unfair competition, through the manufacture and marketing by defendants of a shaving cream under the name of "Twilight Lather Cream." The appeal brings up for review the decree of the District Court, dismissing the bill for noninfringement and lack of unfair competition.

In our opinion the bill was rightly dismissed, but we prefer to rest our affirmance upon a somewhat broader basis than adopted by the District Court. The plaintiff began the manufacture of its product in the year 1910 according to a secret formula, copyrighting its label in the year 1916. The preparation takes the form of a soft paste (stored in tubes or jars), which is applied directly to the face, thus dispensing with brush and cup, and requiring no more rubbing with the fingers than suffices to cover the parts to be shaved.

[1] Setting to one side defendants' contention that the damages suffered and profits made through the alleged infringement and unfair competition are too trifling to justify resort to equity for injunction—in our opinion the expression "Lather Kreem," as applied to plaintiff's product, is purely descriptive, and thus not the subject of a valid trade-mark. But for the word "Krank's," the name has no tendency to indicate origin. Shaving creams, and under that specific name, were well known long before 1910. The 1899 edition of the Century Dictionary gives as a secondary definition of cream:

"Any liquid or soft paste of the consistency of cream; as the *cream* of ale; shaving *cream*." (Lexicographer's italics.)

Moreover, the record specifically mentions three shaving creams as in public use before 1910, viz.: "Euxesis," from about 1895, and two others from about 1905. On this branch of the case the only question requiring serious consideration is that presented by plaintiff's contention that the word "lather" fails of being descriptive by the fact that the preparation contains no soap. But this contention is in our opinion only plausible, at the most. It is true that in its strict sense the term "lather" presents the thought of:

"Foam, froth or suds made from soap, moistened with water, as by a brush for shaving;" or "foam or froth formed in profuse sweating, as of a horse." Century Dictionary, title "Lather."

But the preparation in question is solely a shaving compound. That no ingredient is inserted in the form of soap as such must be accepted, in view of the testimony of plaintiff's president, hereafter referred to.

But that an actual equivalent of soap is absent is by no means satisfactorily established. The formula for the preparation is nowhere given, nor the identity of any ingredient employed. The only testimony on this subject is that of Mr. Krank, plaintiff's president, who, after saying that "the Lather Kreem shaving preparation does not contain any soap at all," and while still under examination by plaintiff's counsel, adds:

"There may be some ingredient in it which may be similar to soap—or *may be that way.* However, it is not a soap. It is not a lather, *strictly speaking.* It answers the purpose of a lather; *provides a lather.*" (Italics ours.)

His reason for saying that it is not "really a lather" is:

"Because you can't can a lather. You understand, you can't put a lather in a jar, and leave it in that form, because it would fall in very short order, and therefore you cannot really make a lather in that way." [1]

This proposition, as applied here, does not impress us. In the first place, the testimony referred to must be considered in connection with the certificate of registration of label, which gives the title "Krank's Lather Kreem," as "*for soap or soap lather.*" (Italics ours.) Again, not all shaving creams take the form of lather without the use of brush. As to one of the shaving creams in public use Mr. Krank specifically says:

"You have to put it on with a brush and make a lather with it."

In the case of one of the others, mentioned above as in public use from about 1905, the directions call for wetting the face with a brush and applying the cream, either to the brush or directly to the face, and then working up the lather. In our opinion, the name "Lather Kreem" was intended to convey the idea of a shaving cream, which, as furnished, took the form of or provided a lather, and without the use of brush, water, or cup. That idea is emphasized by the slogan upon the label:

"No brush, no cup, no soap, no water. Just apply and shave." [2]

It is not important whether the "lather" is "canned," or whether it is "provided" by applying the preparation to a wet face, and distributing it over the face by the fingers. The cream, being a paste, of course contains moisture. The directions say:

"Wet the skin, apply Lather Kreem, wait a minute, and then shave."

In either case the name "Lather Kreem" is equally descriptive. We cannot doubt that the user of "Lather Kreem," after applying the prep-

[1] The word "lather" seems to have been originally the name of a form of niter used for soap, and which seems to have been an alkali or alkaline salt.

[2] The quoted words suggest, not so much the absence of soap or its equivalent, as the absence of the combination of the four elements. It appears that "Euxesis" had the substance of this slogan, viz.: "Without soap, water, or brush," which, in view of Mr. Krank's statement that Euxesis was "greasy," apparently does not necessarily mean that there was no soap in the shaving cream. Another of plaintiff's slogans is: "Replaces soap and brush for shaving. No rubbing."

aration to his face for shaving purposes, would think his face was "lathered," rather than "creamed," nor that the manufacturer intended he should so understand. The name "Lather Kreem" is thus not merely fanciful, suggestive, figurative, metaphorical, or boastful, as is the case with the words "Holeproof," "Wearever," "Queen Quality," "Imperial," etc. It is, in our opinion, as distinctly descriptive as the word "aluminum," when applied to washboards (American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609), "computing," when applied to scales (Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. 965 [1]); "elastic seam," as applied to men's underwear (Newcomer & Lewis v. Scriven, 168 Fed. 621, 94 C. C. A. 77), or "toasted corn flakes," when applied to a breakfast food (Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657, 662, 149 C. C. A. 77).

We think the trade-name tells the whole story, and was designed to do so. It scarcely need be said that the misspelling of the word "cream" cannot give validity to a name otherwise invalid as a trade-mark. The fact that the name "Lather Kreem" was new with plaintiff is not decisive. The same was true of "toasted corn flakes," held by this court to be purely descriptive. Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co. (C. C. A. 6) 235 Fed. 657, 149 C. C. A. 77. The conclusion that the trade-name in question was merely descriptive can be avoided only by a finding that it contains, by implication, a substantial misstatement of fact, which itself would make the trade-mark invalid. Whether plaintiff's preparation is better than its predecessors is beside the mark. The suit is not for the protection of a secret formula. Indeed, plaintiff disclaims any charge of such pirating.

Nor do we think it fairly established that the name "Lather Kreem," without other designation, has acquired a secondary meaning, as indicating plaintiff's product. Defendants' product, under its trade-name, "Twilight Lather Cream," was on sale at Columbus (which was the only place where sales of that product had been made) as early as 1915, and apparently before plaintiff's label was copyrighted. Sufficient proof of the acquirement of such secondary meaning is not furnished by the facts that the druggist jobbers who received orders (presumably from retailers) for "Lather Kreem," and in that form, and who inferably had never heard of any other "lather cream" by that name, have supplied "Krank's Lather Kreem" (Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., supra, 235 Fed. at page 664, 149 C. C. A. 77), and that in applications made to plaintiff itself, as the manufacturer, the words "lather cream" were variously spelled.

[2] If we have rightly concluded that plaintiff's trade-mark is invalid, the question of its infringement is unimportant. But, regardless of the correctness of that conclusion, we agree with the District Court that defendants are not shown to have infringed the trade-mark or otherwise to have been guilty of unfair competition. The name of plaintiff's product, as contained in its label in general use and as copyrighted, is "Krank's Lather Kreem." It is not claimed that defendants have used this label, or this name, or that they have represented (except inferably by similarity of label) that their product is that of plain-

[1] 56 C. C. A. 459.

tiff. No complaint of defendants' advertising is made, except that contained in labels or other matter on its cartons. The decisive question thus is whether such labels and printed matter are reasonably calculated to mislead the ordinary and unwary purchaser into thinking he is buying plaintiff's product, and so enabling defendants to palm off their product as that of plaintiff. (Edw. Hilker Mop Co. v. U. S. Mop Co. [C. C. A. 6] 191 Fed. 613, 618, 112 C. C. A. 176); although unfair competition is possible notwithstanding nonidentity of name (Gaines v. Turner-Looker Co. [C. C. A. 6] 204 Fed. 553, 555, 123 C. C. A. 79).

We think the question above stated must be answered in the negative. Defendants' product has always been distinctly and prominently marked and labeled "Twilight Lather Cream." The name and address of the manufactures (Pabst & Kohler) distinctly and prominently appear, in connection with the labels, on both containers and cartons. Plaintiff's product is equally distinctly and prominently marked "Krank's Lather Kreem"; the manufacturer's name and address being distinctly and prominently given. True, the language of the directions and slogans used by defendants are so very similar to those used by plaintiff as to suggest partial copying. But, as was pointed out by the District Judge:

"They [the tubes and cartons] are so radically different in appearance that no ordinary purchaser would mistake one for the other."

Plaintiff's labels on both containers and cartons are printed in two colors and are decidedly ornamental in appearance. Defendants' labels are printed in one color and without ornamentation. As we have already said, the shaving cream "Euxesis," which long antedated plaintiff's manufacture, used the words "without soap, water or brush." As the District Judge well said:

"The general impression made by defendants' article upon the eye of a casual purchaser, who is unsuspicious and off his guard, is not such as to be likely to result in his confounding it with plaintiff's product."

[3] While proof of actual deception is not essential, the lack of proof thereof may properly be taken into account, in connection with the appearance of the alleged infringing product as not calculated to mislead.

We think the instant case is brought directly within Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., supra.

The decree of the District Court is affirmed.

HALL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1921.)

No. 5709.

1. Indictment and information ⇐110(18)—Indictment for taking from railroad car goods constituting interstate shipment may be in language of statute.

Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, fully defines the offense charged,

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

and it is sufficient for the pleader to describe the offense in the language of the statute.

2. **Criminal law ⊂970(5)—Motion in arrest reaches only defects of substance.**

Motion in arrest of judgment reaches only defects in the indictment which are in matter of substance, and not those which are of form; it being sufficient that the indictment is sufficient to support the verdict.

3. **Larceny ⊂34—Indictment for taking interstate shipment from railroad car need not show manner of taking.**

An indictment under Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, need not show the manner of taking and carrying away of the property described.

4. **Criminal law ⊂444—Waybills held admissible in prosecution for taking interstate shipment.**

In trial for violating Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, waybills made out from markings on the shipment by the express messenger and identified by him *held* admissible as tending to show interstate shipment, there being evidence that, where a waybill is not made out for express matter at the point of shipment, it is customary for the messenger on the train or the agent at point of destination to make it out.

5. **Criminal law ⊂1170½(1)—Witnesses ⊂383—Impeachment on immaterial issue held improper, but not prejudicial.**

In trial for violating Act Feb. 13, 1913, § 1 (Comp. St. § 8603), by taking from a railroad car whisky constituting interstate shipment, it was error to ask accused if he had not made a trip to another town to buy whisky, and on his negative reply to show by stenographic notes that he had testified at a former trial that he had gone there for that purpose, accused not being on trial for violating any law regulating the sale or transportation of liquor; but the error *held* not prejudicial.

6. **Criminal law ⊂1163(1)—Burden on accused to show prejudice.**

On writ of error, the burden is on accused to show that error was prejudicial.

7. **Larceny ⊂33—Proper to describe car as belonging to railway during period of federal control.**

In indictment for violating Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, it was proper to describe a car from which the taking was committed as belonging to a railway company, even though the transaction occurred during the period of federal control.

8. **Larceny ⊂9—No defense that accused owned the property where bailee had lawful possession.**

In trial for violating Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, it was no defense that accused owned the property in question, where it was being shipped C. O. D., as, the property being in the possession of the carrier as bailee, the owner had no right to take the property without satisfying the bailee's lien for charges.

9. **Larceny ⊂60—Not necessary to show shipper's contract in trial for taking interstate shipment.**

In trial for violating Act Feb. 13, 1913, § 1 (Comp. St. § 8603), as to taking from a railroad car goods constituting interstate shipment, it was not necessary to show a contract between the shipper and the carrier involving a delivery of goods by the shipper and an acceptance by the carrier, but a shipment in interstate commerce was sufficiently shown by waybills, together with the fact that shipments were made and accepted by the express company from whose possession it was charged the

property was taken and transported by it through arrangement with the carrier, the United States.

10. Indictment and information ⟸199—Variance may be waived at trial.

A variance between indictment and proof may be waived orally at the trial by defendant's counsel.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Harry S. Hall was convicted of an offense, and he brings error. Affirmed.

M. C. Spicer, of Socorro, N. M., for plaintiff in error.

George R. Craig, U. S. Atty., of Albuquerque, N. M., and Henry G. Coors, Jr., Sp. Asst. Atty. Gen., for the United States.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. [1-3] Plaintiff in error, hereafter defendant, was convicted and sentenced upon each of three counts of an indictment charging violations of section 1, Act Feb. 13, 1913, 37 Stat. 670 (Comp. St. § 8603). The counts of the indictment were in the same language except as to the consignee and the property alleged to have been taken. The first and second counts named the Hall Hotel, Magdalena, N. M., as consignee. The third count named Harry S. Hall, Magdalena, N. M., as consignee. The first and second counts described the property taken as one barrel containing whisky. The third count described the property taken as one trunk containing whisky. The first count was in the following language:

"On May 29, 1919, at, to wit, the county of Socorro, state and district of New Mexico, one Harry S. Hall and one E. J. Walters, whose Christian name is to the grand jurors unknown, did unlawfully and feloniously take and carry away from a certain railroad car, to wit, Atchison, Topeka & Santa Fé combination baggage and express car No. 3205, certain goods, to wit, one barrel containing whisky, said goods then and there constituting an interstate shipment of express, to wit, a shipment of express from Kansas City, in the state of Missouri, to the Hall Hotel, Magdalena, N. M., with intent then and there on the part of them, the said Harry S. Hall and E. J. Walters, to convert said goods to their own use."

Counsel for defendant attacked the indictment in the court below by motion in arrest of judgment. It was by said motion insisted that the indictment failed to state facts sufficient to constitute a public offense under the laws of the United States in this: (a) The manner of the taking and carrying away was not shown; (b) the defendant was not apprised by the indictment of the nature and cause of the accusation against him; (c) it did not appear from the indictment that the defendant did not have the right in law to take and carry away the property mentioned and to convert the same to his own use; (d) that it appeared said property was shipped to himself and intended for himself for his own use; (e) the indictment did not charge fraud or deception in the procurement of the property or in taking and carrying the same

away. Section 1 denounces several offenses. One of them is described as follows:

> That "whoever shall * * * unlawfully take, carry away, * * * from any railroad car, * * * with intent to convert to his own use any goods or chattels * * * which constitute an interstate * * * shipment of * * * express * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both."

We are of the opinion that the statute fully defines the offense charged and that it was sufficient for the pleader to describe the offense in the language of the statute. Doe v. U. S., 253 Fed. 903, 166 C. C. A. 3; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Bloch v. U. S. (C. C. A.) 261 Fed. 321; Dunbar v. U. S., 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Horn v. U. S., 182 Fed. 721, 105 C. C. A. 163; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Smith v. U. S., 157 Fed. 721, 85 C. C. A. 353; Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Montoya v. U. S. (C. C. A.) 262 Fed. 759; section 1025, R. S. U. S.[1] The motion in arrest would only reach defects of the indictment in matter of substance, and not of form. So far as the offense charged in the indictment is concerned, the statute does not require that the possession of the property taken shall be accomplished by fraud or deception. It does not appear from the face of the indictment that the property was shipped by defendant to himself for his own use, whatever might be the effect of such a situation. Neither does it appear that defendant had the right to take and carry away the property described in the indictment. The indictment fully apprised defendant of the nature and cause of the accusation against him. It was not necessary that the indictment show the manner of taking and carrying away of the property in question. The indictment is sufficient to support the verdict, and therefore is good on motion in arrest.

[4-10] It is next objected that the trial court erred in admitting in evidence Exhibit No. 1, offered by the United States. Exhibit No. 1 was the original waybill made by the American Railway Express Company covering the shipment described in the first count of the indictment. It is claimed that there was no foundation laid for its introduction and no evidence that the barrel shipped at Kansas City, Mo., was the same barrel claimed to have been taken from the car at Socorro, N. M. We are clearly of the opinion that the testimony of Mary Halpin, waybill clerk of the American Railway Express Company at Kansas City, Mo., together with the testimony of C. C. Baldwin, express messenger for said company running between La Junta, Colo., and El Paso, Tex., Engel, agent for the company and the Atchison, Topeka & Santa Fé Railway at Socorro, N. M., Stakpole, helper at the same place, Anderson, night clerk of the Hall Hotel at Magdalena, N. M., Cronin, who testified as to the declarations and acts of defendant at Socorro on the night of May 29, 1919, and Sullivan, express agent at Magdalena, N. M., clearly rendered Exhibit 1 admissible as tending

[1] Comp. St. § 1691.

to show an interstate shipment of express. Similar objections were made to the admission of the United States Exhibits 2 and 3. These were the substitutes or over waybills covering the barrel and trunk mentioned in counts 2 and 3 of the indictment. The evidence shows that, where a waybill is not made out for express matter at the point of shipment, it is the custom for the messenger on the train or the agent at the point of destination to make it out. In the present case the waybills under consideration were not made out at Kansas City, Mo., but were made out from markings on the barrel and trunk by Baldwin, the express messenger, and were identified by him. Baldwin received the barrel and trunk from Shirley, the express messenger having charge thereof from Kansas City, Mo., to La Junta, Colo. The Exhibits were clearly admissible together with the other evidence in the case as tending to show an interstate shipment. It is next contended that the trial court erred in permitting the United States to attempt to impeach the testimony of the defendant on an immaterial issue. This alleged error arose in this way: On the trial of the defendant he was asked by counsel for the United States about a trip he had made to Gallup, N. M., with one Walters, and in regard to the purpose for which said trip was made. Defendant testified that he had gone to Gallup at the request of Walters. He was then asked if the object of the trip was not to buy whisky. Defendant answered, "No, sir." Counsel for the United States then offered over the objection of counsel for the defendant the stenographic notes of a former trial for the offense charged in the indictment, which stenographic notes showed that defendant had testified at the former trial that he had gone to Gallup on the request of Walters to buy Indian rugs and whisky. The only matter tending to impeach the evidence of the defendant was that on the former trial he had testified that he had gone to Gallup for the purpose of buying whisky, and at the present trial he had testified that he had not gone for that purpose. The evidence, we think, was clearly inadmissible, but it does not appear that the defendant was prejudiced in any way by the admission of the testimony. The defendant was not on trial for a violation of any law regulating the sale or transportation of intoxicating liquor. The burden was on the defendant to show that the error was prejudicial. Rich v. U. S. (C. C. A.) 271 Fed. 566; Trope v. U. S. (8th Cir.) 277 Fed. 348, filed October 21, 1921. It is next claimed that the evidence is insufficient to sustain the verdict. This question was not raised in the court below, but we have decided to consider it. Counsel for defendant specifies four reasons why the evidence is insufficient: (a) The indictment charges that the goods were taken from a car of the Atchison, Topeka & Santa Fé Railway. This court will take judicial notice that at the time of the alleged taking said railway was being operated by the United States, and therefore the railway was not engaged in interstate commerce. In regard to this contention it may be said that the indictment does not charge that the railway was engaged in interstate commerce, but that the barrels in the first and second counts of the indictment and the trunk in the third count constituted an interstate shipment of express from Kansas City, Mo., to Magdalena, N. M. The evidence shows that the property was in

the possession of the American Railway Express Company, being carried from Kansas City, Mo., to Magdalena, N. M., in a car of the Atchison, Topeka & Santa Fé Railway. If we should take judicial notice that the railway was being operated by the United States at the time in question, this would not show that the United States owned the car. The car belonged to the Atchison, Topeka & Santa Fé Railway Company, and it was proper to describe the car as the property of the railway company. Bloch v. U. S. (C. C. A.) 261 Fed. 321–323; Vaughn v. State, 17 Ala. App. 35, 81 South. 417; Jackson v. State, 17 Ala. App. 197, 84 South. 394. (b) It appears from the evidence that the property belonged to the defendant, and therefore he could not convert it to his own use. In regard to this contention it may be said that, assuming, but not deciding, that the evidence showed that the property belonged to defendant, it also shows that it was in the possession of the American Railway Express Company, being carried between the points mentioned, and the waybills showed that it was shipped charges for transportation C. O. D. The property therefore was in the possession of the express company as bailee, and the owner had no right to take it from the possession of the bailee without satisfying its lien for charges. 17 R. C. L.; 25 Cyc. 32; Kambeitz v. U. S. (C. C. A.) 262 Fed. 378; A., T. & S. F. Ry. v. Hinsdell, 76 Kan. 74, 90 Pac. 800, 12 L. R. A. (N. S.) 94, 13 Ann. Cas. 981; 10 Corpus Juris. 456; State v. Nelson, 36 Wash. 126, 78 Pac. 790, 68 L. R. A. 283, 104 Am. St. Rep. 945. (c) Under this head it is contended that the evidence does not show a contract between the shipper and the carrier involving a delivery of the goods by the shipper and an acceptance by the carrier. Such a showing might be necessary where the shipper is seeking to charge the carrier for the loss of goods shipped, but no such showing was necessary in the present case. The waybills introduced in evidence together with the fact that the shipments were made and accepted by the express company and transported by it through arrangement with the carrier, the United States, sufficiently shows a shipment in interstate commerce. (d) It is claimed that there was a fatal variance between the indictment and the proof in regard to the number of the car. The indictment charged the number of the car to be 3205. The evidence showed that the property was taken from car No. 2305, but counsel for the defendant, Mr. Renehan, at the trial expressly waived this variance by saying: "We waive the variance so as not to cause a possible dispute as to whether it is a variance."

There being no prejudicial error apparent upon the record, the judgment below must be affirmed; and it is so ordered.

THE FLUSH. Appeal of THOMPSON. BULK OIL TRANSPORTS, Inc., v. ROBINS DRY DOCK & REPAIR CO. et al.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 157.

1. **Appeal and error ⟸77(1)—Order substituting attorney is appealable.**
   An order making a substitution of attorneys finally determines the rights of the attorney for whom the substitution is made, and is one from which he can appeal.
2. **Attorney and client ⟸76(1)—Attorney can be discharged at any time without cause.**
   A client has the right to discharge his attorney at any time, either with or without cause.
3. **Attorney and client ⟸75(1)—Court can order substitution of attorney.**
   If a substitution of attorneys cannot be made by consent of both client and attorney, an order for such substitution must be obtained by making proper application to the court.
4. **Attorney and client ⟸75(2)—Fees of attorney discharged for cause will not be protected.**
   If an application for substitution of attorneys is based on the misconduct of the attorney, the court may direct an unconditional substitution, and order surrender of the papers without payment of the attorney's fees, leaving the attorney to bring an action to recover his fees.
5. **Attorney and client ⟸75(2)—Fees of attorney discharged without cause must be protected in order of substitution.**
   If a client, applying for an order substituting an attorney, brings no charges against the first attorney, but merely elects to have such substitution, the order for substitution should not be made, unless the fees of the attorney discharged are either paid or secured.
6. **Attorney and client ⟸75(3)—Order for substitution, preserving attorney's lien on possible recovery on cross-libel, is insufficient.**
   An order for substitution of attorneys, which merely preserved the lien of the first attorney for services already rendered by him on any amount that might be recovered by his client on the cross-libel, is insufficient to secure the payment of the attorney's fees.
7. **Attorney and client ⟸182(3)—Attorney has lien on client's papers.**
   An attorney has a lien on his client's papers, which have come into his possession in the course of his professional services.
8. **Attorney and client ⟸182(3)—Client cannot inspect papers held under discharged attorney's lien.**
   A client, who has discharged his attorney without cause and without paying him for the services rendered, has no right to inspect the papers held by the attorney under his attorney's lien, since to permit such inspection would be in effect to defeat the lien.

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

Libel by the Robins Dry Dock & Repair Company against the steamship Flush, with cross-libel by the Bulk Oil Transports, Inc., against Robins Dry Dock & Repair Company. From an order substituting Saul S. Myers for T. Langland Thompson as attorney for the plaintiff, the ousted attorney appeals. Order modified and affirmed.

See, also, 274 Fed. 133. Certiorari denied, Bulk Oil Transports v. Thompson, 256 U. S. ——, 42 Sup. Ct. 184, 66 L. Ed. ——.

The libelant is a New York corporation and is engaged in the business of ship repairing. Its shipyard is at the Erie Basin in the borough of Brooklyn in the city of New York. It filed its libel against the steamship Flush, in which it alleged that it had furnished materials and supplies, and performed work, labor, and services, in repairing the steamship, in the amount of $201,971.31, which it avers is the reasonable value thereof. It claimed interest on that sum from July 30, 1918. It admitted that it had received in part payment $30,000, and claimed as the amount due and unpaid $171,971.31, with interest from the date before mentioned, and for this it asserted its right to a lien under the Act of June 23, 1910 (Comp. St. §§ 7783–7787).

The Bulk Oil Transports, Inc., hereinafter referred to as the claimant, as the owner of the steamship, filed an answer, in which it alleged that on September 12, 1917, the libelant entered into an agreement with it in writing, in which it covenanted to complete the work within 75 days thereafter, and that the work was not completed until August 20, 1918, 9 months and 26 days after the time specified. For this it claimed damages in the sum of $163,200. It claimed certain additional damages.

The claimant gave security in the sum of $185,000, through a bond executed by the National Surety Company, and one Christoffer Hannevig, who owned all or nearly all of the stock of the claimant, became the indemnitor on the bond. The security having been given, the claimant filed a cross-libel, in which it asked to have the libel filed by the Robins Dry Dock & Repair Company stayed under rule 53 of the Admiralty Rules (267 Fed. xx). Then on October 2, 1920, T. Langland Thompson, the appellant, was substituted as proctor for the claimant in the place and stead of Bullowa & Bullowa. On February 11, 1921, Hannevig was adjudicated a bankrupt and receivers were appointed. Shortly thereafter the attorneys for the National Surety Company asked Mr. Thompson, the appellant, to consent to a substitution of their firm as proctors for claimant. Mr. Thompson agreed to such substitution on the condition that his fee for services rendered be paid. His offer was not accepted.

On the 6th day of April, 1921, the receivers of Hannevig, through Saul Myers, moved for an order to compel Thompson to turn over to the receivers all papers in this suit, on the ground that the receivers hold all the stock of the claimant company. This motion was denied. 274 Fed. 133. On May 25, 1921, the National Surety Company made a motion for permission to intervene as a party respondent, on the ground that it was on the "stipulation for value" in the sum of $185,000. This motion was denied, and an opinion rendered.

On the 29th day of August, 1921, the claimant made a motion, through Saul S. Myers, for an order substituting said Myers as attorney for it. This motion was granted and entered on the 20th day of September, 1921. On the 21st day of September, 1921, appellant duly appealed from said order, and served and filed said motion of appeal, assignment of error, and bond for costs. The essential part of the order providing for the substitution of attorneys, and which is the order appealed from, may be found in the margin.[1] It provides for substitution of attorneys upon the condition that Mr. Thompson's lien is to attach to the proceeds of the cross-libel if any there shall be, and to the papers of the claimant. It also directs that the substituted Mr. Myers is to have access to all of the papers in the possession or under the

[1] "Ordered, that the said motion for substitution of attorneys be and the same hereby is granted, upon condition that the lien of T. Langland Thompson, Esq., the present attorney of the Bulk Oil Transports, Inc., attach to the proceeds of the cross-libel, if any there shall be herein, and to the papers of the Bulk Oil Transports, Inc.; and it is further ordered that Saul S. Myers be, and he hereby is, substituted in place of T. Langland Thompson as attorney herein of the Bulk Oil Transports, Inc., and that he shall have access to all of the papers in the possession or under the control of the said T. Langland Thompson, received from the Bulk Oil Transports, Inc., or from Christoffer Hannevig, or from Christoffer Hannevig, Inc., or from any other source. * * *"

control of the displaced attorney, and which the latter received from the claimant, or from any other source.

T. Langland Thompson, of New York City (Hans P. Treece, of New York City, of counsel), for appellant.

Spier Whitaker and Saul S. Myers, both of New York City, for appellee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] Before this cause was heard upon the merits, a motion was made to dismiss the appeal, on the ground that the order from which the appeal was taken was not a final order, and therefore was not one from which an appeal would lie. We denied the motion and held the order appealable, in accordance with our decisions in In re Oceanic Steam Navigation Co., 204 Fed. 259, 124 C. C. A. 347, and in Cavalliotis v. La Fonciere de France et des Colonies, 272 Fed. 803. The order finally determined the appellant's rights as an attorney in the case. It is a complete determination of the question as to who shall act as the claimant's attorney, and it gave the right to the substituted attorney to inspect the papers upon which the removed attorney claims a lien, and the provision of the order directing a special master to determine the amount of the appellant's lien and report did not destroy the finality of the order.

In denying the motion to dismiss the appeal, we granted a stay of further proceedings until two days after the filing of the opinion in this court deciding the appeal. The case having been heard, we shall now dispose of it upon its merits.

This appeal raises two questions for the consideration of this court. The first is whether a litigant, during the course of a litigation, can displace his attorney, who has not misconducted himself, and substitute another attorney in his place and stead, without first paying or securing to him his fees and disbursements. The second question is whether a client or his attorney has the right to inspect the papers belonging to the client, but retained in the possession of the displaced attorney under the claim of an attorney's lien, without first paying or securing his fees.

In Everett, Clarke & Benedict v. Alpha Portland Cement Co., 225 Fed. 931, 938, 141 C. C. A. 55, this court had occasion to consider the validity of an order allowing the substitution of attorneys and the turning over of papers upon which the attorneys claimed a lien. We then stated that it could not be questioned that a client has the right to change his attorney at any stage of the proceeding and without assigning a reason, that he might make an application to the court to have a new attorney of record substituted and that the court might grant an order of subsitution, imposing such terms as might be justified under the circumstances to protect the rights of the attorney, if he be free from fault.

[2] That a client has the right to discharge his attorney at any time, either with or without cause, is clearly established law. Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984; Silverman v. Pennsylvania R.

Co. (C. C.) 141 Fed. 382; Kelly v. Horsely, 147 Ala. 508, 41 South. 902; Love v. Peel, 79 Ark. 366, 95 S. W. 998; Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Glover v. Dimmock, 119 Ga. 696, 46 S. E. 824; Wipfler v. Warren, 163 Mich. 189, 128 N. W. 178; Delaney v. Husband, 64 N. J. Law, 275, 45 Atl. 265; In re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536. Indeed, in Crosby v. Hatch, 155 Iowa, 312, 316, 135 N. W. 1079, the court declared that—

"No contract of employment can prevent a client from dismissing one attorney and entering into a new arrangement with another."

[3] If a substitution of attorneys cannot be made by consent of both client and attorney an order for such substitution must be obtained by making proper application to the court. Wilkinson v. Tilden (C. C.) 14 Fed. 778; Krekeler v. Thaule, 73 N. Y. 608.

[4] If the application for substitution is based on the misconduct of an attorney, it has been held that the court may direct an unconditional substitution, and order that he give up the papers without payment of his fees, and leave him to bring an action for his fees. Sloo v. Law, Fed. Cas. No. 12,958.

[5] But if the client brings no charges of misconduct against the attorney, but merely elects to have a substitution, the court will grant it imposing such terms as justice requires; and in such cases it is the general rule that a substitution will not be authorized, without providing that the fees and expenses of the displaced attorney shall be paid or secured to him, or his lien in some way preserved. In re Paschal, 10 Wall. 483, 19 L. Ed. 992; New York Phonograph Co. v. Edison Phonograph Co. (C. C.) 150 Fed. 233; Lanagan v. Wayne Circuit Judge, 170 Mich. 435, 136 N. W. 398; In re Dunn, supra. In the case last cited the New York Court of Appeals declared it—

"well settled that the courts will not enforce a substitution of attorneys, where the first attorney is without fault, unless the amount due the attorney for his services and expenditure is either paid or secured."

[6] As respects the first question involved, we have no difficulty in holding that the law is clearly established that an order providing for the substitution of attorneys, in a case where no professional misconduct is alleged, should not be made until or unless his fees for services rendered and expenses incurred have been paid or secured. The order appealed from is in our opinion invalid, as it provides for no such security. It simply provides that the attorney's lien shall "attach to the proceeds of the cross-libel," if any there shall be, and to the papers of the claimant. It is hardly necessary to point out that, if it should turn out that there should be no proceeds from the cross-libel, the security would amount to nothing. Moreover, the attorney to be displaced was not retained under an agreement for contingent fees. In this connection, however, we call attention to Du Bois v. Mayor, etc., of the City of New York, 134 Fed. 570, 69 C. C. A. 112, which was decided by this court, and which involved a substitution of attorneys, the original attorneys having been employed under a contract for fees contingent on their ultimate success in the litigation. A disagreement arose between the client and his attorneys. There was no allegation of

misconduct, and no proof whatever on which to predicate misconduct. The court below required the client to pay the attorneys originally employed a fair and reasonable compensation for the services already rendered as a condition of the substitution. This court declared that, although the complainant had an undoubted right to change his attorneys, it should be upon condition that he pay them fair remuneration for services already performed.

"The agreement here was that the attorneys should receive a contingent fee, dependent upon ultimate success; the complainant would deprive them of the opportunity to earn the contingent fee, and leave them dependent upon the efforts of other counsel, in whose selection they have had no participation, thus leaving them practically remediless."

The action of the lower court was affirmed.

So in New York Phonograph Co. v. Edison, supra, decided in the Circuit Court of the Southern District of New York, Judge Lacombe declared that—

"The proposition that a solicitor be secured merely by preserving his lien on the fruits of the litigation is preposterous."

He pointed out that, if the client should be so unfortunate as to place the case in incompetent hands, there might never be any of the fruits which the original solicitor might have produced, had the cause been left in his hands. He added that it was to guard against "such iniquitous results" that the courts exercise the power of supervision over orders of substitution.

[7] This brings us to a consideration of the second question, and that is whether the client has a right to inspection of the papers upon which his attorney claims a lien. The question assumes that an attorney has a lien for his fees upon his client's papers which have come into his attorney's possession in the course of his professional services. It is, of course, well-established law that such a retaining lien exists, both in England and in the United States. Such a lien was enforced in England as early as 1734. Ex parte Bush, 7 Viner's Abr. 74. And in 1779 Lord Mansfield, in Wilkins v. Carmichael, 1 Doug. 101, 104, declared that it was recognized in courts both of law and equity and was established on general principles of justice. In this country the federal courts have long held that such a lien exists, and that the attorney can retain them until his fees are paid. Finance Co. v. Charleston, etc., R. R. Co. (C. C.) 48 Fed. 45; Leszynsky v. Merritt (C. C.) 9 Fed. 688; In re Wilson & Creig (D. C.) 12 Fed. 235; In re Gillaspie, (D. C.) 190 Fed. 88, 91.

In Jones on Mortgages (3d Ed.) § 115, that writer states that the attorney has a lien on his client's papers for a general balance due him for services, not only in the suit or matter to which such papers relate, but for other professional matters. And the same writer in section 122 makes the following statement:

"The client has a right to change his attorney if he likes, but, if he does so, the law imposes certain terms in favor of the attorney, namely, that the papers in the suit cannot be taken out of his hands until his reasonable charges are paid. The things upon which he claims a lien are things upon which he has expended his own labor or money, and he should have a lien in

the same way as any other workman who is entitled to retain the things upon which he has worked until he is paid for his work."

Conceding, as we must, that the attorney has a lien until he has been paid or secured, the question is: Can the attorney, while the lien exists, be compelled to permit the client or his substituted attorney to inspect the papers? There does not seem to be much authority upon the subject. Rose v. Laughton, 1 Ves. & B. 369, and Commerell v. Poynton, 1 Swanst. 1, support the right to such inspection. These cases were decided by Lord Eldon, who later repudiated and overruled them in Lord v. Workleighton, Jac. 580, and in Newton v. Harland, 4 Scott, N. R. 769. In Lord v. Workleighton, Lord Eldon, in considering a motion for inspection, said:

"My present impression is that he [the attorney] ought to be able to make use of the nonproduction of the papers in order to get what is due him. I am now stating an opinion contrary to what I thought at the time when the cases cited were before me. I think it is better that the point should be settled, and I shall therefore consider of it with the Master of the Rolls and the Vice Chancellor."

The motion for permission to inspect was denied.

The English authorities seem to make a distinction between the case of a solicitor voluntarily withdrawing from a case and the case of a solicitor discharged by the client. Where the solicitor withdraws, the client, it is said, is entitled to an order for the delivery of the papers in the further prosecution of the action, and subject to their redelivery after the hearing. But, where the client discharges the solicitor, the latter is not under any obligation to produce the papers, or to allow the client to inspect them during the continuance of the lien. See Colegrave v. Manley T. & R. 400; In re Cameron's Coalbrook, etc., Ry., 25 Beav. 1; Brassington v. Brassington, 1 Sim. & S. 455; Wilson v. Emmett, 19 Beav. 233; Cane v. Martin, 2 Beav. 584. In Kemp v. King, 2 Moody & R. 437, a case at nisi prius, the point was expressly ruled by Lord Chief Justice Denman. See Jones on Liens, vol. 1, p. 115, note.

In this country there appears to be very little authority upon the question. In Davis v. Davis (C. C.) 90 Fed. 791 (1898), the attorney was served with a subpœna duces tecum to produce papers in his possession, which he held under an attorney's lien. He declined to produce them, and on a motion to punish him for contempt Judge Lowell stated that the client could not require his former counsel to produce papers upon which he claimed a lien. He said:

"* * * If an attorney's lien upon his client's paper amounts to anything, I think he may assert it against the client, even when summoned by him to produce the papers by a subpœna duces tecum. The value of the lien often lies almost altogether in the power to withhold the papers from use as evidence, and that the debtor client should be allowed by a subpœna duces tecum to make practically worthless his creditor's lien seems to me unjust."

[8] As a matter of principle, and without regard to authorities, it seems to us that a client's right to inspect the papers upon which the attorney's lien exists should be denied. His lien is a mere retaining

lien, and gives him only a right to retain them until his charges are paid. He has no right of sale, and his right of retention is valuable only in proportion as the papers are valuable to his client. The leverage which the possession of the papers affords depends upon how embarrassing to the client the possession of them by the attorney is. If the client is given the right to inspect the papers or to compel their production while the lien continues, it certainly impairs the value of the lien, as it diminishes the embarrassment caused by the attorney's retention of them, and might make them valueless to the attorney, and the lien nugatory. At the argument counsel gave a homely, but effective, illustration of this. He said that a blacksmith has a lien on a horse for its shoeing, and can retain possession of the horse. If he were compelled to let the owner have the use of the horse whenever he so desired, the blackmith would simply be left with the privileges of feeding and caring for the horse.

In what has been said it must be understood that we have been discussing the right of the attorney to refuse inspection to his client or to one representing the client. Whether the attorney's lien on his client's papers goes to the extent of enabling the attorney to refuse to produce in court documents upon which he claims a lien, where the party demanding their production is a third person, and not the person against whom the lien is claimed, is an entirely different question from the one before us, and is one upon which it is unnecessary to express any opinion at this time. See Hope v. Liddell, 7 De Gex, M. & G. 331.

It is our conclusion that that part of the order which gives to the substituted attorney "access to all of the papers in the possession or under the control of the said T. Langland Thompson, received from the Bulk Oil Transports, Inc., or from Christoffer Hannevig, or from Christoffer Hannevig, Inc., or from any other source," is not justified by the authorities or according to sound reason.

The order for the substitution of attorneys should be granted only upon condition that the fees and disbursements due to T. Langland Thompson for professional services, rendered to the Bulk Oil Transports, Inc., be first paid or secured, and is so modified. It is further modified by striking out all that portion which requires the appellant to grant the substituted attorney access to the papers in the possession or under the control of the appellant, and which he received from "the Bulk Oil Transports, Inc., or from Christoffer Hannevig, or from Chrisoffer Hannevig, Inc., or from any other source." As so modified, the order is affirmed.

MURRAY et al. v. WAGNER et al.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 46.

1. **Pleading ⟸236(4)—Court has discretion to permit amendment after proofs.**

   It was within the discretion of the trial court to permit an amendment of the complaint to be made after all the testimony had been taken.

2. **United States ⟸89—Purchaser of stolen notes without knowledge gets title.**

   A purchaser of negotiable Victory Notes, which had previously been stolen from the owner, is entitled thereto as against the one from whom they were stolen, if he had no notice of the defects in the title.

3. **United States ⟸89—Purchaser from bond broker is not put on inquiry as to title.**

   A purchaser of negotiable Victory Notes from one who was in the business of selling such securities is not put on inquiry as to defects in the title to the bonds by knowledge that the broker was selling them for another, since the rule that an agent cannot pass title is subject to exception, where the property consists of money or negotiable paper under Negotiable Instruments Law N. Y. § 91, and where the principal intrusts the possession of his goods to one whose business it is to sell similar property, either as the owner or as the agent of the owner.

4. **United States ⟸89—Notice of defect of title to notes must do more than raise suspicion.**

   Under Negotiable Instruments Law N. Y. § 95, providing that notice of defect in the title must be actual knowledge of the defect, or knowledge of such facts that the taking of the instrument amounted to bad faith, a suspicion of defect of title or the knowledge of circumstances which would excite such suspicion, or even gross negligence by the taker, does not amount to knowledge of the defect, which defeats his title, so that mere knowledge that the seller of Victory Notes was a broker selling them for another does not defeat the title of the purchaser.

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

Action by Emil W. Wagner and others, copartners doing business under the firm name and style of E. W. Wagner & Co., against James Murray, as Property Clerk of the Police Department of the City of New York, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

The judgment below was in favor of plaintiffs there, who are defendants in error here. The parties will be referred to as they were aligned below.

Wherry & Mygatt, of New York City (Frederick E. Mygatt and William M. Wherry, Jr., both of New York City, of counsel), for plaintiffs in error.

Hays & Wadhams, of New York City (Arthur Garfield Hays, of New York City, and John Schulman, of Brooklyn, N. Y., of counsel), for defendants in error.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

MAYER, Circuit Judge. The action is for conversion of 25 $1,000 4¾ Victory Notes of the United States, which, in August, 1919, were owned by Whitney & Co., defendants below. Murray, the property clerk of the New York police department is a formal defendant. These notes were stolen from Whitney & Co. on August 13, 1919. Plaintiffs were stockbrokers having offices in various cities throughout the United States. One of these offices was in the Hollenden, one of the principal hotels in Cleveland, Ohio, and in charge of one Graves. One Samuel Ginsberg was the proprietor of a small cigar store across the street from the Hollenden Hotel. Ginsberg was licensed to deal in securities in accordance with the so-called Blue Sky Law of Ohio [1] from September 12, 1919, and this license was existent on October 16, 1919. Graves, who had known Ginsberg for some time, sold him some copper stock in July, 1918, and thereafter, and until October 16, 1919, had several transactions with him. Graves bought from Ginsberg Liberty Bonds on January 20, 1919, Victory Notes on September 8, 1919, and Victory Notes and Liberty Bonds on September 30, 1919—all aggregating $17,050. These transactions were never questioned. Prior to October 16, 1919, Graves had been told that Ginsberg was a licensed broker, and was handling Liberty Bonds, and had sold bonds to another reputable brokerage house in Cleveland.

On the morning of October 16, 1919, Ginsberg went to Wagner & Co.'s office, saw Graves, and told him that he had $25,000 Victory 4¾'s, which he would like to sell. Graves asked him whether he wanted them sold "at the market," to which Ginsberg answered, "Yes." In accordance with the practice of the Wagner firm, Graves sent an order to New York over the private wire to Wagner's New York correspondent, Josephthal & Co., "Sell twenty-five thousand Victory 4¾'s at the market." Within a few minutes, Josephthal & Co. wired back that they had sold the notes at 99.72. Meanwhile Graves had instructed Drapes, the cashier of Wagner & Co., to check up the notes. This was, apparently, an ordinary and usual precaution and instruction. Drapes had lists of stolen bonds, showing the numbers. These lists were obtained from the Federal Reserve Bank in Cleveland and other sources. Drapes did not find the numbers of these notes on any of the lists, and so reported to Graves, Thereupon Drapes figured out what was due Ginsberg, wrote out a check to Ginsberg's order on the Guardian Savings & Trust Company of Cleveland for $25,379.42, and delivered the check to Ginsberg. Wagner & Co. received about $18 for the transaction, which was regarded by Graves as broker's commission.

The fact that the notes in question had been stolen from Whitney & Co. in August, 1919, was not known to Graves. After the check was delivered to Ginsberg, he left the Wagner office. He returned, however, in a few minutes with the check, and said to Graves:

"Will you go to your bank and identify me? * * * I am not known over there. * * * I want to get the cash on this check."

Thereupon Graves said:

"Why, yes: I can do that."

[1] Gen. Code, §§ 6373—1 to 6373—24.

He further testified:

"I think I asked him why he wanted the cash, and he said the client that he sold the securities for had to have currency."

Graves then identified Ginsberg at the bank, and for that purpose also indorsed the check. After Graves left the bank, Ginsberg cashed the check. That night the notes were sent by Wagner & Co. to Josephthal & Co. for delivery to the purchasers, who were Sutro & Kimbley. When they were presented by the latter firm to the Federal Reserve Bank for exchange for other securities, the notes were held, and then delivered to the New York police department as stolen property. Murray, the property clerk, delivered them to Whitney & Co., who claimed them as owners. Upon application of Sutro & Kimbley, the Stock Exchange decided that, since a dispute had arisen about the title, Wagner & Co. should reimburse Sutro & Kimbley and should establish title to the notes. Wagner & Co. received from Sutro & Kimbley the receipt given by the police department, together with an assignment to them of all the right, title, and interest in the receipt and in the notes. Wagner & Co. made an unsuccessful demand for the bonds on Whitney & Co., and hence brought this action.

The complaint alleged that the notes were purchased by Wagner & Co. from Ginsberg in the regular course of business; but, on the trial, it was apparent that the pleader, in so alleging, was under a misapprehension, as the proofs showed that Wagner & Co. acted as brokers, and sold the notes as above described, and received only a broker's commission. When all the testimony had been taken, counsel for Wagner & Co. moved to amend the complaint. This motion was somewhat informal in its phraseology, but it was clear enough to demonstrate that it was then alleged that Wagner & Co. were then the holders and owners of the notes, and had therein a special property right, in that they held these notes as security for the advance made to Ginsberg. After some colloquy, it was plain that counsel for Whitney & Co. did not press his objection to the amendment. On the contrary, he proposed that the court should leave to the jury two questions as follows:

(1) Did Wagner & Co. on October 16, 1919, advance to Samuel Ginsberg the sum of $25,379.48 on the security of the 25 Victory Bonds?

(2) If you answer "Yes" to the first question, then did Wagner & Co. act in this transaction with good faith?

Then counsel said:

"Now, if your honor will leave those two questions to the jury, to answer 'Yes' or 'No,' why, then, upon the findings, you can direct a verdict, which will never require another trial."

The jury answered each question in the affirmative, and thereupon the court directed a verdict in favor of plaintiffs.

[1] In the third assignment of error, defendants do not complain of the nature of the amendment, but merely that the court, "after defendants had moved for a dismissal of the complaint, allowed the plaintiffs to amend their complaint." The allowance of the amendment at that time was well within the court's discretion, and hence was not error.

[2] Up to the time when Ginsberg delivered the notes and received the check, there was nothing in the testimony which would have justified a verdict in favor of defendants. So much apparently is admitted by counsel for defendants, when they state in their brief:

"If Ginsberg had not disclosed his agency, the situation would have been wholly different. * * *"

In Crittenden v. Widrevitz (C. C. A.) 272 Fed. 871, recently decided by this court, the court sustained a directed verdict on facts less favorable to the purchaser of the stolen bonds than those which appear in this case prior to the conversation about cashing the check. Whether or not the transaction, as between Graves, acting for Wagner & Co., and Ginsberg, was completed when Graves delivered the check, we need not determine.

[3] The question is whether what Ginsberg said to Graves was notice of defect of title, in that Ginsberg was not the owner, but was acting for another, and thus that Wagner & Co., as matter of law, did not become owners and holders in good faith without notice. It is true, of course, that ordinarily possession by an agent is as consistent with agency as with ownership, and therefore, as against the true owners, an agent cannot pass title. But to this rule, as said by Mechem on the Law of Agency (2d Ed.) § 2110:

"There are two exceptions made. One relates to the case in which the property in the agent's possession consists of money or of negotiable paper; the other, to the case in which the principal intrusts the possession of his goods to one whose business it is to sell similar property, either as the owner or as the agent of the owner."

The first exception has been codified by the Negotiable Instruments Law (Consol. Laws, c. 38) of New York (section 91) and by the Ohio General Code (section 8157). The second exception is thus well expressed by Mechem (section 2112):

"If a man voluntarily delivers his property into the customary business possession of one, like an auctioneer, broker, or factor, whose ordinary business it is to sell similar property as the agent of the owners, it is said to be a warrantable inference, in the absence of anything to indicate a contrary intent, that he intends his property to be sold also."

As stated, supra, Ginsberg was a duly licensed broker, authorized under the laws of Ohio to deal in this class of securities, and that fact had come to the attention of Graves prior to the transaction here concerned. There was, therefore, no duty per se upon Graves to refuse to identify Ginsberg at the bank, nor to order the payment on the check stopped.

[4] What constitutes notice of defect of title in respect of negotiable instruments, as in many cases defined, has been simply and clearly stated in section 95 of the New York Negotiable Instruments Law, as follows:

"Section 95. *What Constitutes Notice of Defect.* To constitute notice of infirmity in the instruments or defects in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

See, also, Page & Adams Annotated Ohio General Code, § 8161, which is identical with section 95, supra.

Another way of stating the proposition is very well set forth in Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 630, 50 S. E. 880, 881 (70 L. R. A. 312). In that case, on the facts, the bank to which the notes were sold knew that the agent was acting in derogation of his principal's rights. The court, however, in its opinion said, inter alia:

"The settled law of the country now is that, despite suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, a party who takes a negotiable instrument before it is due for a valuable consideration, without knowledge of any defect of title in good faith, obtains a good and indefeasible title thereto."

See Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 69 U. S. (2 Wall.) 110, 17 L. Ed. 857; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193; Crittenden v. Widrevitz, supra.

As Ginsberg was an authorized broker, it cannot be said that, as matter of law, Graves was charged with actual knowledge of any infirmity or defect in the title of the notes. Whether Graves had "knowledge of such facts that his action in taking the instruments amounted to bad faith" was regarded below as a question of fact, and, in effect, submitted to the jury after a clear and comprehensive charge.

In view of the jury's answer, it is unnecessary to consider whether plaintiffs would have been entitled to a directed verdict.

Judgment affirmed.

THE BOSTON.*
THE RICHMOND.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

Nos. 16, 17.

1. **Collision ⇐93—Evidence held to justify finding of fault.**
   In libel by owner of steamer against owner of ferryboat, arising out of a collision when the latter attempted to cross the bow of the former, evidence *held* to justify a finding that the ferryboat was gravely at fault, and that she attempted to navigate without regard to the rights of the steamer, which was the privileged vessel under Pilot Rules, art. 19, providing that, when two steam vessels are crossing, the vessel having the other on her starboard side shall keep out of the way.
2. **Collision ⇐38—Duty of privileged vessel to hold her course.**
   When two steam vessels are crossing so as to involve risk of collision, it is not only the right, but the duty, of the privileged vessel, under Pilot Rules, art. 19, to hold her course and speed until a departure from the rule is necessary to avoid immediate danger, and the fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence.
3. **Collision ⇐38—Duty of privileged vessel to assist maneuver assented to.**
   Where privileged vessel, under Pilot Rules, art. 19, giving a steam vessel to the starboard of another the right of way, assents to proposal of the other to cross her bow by repeating two whistles, it is her duty to at once assist the maneuver.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 314, 66 L. Ed. —.

4. Collision ⊂=153—Claim of fault, not suggested below, not reviewed on appeal in collision case.

On appeal from a decree in a proceeding in admiralty to determine who was at fault in a collision between steamers, it cannot be claimed by appellant for the first time on appeal that the other vessel was at fault, in that she was navigating in violation of Consolidation Act N. Y. § 757, requiring steamboats to be navigated as near as possible to the center of East River.

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

Libel in admiralty by the New England Steamship Company, owner of the steamer Boston, against the City of New York, owner of the ferryboat Richmond, with cross-libel by the libelee. Decree for the former, and the latter appeals. Affirmed.

John P. O'Brien, Corp. Counsel, of New York City (Charles J. Carroll, of Brooklyn, N. Y., of counsel), for appellant.

Haight, Smith, Griffin & Deming, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. These causes were tried together in the court below, were argued together in this court, and will be decided in a single opinion.

The New England Steamship Company, a corporation organized under the laws of the state of Connecticut, as the owner of the steamer Boston filed its libel against the city of New York, owner of the ferryboat Richmond in a cause of collision, civil and maritime. The libelant complained that on December 12, 1917, the steamer Boston, being at the time seaworthy and properly manned and equipped, left New Bedford, Mass., bound for Pier 40, North River, on one of her regular trips; that when the Boston arrived in the vicinity of the Battery in New York Harbor at about 6:30 a. m., on the morning of December 13, 1917, the municipal ferryboat Richmond, was observed one-half to three-quarters of a mile away and about one and one-half or two points off the Boston's port bow; that the ferryboat was just coming from behind Castle William on Governors Island and was showing her green light; that the Boston immediately gave the ferryboat a one-blast signal; that the ferryboat did not answer this signal, but shortly thereafter the ferryboat gave a two-blast signal, indicating that she was going to cross the Boston's bow; that, realizing that this was a dangerous maneuver for the ferryboat to attempt, those in charge of the Boston immediately stopped her engines, had them put full speed astern, and at the same time blew three whistles; that they then blew the danger signal, and the Boston's wheel, which had been to port, was put hard astarboard, in an attempt to swing the bow to port and avoid a collision; that the ferryboat made no maneuver to avoid the collision, but continued ahead across the course of the steamer, and the Boston's bow came in contact with the Richmond's starboard side, about 40 or 50 feet from her stern, resulting in the stem of the steamer being badly damaged.

The city of New York in its answer alleged that at 6:10 a. m. on Decemer 13, 1917, the municipal ferryboat Richmond left Staten Island on her regular trip, bound for her slip at the foot of Whitehall street, borough of Manhattan, city of New York; that when she arrived about off the castle on Governors Island, some time about 6:30 a. m., a steamer, which afterwards proved to be the Boston, was observed coming down the East River, about 1,000 feet off the Manhattan shore and about a half a mile away; that the Richmond immediately blew a two-whistle signal, thereby requesting permission to go ahead of the Boston in order to make her slip; that the Boston immediately answered with a two-whistle signal; that the Richmond thereupon proceeded to cross the bow of the Boston in accordance with the two-whistle agreement; that after proceeding for about 20 seconds, and when the Richmond had gotten within about 450 feet of her slip, her captain, noting that the Boston was navigating rather close, blew the Boston a second two-whistle signal, which signal was immediately answered by two whistles from the Boston; that the Boston, however, failed properly to navigate in accordance with the said whistle agreement, with the result that, while the Richmond was attempting to enter her slip and was within 300 feet thereof, the Boston struck her about 40 feet from the stern on her starboard aft quarter.

The answer charged negligence on the part of those in charge of the Boston in the following particulars:

(1) In that the said steamship Boston was navigating too close to the piers.

(2) In that the said steamship Boston failed to abide by a whistle agreement.

(3) In that the said steamship Boston failed to keep out of the way of the Richmond, when the ferryboat was attempting to make her slip.

(4) In that the said steamship Boston, when danger of collision was imminent, did nothing to avoid it.

(5) In that the steamship Boston was in charge of an incompetent master and crew.

(6) In that the said steamship Boston was negligent in such other and further respects as will be pointed out at the trial.

The city of New York also filed a cross-libel against the New England Steamship Company, as the owner of the steamer Boston, in which it alleged that the collision was due to the negligence of those in charge of the Boston in the particulars stated in the answer to the libel filed against it by the New England Steamship Company, as already recited, and sought to recover for the damage done to the Richmond, which it alleged was in the sum of $5,250, and also sought to recover for the loss of the use of the vessel while undergoing repairs, and for expenditure for surveyors' fees and other charges.

The District Judge accepted in the main the claim made by the steamer Boston, which he held to be the privileged vessel. He found the collision took place at least 600 feet from the pier ends, and that the Richmond "was gravely at fault" and "had attempted to navigate without regard to the rights of the Boston." He declined to find the Boston in fault, especially in view of what he regarded as "the glaring

faults" of the Richmond, and a decree was entered against the city of New York for the sum of $21,745.43, with interest. The cross-libel was dismissed.

The testimony shows that the Boston had the Richmond on her port side and that the vessels were on crossing courses. Article 19 of the Pilot Rules provides that—

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

And article 21 provides that, where one of the two vessels is to keep out of the way, the other shall keep her course and speed. Under these rules the Boston was entitled to keep her course and speed, and the Richmond was the burdened vessel, and should have passed under the stern of the Boston. When the Boston discovered the Richmond, she blew a one-whistle signal, indicating an intention to hold her course and speed; the Richmond being at the time about half a mile away. The Richmond continued ahead, going at full speed, and when about 800 feet away blew two whistles, indicating an intention to cross the bow of the Boston. Thereupon the Boston, according to the testimony of her captain, answered with two whistles, and then stopped and backed under a full-speed order, and blew three whistles to notify the Richmond that the Boston was backing, and then blew the danger signal. The wheel of the Boston was also put astarboard. The captain of the Boston was asked why he blew the two whistles. He answered:

"Well, we were so close together, to let her know that I had heard him, and was going to do everything possible to let him get by. I said: 'By golly! She is going to cross our bow.' She couldn't do anything else then, because she was close to us, and she couldn't do anything but go across the bow. She was going ahead quite strongly at that time."

Again, on the cross-examination, he was asked the purpose of his blowing the two-whistle signal to the Richmond, and he replied:

"I knew she was determined to go across my bow, because she couldn't do anything else, and I answered to let her know that I heard her two whistles, and immediately blew her three, to let her know that I was backing."

The vessels collided, the Boston striking the Richmond about 40 or 50 feet from her stern on the starboard side. The following is a further excerpt from the testimony of the captain of the Boston:

"Q. Did the Richmond blow alarm whistles? A. I didn't hear her; no, sir.
"Q. Didn't she do anything to avoid collision? A. Not that I could see. * * *
"By the Court: Q. She had slackened her speed, had she not? A. Not until after she hit us, I don't think she did; I don't think she slowed up a bit, because she was going quite fast."

At the time this collision occurred there were no other vessels near enough to interfere in any way with the navigation of either boat.

[1] This case was very carefully considered by the court below. The District Judge, who heard and saw the witnesses, was in a position to decide between the conflicting stories, and we see no reason for thinking that he was mistaken in the conclusions at which he arrived

as to the facts. The testimony seems to us amply to justify the finding that the Richmond was gravely at fault, and that she attempted to navigate without regard to the rights of the Boston, which was the privileged vessel.

The Richmond had no proper lookout. If she had had such a lookout, those in charge would have known of the presence of the Boston long before they did. It appears from the testimony of the captain of the Richmond that he was not aware of the Boston's presence until he was midway between Castle William and the Ellis Island slip. He did not discover her until he had traveled fully half of the distance from the point where he should have first observed her to his destination. The Richmond was so occupied in cutting across the bow of Transfer No. 25 that she paid no attention to the Boston. Then her captain blew two whistles to the Boston, and proposed to cut across her bow, instead of passing under her stern, as the rules of navigation require.

The Richmond, in proposing to cut across the bow of the Boston and insisting upon it, assumed the risk of what the court below properly characterized as "an obviously hazardous and wholly unnecessary navigation, which could have been dictated only by an obstinate insistence upon some supposititious right of a ferryboat to disregard the steaming rules." And the proposal was made at scarcely more than 40 seconds from the point of meeting of the vessels, while she was approaching at top speed. See The Binghamton (C. C. A.) 271 Fed. 69, 72; The Persian, 224 Fed. 441, 140 C. C. A. 135.

[2] It is argued that the Boston was at fault, inasmuch as, after the Boston blew her one-whistle signal, indicating her intention to keep her course and speed as the privileged vessel, continuing under a one-bell signal right up to within 600 feet of the Richmond, she doggedly claimed her privilege." But until she had consented to surrender her privilege she had a right "doggedly" to claim it, until it became evident that the Richmond was not going to obey the rules of navigation, and that it was necessary to do something to avoid collision. It is not only the right, but the duty, of a privileged vessel to hold her course and speed until a departure from the rule is necessary to avoid immediate danger. The Binghamton (C. C. A.) 271 Fed. 69; Yang-Tze Ass'n, etc., v. Furness, 215 Fed. 859, 132 C. C. A. 201. And, as was said in The Binghamton, supra, the fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence.

[3] It was, however, a most serious question whether, after the Richmond made her first proposal to cross the Boston's bow, the latter assented to the proposal, or whether her assent was withheld until the Richmond renewed the proposal by a repetition of the two whistles. The District Judge had some considerable doubt as to whether the Boston ever answered the first signal. Of course, if she did assent to the proposal when first made, it would have been her duty at once to have assisted the maneuver. But the District Judge was not satisfied that she did assent to the proposal when first made, and we are not disposed to set aside his findings. The captain of the Boston seems

to us to have exercised his best judgment, and we think the court below was justified in its findings of fact, and committed no error of law upon which we can reverse.

[4] We ought, perhaps, to add that the appellant claimed in this court that the Boston was in fault in that, at the time of the collision, she was navigating in violation of what is known as the East River statute. Consolidation Act N. Y. (Laws 1882, c. 410) § 757. That statute requires that all steamboats passing up and down the East River, between the Battery and Blackwells Island, shall be navigated as near as possible in the center of the river, except in going into or out of the usual berth or landing place of such steamboat, and shall not be propelled at a greater rate of speed than 8 miles an hour below Corlear's Hook, nor 10 miles an hour above Corlear's Hook. See New York Central Tug No. 17, 256 Fed. 220, 167 C. C. A. 436. And, as the court below found that the collision occurred approximately 600 feet from the pier ends, the Boston could not have been navigating according to the rule. It is claimed, therefore, that, as the vessel was navigating in violation of the statute, the burden was on the Boston to show that such violation did not contribute to the collision. Inasmuch as no such claim of fault was suggested at the trial in the court below, and is not assigned as error, it is not properly before us on the appeal, and in accordance with our recent decision in The Plymouth, 271 Fed. 461, we must disregard it. And see The Minnie, 225 Fed. 36, 140 C. C. A. 362; The Philadelphia, 75 Fed. 684, 21 C. C. A. 501; Tow Boat No. 1, 74 Fed. 906, 21 C. C. A. 169; Brauer v. Compania Navigacion la Flecha, 66 Fed. 776, 14 C. C. A. 88.

Decree affirmed.

UTAH CONSOL. MINING CO. v. UTAH APEX MINING CO. (four cases).*

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

Nos. 5878–5881.

Mines and minerals ⊂=31(3)—A limestone bed held not to constitute a broad vein giving extralateral rights throughout entire thickness.

A bed of limestone of an average thickness of 200 feet, but varying in thickness from a few feet at the surface to 400 or 500 feet in its dip, lying between beds of quartzite, *held* not to constitute a single broad vein or lode giving extralateral rights to claims on its apex throughout its entire thickness, on evidence that, while it contained a clearly defined metal bearing vein, lying for the most part on its foot wall, which the owner of the apex claims he was entitled to follow extralaterally, it was not generally mineralized. Also *held* that certain other fissure veins of ore contained in such limestone bed were not a part of the foot wall vein, but were separate and distinct therefrom and subject to different ownership.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by the Utah Consolidated Mining Company against the Utah Apex Mining Company. Decree for defendant, and complainant appeals. Affirmed.

⊂=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. —.

John P. Gray, of Cœur d'Alene, Idaho (A. C. Ellis, Jr., of Salt Lake City, Utah, on the brief), for appellant.

J. A. Marshall, of Salt Lake City, Utah, and William E. Colby, of San Francisco, Cal., for appellee.

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

CARLAND, Circuit Judge. These cases were brought by appellant against appellee for the purpose of quieting the title to certain ore bodies found in the Yampa limestone located in the Bingham mining district, Utah, and for injunction and accounting. Appellant claims to be the owner of these ore bodies by virtue of extralateral rights resulting from its ownership of certain mining claims known as Yampa Extension Northeast, Yampa, Mercer and Mercer No. 2, Keepapitchinin, and Rattlesnake. As different segments of the vein or lode upon which these claims were located are included in the claims mentioned, a case was brought upon each claim. The four cases were by stipulation consolidated for trial and tried as one case. They have been heard here as one case, and will be so treated in this opinion. The appellee in its answer alleged that it was the owner of mining claims located in the Bingham mining district, Utah, known as the Nellie Bly, York, Atlantic, Petro, Minnie, and Andy No. 2, and that by virtue of said ownership, including extralateral rights, it was the owner of the ore bodies in controversy. Appellee, however, did not pray for any affirmative relief. The trial court decided that appellant had not by a preponderance of the evidence sustained its contention, that the Yampa limestone was a broad lode, but did hold that the flat sheet of ore lying between the quartzite below and the limestone above was the vein which had its outcrop within the boundaries of the mining claims of the appellant and gave to the appellant extralateral rights beneath the surface of the mining claims of appellee, but that the ore bodies in dispute were not a part of that vein. Judgment was therefore entered for the appellee. The following is a statement made by the trial court, with which we agree, as to what the evidence showed in regard to the geological condition of the country where the ore bodies in dispute are located:

"Geologically the country involved in this litigation consists of an underlying quartzite bed or stratum of unknown extent and thickness. Upon this quartzite there is a limestone bed, called the Highland Boy limestone, of an average thickness of about 250 feet, by varying in thickness from about 100 to 400 feet. Above the Highland Boy limestone there is a bed of quartzite having an average thickness of about 250 feet, and above this quartzite bed there is another limestone bed, called the Yampa limestone, with an average thickness of about 200 feet, but varying in thickness from a few feet at or near the surface to 400 or 500 feet at depth in the neighborhood of the steepening of the dip of the limestone. Above the Yampa limestone there is a quartzite stratum having a thickness of about 700 feet, and above this stratum of quartzite a limestone bed, called the Parnell, of about 30 feet in thickness. Upon the Parnell limestone rests a quartzite bed containing within it here and there thin lenses of limestone. This bed of quartzite has a thickness of about 280 feet. Above this quartzite there is a thin bed of limestone called the Petro, and above the Petro an indefinite thickness of quartzite in which are found here and there thin lenses of limestone.

"The limestone and quartzite beds above mentioned are sedimentary rocks, and, as laid down in the bottom of the ocean, were originally level. Later and in the mountain making of this region these sedimentary beds were uplifted and more or less tilted and bent so that now they have a dip northerly at the surface and for some considerable distance below the surface of about 30 degrees, and an easterly and westerly strike across the country.

"Subsequent to the mountain building which resulted in the tilting of these sedimentary beds of limestone and quartzite there was an intrusion of porphyry—an igneous rock coming up from the depths, apparently from the south and east—which cut through, absorbed, or threw aside portions of the sedimentary beds of limestone and quartzite lying above. After this intrusion of porphyry the ores and mineral contained in the mining properties of the parties to this action were deposited."

Appellant's mining claims are located on the Yampa limestone as above described. Appellant maintains:

(1) That the Yampa limestone within its claims between quartzite boundaries, situated as it is in the Bingham district, constitutes in the eyes of the miner and under a proper construction of the mining law a single lode or vein of metal bearing rock.

(2) That the ore bodies mined by the appellee and in controversy are so situated in the ground, so related to one another and to the vein which is admitted in the answer to belong to the appellant, that they cannot be separated from it, and are therefore part of it.

(3) That the Yampa vein or lode has been developed continuously in ore from the surface to the ore bodies in controversy.

The appellee denies that the Yampa limestone bed is sufficiently altered or generally mineralized as to justify its designation as a vein or lode. It asserts that the ore bodies in controversy are closely associated with distinct fissure veins which were the source of the mineralization of these particular bodies which are situated vertically beneath the surface of the mining claims owned by appellee, and that these fissure veins have their apices in appellee's claims. Appellee, however, admits that there is a vein or lode which counsel calls the "Yampa foot wall vein," extending lengthwise through the mining claims of appellant and dipping beneath the surface of the claims of appellee so located that the appellant has extralateral rights thereon, but denies that the ore bodies in dispute are a part of any such vein or any vein apexing in the mining claims of appellant. There is no dispute as to appellant's ownership of its several mining claims nor the position of the apex of the Yampa limestone in those claims. It is also undisputed that the Yampa limestone has definite boundaries consisting of overlying and underlying quartzite, and that the ore bodies in controversy are within the Yampa limestone. It is also admitted that the ore bodies in dispute are within planes drawn vertically through the parallel end lines of appellant's claims extended with the dip of the Yampa limestone bed. It will be seen from the statement so far made that the questions for decision are: (1) Whether or not the Yampa limestone bed is sufficiently mineralized so as to constitute a vein or lode within the contemplation of the mining laws of the United States. (2) Are the ore bodies in dispute a part of the so-called Yampa foot wall vein? If either question is answered in the affirmative, judgment must be entered for appellant. The evidence shows and the trial court so found

that the Yampa foot wall vein is essentially a fissure vein, generally following the contact between the Yampa limestone bed and the underlying quartzite and possessing a sheetlike character. The ore bodies developed by the appellant and its predecessors consist of this flat sheet of ore whose apex extends a distance of about 2,500 feet within the boundaries of appellant's claims or some of them, and certain stopes above it. For short distances, but infrequently, this fissure vein passes entirely into the overlying limestone, and again is found in the underlying quartzite, but, as has been stated, it is generally confined between the two rocks. The parties to this litigation do not disagree as to the extent of the workings of appellant, but in accord with their different contentions one side says that these workings were along the strike and dip of the limestone bed, and the other says that said workings were along the strike and dip of the foot wall vein. As thus explained, it may be stated that the vein has been developed by appellant or its predecessors on its strike upwards of a mile and on its dip for nearly 3,000 feet. Measured horizontally, these workings have extended hundreds of feet beneath the surface of appellee's claims. Ore of a value in excess of $25,000,000 has been mined. The vein has an average width of from 4 to 8 feet. The mineral of the vein is usually separated from the hanging wall or limestone side by a gouge or parting. The mineralization of the vein does not fade into the overhanging limestone, but is clearly separated from it. In the neighborhood of the ore bodies in dispute the limestone bed and the flat sheet of ore in sympathy with it turn over on their dip and descend to the deep in nearly a vertical position along the foot wall contact. The Yampa limestone has an average thickness of about 200 feet, but varies in thickness from a few feet at the surface to 400 or 500 feet where at its dip it becomes almost vertical. The dimensions of this limestone become material in determining its mineralization, as the amount of ore must to a certain extent be compared with the body of rock which it is claimed the ore mineralizes. When this comparison is made it seems plain that a large part of the Yampa limestone is unmineralized rock. The trial court found, and there is evidence to support its finding, that—

"Commencing near the surface and a short distance below the outcrop of the Yampa limestone, and extending in a northeasterly direction for a distance of approximately 1,000 feet, there are a number of lead stopes in the limestone above the thin, flat sheet of copper ore described above; and beginning at the easterly end of the lead stopes just mentioned there are a group of copper stopes in the limestone above the thin flat sheet of copper ore, running almost east and west, a distance of 700 or 800 feet.

"Except the group of lead and copper stopes in the limestone above the flat sheet of ore above described, there are no ore bodies or mineralization not clearly associated with the flat sheet of ore, until the ore bodies in dispute are reached below.

"The limestone above and overlying this thin, flat sheet of ore—in the country intervening between the ore bodies in dispute and the local occurrences of lead and copper ore in the body of the limestone near the surface, a distance along the dip of about 1,800 feet, and east and west along the strike a distance of about one mile—is, except to a very limited extent, undeveloped and unprospected, and, so far as known, is practically unmineralized, unchanged, unbroken limestone."

Among the lead and copper stopes mentioned by the court are the Abe Raise, Sulphur, Stearns East, Stearns West, and Sullivan stopes. An examination of the evidence in relation to these stopes and other ore bodies convinces that they cannot be said when taken in connection with the foot wall vein to make of the whole body of limestone a single broad lode. Counsel for appellant, however, confidently claim that when the definitions of what constitutes a vein or lode, as that term is used in the Acts of Congress of 1866 (14 Stat. 251) and 1872 (Comp. St. § 4614 et seq.), are considered, and when the character of the mineralization of the Eureka lode in Eureka Mining Co. v. Richmond M. Co., 4 Sawy. 302, 8 Fed. Cas. pp. 819–825, No. 4,548, and the Jordan lode in U. S. M. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587 (8th Cir.), are compared with the Yampa limestone claimed as a lode in the present case, there can be no escape from the conclusion that the Yampa limestone is a broad lode. Justice Field in the Eureka Case defined a lode as follows (italics ours):

"We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of *mineralized rock* lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a *mineralized zone* or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

In regard to the limestone which in the Eureka Case was held to be a lode, Justice Field said:

"The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been *broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each,* so far as explorations show, all traces of stratification, thus specially fitting it, according to the testimony of the men of science, to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been. at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. *This broken, crushed, and fissured condition pervades,* to a greater *or less extent, the whole body,* showing that the same forces which operated upon a part, operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed, and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity."

In Mining Co. v. Lawson, supra, the Jordan limestone was involved. This limestone is situated in the Bingham district and is about 3,300 feet distant from the Yampa limestone. In this case this court said:

"A careful examination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral bearing rock extending from the quartzite on one side to the quartzite on the other. The limestone has been *profoundly broken, altered, and mineralized,* and has thereby obtained an individuality which, apart from

other differences, clearly distinguishes it from the neighboring rock. There is a local absence of ore in places, a continuous occurrence of it in others, and a seeming local occurrence of it in still others, but the ore bodies are not separated, one from another, by any defined boundaries. As in Eureka Consolidated Mining Co. v. Richmond Mining Co., 8 Fed. Cas. 819, 825 (No. 4548), they are parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone. As shown by extensive exploration and actual mining, the mineralization has been so general that its only defined limits are the quartzite walls which bound the limestone, and within it one may reasonably expect to encounter ore by driving or cross-cutting in any direction."

These definitions of a vein or lode may be accepted as generally correct. We have carefully read the opinions of the court in the Eureka and Lawson Cases and examined the facts in those cases so far as those facts were found by the court. We are quite sure that we have no authority to examine the evidence in those cases for the purpose of finding the facts ourselves for two reasons: (1) If we found them the same as stated by the court, it would serve no useful purpose. (2) If we found them to be different, it would be a retrial of those cases without jurisdiction so to do. Briefly stated, we are unable to find that the Yampa limestone is, as was said of the Eureka and Jordan lodes, broken up, crushed, disintegrated, and fissured, in all directions so as to destroy except in places of a few feet each so far as explorations show all traces of stratification, and that this broken, crushed, and fissured condition prevades to a greater or less extent the whole body of the Yampa limestone showing that the same forces which operated on a part operated on the whole and at the same time. The Supreme Court in affirming the judgment of this court in the Lawson Case said:

"Summing up our conclusions, the findings of fact as stated in the opinion of the Court of Appeals are not clearly against the testimony and must, therefore, be sustained." Lawson v. M. Co., 207 U. S. 19, 28 Sup. Ct. 15, 52 L. Ed. 65.

This remark and others found in the opinion of the Supreme Court justifies us in saying that the decision in the Lawson Case ought not to be extended to cases where the facts are not clearly the same. Again, on page 12 of 207 U. S., on page 19 of 28 Sup. Ct. (52 L. Ed. 65), the same court in the same case said:

"With reference to the conclusion of the Court of Appeals it is sufficient to say that, if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong."

The evidence in this case not only fails to show that the finding of the trial court was wrong on the question of a broad lode, but shows that it was right. Grand Central Mining Co. v. Mammoth Mining Co., 29 Utah, 490, 83 Pac. 648.

In considering the Yampa foot wall vein as it relates to the mineralization of the Yampa limestone, we are of the opinion that it shows too much; that is its extent and location tends to show that it is the vein or lode which gives to appellant its extralateral rights, and there-

by negatives to a certain extent the claim that the Yampa limestone is a broad lode.

It remains to consider the question as to whether the ore bodies in dispute are a part of the Yampa foot wall vein. Of course, if the claim of appellant that the Yampa limestone was a broad lode had been sustained, the question now to be considered would be immaterial, or, if it had been decided that the ore bodies in question were a part of the Yampa foot wall vein, the question of a broad lode would be immaterial, but appellant has the right to maintain its title to the ore bodies in dispute by urging alternative sources of title, although in sustaining one it abandons the other. Before taking up the question to be considered, certain criticisms made by counsel for appellant as to the decree entered below may be noticed. There was and is only one major issue presented by the pleadings for decision. That question was and is whether appellant is the owner of the ore bodies in dispute. Appellee asked for no affirmative relief. It is satisfied with the decree. The decree decided that appellant was not the owner of the ore bodies in question through either of its claimed sources of title. This met the issue presented by the pleadings. No further decision was necessary or proper. The testimony in regard to the ore bodies in question was relevant for two reasons: (1) For the purpose of showing that said bodies were or were not a part of the Yampa foot wall vein; (2) as tending to show the source of the mineralization of the Yampa limestone. It is claimed by appellant that appellee came in contact with the ore bodies in dispute prior to 1909, by driving what is called in the evidence the Parvenu tunnel, and shown upon appellee's 1,000 level maps; that this tunnel was a cross-cut about 2,000 feet in length chiefly in quartzite and entering beneath the surface on the west side of Carry fork, and so pointed that, if the Yampa limestone continued its northerly dip of 30 degrees, the tunnel would have intercepted the downward extension of the foot wall of the Yampa limestone. At the time of the driving of this tunnel, however, the steepening of the dip of the Yampa limestone had not been developed, so that the tunnel, instead of penetrating the limestone at the foot wall, barely entered the hanging wall margin of the limestone. That some 18 months later appellee, having exhausted the ore in the upper limestone lodes (Parnell and York Petro), began operations in the Yampa limestone, and from these stopes appellee has mined a large amount of ore. Appellant, gradually developing its mine and extending its workings downward upon ore bodies on the dip of the Yampa limestone, or, as appellee would say, along the dip of the Yampa foot wall vein, reached the area entered by appellee, and, as appellant claims, made connections in ore with the workings of appellee. Appellant further claims that the ore bodies removed by appellee were not discovered nor developed by following downward upon any ore or from the surface, but through crosscuts driven in a southerly direction from the Parvenu tunnel, which at that point was 1,000 feet under ground, and which had not been driven along any ore whatever. Admitting, however, all that is claimed as to the manner in which the appellee discovered the ore bodies in

dispute, we do not see how these facts have any bearing upon the question at issue. Appellee's motive or the manner in which it proceeded has no relevancy in determining whether the ore bodies in dispute are a part of the Yampa foot wall vein. As we have stated, however, the claim of appellant, we briefly state that appellee claims that the Parvenu tunnel was run entirely underneath the surface of its territory, that the Petro, Louisa, Dana, and Leonard fissures extended from the surface down for a considerable distance at the time of the running of the tunnel and were already well known, and that the tunnel was run not only for the purpose of making a connection with the bottom of one of appellee's shafts or inclines, and as a main channel for getting ore out of its mine, but also with the idea of intersecting these fissures in depth. We omit however any further discussion of this matter as immaterial.

Appellant claims that the ore bodies in dispute are a part of the Yampa foot wall vein for the reason that the evidence shows a junction or union of branches or split veins, as they are called in the record, extending from the Yampa foot wall vein to and coming in contact with the ore bodies or some of them. It is admitted by appellee that one of the branches or split veins comes down to the No. 5 ore body, or to be more specific to the fissure extending up from it where the vein is interested and cut off, but counsel contend, and we think correctly, that an admission that there is an intersection is not equivalent to an admission that there was a union or connection. We are of the opinion that the evidence shows that at the only place where the Yampa foot wall vein comes in contact with any of the ore bodies in dispute such contact constitutes an intersection and not a junction or union. As has been said before, appellee admits that appellant is the owner of such spurs and split veins which are a part of the Yampa foot wall vein.

All the witnesses for appellee testify that these spurs or veins pinch out or die in a comparatively short distance from the parent vein. Appellee mined the ore bodies in controversy for eight years before this litigation was commenced, and for six years before that time appellant knew that appellee claimed the ore bodies in dispute and was engaged in mining them. There is abundant evidence to sustain a finding by the court that the ore bodies in dispute are closely associated with a fissure and its branches or spurs which extends from the surface downward into the Yampa limestone and are not mineralogically connected with the vein underlying the limestone bed. This fissure was for several years before the commencement of this litigation known in Bingham camp as the Petro. It is so called in the evidence by appellee. In the evidence of appellant it is called the Smith fault or fissure. We must assume that the trial court found, judging from what it expressly found, that the ore bodies in dispute had their origin in the Petro fissure. Silver King Coalition Mines Co. v. Conkling Mining Co. (April 11, 1921) 256 U. S. 18, 41 Sup. Ct. 426, 65 L. Ed. ——. This fissure comes down through the limestone nearly at right angles to the Yampa foot wall vein and intersects the limestone beds. Its total width is 7 to 8 feet. We are satisfied from the evidence

that the Petro is the ore-carrying channel which mineralized the Sambo or Parvenu ore bodies, which are two separate ore zones related to the Petro fissure. What has been said in regard to the effect of the finding of the trial court upon the question of a broad lode apply also to its finding that the ore bodies in dispute were not a part of the Yampa foot wall vein. As late as Silver King M. Co. v. Conkling M. Co., supra, the Supreme Court said:

"But the experienced District Judge, after careful consideration, was of the opinion that the ore belonged to the vein. We see nothing to convince us that he was wrong."

The burden of proof to sustain both contentions of appellant, namely, that the Yampa limestone was a broad lode, and that the ore bodies in dispute were a part of the Yampa foot wall vein, was upon the appellant. We agree with the trial court that the burden was not met. We have not found it possible in an opinion of reasonable length to analyze the evidence of the experts who have testified in the case. They all have their opinions and theories, but the miner determines what a lode is largely from physical facts.

We have carefully considered the evidence, and are not convinced that the trial court was wrong upon either issue passed upon by him.

The decree below, being in our opinion right, is affirmed.

CUDAHY PACKING CO. v. CITY OF OMAHA et al. *

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

No. 5730.

1. **Waters and water courses ⟸203(7)—Packing company held party in interest to agreement between water company and city.**
   Where city accepted deed of water system, containing a provision that transfer was subject to obligations entered into by the water company with private consumers in the city, which were to be assumed by the city, it must be held that such provision was entered into for the benefit of a packing company having a contract with the water company to receive water at a specified price, and a demand on the part of the packing company and institution of suit against the city to recover the difference between the contract price and the price charged by the city, which was paid under protest, was an acceptance by the packing company of the contract; but the contract between the packing company and the water company would have created no obligation on the part of the city, in the absence of an agreement to be bound thereby and to perform the unexpired term.

2. **Waters and water courses ⟸183(3)—City of Omaha had power to purchase waterworks system.**
   The city of Omaha, Neb., had the unquestioned power under the laws of the state and ordinances passed in pursuance thereof to purchase in 1912 a water system and to pay for the same.

3. **Waters and water courses ⟸203(7)—Assumption of obligations of contracts held consideration on purchase price of waterworks system.**
   City of Omaha, Neb., in purchasing a waterworks system in 1912, had full power and authority to agree as a part of the consideration for the

conveyance that it would carry out and perform contracts between the water company and consumers, and, having so agreed, it was not within the power of the city, or a water board, to advance water rates as to a consumer receiving water under a contract.

4. Waters and water courses ⟸183(3)—Agreement of city to be bound by contracts of water company on transfer of property was binding on water board.

Although a separate corporation, the water board of the city of Omaha, Neb., in 1912, was bound by an agreement by the city to assume obligations of contracts between water company and consumers as part of consideration for conveyance of the water system to the city by the water company.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by the Cudahy Packing Company against the City of Omaha and others. Judgment for defendants, and plaintiff brings error. Reversed, and new trial ordered.

Yale C. Holland, of Omaha, Neb. (C. W. Sears, J. A. C. Kennedy, George L. De Lacy, and Charles F. McLaughlin, all of Omaha, Neb., on the brief), for plaintiff in error.

John Lee Webster, of Omaha, Neb. (W. C. Lambert, of Omaha, Neb., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This action was brought by the Cudahy Packing Company, hereafter called packing company, against the city of Omaha, hereafter called city, the water board of the city of Omaha, hereafter called water board, and the Metropolitan water district of the city of Omaha, hereafter called water district, for the purpose of recovering the sum of $47,461.49, with interest, as having been unlawfully exacted for water service. At the trial of the action counsel for both parties moved for a directed verdict. The court directed a verdict against the packing company. Alleged errors relating to the admission of evidence have been assigned; but as these alleged errors cannot, in our opinion, affect the decision which must be made, we confine our consideration to the question as to whether or not the trial court erred in directing a verdict as it did, the material facts being largely undisputed.

Before proceeding to consider the facts immediately connected with this case, we may state that the record shows beyond question that by the litigation between the city and the Omaha Water Company, hereafter called water company, some things were settled. Among these were the propositions that the city had the power to purchase the waterworks system of the water company and exercised said power by purchasing, on June 20, 1912, from said water company, the entire system of waterworks operated and owned by said water company, wherever located, together with the appurtenances thereunto belonging, for the sum of $6,392,720.17, and other considerations mentioned

in the deed of conveyance; that said deed contained, as one of its clauses, after the description of the property granted and the habendum clause, the following language:

"Subject, nevertheless, to the obligations entered into by the said the Omaha Water Company with private consumers in said city of Omaha, and in the cities of South Omaha, and Florence, and in the village of Dundee and in East Omaha, and with said municipalities, under or by virtue of any of the ordinances, agreements and arrangements hereinbefore set forth, all of which obligations are to be assumed by said city of Omaha."

No court ever decreed that the city should assume any of the obligations mentioned in said clause, but it voluntarily and of its own free will accepted as grantee said deed of conveyance without making any objections to said clause.

Coming now to the case in hand, it appears that at the time of said conveyance there was a written contract in existence between the water company and the packing company, whereby the latter was entitled to receive from the former, for a period of ten years from June 1, 1904, water at the rate of 4½ cents per 1,000 gallons at its plant in the city of South Omaha. In this opinion no distinction is made between the water company existing under the laws of the state of Illinois and the water company existing under the laws of the state of Maine, as there is no question but that the former conveyed all its rights of property to the latter. The Legislature of Nebraska, by an act approved February 2, 1903 (Laws 1903, c. 12), created a water board for metropolitan cities. Omaha was the only city of that class. This board was charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service or the sale of water. These powers were enlarged by amendments passed in 1905 and 1911. On April 15, 1913, the Legislature of Nebraska passed an act (Laws 1913, c. 143) under which the water district was on July 23, 1913, duly organized, and took over the management of the waterworks system in the cities of Omaha and South Omaha, and thereby superseded the water board. On July 1, 1912, the city having acquired the system of waterworks from the water company, as above stated, through said water board, refused to perform the contract between the water company and the packing company for its unexpired term of two years, less one month, and compelled the packing company to pay for all water received 8 cents per 1,000 gallons. The difference between the contract price of 4½ cents and 8 cents was paid by the packing company under protest, and it is this difference, with interest, that this suit is brought to recover.

[1, 2] We are of the opinion that this action is properly brought by the packing company, for the following reasons: The packing company was a private consumer of water in the city of South Omaha. By the sale of the waterworks system to the city the water company had rendered itself unable to perform the unexpired term of the contract between it and the packing company. The packing company was thereby compelled to look to the city for its supply of water, as the city was the only party which could perform the service. So that it

may be truly said that the agreement above quoted from the deed of conveyance was entered into for the benefit of the packing company, and it is now the real party in interest. 6 R. C. L. p. 884. The demands on the part of the packing company that the city perform its contract, and the institution of this suit, was an acceptance of the contract. 6 R. C. L. 889. If the city, however, had no power to agree that it would perform, for the unexpired term of two years less one month, the contract between the water company and the packing company, then the judgment below must be affirmed, as the city was under no obligation to perform the contract unless it could lawfully agree so to do. The mere existence of the contract, conceding it to have been legal, created no obligation on the part of the city to perform it. So the whole case must be determined, one way or the other, as we may determine whether the city had or had not the power to make an agreement to perform the unexpired term of the existing contract. In determining this question, however, it will not do to confine our consideration to the power to make rates for water service vested by law in the water board or the water district of the city. As has been before stated, the city had the unquestioned power under the laws of Nebraska, and ordinances passed in pursuance thereof, to purchase the waterworks system and to pay for the same (Omaha Water Co. v. City of Omaha, 162 Fed. 225, 89 C. C. A. 205, 15 Ann. Cas. 498, affirmed 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991), and it cannot be doubted but that it was proper and right for the city to agree, as a part of the consideration to be paid for the system of waterworks, that it would perform for a period of less than two years the contract between the water company and the packing company. Presumptively, the city could not have purchased the waterworks system without assuming the performance of the outstanding contracts. This aspect of the case throws light on the extent of the power to purchase, and as an incident thereof the power to assume the performance of the contract in question. Consumers of water had no other source of supply, and if the city did not perform the service no service could be had. Moreover, there was conveyed to the city by the deed of conveyance all existing contracts with private consumers. Morally considered, therefore, there is no question of the propriety of the city's agreement. The ground upon which the trial court based its decision was that as soon as the title of the waterworks system became vested in the city, the power to fix rates for water service, conferred by law upon the water board, became operative, and that the agreement by the city to perform for the unexpired term of the contract between the water company and the packing company, which also became effective at the same time, could be rendered void and of no effect by the exercise by the water board of its power to fix rates. Whatever may be the power of the state, or corporations or boards upon which it has conferred the power to fix rates for service performed by public utilities, notwithstanding the rate fixed by private contract (Union Dry Goods Co. v. Georgia Public Service Com., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; Public Utilities Com. v. Wichita R. & Light Co. [C. C. A.] 268 Fed. 37; Omaha Water Co. v. City of

Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. [N. S.] 736, 8 Ann. Cas. 614), the decision of this case cannot rest upon that proposition alone.

[3] We are clearly of the opinion that the city, having the power to purchase the waterworks system and to pay therefor, had full power and authority to agree, as a part of the consideration for the conveyance of the waterworks system and the very contract now under consideration, that it would carry out and perform the short term for which the contract had to run, and that the power to purchase the system of waterworks having been granted by the laws of the state of Nebraska, and ordinances passed in pursuance thereof, and the exercise of this power having been upheld by the highest court of the land, it was not within the power of a mere agency of the city to strike down that power after its lawful exercise, by advancing the rates for water service from 4½ cents to 8 cents per 1,000 gallons. Being of the opinion that the power to fix rates for water service possessed by the water board must be construed with reference to the power of the city to purchase the waterworks system, and as thus construed it was not within the power of the water board to annul the contract made by the city to perform the unexpired term of the contract between the water company and the packing company, we now turn to the last-named contract for the purpose of ascertaining whether there was anything in that contract which rendered its performance by the city unlawful.

[4] In considering this question we must look at the contract as it was made June 1, 1904, between the water company and the packing company, and not under conditions created by the city, or third parties after its assumption by the city. It is urged that the contract was discriminatory when made. The rate was lower than the meter rate prescribed by the water company for private consumers, but it was not lower than the rate prescribed by the water company for all other consumers of water of the same class using the same amount of water. It is further urged that it has been demonstrated since the waterworks system was taken over by the city that the actual average cost of supplying water is much in excess of 8 cents per 1,000 gallons. But if the city lawfully assumed the contract, the fact that for a short period it would not be profitable would be no excuse for refusing to perform it. Other contracts conveyed by the deed of conveyance might be profitable, and the city could not select, for this reason, which contracts it would perform and which it would not. There is no showing that in 1904 the actual cost of supplying water was more than 4½ cents per 1,000 gallons to the water company. It is further claimed that the water board was an independent legal entity, and not bound by the contract made by the city. It is true the water board was a separate corporation, but the waterworks system was the property of the city, and the moneys collected for water service belonged to the city. The exercise of the power to purchase by the city necessarily bound the water board if the contract was legal, and we are of the opinion that it was.

For error in directing a verdict for the defendants the judgment below is reversed, and a new trial ordered.

STONE, Circuit Judge (dissenting). I am compelled to dissent by the following considerations, which seem, to me, controlling: Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420, is the latest of a long line of cases in the Supreme Court declaring the law that contracts with public service corporations affecting rates to be charged for such service are made subject to the police power of the state to change such rates on the grounds of inadequacy or of discrimination. That rule has been enforced by this court. Public Utilities Commission v. Wichita R. & L. Co. (C. C. A.) 268 Fed. 37. The Omaha Water Company was clearly such a public service corporation. It could not bind itself to any private consumer by contract so as to affect the right of the state to control the rates charged. The contract between the packing company and the water company, here involved, was, under the above line of cases, made subject to state control as to the service charge or rate. The character of the contract, in this respect, could not be affected by its assumption by a purchaser of the business and plant of the water company.

The effect of such purchase was merely to substitute a stranger for one of the contracting parties. It did not alter the obligations of the contract in any other manner. Obviously, an assignment of the contract cannot increase the power of the parties to contract away the declared controlling police power of the state. The city, as furnisher of water to private consumers, could not contract with a consumer for a rate which could not be changed by the state, if such rate proved noncompensatory or discriminatory. What the city could not do directly it could not do indirectly by assuming such a contract already made. The whole situation is comprehended in the statement that the police power of the state to control, within certain limits, charges for public utility services, cannot be abridged or affected by the private contract or conduct of any one.

The mere incidental fact that the unexpired term of the contract was short (two years) cannot affect, much less control, the legal situation. In passing, it may be said that the unexpired term involved in the Union Dry Goods Company Case, supra, was but three years.

Here, it has been demonstrated that the contract rate involved is noncompensatory. Hence the condition authorizing exercise of the state police power as to these rates has arisen, and it has been acted upon by the proper state authority.

WALL et al. v. UTAH COPPER CO.

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

No. 5698.

Courts ⇐363—Estoppel ⇐37—Grantor of mining claims held by State Statute and estoppel precluded from asserting after-acquired title.

Under Comp. Laws Utah 1917, § 4879, providing that title acquired by a grantor after a conveyance by him in fee simple inures to his grantee, as well as by estoppel, a grantor of mining claims by the number and name given in their surveys, which contained plats designating their boundaries and area, *held* precluded from claiming any part of the ground so designated as included in an older claim which he afterwards acquired.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by Mary Frances Wall, administratrix, and others, against the Utah Copper Company. From the decree, complainants appeal. Affirmed.

William W. Ray, of Salt Lake City, Utah (Athol Rawlins, of Salt Lake City, Utah, on the brief), for appellants.

A. C. Ellis, Jr., of Salt Lake City, Utah (W. H. Dickson, of Salt Lake City, Utah, on the brief), for appellee.

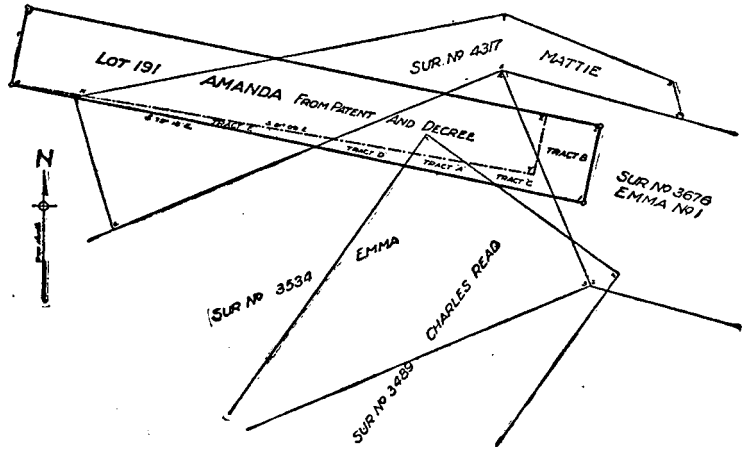
Before CARLAND, Circuit Judge, and LEWIS and YOUMANS, District Judges.

LEWIS, District Judge. A mining claim was located by John Anderson in the West Mountain Mining District, Salt Lake County, Utah, as the Amanda Lode. It was later further designated as U. S. Lot No. 191 when surveyed for patent. That survey was made in 1879, and describes a rectangular parallelogram 1,480 feet long by 200 feet wide, lying easterly and westerly. It was not within the limits of public land surveys. The initial point of the survey, as shown by U. S. Deputy Mineral Surveyor's notes, was the center of an incline shaft on the claim, thence by two courses to the southeast corner of the claim, at which point the surveyor, according to a recitation in his notes, erected a mound of stones and set a pine post 4½'x4"x4", and by appropriate marks on the post designated and fixed it as Corner No. 1, tying it to a mahogany tree 4 inches in diameter which "bears S. E. 27 ft. distant," thence N. 10° 45' E. 200 ft. to the northeast corner, where he erected a mound of stones and set a like post and marked it as Corner No. 2 of the claim. This corner was not directly tied. Thence N. 79° 15' W. 1,480 ft. to the northwest corner of the claim, where he erected a mound of stones and set a like post and marked it as Corner No. 3 of the claim, and gave that corner three direct ties, thence S. 10° 45' W. 200 ft. to the southwest corner of the claim, where he erected a mound of stones and set a like post and marked it as Corner No. 4 of the claim. This corner was not directly

tied. Thence S. 79° 15′ E. 1,480 ft. to Corner No. 1. Points on the side-lines were tied to natural objects and monuments.

Mining operations about the southeast corner have caused a caving in so that the stake and mound of stones designated in the survey as Corner No. 1 were lost, and presumptively the mahogany tree to which it was tied went down also. U. S. Patent issued in 1880, conveying the claim to John Anderson, describing it as Amanda Lode Lot 191, and by metes and bounds. Thereafter title to it passed to Enos A. Wall, who brought this suit and died pending the cause, wherein he charged that defendant was and had been trespassing upon the claim through underground workings and had extracted and carried away ores of great value, for which he asked judgment, that defendant be enjoined from future trespasses and that his title to the claim be quieted in him.

After patent had issued for the Amanda a number of other mining claims were located nearby, and the four with which we are now concerned are the Emma, Sur. No. 3534, Emma No. 1, Sur. No. 3676, Charles Read, Sur. No. 3489, and Mattie, Sur. No. 4317, all of which overlap the Amanda, as shown by this diagram:



The Emma was surveyed for patent in 1897, the Emma No. 1 in 1898, and patents for both of them issued to one Quinn in 1899. The Charles Read was surveyed for patent in 1897, and patent for it issued to the original plaintiff Wall in 1899. The Mattie was surveyed for patent in 1900, Wall being the owner, but patent has not issued. Wall later became the owner of the two Emma claims, and conveyed them and the Charles Read and Mattie to the defendant, or (as to some of them) to its grantors. He had not acquired the Amanda claim prior to parting with title to the other four claims. The field notes of surveys of the Emma, Emma No. 1, and Charles Read place the southerly side-line and the easterly end line of the Amanda, as shown by the dotted line X Y Z on the diagram, within the outer boundaries of that

claim as asserted here by appellants; and the field notes of the Mattie survey represent the north side-line as having a course N. 81° 9′ W. instead of N. 79° 15′ W., thus making it parallel with the southerly side-line as shown by the dotted line. The patents for the three overlapping claims exclude in general terms, as is the uniform practice, the overlapped and previously granted ground within the Amanda thus: "Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said mining claim or Lot 191," and they also give the area granted by each patent in the three overlapping claims, but do not specify the acreage in conflict between the Amanda and either of those claims. The field notes, however, on which the patents issued in each instance specify the acreage in conflict with the Amanda and each of those claims, and computation discloses in each instance that the area in conflict south and east of the dotted line was not accounted for by the surveyor as part of the Amanda claim but as free ground to be included as parts of said three claims for patent as such. It clearly appears from their patent surveys that the ground thus reported by them to be in conflict was north and west of the dotted line. We do not deem it important to determine the causes that led to the conclusion arrived at by the surveyors in making the patent surveys that the ground south and east of the dotted line was not within and a part of the Amanda claim. Mining engineers who testified did not agree as to the true location of Corner No. 2 of the Amanda. It was established that for many years there had been a mound of stones and a pine post 4″x4″ marked as Corner No. 2 of the Amanda at a point some distance westerly of the point shown on the diagram as Corner No. 2 of the Amanda, and some feet north of what is there shown as the Amanda northerly side-line. A corner post could not be found at the point shown as Corner No. 2 on the diagram. Maps of the district showing the location and shape of different claims and their relations to each other had been issued and sold to the public, representing the Amanda claim with side and end line as shown by the dotted line. Mining Engineers who made patent surveys for claims in the immediate locality of the Amanda, other than the three with which we are now concerned, were required to check the Amanda patent survey, and their testimony tends to support the conclusion that the dotted line constituted the southerly side-line and easterly end line of the Amanda. The area called for in the patents of the Emma, Emma No. 1 and Charles Read claims, respectively, requires the inclusion therewith of the ground lying southerly and easterly of the dotted line, and likewise the patent survey of the Mattie requires the inclusion of the small strip to the south of the dotted line in its acreage, to make them correspond with the total acreage designated as free and patentable ground. The same thing as to acreage in the patented claims appears in the field notes of those claims. Thus we have both field notes of the four patent surveys and acreage represented as patentable mutually supporting each other that the disputed territory was not a part of the Amanda claim. When Wall delivered his deeds conveying the Emma, Emma No. 1 and Charles Read claims to the defendant or

its grantors he delivered at the same time the three patents, and they each recite that "there have been deposited in the General Land Office of the United States the plat and field notes of survey" for the claim the patent conveyed. Those patents described the ground conveyed by giving in each instance the name of the claim and its survey lot number, and also by metes and bounds, i. e. their end and side-lines, as shown on the diagram and as given in the field notes, and designated the points of intersection with Amanda end and side-lines in accordance with the field notes. When Wall conveyed them he described them in his deed by the name of the claim and the U. S. survey number.

On the foregoing facts the court gave plaintiffs the relief sought as to all ground in conflict between the Amanda and the four other claims which lies north and west of the dotted line X Y Z, but held that as to the ground east and south of that line, marked as tracts A, B, C, D and E, the plaintiffs were not entitled to recover, resting its conclusion upon a Utah statute which reads thus:

"If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance." Comp. Laws 1917, § 4879.

Obviously, we need not decide which patent passed title to the tracts in dispute. The patent surveys of the four claims represented the disputed tracts as being parts of them, and the patents that issued for three of them purported to convey four of the tracts as parts of the patented claim. "It is a familiar rule of law, that, where a plat is referred to in a deed as containing a description of land, the courses, distances, and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed." Jefferis v. Land Co., 134 U. S. 178, 194, 10 Sup. Ct. 518, 522 (33 L. Ed. 872); see also Chapman and Dewey v. Levee District, 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564. Wall, when he executed and delivered his deeds to the four claims, described them by the names and numbers given to them in the United States mineral surveys for patents, which was a representation that the premises being conveyed by him were premises described in those surveys and patents. It is not questioned that his deeds, under the local statutory rule of construction, purported to convey title in fee simple absolute; and assuming now, without deciding, that the tracts in dispute were a part of the Amanda claim as patented, nevertheless when he thereafter acquired title to that claim the statute at once operated to immediately pass title in the disputed tracts to his grantees and their assigns.

Furthermore, the statute on after-acquired title aside, we are not convinced that the facts are insufficient to raise an estoppel. Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; Ryan v. U. S., 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; Bush v. Person, 18 How. 82, 15 L. Ed. 273; Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805;

Moore v. Crawford, 130 U. S. 122, 130, 9 Sup. Ct. 447, 32 L. Ed. 878; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; U. S. v. C. & O. Land Co., 148 U. S. 31, 45, 13 Sup. Ct. 458, 37 L. Ed. 354. Wall received a very large sum as consideration for the claims, his conveyance of the fee was an implied representation that he was seized and possessed of the estate which he conveyed, and had good right to make the conveyance. The facts debarred him and appellants to make claim to the tracts in dispute.

Affirmed.

In re WEIDENFELD.

Petition of MILKMAN.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 41.

1. **Bankruptcy ⟸339—Only pleadings as to claim are sworn proof and objection.**
   The only pleadings of proof of a debt in bankruptcy are the sworn proof, or the filed claim, and the objection to the claim, which must be filed by the trustee in writing.
2. **Limitation of actions ⟸182(2)—Must be pleaded.**
   The statute of limitations is a defense only when pleaded.
3. **Bankruptcy ⟸339—Objection to claim held not to raise defense of limitations.**
   An objection to claims presented against a bankrupt's estate, that there was no proof of the validity or consideration for the claims, or of their being proper, under the laws of the state, does not include the statute of limitations as a plea in bar.
4. **Bankruptcy ⟸340—Sworn proof of claim is prima facie evidence.**
   Though the schedule of a debt barred by the statute does not make it a provable claim, the sworn proof of claim is prima facie evidence, which warrants payment of the claim, in the absence of an objection.
5. **Bankruptcy ⟸339—Objection to claim is for hearing.**
   Under Bankruptcy Act, § 57 (Comp. St. § 9641), it is the objection to the claim against the estate, and not the claim itself, which is for hearing and determination.
6. **Bankruptcy ⟸339—Objection to claim should present grounds.**
   While there is no particular form required for objections to claims against the bankrupt estate, such objections should be in writing, and should be sufficiently explicit to indicate to the one presenting the claim the nature of the objection, and to enable the officer passing on the claims to do so intelligently and judicially.

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

In the matter of the estate of Camille Weidenfeld, bankrupt. On petition by Walter B. Milkman, as trustee, to revise an order of the District Court (271 Fed. 1010), reversing an order of the referee in bankruptcy, which rejected and disallowed a claim filed against the bankrupt estate, for the estate of John Byrne, deceased. Order of the District Court affirmed.

See, also, 257 Fed. 872; 267 Fed. 699.

Herman J. Witte, of New York City, for petitioner.
Frederic W. Frost, of New York City, for respondent.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Camille Weidenfeld was adjudicated a bankrupt on the 19th of May, 1919. On April 11, 1907, the executors of John Byrne recovered a judgment, which was docketed on that day in the clerk's office of Nassau county, N. Y., for $395,745.82. After negotiations between the parties, and on April 20, 1919, an agreement was made in writing between the executors and the bankrupt, which provided, among other things, that the bankrupt pay in cash $25,000 at the time of the signing of the agreement, and deliver a promissory note of $50,000, to be paid on April 20th, 1910. For security, for the payment of this note, the bankrupt agreed to deliver as collateral a policy of life insurance in the New York Life Insurance Company for $50,000 and the capital stock of a domestic corporation which owned real estate in the city of New York. The agreement provided that the $50,000 could be paid at any time prior to the due date, and upon such payment there would be a transfer of the collateral which accompanied the note. It provided for the delivery of 20 promissory notes, of $5,000 each, aggregating $100,000, bearing the date of delivery, and providing that one should become due every 6 months, and, upon default of the payment of any of these notes, the promissory notes then outstanding should become due and payable immediately. It was further provided that the executors would be further secured by a confession of judgment, to be delivered at the time of the payment of $25,000 cash, which would conform to the New York Code of Civil Procedure, and which would provide for the entry of the judgment as upon contract against the bankrupt for the entire amount of the judgment of $395,745, with the interest thereon, less any payments made under the provisions of the agreement, and that such payment should apply on the amount due for principal and interest. It provided the form of the agreement, and for a renewal thereof three months prior to the date when such confession of judgment shall cease to be effective, under the provisions of the New York Code; that is to say, that a further confession of judgment would be executed and delivered to the executors for the longest permissible period. Upon any default in carrying out the terms of the agreement, it was provided that the confession of judgment for the entire amount remaining due upon the original judgment should immediately become due and payable, "notwithstanding this agreement, and judgment may be entered forthwith against the second party therefor." Twenty-five thousand dollars in cash and other payments were made. Other security was delivered, so that the stock of the realty corporation given as collateral for the $50,000 note was released. The $50,000 note was paid, but default was made in other payments. Note No. 6, for $5,000, maturing four years after date, was sold on the 14th of May, 1919, to one William W. Wilson, and was deducted from the total indebtedness claimed in the proof of claim.

No action was brought to enforce the payment of these notes, nor was the confession of judgment entered within this statutory time, as provided by section 1275 of the New York Code of Civil Procedure. This status continued from the payment of the last note to the filing of the petition in bankruptcy.

The claim filed is for $588,416.45. This amount is the original judgment and interest, less the payments made. A claim was also filed by William W. Wilson for the amount of $5,000. The referee in bankruptcy disallowed both claims. An appeal was then taken to the District Court. The District Judge reversed the referee's determination, and the record discloses no petition to review the action of the referee, in so far as his determination related to the claim of William W. Wilson. The opinion of the District Judge considers only the claim of the executors of John Byrne, and reversed the determination of the referee only in so far as it relates to that claim. Therefore the claim of William W. Wilson is not before us, and we cannot consider it on this application for a revision of the order of the District Judge.

[1-3] The referee expunged the claim of the estate of John Byrne for the reason that it was barred by the statute of limitations. The only pleadings of proof of a debt in bankruptcy are the sworn proof, or the filed claim, and the objection to the claim, which must be filed by the trustee in writing. The statute of limitations is a defense, and a bar only when pleaded. The objection, which is filed by the trustee, does not include the statute of limitations as a plea in bar. The defense offered in the objection filed here is that there was no proof before this court of the "validity or consideration for the said claims, or of their being proper under the laws of the state of New York," and the prayer is that the claims be disallowed and expunged. It is the duty of the trustee to plead the statute of limitations whenever an outlawed claim is presented.

[4, 5] The schedule of a debt barred by the statute does not make it a provable claim. Bankruptcy proceedings are more summary than ordinary suits. The sworn proof of claim is prima facie evidence of its allegations in case it is objected to. The proof of claim warrants payment of a dividend, in the absence of an objection, and therefore has probative force. Whitney v. Dresser, 200 U. S. 533, 26 Sup. Ct. 316, 50 L. Ed. 584. It is the objection, and not the claim, which as pointed out by § 57 of the act (Comp. St. § 9641) is for hearing and determination.

[6] While there is nothing in the act or the rules in bankruptcy directing the forms of such objections they should be in writing, and the specifications should be sufficiently explicit to indicate to the one presenting the claim the nature and the character of the objections. It should be sufficient to enable the officer passing on the claims to do so intelligently and judicially. Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497; In re Royce Dry Goods Co. (D. C.) 133 Fed. 100. Such objections are specifically allowed by statute. In re Wooten (D. C.) 118 Fed. 670. The defense of the statute of limitations is a bar to a claim, and, when it is interposed, it must be pleaded and proved. In the

absence of such a defense, presented by objection, it was permissible for the executors to file and prove their claim.

Order affirmed.

ANDUJAR v. HANI.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 32.

1. **Appeal and error ⟸996—Construction of contract held one for interpretation by court.**

Where the ultimate difference between the parties to a contract of sale of ships was no more than differing inferences drawn from the same words, and each party demanded that the court interpret the writings, leaving to the jury nothing but an assessment of damages, a finding of the court that there was no meeting of the minds of the parties must be accepted on appeal; an inference from admitted facts being itself a fact.

2. **Evidence ⟸450(8)—Ambiguity held to exist in sale contract.**

A cablegram concerning purchase of ships, "Make payments deposit New York joint names, payable to sellers as follows: First payment hundred thousand dollars immediately; second payment hundred thousand dollars on arrival steamers New York; third payment, four hundred thousand dollars on delivery title deeds"—answered by cable of seller, "Accept your proposal," *held* ambiguous, in that it cannot be determined whether seller was immediately entitled to the $100,000, or whether it was to be placed under the joint control of seller and purchaser until delivery of the title deeds, etc., and other evidence was admissible.

3. **Shipping ⟸27—Meaning of contract held for court.**

Construction of an accepted offer for purchase of ships to "make payments deposit New York joint names, payable to sellers as follows: First payment hundred thousand dollars immediately," etc., *held* a question for the court, and not the jury; the difference between the parties being whether or not the seller was entitled to immediate possession of the first $100,000, the words "joint names" and "immediately" being plain enough, singly considered.

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

Action at law by Anthony Andujar against Jean Hani. Judgment for defendant, and plaintiff brings error.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for plaintiff in error.

Frederic R. Coudert, Howard Thayer Kingsbury, and Thomas W. Kelly, all of New York City, for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. This writ raises no point of pure law, but questions the application made by the trial judge of a plain legal rule to a set of facts fully proven or admitted. The rule of law is that the interpretation or construction of written documents is for the court, and the substance of the assignments of error insisted on is, first, that the court erred in finding any ambiguity in certain writings

set forth and admitted in the pleadings; and, second, in holding, even after erroneously admitting other written communications between the parties, that no contract had been made, because their minds had never met.

Action is for breach by vendee of an alleged contract to purchase certain steam vessels. There was no talk between the parties, who were unknown to each other, and separated by the Atlantic Ocean. Their communications were by cable, and largely through brokers or agents; but, as the agency is admitted, we shall speak as though the plaintiff and defendant exchanged telegrams. Complaint alleges that the contract sued on was completed by, and stated in a cable sent by Hani in Paris to Andujar in New York, as follows:

"Have received only one telegram from you. Pleased hear everything in conformation. Accept. Make payments deposit New York joint names, payable to sellers as follows: First payment hundred thousand dollars immediately; second payment, hundred thousand dollars on arrival steamers New York; third payment, four hundred thousand dollars on delivery title deeds to my bank when alterations one-half completed and transfer secured with Veritas certificate highest classification; last payment when boats completed and on delivery with flag transferred. Confirm instanter."

To this plaintiff replied at once, "Accept your proposal * * * as contained in your telegram as follows," and then wired back to Hani verbatim the message above set forth. Defendant thereupon deposited in New York $100,000, to the joint order of an agent of Andujar and the Chase National Bank, as his own agent. This was in July, 1917, during the World War, and when cable communication was delayed and untrustworthy; but it is not alleged nor proved that the two messages above referred to were in any way changed or mistakenly transmitted.

The steamers, which were the subject of contract, had Cuban registry, and admittedly it was part of the scheme that they were to come to New York, be proved by inspection as fit for a good rating, and transferred to the French flag; but in July, 1917, they were still in Cuban waters. As soon as the $100,000 was in New York, Andujar demanded it; Hani would not permit the Chase Bank to pay it over, holding that the delivery of title papers and classification (rating) certificates were prerequisites thereto. Thereupon Andujar brought this action, alleging as breach refusal to pay over the $100,000, and obtained jurisdiction over Hani, by attaching the money or credits aforesaid. Hani appeared, by counterclaim set up the same contract as he conceived it, and demanded damages from Andujar, alleging as breach that the latter had refused to bring the vessels to New York.

At the close of evidence, it appears by clerk's minutes that each party moved for a directed verdict. This was true (as is shown by the so-called bill of exceptions; i. e., the stenographer's minutes) in the sense that each demanded that the court interpret the exchanged cable messages as did the demandant, leaving to the jury nothing but an assessment of damages. The difference between opposing counsel was that plaintiff insisted on the subject-matter of interpretation as no more than the two cables pleaded, while plaintiff extended the same to a long

line of messages, some obviously full of errors, and many delayed, so that the order of sending remained quite uncertain.

The court directed a verdict for defendant on complaint, and for plaintiff on counterclaim, giving opinion declaring (in substance) that this result was reached, because, there being ambiguity in the pleaded messages, it was his opinion on the explanatory evidence that the minds of the parties had never met on the vital points of the times and methods of payment, for Andujar intended to get $100,000 forthwith, while Hani intended merely to deposit payments in New York, and give Andujar nothing but joint control over such deposits, until title and rating had been satisfactorily established.

[1, 2] This ultimate difference between the parties was no more than differing inferences drawn from the same words. A plainer case for interpretation is hard to imagine, and, since both litigants formally submitted the point to the court, decision here might be rested on the familiar rule as to the effect of joint motions for direction (United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; Wilson v. Knowles, 213 Fed. 782, 130 C. C. A. 440), for an inference from admitted facts is itself a fact (In re Pierce, etc., Co., 246 Fed. 814, 159 C. C. A. 116). But we go further, and hold that ambiguity, in the sense of lack of plain words, exists in the pleaded telegram; for "make payments deposit New York joint names, payable to sellers as follows: First payment $100,000 immediately," etc., cannot mean "make payments to sellers as follows: First payment $100,000 immediately," and, unless it does mean that, the plaintiff is wrong. "Joint names" must mean something; the primary meaning is joint control, and if the duty of Hani or his agent was merely to join in paying Andujar, the phrase means nothing.

[3] It is quite true that a ruling which destroyed plaintiff's pleaded contention seemed favorable to defendant's theory of the relations of parties. But we are not concerned with the logic of that situation, for no writ has been taken by defendant; the lower court's action on the counterclaim is not before us. When the whole line of cables between these men is considered, we have no doubt of the correctness of the ruling made. There was no comprehension by either party of the other's position on the fundamentals of the bargain they were trying to make. Plaintiff sought to take one paper of many, and say to defendant: These words are so plain that you must abide by them; their meaning is too apparent for other or further evidence. Bijur , etc., Co., v. Eclipse, etc., Co., 243 Fed. 500, 603, 156 C. C. A. 298. We agree that such plainness of meaning does not exist. Nor, since the words (singly considered) are plain enough, did the ambiguity, by itself, give any right to refer the matter to the jury, had that been requested. The meaning, or lack of it, was for the court. First National Bank v. Pipe, etc., Co. (C. C. A.) 273 Fed. 105, 107.

Judgment affirmed, with costs.

BANKERS' TRUST CO. v. KIEHNE.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1921.)

No. 5498.

Equity ⇐362—Bill not subject to dismissal on motion because of adequate remedy at law.

Where a bill states a cause of action in equity, the objection that complainant has an adequate remedy at law is not properly raised by a motion to dismiss.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Suit in equity by August Kiehne against the Bankers' Trust Company. Decree for complainant, and defendant appeals. Affirmed.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for appellant.

William H. Winter and Winter, Goldstein, Miller, McBroom & Scott, all of El Paso, Tex., for appellee.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. The following statement taken from the brief of counsel for appellee fairly states the purpose of this action:

"On February 16, 1917, appellee sued appellant in the District Court of the United States for the District of New Mexico, by bill in equity, whereby appellee sought to enjoin the prosecution by appellant of a suit filed by appellant against appellee to recover judgment on a note for $18,000 executed by appellee to appellant, and wherein also appellee sought to have a contract of subscription for 2,000 shares of stock in the Bankers' Trust Company, therein referred to, delivered up and canceled and surrendered to appellee, and, wherein appellee sought to have the $18,000 note which appellant had brought suit upon to recover judgment against appellee, delivered up and canceled and surrendered to appellee, and wherein appellee sought to recover judgment against the appellant for the sum of $5,000, paid by appellee to appellant, with interest thereon, and wherein appellee sought to have his name removed and stricken from the stock books and corporation records of the said appellant, Bankers' Trust Company."

Appellee recovered judgment. There was a motion to dismiss appellee's amended complaint which was denied.

It is contended that the court erred in so ruling because appellee's complaint was bad for want of equity. There is nothing in the contention that appellee was as much a party to the fraud as appellant. Washer v. Smyer, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320, is not in point. Even if appellee had an adequate remedy at law, a motion to dismiss was not the remedy. Pierce v. National Bank of Commerce (C. C. A.) 268 Fed. 487; section 274b, Judicial Code, amendment of March 3, 1915, 38 Stat. 956 (Comp. St. § 1251b). There was no error in the refusal of the court to transfer the case to the law docket, as it was not one that ought to have been brought at law.

Judgment affirmed.

HELENA WATER CO. v. CITY OF HELENA et al.

(District Court, E. D. Arkansas, E. D. October Term, 1921.)

No. 493.

1. **Courts ⟸371(1)—Federal court held to have jurisdiction to determine validity of rates fixed by municipal council; "judicial proceeding."**

Acts Ark. 1921, No. 124, § 19, provides that any public utility may have the action of a municipal council or commission fixing rates reviewed as to its legality, fairness, and reasonableness by the circuit court of the county by filing a complaint as in other cases according to the usual rules of pleading, whereupon the court shall proceed de novo and shall determine what rates would afford reasonable compensation for the services rendered and certify the same to the council or commission, which shall thereupon fix rates in conformity with such findings. *Held*, that such proceeding, though called an appeal, is a judicial proceeding, and where the jurisdictional facts exist, may be brought in a federal court.

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

2. **Constitutional law ⟸61—Statutory provision giving legislative powers to court held void under state Constitution.**

The provision of Acts Ark. 1921, No. 124, § 19, conferring on a court legislative power to fix rates for a public utility on appeal from the action of a municipal council or commission *held* void as in violation of Const. Ark. art. 4, § 2, which prohibits the exercise by one department of the state government of powers belonging to either of the others, but under its express terms such invalidity does not affect other provisions of the act.

In Equity. Suit by the Helena Water Company against the City of Helena and others. Motion by complainant for preliminary injunction. On objection to jurisdiction. Overruled.

Moore, Smith, Moore & Trieber, of Little Rock, Ark., for plaintiff.
Fink & Dinning, of Helena, Ark., for defendants.

TRIEBER, District Judge. The plaintiff seeks a temporary injunction to restrain the defendants, the city, and its officials from enforcing an ordinance fixing rates for supplying water to the citizens of the city, which are alleged to be confiscatory.

A preliminary question arising is whether, under the act of the General Assembly of the state of Arkansas of February 15, 1921 (Act 124, Acts of Ark. 1921, pp. 177, 202), the rule of law established in Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, and cases following it or that in Bacon v. Rutland R. R., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538, and authorities following that case, controls.

The importance of the question will be apparent from the fact that, if the court should erroneously hold that the Prentis Case controls, and for this reason refuse to grant the temporary injunction, until plaintiff has exhausted its remedy of appeal provided by the act, and the courts of the state should hold that the rates are not confiscatory, that determination would become res judicata. Detroit, etc., Ry. v. Michigan R. R. Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288, affirming the decision of the District Court reported in 203 Fed. 864.

[1] The provision of the act of the General Assembly vesting the power in municipal councils to establish rates is section 17, and need not be copied, as it vests the power usually vested in commissions and cities to establish rates to be charged by public utilities. The section providing for appeals from the action of the council of a city exercising this power is found in section 19 of the act. That section reads:

"Sec. 19. *Appeal from Action of Municipal Council or City Commission.* Any person, firm, company, or corporation aggrieved by any rate fixed by said municipal council or city commission or by any order or ordinance made in pursuance of this act, shall have the right to have said action on the part of such municipal council or city commission reviewed as to its legality, validity, fairness and reasonableness, by the circuit court of the county in which said municipal council or city commission is located (or where there are two circuit courts in said county, then in the circuit court in the district where such council or commission is situated). Said review, however, by said circuit court shall be made; provided, and upon condition, that the applicant files in said court or in the office of the clerk thereof within sixty (60) days after making of such order or ordinance or rate as to which the appeal is desired, its petition or complaint as in other cases setting out the order or ordinance or rate or other matter therein complained of, therein alleging according to the usual rules of pleading facts showing that the applicant is entitled to the relief therein prayed, upon which complaint summons shall be issued and served in the manner and for the time as in other circuit cases; the said appeal in the circuit court shall proceed de novo. The court in reviewing the action of the council or commission shall hear evidence and determine what rates would afford the appellant valid and reasonable compensation for the services rendered, and shall enter an order setting out such rates and cause the same to be certified to the council or commission and such council or commission shall thereupon fix such rates as shall be in conformity with the finding of the court; provided, either party shall have the right to appeal to the Supreme Court within thirty days from the rendition of such order, in which event the said council or commission shall await the further orders of the court. The circuit court shall have the power to require all proof to be taken in the form of depositions, if so desired by it, and to appoint a master to take the proof and make a finding and recommendation, subject to the approval of the court. The circuit court or the judge thereof in vacation of the county in which such municipality is located, shall upon petition therefor, have the power and is hereby delegated the duty to issue a preliminary restraining order with or without bond as may seem proper, restraining the violation of any order or ordinance made by any municipality under this act, or restraining the violation of any duty on the part of any public utility prescribed by this act or any municipality hereunder and upon final hearing upon such petition to make permanent on the part of said court, said preliminary restraining order."

It will be noticed that this section requires the public utilities to file an ordinary complaint in the circuit court, that the hearing be de novo, and authorizes the court "to determine what rates would afford the appellant valid and reasonable compensation for the services rendered, and shall enter an order setting out such rates and cause the same to be certified to the council or commission, and such council shall thereupon fix such rates as shall be in conformity with the finding of the court." The right of appeal from the circuit to the Supreme Court is also authorized by that section. That the establishment of rates for the future is clearly legislative is beyond question. Prentis v. Atlantic Coast Line, supra, while, on the other hand, the appeal

provided is clearly a judicial Act, as the Constitution of the state separates legislative, executive, and judicial powers. The Supreme Court of the state in a number of cases has held that on appeals from assessments of benefits by improvement districts the circuit courts of the state act in a judicial capacity. In Mo. Pac. R. R. v. Conway County Bridge District, 134 Ark. 292, 297, 204 S. W. 630, 631, which was on appeal from such an assessment, the court said:

"The circuit court acts in a judicial, and not in an administrative, capacity, and under the Constitution an appeal to this court will lie from all final judgments and orders of the circuit court. * * * The right of appeal extends to special proceedings, though the right be not expressly granted in the statute authorizing such proceedings"—citing former decisions of that court.

In St. Louis Southwestern Ry. v. Commissioners of Road Impr. Dist. No. 2, 265 Fed. 524, the United States Circuit Court of Appeals for this circuit held that such an appeal is a suit, which may be removed to the national court for diversity of citizenship. It is true that the Supreme Court of the state in Mo. Pac. R. R. v. Izard County Highway Impr. District, 143 Ark. 261, 220 S. W. 452, held that such a proceeding is not removable, but the opinion in that case was filed five days before the opinion in the St. Louis Southwestern Ry. v. Commissioners of Road Imp. District No. 2, supra, and neither court knew of the decision of the other. Although the Supreme Court held in that case that it was not a judicial proceeding, which can be removed to a national court, it proceeded to dispose of the case on its merits, notwithstanding that the Constitution of the state separates legislative, executive, and judicial powers and provides that (article 4):

"Sec. 1. The powers of the government of the state of Arkansas shall be divided into three distinct departments, * * * to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.

"Sec. 2. No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

In view of these provisions of the Constitution and its construction by the court of last resort of the state, the court is of the opinion that the proceeding under section 19 of the act, although denominated "an appeal," is in fact so far as it applies to the sufficiency of the rates, a judicial proceeding, and, if the necessary facts authorizing a national court to assume jurisdiction exist, it is its duty to exercise it, when invoked. Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546; General Oil Co. v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; Barber Asphalt Co. v. Morris, 132 Fed. 945, 949, 66 C. C. A. 55, 59, 67 C. C. A. 761; Love v. Atchison, T. & S. F. Ry., 185 Fed. 321, 325, 107 C. C. A. 403, 407.

[2] But the power of the court to establish rates for the future is clearly a legislative act, and, under the Constitution of the state, cannot be conferred on the judiciary department, and is therefore unconstitutional. State v. Hutt, 2 Ark. 282; County of Pulaski v. Irvin, 4 Ark. 473; State Bank v. Curran, 10 Ark. 142; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

Is that part of the act conferring rate power on the court separable from the other part? Ordinarily this would at best be doubtful, for both of these powers are conferred in the same section and sentence. But section 26 of the act provides:

"If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act."

These provisions are therefore separable.

The conclusion of the court is that, while the court is without jurisdiction to establish rates for the future, it has the same jurisdiction to determine whether the rates are confiscatory as the circuit courts of the state are given by the act, and the contention that this action is to be ruled by the Prentis Case is untenable.

YELLOWSTONE-MERCHANTS' NAT. BANK OF BILLINGS v. ROSENBAUM BROS. & CO.

(District Court, D. Montana. January 9, 1922.)

No. 975.

Removal of causes ⇐10—Nonresident defendant may remove cause to federal court, though not served with process.

Nonresident defendant may remove cause to the federal court any time before he is required to plead, though not yet served with process, where valid process might issue.

At Law. Action by the Yellowstone-Merchants' National Bank of Billings against Rosenbaum Bros. & Co. Motion by plaintiff to remand to state court denied.

Collins & Wood, of Billings, Mont., for plaintiff.

Cooper, Stephenson & Hoover, of Great Falls, Mont., Shea & Wiggenhorn, of Billings, Mont., and C. G. Myers, of Chicago, Ill., for defendant.

BOURQUIN, District Judge. Plaintiff is a national bank of this state, and defendant is a corporation of Illinois. The action in trover was brought in a state court, process was served in this state upon defendant's president, defendant appeared specially to quash and dismiss and to remove the cause hither, and also appeared specially herein to quash, and plaintiff appeared specially to remand.

Plaintiff's contention is that, since defendant insists it was not legally served with process, and is not subject to process in this state, for that it is in no respect to be found in it, the action could not have been brought and maintained in this court against defendant's objection, and that in consequence it cannot be removed hither against plaintiff's objection. And appeal is made to Nickels v. Pullman Co. (D. C.) 268 Fed. 610, and its construction of the rule of Wisner's Case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and Moore's Case, 209 U. S. 490,

28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. The Nickels Case supports plaintiff's contention, but it is believed its construction of the rule aforesaid is erroneous.

That rule is that any federal court has original jurisdiction of suits between citizens of different states, but compulsory jurisdiction of the parties' persons only when the suit is brought in the district of the residence of one of them. Otherwise brought, jurisdiction is secured of defendant's person only by his waiver of objection to improper venue, not to improper process, because there can be no process nor service. Likewise any federal court has jurisdiction on removal of such suits, but compulsory jurisdiction of the parties' persons only where the suit is brought in and removed from a state court within the district of plaintiff's residence. Brought in a state court within any other district, jurisdiction of plaintiff's person on removal is secured only by his like waiver of objection to venue, and not to process. (Query: With plaintiff's consent, can removal be had of a suit brought in the district of defendant's residence? Probably it could, as a suit within the jurisdiction of the federal courts anywhere.)

Hence a suit brought in a state court, in a district wherein brought in a federal court there is no compulsory jurisdiction of defendant's person, cannot be removed to the federal court and thereby secure compulsory jurisdiction of plaintiff's person. And, the statute limiting removal to nonresident defendants, it follows there can be removal without plaintiff's consent of suits brought in the district of plaintiff's residence, but not of suits brought elsewhere.

Assuming this to be the rule of Wisner's Case and Moore's, the fallacy of Nickel's Case is that it conceives the rule to be that, without plaintiff's consent, there cannot be removal, unless prior thereto compulsory jurisdiction of defendant's person is actually secured in the state court by valid service of process on him. The rule does not require such construction, and to infer it is to destroy rights always heretofore assumed to be contemplated by the statute, viz. removal to secure in the federal court determination of all issues, whether of process, provisional remedies, or the merits, and to that end to remove the cause at "any time before the defendant is required * * * to plead" in the state court, or, in other words, before process served or even issued. It will be remembered that defendant's appearance to remove the cause is special, whether or not he so characterizes it, and he need file no pleading in the state court.

All defendant's motions or pleadings, whether in respect to process, provisional remedies, or merits, may be filed in the federal court after removal. In Remington's Case, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959, practically "all fours" this at bar, in the state court defendant moved quashal of process, which was denied, removed the cause to the federal court, and therein renewed his motion to quash; plaintiff objected to its consideration, and moved to remand, and quashal was granted and remand denied. In legal effect, without having been served with process, defendant appeared and had compulsory removal of the cause.

So far as removal is concerned, if valid process can issue and in theory may be served, it suffices for the compulsory jurisdiction of defendant's person contemplated by statute and rule, and authorizes compulsory removal. To defeat removal, no immaterial speculation or conjecture will be indulged that perhaps defendant will not at any time be found long enough within the district to permit and accomplish service of process.

Indeed, Nickel's Case recognizes this as the rule; for, after construing it as aforesaid, it decides that if, at the time plaintiff brought the suit in the state court, that court's process could have been served on defendant, remand will be denied, even though service had not been made; that is, if service is possible in theory, no speculation will be indulged that it may not be made in fact. It is true Nickel's Case limits its rule to suits wherein a corporation has a resident agent upon whom service may be made; but in that contingency, as in the converse, service is only possible in theory and may not be made in fact. For in the one, as in the other, service in fact depends upon finding and serving the agent or defendant in the district. The distinction of Nickel's Case is only based on degrees of speculation, not to be indulged. So, after all, Nickel's Case and this at bar in essence are in accord.

It is true Congress is constantly restricting the jurisdiction of the federal courts, in only important causes, however, for it is also true that it is constantly extending their jurisdiction to trivial causes and to causes virtually filched from the states' police power, until they are crowded with white slavers, pimps, prostitutes, and panders, drug peddlers and addicts, bootleggers and poachers. This court was lately horrified to find all its machinery in motion and with a jury engaged in trying (God save us) five reputable citizens upon a charge of having joint possession of one dead hell-diver.

Therein the prestige and efficiency of the courts inevitably suffer, to the impairment of the administration of justice. It is not thought, however, that the removal statute and rule aforesaid indicate any such restriction as Nickel's Case assumes to discover. At any rate, if, as here, plaintiff assumes to have served process upon defendant, whether that service is valid is for determination somewhere; and, as removal is to secure to defendant determination in the federal court of all issues in the suit, he may remove the cause to that end in respect to this issue of process, as well as to all others.

Remand is denied.

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. IMPERIAL WHEEL CO.

(District Court, N. D. New York. January 6, 1922.)

1. Corporations ⇐668(7)—Service on president of foreign corporation while temporarily present in the state held insufficient.

Where foreign corporation did no business in the state, and had no property therein, and where the president while temporarily present in the state transacted no business for the corporation, the service of process

on the president during such temporary presence was insufficient to give the court jurisdiction against such corporation.

2. **Corporations ⊜665(4)—Affidavit opposing motion to dismiss for want of jurisdiction held insufficient to justify retention of jurisdiction to make reference to determine question.**

Where affidavit opposing motion to dismiss suit against corporation as obtained by service in a state where it did no business was composed almost entirely of statements on information and belief without giving the sources of the information or the grounds for the belief, and where the remainder of the affidavit did not show any fact on which to base jurisdiction, there was no justification for a reference requested by plaintiff to determine jurisdiction, since the court, though authorized to order a reference to explain apparent discrepancies in conflicting affidavits, will not do so unless there is at least a showing in affidavit of party opposing the motion to justify the retention of jurisdiction assuming the facts alleged by him to be true.

At Law. Action by the Zurich General Accident & Liability Insurance Company, Limited, against the Imperial Wheel Company. On motion to set aside the service of summons and to dismiss the complaint on the ground that the court is without jurisdiction. Motion granted.

Ralph Shulman, of Syracuse, for plaintiff.

William H. Harding, of Syracuse, for defendant.

COOPER, District Judge. This is a motion to set aside the service of a summons and to dismiss the complaint on the ground that the court is without jurisdiction of the parties.

The plaintiff is a foreign corporation, with its home office in Zurich, Switzerland, and its principal office in this country in Chicago. The defendant is a foreign corporation having its principal office and place of business in the city of Flint, Mich. The complaint alleges that the defendant sold to the Chevrolet Motor Company an automobile which collapsed while the car was being driven, and as a result thereof its various occupants were injured. The plaintiff insurance company paid the damages to which the Chevrolet Motor Company was adjudged to be liable, and now, being subrogated to the rights of said company, has brought this action against the manufacturer of the wheel.

The action was commenced in the Supreme Court of this state, and was removed to this court upon the grounds of diversity of citizenship. The defendant now appears specially and moves to vacate the service.

The defendant sets forth by affidavit of its president that the offices, plant, and property of the defendant are wholly within the state of Michigan; that it has no office, plant, place of business, property, or assets within the state of New York; that it never had and does not now have an agent within this state; that it never did business within this state; and that at the time the defendant was served the deponent was merely attending a convention in this state.

[1] It is well settled that there can be no basis for asserting jurisdiction as the result of service of process on the president of a foreign corporation in a state where he was temporarily present and where the corporation did no business, had no property, and where the president was transacting no business for the corporation in the state where

he was served. Goldley v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathiesson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Riverside Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

[2] The plaintiff requests that a reference issue to take proof as to whether or not the defendant corporation was doing business within the state of New York. Although there is power in the court to order a reference so as to explain any apparent discrepancies in the conflicting affidavits (Conley v. Mathiesson Alkali Works, 190 U. S. 406, 407, 23 Sup. Ct. 728, 47 L. Ed. 1113), nevertheless, before such a reference order issue, there should at least be a showing in the affidavit of the party opposing the motion as would justify the retention of jurisdiction, assuming the facts alleged by him to be true. There can be no justification for the retention of jurisdiction where the affidavit opposing the motion is composed almost entirely of statements upon information and belief, without giving the sources of the information or the grounds for the belief, and where the remainder of the affidavit does not show any fact upon which to base jurisdiction.

Fishing expeditions are not favored by the courts. There is nothing to lead to the belief that the plaintiff will show that the defendant is doing business within this state.

Motion to dismiss is granted. An order should be entered accordingly.

In re EMPIRE GROCERY CO.

(District Court, D. Massachusetts. December 1, 1921.)

No. 28815.

Bankruptcy ⇐140(2)—Seller not entitled to reclaim goods purchased by bankrupt in good faith, though when actually insolvent; what constitutes good faith.

While a purchase of goods on credit by a person who knows that he is insolvent and will not be able to pay for them, or who is in fact insolvent, but voluntarily refuses to ascertain his condition, is an essentially fraudulent transaction, and entitles the seller to reclaim his goods, a purchase by a mercantile corporation, whose managing officer, while knowing the precarious condition of its affairs, believed with some reason that they could be adjusted, so that it would continue in business, and who acted in good faith in making the purchase, lacks the elements of actual fraud which entitles the seller to reclaim the goods from its trustee in bankruptcy.

In Bankruptcy. In the matter of the Empire Grocery Company, alleged bankrupt. On petition to reclaim goods. Order of referee, denying petition, affirmed.[1]

Stoneman & Hill, of Boston, Mass., for petitioner.
Albert A. Ginzberg, of Boston, Mass., for respondent.

MORTON, District Judge. The purchase of goods on credit, by a person who knows that he is insolvent and will not be able to pay for them, is an essentially fraudulent transaction, which, as Mr. Jus-

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

[1] For order of referee, see 277 Fed. 1023.

tice Hoar said in Dow v. Sanborn, 3 Allen (Mass.) 181, at page 182, resembles larceny. Insolvent traders not infrequently shut their eyes to the facts about their business or fail to keep properly informed about it; sometimes deliberately, but oftener, I think, through lack of courage to face the situation. Such men keep their business going after it should have been closed, and keep obtaining on credit goods which by no possibility can be paid for. While such persons are not consciously fraudulent in making purchases on credit, the result upon those from whom they buy is the same as if they were. Good faith, which rests only on ignorance, due to a willful, or reckless, or despairing failure to face the facts, is, in proceedings of this sort, the legal equivalent of actual fraud, and entitles the seller to reclaim his goods. In re Henry Siegel Co. (D. C.) 223 Fed. 369, and cases cited. On the other hand, a merchant is not obliged to close his doors as soon as he becomes aware of his insolvency. If he faces his situation, and really believes that he can pull out by keeping on his purchases made for that purpose are not fraudulent, provided that his belief is not illusory merely, and without any reasonable ground for it.

In this case, when the goods in question were delivered, the buyer was deeply insolvent. Those in charge of it did not realize that fact. Wallace, who was its treasurer and "executive officer," seems to have kept reasonably close track of its affairs. About three months before the bankruptcy he had paid $8,500 for a half interest in the alleged bankrupt, and until less than a month before the filing of the petition against it he was trying to arrange the sale of an issue of its preferred stock. He was not aware of the unsatisfactory character of its accounts receivable, on which it made heavy losses, and, while he feared it would make a large loss on its sugar contracts, he was hoping that some way might be found to arrange or postpone the settlement of them. It is not shown that his failure to appreciate the seriousness of the company's condition was due to such ignorance of its affairs as I have referred to, nor that his expectation, at the time of these purchases, that the company would be able to continue, was so without foundation as to be fanciful and illusory. The learned referee has found that those in charge of the company's affairs acted in good faith, and upon a careful reading of the testimony I am not prepared to say that his finding is clearly wrong.

Decree affirmed.

In re HOROWITZ et al.

(District Court, N. D. New York. January 6, 1922.)

Bankruptcy ⇐225—Copy of testimony delivered to witness, when rule is complied with.

Where, in compliance with General Order XXII (89 Fed. x, 32 C. C. A. xxv), witnesses have read over and signed testimony taken before a referee, a copy of the minutes may be delivered to them.

In Bankruptcy. In the matter of Nathan S. Horowitz and others, bankrupts. Application to restrain delivery of copy of minutes of a hearing held before a referee. Order to show cause vacated, on showing that testimony in possession of referee has been subscribed.

Edward L. Smith, of Utica, N. Y., for trustee.
James J. Barrett, of Utica, N. Y., for Emil A. Klein.

COOPER, District Judge. Application is made to restrain the delivery of a copy of the minutes of a hearing held before a referee in bankruptcy.

Emil A. Klein and Sol Shafer testified before a referee concerning transactions with the bankrupt. The minutes were transcribed by the stenographer, and the witnesses desired to secure a copy of the same. The trustee has brought suit against these men to set aside certain transfers of property, and seeks to restrain the delivery of a copy of the minutes of the proceedings held before the referee. The object of the restraining order, as claimed by the attorney for the trustee, is to prevent the witnesses or their attorneys from inspecting the minutes, asserting that the testimony may be changed at some subsequent time. No authority is cited by either counsel upon the subject, and apparently the question is a novel one.

Decided upon equitable grounds, there is no cause for alarm in permitting the witnesses having a copy of their testimony. Any apprehension is rendered futile by the fact that the testimony before the referee is under oath, and any perjurious statements that might later be made can well be remedied. In full justice to the witnesses, they should be given an opportunity to go over the testimony, and I fail to see any reason for refusing to permit them to have a copy thereof, after they both shall have signed their testimony as provided in General Order XXII (89 Fed. x, 32 C. C. A. xxv).

The order to show cause may be vacated upon a showing that the testimony in possession of the referee has been subscribed by each of them.

UNITED STATES v. FALLOCO.

SAME v. ROSS.

(District Court W. D. Missouri, W. D. January 7, 1922.)

Nos. 4496, 4514.

1. Searches and seizures ⟸7—Fourth Amendment does not affect state officials.

The Fourth Amendment to the United States Constitution, prohibiting unlawful searches, is directed only against the federal government and its agencies, and not against individual conduct of state officials.

2. Criminal law ⟸394—Evidence procured by state officers searching without warrant may be used in federal prosecutions.

Where police officers of the state, acting as such, made arrests and searches under the state law, the evidence procured by them, if otherwise competent and material, may be used in prosecutions in a federal jurisdic-

tion, even though the search, if made by a federal officer, would have violated the Fourth Amendment.

3. **Criminal law ⊜394—Evidence held to show search by state officers was under direction of federal officers.**

Evidence that the federal officers charged with the enforcement of the Prohibition Act had conferred with police officers of the city to secure co-operation in the enforcement of prohibition, and had instructed the city officers as to the evidence necessary to sustain a prosecution, and that practically all complaints against persons arrested by such police officers were filed in the federal jurisdiction, *held* to show that the police officers in making a search were acting under the direction of the federal officers, so that evidence procured thereby could not be used against defendants because the search was made without warrant.

4. **Criminal law ⊜394—Specific knowledge or direction to state by federal officers unnecessary to invalidate evidence procured by search.**

Where the state and federal officers were co-operating generally in enforcement of the prohibition law, it is unnecessary to show that the federal officers had knowledge of or gave specific directions for the particular search in controversy, which was made without warrant, in order to render the evidence procured by that search incompetent in a prosecution in the federal court.

Tony Falloco and Tony Ross were separately charged with violation of the National Prohibition Act. On separate application of each defendant to suppress evidence against them, obtained by state police officers through a search without warrant. Applications sustained.

Samuel M. Carmean, Asst. U. S. Atty., of Kansas City, Mo., and Byron H. Coon, Asst. U. S. Atty., of Joplin, Mo.

E. H. Gamble and James M. Rader, both of Kansas City, Mo., for defendants.

VAN VALKENBURGH, District Judge. While these two cases arise out of distinct transactions, and involve different facts and circumstances, the same principle is involved, and both motions were heard together. A single ruling will dispose of both applications. The seizures in both cases were made by police officers. In the Falloco case the defendant's premises consisted of a house, barn, and shed, all of which were within the same inclosure; that is to say, situated upon the same lot of ground in Kansas City, Mo. The officers passed from the shed through a sort of harness room and through a door which led into an underground apartment; that part of the ground in which this latter apartment was situated being higher than that upon which the shed stood. They there found a still, some whisky, and some mash for use in making whisky. The defendant was present and in charge. The still was in operation. They arrested the defendant and turned him and a sample of the whisky over to federal officers, and this prosecution resulted. The attention of the officers was directed to the property in question by smelling the odor of the distillation while walking their beat on the street along which the building was located. Their sense of smell led them to the hidden illicit apparatus and product. They had no search warrant.

In the Ross Case the officers had been directed by their superiors of

the police department to proceed to the Ross premises, where there was reason to believe that the illicit manufacture of whisky was in progress. As they approached the house the fumes of the distillation were distinctly perceptible. They demanded admission to the house, which was subsequently granted, and they gained access to one of the rooms in which a considerable quantity of liquor was found, and beneath the floor was found a still in operation and about 17 barrels of mash. Here again the officers had no search warrant.

The defendants base their application for a suppression of this evidence upon the ground that the relationship existing between the police officers and the enforcement officers of the United States was of such a nature as to make the former substantially the representatives of the government, or, at least, to subject them and their acts to the provisions of the federal Constitution, and more specifically the Fourth and Fifth Amendments thereto. A review of the testimony is essential to the proper application of the legal principles involved.

Mr. Shrader Howell, called on behalf of the defendants, testified that he was formerly, and at the time these transactions arose, federal prohibition director for this district; that along in April, 1920, under the former board of police commissioners, he arranged for a conference with the board in respect to securing co-operation beween the state and federal authorities by reason of the concurrent jurisdictions. He said:

"We did have that conference, I think, with Mayor Cowgill and Mr. Ransom and Mr. Halpin. At that time I think the state law was not in effect, * * * but we had a general understanding they would lend every co-operation they could with reference to making arrests. And as near as I can recollect, when the new board came in, in January, according to my best recollection, I arranged a conference with the commissioners in connection with George Williams, who was the agent in charge here at Kansas City. * * * The conference with Commissioners Foster and Wilson was very brief; in other words, they merely said they would co-operate and referred me to Chief Edwards, and we had our real talk with him.

"Q. And at that conference you asked him to assist the federal officers in the enforcement of the Prohibition Act? A. Yes, sir.

"Q. What did he say? A. He very promptly said that anything his department could do we could count on.

"Q. Now, from that time forward state whether or not your agents in charge of the enforcement of the Volstead act had conferences with the police officers in regard to the enforcement of the Prohibition Act. A. I know they conferred in the handling of cases with various officers, but I don't know that myself.

"Q. Now, from that time forward, August 1, 1921, do you have any knowledge of the number of cases that were turned over to the federal officers here charged with the enforcement of the Volstead Act? A. Well I know there were a great number, but I couldn't give any definite estimate even.

"Q. There was a working agreement that was in continual process of operation at least from that time forward? A. Yes; they were turning over violators of the Prohibition Act to the federal agents.

"Q. Did you have any conference with either of these two boards of police commissioners upon the subject of procurance of search warrants as a prerequisite to obtaining of testimony? A. No, sir.

"Q. The subject of search warrants was not mentioned? A. Not that I recall; no, sir."

Cross-examination:

"Q. This conversation that you had was just a general conversation with the commissioners in reference to the National Prohibition Act, was it, and its application? A. Well, with reference to co-operation between the two departments.

"Q. Now at that time did you tender to the police force or to the commissioners here in Kansas City any of your agents to assist in making raids or arrests? A. No; that matter was not gone into.

"Q. Did you instruct them in what manner to make this evidence? A. No, sir.

"The Court: When you speak of co-operation, Mr. Howell, just describe what you had in mind in this conference. A. What was discussed at that conference was this: At that time the docket was congested, and after conferring with Judge Sullinger and I think the commissioner, we tried to work out some plan by which as many cases as could be prosecuted under the state law should go to the state courts, and had a general understanding that first offenses, in the absence of any particular reasons, should be handled in state courts. That would release the commissioner of the court and the federal court to handle more aggravated cases and second offenses. That was the basis of our whole conference.

"The Court: As I understand you, your understanding with them was in the way of co-operation—was to try to stimulate the local authorities into a greater responsibility in the prosecution of cases in their jurisdiction, and not leave the entire matter to the consideration of government officers? A. That was the idea back of the conference, so far as I was concerned."

Redirect examination:

"Q. Isn't that one of the reasons you went to the police department, in order that you might from them procure support and evidence which they had obtained in searches and seizures without putting your department to the trouble of procuring search warrants? A. No; that question wasn't acute at that time.

"Q. Later on did it become acute? A. We never discussed that matter at all. The matter of how the police should procure evidence was a matter I thought entirely out of my jurisdiction.

"Q. Isn't that the one idea that actuated you in inviting the police department to co-operate with your department? A. No; I can't say it was; of course, we wanted to get results, but that wasn't the purpose of our conference."

Pearl Horn, called as a witness on behalf of the defendants, testified that he was the sergeant in charge of the so-called raiding squads of the Kansas City police department during the month of August, 1921. To this Chief Edwards also testified. Horn was in charge during July and August. His duties, among others, included dealing with violations of the Volstead Act. 41 Stat. 305.

"Q. State whether or not you had any conference with any of the federal officers here with respect to what should be done in the way of procuring testimony to be used in the prosecution of violators of the Volstead Act. A. Well, that was merely a sort of school. I guess you would call it that. None of us was familiar with getting evidence, and they just merely had a little school one evening to instruct us along those lines.

"Q. Where was that? A. That was in one of the rooms here on the third floor [of the Federal Building].

"Q. Do you remember who was present? A. Mr. Coon, I believe.

"Q. The assistant United States district attorney? A. Yes, sir.

"Q. What occurred there? Who else was present besides you and Assistant District Attorney Coon? A. Mr. Wilson—Commissioner Wilson—and Chief Edwards and Officer Cole, Officer Chandler, and Officer Snow.

"Q. Now, what occurred there? A. They just instructed us how to secure the evidence so it would be a case when brought up here, so it wouldn't have to take up the time—the best way to secure evidence.

"Q. What did he say—what is your recollection of what was said there? A. Well, I don't just recollect other than that it was testimony in general under the Volstead Act.

"Q. As to what evidence would be sufficient to convict? A. Yes.

"Q. And what to do when you made a raid about turning anything that was seized over to the federal government? A. Yes.

"Q. And what information the federal authorities would require in order to obtain a conviction? A. Yes, sir.

"Q. When was this conference you just spoke of, this school? A. I don't remember the exact date, either in July or June.

"Q. The latter part of June or the first of July? A. Yes.

"Q. During the month of July give the court your best recollection of how many cases you turned over to the federal authorities here? A. Well, during July, I judge, to the best of my knowledge, there was right close to 200 or 250 during that month.

"Q. During July. Now, during August what would be your best estimate that you as head of the raiding squad turned over to the federal officer for violation of the Volstead Act? A. I believe I counted the cases of violations of the prohibition act. I couldn't say they were all brought up here, but there was, to my best knowledge, I think, right close to 500 cases.

"The Court: You mean August alone or in July and August? A. July and August. There was a short time there that the federal authorities were in St. Joe. They held court in other places, and we didn't bring any cases here at that time."

Cross-examination:

"Q. Were you familiar with the terms of the National Prohibition Act? A. No, sir; I was not.

"Q. And in the conversation or visit you made down at the Federal Building here what was your purpose in coming? A. To get instructions along that line.

"Q. To learn what the law was and get instructions? A. Yes.

"Q. Now were you at that time tendered the assistance of any federal officers or anything like that? A. No; not at that time.

"Q. The discussion there was simply as to the Volstead Act and its provisions and enforcement? A. Yes."

Redirect examination:

"Q. When you made an arrest, after having raided a place and found there evidence of what you thought was a violation of the Volstead Act, what was the procedure by which the arrested person found his way from the hands of the police department into the hands of the federal officers? A. Well, we brought them up here and turned them over to the prohibition officers.

"Q. You mean here at the Federal Building? A. Yes, sir; and the prohibition officers took the facts in the case and they were filed on, or brought before the commissioner.

"The Court: And if they were discharged, weren't held by the federal authorities, what was done? A. They were released. After we turned them over to the federal authorities, if they didn't file on them, they were released.

"Q. Did you ever turn any of those things over to the federal authorities along with the prisoners? A. We used to bring a sample of the liquor up here.

"Q. Did you get out any search warrants to make these raids? A. No, sir."

Byron H. Coon, Esq., called as a witness on behalf of the government, testified that he was the assistant United States district attorney

mentioned in the testimony; that he met one evening in the district attorney's office several of the officers who were especially looking after violations of the state liquor law and were members of the police department of Kansas City. Attention was called especially to the fact that arrests and prosecution of liquor violations in the state courts would be of benefit in two ways; it would tend to decrease the number of cases before the commissioner, and would lay the foundation for prosecution by way of injunction, if any of the defendants who were convicted in the state court were afterwards apprehended by any federal officers. He thought that remedy would be effective and tend to reduce the number of prosecutions which came before this court. At that time the different provisions of the Volstead Act were gone over, and it was just a general discussion of the law as he understood it at that time.

Cross-examination:

"Q. You were not discussing questions of injunction with the police officers. were you. Mr. Coon? A. I believe that at that time I mentioned the fact that arrests that they made, and convictions that resulted therefrom in the state court, would be of advantage if the federal officers had occasion to arrest the same party; and I would say further now that I called their attention to the fact that I believed that arrests by state officers and convictions in state courts would be also beneficial in prosecutions that might be instituted on the charge of maintaining a nuisance. * * * That conference, I want you to understand now, wasn't had or any discussion entered into there with a view of increasing the business in the federal court here.

"Q. Well, didn't you tell them where their evidence had been short before that—where additional evidence was necessary? A. We probably discussed what would be a complete case.

"Q. And if they expected to get any conviction in this court what they would have to produce? A. I didn't put it on that basis; no, sir.

"Q. Wasn't your object more particularly to inform them as to what evidence would be necessary to be able to obtain convictions? A. No, sir; my idea was to stimulate prosecution of liquor cases under the state law in the state courts, and that prosecution so had there would be of benefit on the nuisance charge. * * * It wasn't with any view of making them part of any federal agency. I didn't have that in view. * * * I know I mentioned the fact that convictions in the state court, if had before, would be of advantage in the case we prosecuted here against the same defendant on a nuisance charge, and that, if they were prosecuted in the state court to conviction, the record therein made would be of advantage here. The different terms of the Volstead Act were read to them."

Officer E. R. Thornton testified that he arrested Falloco, and that the prisoner and whisky were turned over to the federal authorities. He had received no instructions from the federal authorities prior to that time with reference to this particular case. In the first instance he reported to his superior officer at the city hall in the police department.

"Q. After reporting there what was the next thing you did? A. Well, that was all we did right away. I am not sure, but I believe that was on Sunday. The next day, of course, we brought the man up to the government."

Officer Hammond testified that he arrested the defendant Ross.

"Q. What did you do with him? A. Took him to No. 4, and from there to No. 1, and from there up here.

"Q. You turned him over to Mr. Dunnigan, federal prohibition agent? A. Yes, sir.

"Q. And they filed a complaint against him to appear before Commissioner Beardsley? A. Yes, sir.

"Q. You have arrested a great many people for violation of the Volstead Act? A. Yes, sir.

"Q. And all those people have been brought up here and turned over to Mr. Dunnigan? A. Not all of them.

"Q. Where you thought you had enough evidence to convict under the Volstead Act, you brought them up here? A. We took some of them to the state authorities, if they couldn't handle them up here.

"Q. You brought them up here first? A. We brought them here first."

Sergeant Withrow testified as follows:

"Q. What did you do with Ross? A. Arrested him and took him to No. 4 station.

"Q. Then what did you do? A. Booked him for investigation and sent him to No. 1.

"Q. Then what? A. The officers took him out the next morning to the government."

Frank Anderson testified as follows:

"Q. What do you have to do with prisoners who are taken by the police department, where you find evidence which in the opinion of the department might tend to convict them of violations of the Volstead Act? A. I book the prisoners and get the evidence from the officers for trial the next day and take care of the evidence.

"Q. What do you do with respect to turning them over to the federal officers? A. The next morning we turn them over, according to what the case is, to the federal court; that is, the prohibition agents, we send them up there, and if they can't handle them, we send them to the state.

"Q. That has been the regular practice of the police department for how long a time? A. Ever since the Volstead Act has been in effect.

Q. Is that regardless of whether or not searches or seizures in such cases have been made with or without search warrants? A. We work according to the laws of the State of Missouri in these searches. If the case is so it could be put into the government's hands, we send it over here.

"Q. How many cases have you turned over to the federal government in this way during the last six months? A. Six or seven hundred."

[1, 2] It must be conceded that the Fourth Amendment to the Constitution of the United States is not directed to individual conduct of state officials. Its limitations reach only the federal government and its agencies. The police officers of this state may make arrests for violation of the prohibitory law by virtue of the authority vested in them under the enforcement act of this state, which runs concurrently with the federal enactment known as the Volstead Act. In so doing they act as state officers, and, though their procedure may not accord with that required and guaranteed by the fundamental law in the federal jurisdiction, nevertheless the evidence they procure, if otherwise competent and material, may be used in prosecutions in a federal jurisdiction if it comes to the knowledge of the federal prosecuting officer. But, as has been said by the Supreme Court, and in the lesser federal courts, the alleged unlawful search and seizure must not be made by, or under the direction of, any officer of the United States.

As was said in United States v. Burnside (D. C.) 273 Fed. loc. cit. 605:

"The United States had no part in securing the search warrants in question, nor in executing the same. The proceedings were carried on by the police officers of the city of Superior prior to the time when any proceedings were taken by the United States government, and it appears from the testimony taken in connection with this application that the proceedings by the city officers were entirely independent of the United States government or any of its agents, and that it was some time after the search had been executed and the liquor seized that the police officers of the city of Superior deliveerd the liquor so seized to the United States Attorney for use as evidence in the pending proceeding."

Merely because the jurisdictions are concurrent and that the subject-matter of the offense is identical, that, in fact, the two enforcement jurisdictions overlap, and that one jurisdiction may, if it sees fit, turn an offender over to the other for prosecution, all this is insufficient, standing by itself, to charge the officers and courts of the United States with excess of authority, if that be found to exist, on the part of state officers. The evidence thus secured, if pertinent, may be used.

[3] I am convinced, upon careful analysis, that the relationship between the state and federal officers in the cases at bar was such as to take these cases out of the rule just stated. There were conferences between state and federal authorities. Those conferences were held with a view to a closer co-operation between the two jurisdictions in the enforcement of the prohibitory law. Our attention here is confined to the situation shown to exist during a restricted period, to wit, the months of July and August of last summer. It is true undoubtedly, as suggested, that in the minds of the federal officers there was no purpose of expanding the federal jurisdiction, and bringing a greater flood of cases to the federal court. It is true that they had not in mind the use of unconstitutional summary methods of securing evidence, and that they desired greater activity in the way of prosecutions in the jurisdictions of the state; nevertheless the effect of these conferences was to stimulate activity on the part of the state authorities, with the objective of a more effective enforcement of the Volstead Act. The resulting procedure, whatever the underlying motive, was that, during the limited period referred to, the great majority of prosecutions in the federal court were initiated by the police officers of the state; that the violations in which arrests were made were brought, and intended to be brought, immediately to the federal court, and were not intended to be, and were not, taken to the state court, except, perhaps, in very exceptional cases, unless the federal authorities declined to take cognizance of them. On the other hand, the enforcement officers of the government understood this, acquiesced in it, and acted in accordance with this tacit, if not express, understanding. Those arrested one day were brought regularly to the federal court on the following morning. The procedure was systematic and frictionless.

[4] Under such circumstances, I do not think it necessary to show that the officers of the government had special knowledge, or issued special directions, in each specific case. If we were to ignore this circuitous, uninterrupted, but substantial evasion of the Fourth Amendment to the Constitution of the United States, even though that evasion was unconscious and unstudied, we should countenance a depar-

ture from the spirit of our fundamental law more harmful in its far-reaching effects than the evil here sought to be remedied. Nothing herein said is to be construed as a surrender of the right of the government to avail itself, without stint, of evidence incidentally secured by state officers under the rules, principles and conditions announced by the Supreme Court and other courts of the United States. I simply hold that, under the situation here presented by the record, the police officers in the cases at bar were so far recognized agencies of the government in the enforcement of the prohibitory law that their acts must be governed by the limitations imposed by the federal Constitution. This being so, the applications of the defendants, Falloco and Ross, must be sustained.

Ex parte KOZLOWSKI.

(District Court, D. Delaware. November 12, 1921.)

No. 8.

1. **Habeas corpus ⟸45(3)—Authority of federal court to discharge state prisoner.**
   On petition to a federal court for a writ of habeas corpus by one held in jail by state officers, under Rev. St. § 753 (Comp. St. § 1281), the questions presented are: (1) Whether petitioner is held in custody in violation of the Constitution of the United States; and, if so, then (2) whether the facts and circumstances of the detention are such as to warrant the exercise of the discretion vested in the federal court in favor of the prisoner's discharge.

2. **Constitutional law ⟸270—Excessive sentence is not due process of law.**
   One held in prison under a sentence which the court was without jurisdiction to impose is deprived of his liberty without due process of law, in violation of the Fourteenth Amendment.

3. **Habeas corpus ⟸111(1)—Prisoner held under void sentence discharged.**
   Petitioner was arrested and convicted before a municipal court for failing to provide for his family under Rev. Code Del. 1915, § 3034, which authorizes a fine or imprisonment not exceeding one year on conviction. Sections 3037 and 3040 provide that either before or after conviction the court may parole the defendant under an order requiring him to pay a stated sum periodically to a trustee, and that on information and due proof that he has violated such order the court may "proceed with the trial or * * * enforce the suspended sentence as the case may be." Petitioner was paroled, and was afterward served with a subpœna to appear and testify, and thereupon was ordered "to be committed until the arrearages are paid, and to give bond in the sum of $500, with surety, for compliance with the order." Under such order without mittimus or other commitment paper, petitioner was held in jail by the police. *Held*, that the court was without jurisdiction to impose any sentence other than that prescribed by the statute, that the order was void, and that petitioner was entitled to discharge on a writ of habeas corpus by a federal court.

Habeas Corpus. In the matter of the petition of Victor Kozlowski for writ of habeas corpus. Writ granted, and petitioner discharged.

Robert Adair, of Wilmington, Del., for petitioner.

Percy Warren Green, of Wilmington, Del., for respondent George Black.

MORRIS, District Judge. Victor Kozlowski, being a prisoner in the custody of George Black, superintendent of police of the city of Wilmington, state of Delaware, presented to this court his duly verified petition for a writ of habeas corpus under the Constitution and statutes of the United States, upon the ground that he was in custody in violation of the Constitution of the United States, especially that clause of the Fourteenth Amendment which declares that no state shall "deprive any person of life, liberty, or property, without due process of law." The facts therein set forth with respect to the detention of the petitioner and the claim or authority for such detention are, in substance, that at a session of the municipal court of the city of Wilmington, held on the 29th day of October last, the petitioner was ordered to be committed, not for any crime, not to any official or officials, not to any place of imprisonment, and not for any term, but merely that he be "committed until the arrearages are paid"; that the clerk of that court refused to issue a copy of the alleged process by which the petitioner was brought before the municipal court or of the proceedings had therein; that the petitioner believes that he was so committed and restrained of his liberty for an alleged or pretended contempt of court in not obeying an order of that court; that he is utterly unable to comply with such order, and denies the alleged contempt. Upon presentment of the petition a writ of habeas corpus was awarded by this court, directed to George Black, the person in whose custody the petitioner was detained. Within the time specified by the statutes of the United States the person to whom the writ was directed made return thereof, certifying to this court the cause of the detention of the petitioner, and at the same time brought the petitioner before this court. The return to the writ states:

"I, George Black, superintendent of police of the city of Wilmington, county and state aforesaid, to whom the attached writ of habeas corpus is directed, and in obedience to said writ, I herewith produce the body of Victor Kozlowski detained and held in custody by me.

"And for return of said habeas corpus I beg leave to say that the said Victor Kozlowski was committed to my care as high constable of said city by an order of the honorable John F. Lynn, deputy city judge of the municipal court for the said city of Wilmington, a court of competent jurisdiction, on the 29th day of October, A. D. 1921, to be by me held and detained until the arrearages of a nonsupport order are paid on a judgment rendered by the municipal court on the 15th day of March, A. D. 1921, the said nonsupport order being that he the said Victor Kozlowski pay the sum of twenty ($20.00) dollars per week, and also to be released on his own recognizance without surety; and also the said Victor Kozlowski is in my custody by virtue of the said judgment rendered on the said 29th day of October, whereby the terms of the aforesaid order of support were subsequently modified, in that the said Victor Kozlowski was ordered to enter into a recognizance in the sum of five hundred ($500.00) dollars with approved surety for the faithful performance of the order made on the said 15th day of March;

"And the said Victor Kozlowski now in court in his own proper person is the identical person named in said nonsupport order and committed to my care on the said 29th day of October, and is now held in my custody by the author-

ity of said process, which is attached herewith, and made a part of this my return, and for further return I beg leave to say that the said Victor Kozlowski, after the judgment as aforesaid, to wit, on the 1st day of November, A. D. 1921, presented his petition for a writ of habeas corpus to the honorable Herbert L. Rice, resident judge of New Castle county, Del., a copy of which said petition is attached hereto.

"That a writ was issued to me, and in obedience to said writ I produced the body of said Victor Kozlowski before the said honorable Herbert L. Rice, on Wednesday, November 2, A. D. 1921, at 3 o'clock in the forenoon [afternoon].

"That after hearing the said petition the said honorable Herbert L. Rice dismissed the petition and remanded the petitioner to my custody. A copy of the opinion of the said Herbert L. Rice is attached hereto."

Annexed to the return, as exhibits, are certified copies of records of the municipal court showing proceedings therein had in the case of State of Delaware v. Victor Kozlowski, the petitioner herein. It appears therefrom that on March 7th last a warrant was issued, charging him with nonsupport; that upon a plea of not guilty he was, on the 15th day of March, after hearing, adjudged guilty, and without imposing the penalty provided by law the court ordered him to pay, or cause to be paid, to a trustee approved by the court the sum of $20 per week for the support and maintenance of his wife and four minor children under the age of 16 years in destitute and necessitous circumstances; to appear personally in that court, whenever thereafter ordered to do so; to comply with the terms of the order of support, or of any modification thereof; and that the defendant be released from custody on probation, upon entering into a recognizance without surety to the state of Delaware in the sum of $500 for compliance by him with the order of support. It further appears from the order that the defendant entered into a recognizance, without surety, as ordered, and that he was, on the 15th day of March, 1921, released from custody on probation. The record of the municipal court in that cause next subsequent to the order of March 15th is a subpœna issued on the 28th day of October last, directed to the petitioner, commanding him to appear before the judge of the municipal court on the 29th day of October "to testify all those things you shall know or be examined in a matter of controversy depending, wherein the state of Delaware is plaintiff, and Victor Kozlowski is defendant." The next and last action of the municipal court in the cause in question, so far as disclosed by the record, is evidenced by the following order:

"And now, to wit, this 29th day of October, A. D. 1921, the defendant being present, after hearing all the evidence produced on behalf of the state and the defendant, the Hon. John F. Lynn, deputy city judge of the municipal court for the city of Wilmington, ordered the defendant to be committed until the arrearages are paid, and to give bond in the sum of $500, with surety, for the compliance of the order."

No mittimus, commitment, or other like process was issued pursuant to that order.

No material facts other than those appearing by the petition and return were disclosed at the hearing following the return of the writ.

The authority of this court to issue the writ of habeas corpus, to examine the proceedings in the municipal court, and to dispose of the

petitioner as law and justice require rests upon sections 751, 752, 753, and 761 of the Revised Statutes of the United States (Comp. St. §§ 1279–1281, 1289), which, so far as here pertinent, provide:

"Sec. 751. The Supreme Court and the (circuit and) district courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he * * * * is in custody in violation of the Constitution * * * of the United States; * * *

"Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

The scope of the authority thus conferred by Congress upon the federal courts to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty where the petitioner is imprisoned under authority of a state has been many times considered by the Supreme Court. In Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, it was declared that Congress intended to invest the courts of the Union and the justices and judges thereof with power, upon writ of habeas corpus, to restore to liberty any person within their respective jurisdictions who is held in custody, by whatever authority, in violation of the Constitution of the United States, and held that the fact that a petitioner is imprisoned under the authority of a state cannot affect the question of the power or jurisdiction of a federal court to inquire into the cause of his commitment and to discharge him if he is restrained of his liberty in violation of the national Constitution. The Supreme Court there pointed out, however, that, notwithstanding the grant of power so to do, nevertheless Congress did not intend to compel the federal courts by the writ of habeas corpus to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising jurisdiction within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States, and that the statutory injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require," does not deprive the federal courts of discretion as to the time and mode in which it will exert the powers conferred upon it. Realizing that the discharge of a state prisoner by a federal court touches closely upon the relations between the state and federal governments, the Supreme Court added:

"That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

The decision in Ex parte Royall was followed and approved by the same court in New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80.

[1, 2] Two basic questions are therefore presented in this cause, viz.: (1) Whether the petitioner is held in custody in violation of the

Constitution of the United States; and, if so, then (2) whether the facts and circumstances of the detention are such as to warrant the exercise of discretion vested in this court in favor of the petitioner's discharge. Fortunately we are not without the authoritative assistance of decisions of the Supreme Court of the United States upon each of these points. What is due process of law, without which, as provided by the Fourteenth Amendment to the Constitution, no state may deprive an individual of his liberty, was considered and defined in Caldwell v. Texas, 137 U. S. 692, 697, 11 Sup. Ct. 224, 226 (34 L. Ed. 816). The court there said:

"By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. 2 Kent, Com. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank of Columbia v. Okely, 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. Hurtado v. California, 110 U. S. 516, 535."

In view of the foregoing clear and plain enunciation of the fundamental principles, it is not surprising to find that the same court has declared that the imposition of a sentence, by a court upon a defendant in a criminal case, unauthorized by law or in excess of that authorized, deprives the defendant of his liberty in violation of the federal Constitution, for, in such case, the exercise of power is special, partial, and arbitrary and is not controlled by laws operating on all alike. The Supreme Court, dealing with a similar question in Ex parte Lange, 85 U. S. (18 Wall.) 163, 176, 21 L. Ed. 872, said:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void."

In Re Mills, 135 U. S. 263, 270, 10 Sup. Ct. 762, 764 (34 L. Ed. 107) the sentence imposed upon a petitioner by an inferior federal court was in excess of the authority conferred by the statutes of the United States. The court said:

"The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. Ex parte Lange, 18 Wall. 163, 176; Ex parte Parks, 93 U. S. 18, 23; Ex parte Virginia, 100 U. S. 339, 343; Ex parte Rowland, 104 U. S. 604, 612; In re Coy, 127 U. S. 731, 738; Hans Nielsen, Petitioner, 131 U. S. 176, 182."

It becomes manifest without the citation of additional cases that a sentence of imprisonment imposed in a criminal case without warrant of law puts the person sentenced in custody in violation of the Constitution. This is a government of laws and not of men, and the power of punishment is alone through the means which the laws have provided for that purpose. By the protection of the law alone are human rights secured, and the laws which protect the liberties of the people may not be violated or set aside even to inflict upon the guilty unauthorized, though merited, justice.

[3] Disclaiming any assertion of a general power of review over the judgments of the municipal court in criminal cases, I shall now proceed to inquire whether that court had power to render the judgment, that is, impose the sentence, by which the petitioner is imprisoned. The statutes of the state of Delaware material to be here considered in this connection are sections 3034, 3037, and 3040 of the Revised Code of Delaware 1915. They are:

"3034. Any husband who shall, without just cause, desert or willfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, or any parent who shall, without lawful excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate child or children, under the age of sixteen years, in destitute or necessitous circumstances, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine, not exceeding five hundred dollars, or by imprisonment with hard labor in such penal or reformatory institution of this state as may be determined upon by the court, for a period not exceeding one year, or both. * * *

"3037. Before the trial, with the consent of the defendant, or at the trial, on entry of a plea of guilty, or after conviction, instead of imposing the penalty hereinbefore provided, or in addition thereto, the court in its discretion, having regard to the circumstances, and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by the court from time to time, as circumstances may require, directing the defendant to pay a certain sum periodically to the wife, or the guardian, or custodian of the said minor child or children, or to an organization or individual approved by the court as trustee, and to release the defendant from custody on probation, upon his or her entering into a recognizance, with or without surety, in such sum as the court or a judge thereof in vacation may order and approve. The condition of the recognizance shall be such, that if the defendant shall make his or her personal appearance in court whenever ordered to do so, and shall further comply with the terms of such order of support, or of any subsequent modification thereof, then such recognizance shall be void, otherwise in full force and effect."

"3040. If the court be satisfied by information and due proof under oath that the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original conviction, or enforce the suspended sentence, as the case may be."

As hereinbefore appears the record discloses that on March 15th the municipal court made an order directing the defendant to pay $20 periodically to an individual approved by that court as trustee, and releasing the defendant from custody on probation upon his entering into a recognizance without surety, and that such recognizance was entered into by the petitioner, and that he was accordingly released. The only process of the court thereafter served upon him was a subpœna to testify. The order of the court of October 29th does not show that

he was then charged with or convicted of any offense or crime. I find nothing in the Delaware statutes dealing with desertion and nonsupport authorizing imprisonment for unpaid arrearages. Even assuming that the record discloses that before October 29th, the day on which the last order of the municipal court was made, the defendant had violated the terms of the order of March 15th, and that the subpœna ad testificandum may be considered an "information" under section 3040 of the Delaware Code, yet the only penalty aside from the forfeiture of the recognizance with which such violation may be visited under the statute is expressed in the words that the court "may forthwith proceed with the trial of the defendant under the original conviction or enforce the suspended sentence, as the case may be." The only sentence authorized by the statute upon original conviction or upon the court being satisfied that the defendant has violated the terms of its order is a fine not exceeding $500 or by imprisonment with hard labor for a period not exceeding one year in such penal or reformatory institution of the state as may be determined upon by the court, or both. It seems inevitably to follow that the defendant is deprived of his liberty without having been charged with any offense known to the laws of the state of Delaware and under a sentence likewise unknown to the laws of this state. Nor is the sentence a trifling one. Viewed in the light of the facts disclosed by the record, the sentence is a sentence for life. It appears from the sworn petition for the writ of habeas corpus that the petitioner has not the ability to comply with the order of court, having no property, means, or income which will enable him to do so. This sworn statement of the petitioner was not denied by the return or at the hearing. Under these facts it is clear that the incarceration imposed by the sentence of the municipal court may terminate only with the life of the petitioner. Manifestly that court was without jurisdiction to impose such sentence, and under the authorities above cited it is in conflict with the Fourteenth Amendment of the federal Constitution, and hence is null and void. In fact counsel for the respondent at the argument did not attempt to sustain the validity of the order directing that the petitioner "be committed until the arrearages are paid," but frankly and commendably admitted that if the order did not otherwise direct the imprisonment of the defendant he should be discharged by this court. Counsel based his contention that the petitioner should not be discharged upon that portion of the order which requires the defendant "to give bond in the sum of five hundred dollars, with surety, for the compliance of the order," but he failed to point out any law of the state of Delaware authorizing the municipal court to imprison a person until he shall give bond with surety. Furthermore the only alleged justification for the imprisonment of the petitioner is the order of October 29th, and while that order directs the petitioner "to give bond," I do not understand that it directs that he stand committed until such bond shall be given. The commitment seems to be required only "until the arrearages are paid."

It being manifest that the petitioner is in custody in violation of the Constitution, it only remains to inquire, such imprisonment being under

color of authority of a state court, whether the facts and circumstances surrounding that imprisonment are such that the discretion of this court should be exercised in favor of the prisoner's discharge. To obtain the answer to this inquiry we need but turn once again to the decisions of the Supreme Court. In re Hans Nielsen, Petitioner, 131 U. S. 176, 182, 9 Sup. Ct. 672, 674 (33 L. Ed. 118), that court, speaking by Mr. Justice Bradley, said:

"The objection to the remedy of habeas corpus, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. * * * The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in Ex parte Siebold, 100 U. S. 371, 375, and is illustrated by the case of Ex parte Parks, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. * * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

The law upon this point was summarized in the notable case of Frank v. Mangum, 237 U. S. 309, 326, 327, 35 Sup. Ct. 582, 587 (59 L. Ed. 969) thus:

"It is therefore conceded by counsel for appellant that in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings."

These principles were assumed by the Supreme Court in Collins v. Johnston, 237 U. S. 502, 35 Sup. Ct. 649, 59 L. Ed. 1071, to be as applicable when the prisoner is detained by a sentence of a state court as when he is detained by a federal court.

In view of what has been hereinbefore said I am constrained to conclude that the petitioner is in custody in violation of the Constitution of the United States, and that a proper exercise of judicial discretion requires that he be now discharged. In reaching this conclusion I am not unmindful of the fact that the legality of the petitioner's detention was considered upon a writ of habeas corpus by the resident judge of New Castle county. In view of the great respect that I entertain for the opinions and judgments of that learned judge, it is with trepidation that I find myself not in accord with his conclusions, yet I can but believe that had the aspects of the matter presented to this court been called to his attention and the decisions of the Supreme

Court of the United States, here relied on, been brought to his notice the proceedings in this court would have been unnecessary.

The petitioner is discharged.

THE PENZA.

THE TOBOLSK.

(District Court, E. D. New York. September 26, 1921.)

No. 302.

1. **International law ⇐10—A government not recognized cannot sue.**
   Libel by the "Russian Socialist Federated Soviet Republic" and its "agent and representative," which failed to allege that such republic had ever been recognized as a sovereign state by the United States or that such agent had ever been recognized as an agent or representative of such republic, *held* properly dismissed.

2. **Evidence ⇐26—Judicial notice taken of recognition of foreign governments and their representatives.**
   Judicial notice will be taken of the action of the political department of the government on such questions as the recognition of foreign governments and their representatives.

3. **Constitutional law ⇐68(1)—Recognition of foreign governments a political question.**
   Which government in a foreign country is sovereign de jure or de facto is not a judicial, but a political, question, the decision of which by the legislative and executive departments of government binds the judicial department.

In Admiralty. Libel by the Russian Socialist Federated Soviet Republic and Ludwig C. A. K. Martens, as agent and representative thereof, by Rose Weiss, attorney in fact, against the steamers Penza and Tobolsk, their tackle, etc. On exceptions to libel. Libel dismissed.

Charles Recht, of New York City, for libelants.

Victor E. Gartz, of New York City (John P. Murray, of New York City, of counsel), for respondent.

MANTON, Circuit Judge. [1] This libel is filed, seeking title and possession of two steamers, known as the Penza and Tobolsk, which are now alleged to be held illegally and against the title and possession of the libelants. Exceptions to the libel are filed, chief among which is the claim of the respondent that the libelants may not maintain this libel, for the reason that the Soviet Republic has not been recognized as a sovereign state by the government of the United States, and that Mr. Martens, its agent or representative, has therefore not the capacity to sue as such. The libel alleges that the "Soviet Republic is a sovereign state of nations." There is no allegation that the Russian Socialist Federated Soviet Republic has ever been recognized as a sovereign state by the United States government, nor is there any allegation that Mr. Martens has ever been recognized as an agent or representative of

the Soviet Republic. Following the overthrow of the Czar's government, the provisional government of Russia was recognized by the United States government, and Boris Bakhmetieff was received by the State Department as ambassador extraordinary and plenipotentiary of Russia. Of this the court may take judicial notice.

[2] The courts will take judicial notice of the action of the political department of the government on such questions. In the most recent case on this subject (Oetjen v. Central Leather Co., 246 U. S. 301, 38 Sup. Ct. 310, 62 L. Ed. 726) the court said:

"This court will take judicial notice of the fact that, since the transaction thus detailed and since the trial of this case in the lower courts, the government of the United States recognized the government of Carranza as the de facto government of the republic of Mexico, on October 19, 1915, and as the de jure government on August 31, 1917."

See, also, Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733.

In Jones v. United States, 137 U. S. 214, 11 Sup. Ct. 84, 34 L. Ed. 691, the court said:

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the Legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

[3] The courts must follow and may not lead the executive. They have no authority to institute an original inquiry into conditions of a foreign state of government. Which is a sovereign, de jure or de facto, of a territory is not a judicial, but a political, question for determination. But the legislative and executive department of any government by its decision or action binds the judicial. Jones v. United States, supra.

The Circuit Court of Appeals for this circuit in the case of Agency of Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 363, 169 C. C. A. 379, 6 A. L. R. 1182, said, speaking of the Russian government at that time:

"On July 5, 1917, the United States government recognized Boris Bakhmetieff as the Russian ambassador. The record contains a certificate, signed and sealed on May 8, 1918, by Robert Lansing, Secretary of State of the United States of America, stating that Boris Bakhmetieff presented his letter of credence to the President and was officially received by the President as ambassador extraordinary and plenipotentiary of Russia on July 5, 1917, and that he has since that date been recognized by the Department of State as the ambassador of Russia. * * * Who is the sovereign, de jure or de facto, of a country, is a question for the political departments of the government. It is not a judicial question. The decision of the matter by the political departments is in this country conclusive upon the judges. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691. The same principle is the established law of England. Republic of Peru v. Dreyfus, 38 Ch. Div. 348, 356, 359. In the same way, the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the

political branch of the government. In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States, is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof." 258 Fed. 368, 169 C. C. A. 384, 6 A. L. R. 1182.

This court must take judicial notice of the attitude and action of the State Department and the date of the issuance of the certificate of the Secretary of State in the American Can Case to the date of the commencement of this suit, or even to the present date. On May 6, 1921, the State Department issued a press statement as follows:

"The Department of State has received numerous inquiries regarding Mr. L. A. Martens, claiming to be a representative of a Russian Socialist Federated Soviet Republic. The department feels it to be its duty to inform the public that Mr. Martens has not been received or recognized as the representative of the government of Russia or of any other government. As the United States government has not recognized the Bolshevik régime at Moscow as a government, extreme caution should be exercised as to representations made by any one purporting to represent the Bolshevik government."

It appears that the libel was verified by Rose Weiss on July 17, 1921. On August 5, 1921, the State Department again announced in answer to an inquiry:

"In reply the department desires to inform you that the so-called Russian Socialist Federated Soviet Republic has not been recognized by the government of the United States, nor is Mr. Recht recognized by it as an agent or attorney of the so-called Russian Socialist Federated Soviet Republic. The status of Mr. Bakhmetieff as ambassador of Russia has not changed since this department's letter to you of June 24, 1919. The inclosed copy of the July 'Diplomatic List' of foreign representatives in Washington contains on pages 4 and 5 the names of officials of the Russian embassy."

Therefore it must be noticed by this court that this country has recognized and still continues to recognize Mr. Bakhmetieff as the representative of Russia, and has refused to recognize the Soviet Republic and also Mr. Martens as the representative of any Russian government. The court may not, as counsel for the libelants suggests, make an independent inquiry, for to do so, if counsel's hope prevailed, would be to recognize Martens while the State Department recognizes Mr. Bakhmetieff. The cases counsel refer to are entirely in harmony with these conclusions. No principle of general law is more universally asknowledged than the perfect equality of nations. All sovereign states, without respect to their relative power, are equal. Under this equality, whatever is lawful for the one is equally lawful for another, and whatever is unjustifiable in one is equally so in another. The refusal of the United States to recognize in any way the Soviet government is entirely consistent with its present manners of diplomacy. It is in harmony with its rights and requirements under the international law.

"It is a fixed habit of this government to hold no official intercourse with agents of parties in any country which stand in an attitude of revolution antagonistic to the sovereign authority in the same country, with which the

United States are on terms of friendly diplomatic intercourse." Memo. read by Mr. Steward to Mr. Corwin, Dip. Cor. 1865, III, 484.

"But the capacity of a state, in itself, for recognition, and the fact of recognition by other states, are two different things. Recognition is not an act wholly depending on the constitutionality or completeness of a change of government, but is not infrequently influenced by the needs of the mutual relations between the two countries. When radical changes have taken place in the domestic organization of the country, or when they seem to be contemplated in its outward relations, it is often a matter of solicitude with this government that some understanding should exist that the rights acquired by our citizens, through the operation of treaties and other diplomatic engagements, shall not be affected by the change. In other words, while the United States regard their international compacts and obligations as entered into with nations rather than with political governments, it behooves them to be watchful lest their course toward a government should affect the relations to the nation. Hence it has been the customary policy of the United States to be satisfied on this point, and doing so is in no wise an implication of doubt as to the legitimacy of the internal change which may occur in another state. The actual formula of recognition is unmistakable, and, short of that evident step, the diplomatic fiction of 'officious' intercourse, or 'unofficial' action, is elastic enough to admit of continuing ordinary intercourse, for the most part without rupture of any of its varied parts." Mr. Evarts, Secretary of State, to Mr. Baker, June 14, 1879, U. S. Inst. Venezuela, III, 67; Moore, Int. Law Dig. I, 151.

"Since the notable precedent of The Sapphire, 78 U. S. (11 Wall.) 164, 20 L. Ed. 127, the principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise. No other doctrine is thinkable, at least among nations which have any conception of international honor. See, also, United States of America v. McRea, L. R. 8 Eq. 69; John Bassett Moore's Digest of International Law, vol. 1, p. 249, and also 251, quoting Secretary Bayard's instructions to the then American Minister to Peru (September 23, 1886)."

In Russia there has not been any change of sovereignty, nor has there been any change of government, recognized by any responsible sovereign state in the world. The fact that Great Britain has, for economic reasons, made an agreement, is but an unofficial recognition of the Soviet Republic by that country. This, however, is not an official political recognition of that republic. In the Ambrose Light Case (D. C.) 25 Fed. 410, it was held:

"Insurgents have strictly no legal rights, as against other nations until recognition of belligerent rights is accorded them. (3) Recognition of belligerency, or the accordance of belligerent rights to communities in revolt, belongs solely to the political and executive departments of each government. (4) Courts cannot inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments, and recognize only what those departments recognize; and, in the absence of any recognition by them, must regard the former legal conditions as unchanged."

The same conclusions as here announced were arrived at in the Ninth Circuit. The Rogdai, 278 Fed. 294, decided May 25, 1920, by Judge Dietrich in the Northern District of California.

The Soviet Republic never having been recognized as a sovereign state by this government, it may not maintain this libel in the federal courts. Its alleged agent would have no better or greater rights than his principal. Therefore this exception to the libel must be approved.

Since it results in the dismissal of the libel, there is no necessity for considering the other exceptions which were filed.

Exceptions sustained; libel dismissed.

MILLER v. UNITED STATES.

(District Court, S. D. New York. May 20, 1921.)

1. **Railroads ⇐150—Interstate Commerce Commission's order approving issuance of securities not subject to attack by stockholder.**
   Owner of stocks or bonds of railroad cannot, under Commerce Court Act and Urgent Deficiencies Act (Comp. St. §§ 992, 994), petition to enjoin, set aside, annul, or suspend order of Interstate Commerce Commission approving issuance of new securities by the railroad under Railroad Bill, § 268(a), since under section 272(6) only authorities of the states through which the carrier passes can object to issuance of new securities.
2. **Railroads ⇐150—Investigation required of Interstate Commerce Commission approving issuance of securities.**
   The Interstate Commerce Commission, on application of railroad for authority to issue securities, need make only such investigation as the Commission considers necessary, which investigation may be informal.
3. **Railroads ⇐150—Interstate Commerce Commission approving issuance of securities need not pass on reorganization plan.**
   The Interstate Commerce Commission, on application by newly organized railroad for authority to issue securities to purchase property of old railroad at foreclosure sale, is not concerned with the reorganization plan, but will pass merely upon the propriety of exchanging new securities for old property, since, if the property is adequate, the Commission need not go into the validity of its acquisition by the new company.

In Equity. Petition by E. H. Miller to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission approving issuance of new securities by the Chicago & Eastern Illinois Railroad Company. On motion of the United States to dismiss petition. Motion sustained.

Suit under Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act October 22, 1913 (38 Stat. 219; Comp. St. §§ 992, 994) to enjoin, set aside, annul, or suspend order of Interstate Commerce Commission, February 3, 1921, approving the issuance of new securities by Chicago & Eastern Illinois Railroad Company. Hearing on motion of United States to dismiss the petition. Motion sustained.

The petitioner in this proceeding asks this court "to set aside and annul an order granted by the Interstate Commerce Commission on or about February 3, 1921, approving the issuance of new securities by the Chicago & Eastern Illinois Railroad Company. * * *" The only allegation of any interest which the petitioner has in the proceeding is his statement in the petition that "your petitioner represents, in his application, an interest of nearly $100,000, in the stock of the Chicago & Eastern Illinois Railroad Company."

The original Chicago & Eastern Illinois Railroad Company is in the hands of receivers who were appointed in May, 1913.

The petition sets forth that the original application to the Commission for the right to issue securities by a corporation about to be formed, but really previously incorporated, was signed by Joseph P. Cotton, counsel for the committee protecting the general mortgage bonds of the old company, the Chicago & Eastern Illinois Railroad Company, and by George Wellwood Murray,

counsel for the committee protecting the preferred and common stock of the railroad company. The petition goes on to state that under date of January 20, 1921, there was filed with the Commission a petition by the railway company for leave to issue securities in order to purchase property belonging to the old railroad company at foreclosure sale of some of the mortgages securing certain of the bonds above mentioned. This foreclosure suit is pending in the federal court in Chicago. The petition of the new railway company is stated to have adopted as its own the prior application of Messrs. Cotton and Murray.

A deposit agreement was made for the protection of owners of preferred and common stock, dated May 28, 1913, one clause of which is as follows:

"In order to comply with the rules of the committee on stock list of the New York Stock Exchange, a period of five years is hereby specified as the period within which depositors will be entitled either to receive the new securities resulting from the plan for reorganization or readjustment of the railroad company or its affairs, or to the return of the deposited securities upon the compliance with the terms of this agreement. * * *"

A deposit agreement relating to the refunding and improvements bonds of the old company, bearing date March 25, 1914, was likewise made. This contained no provision as to the withdrawal of the bonds after five years, and vested the committee named in the agreement with the legal title to all the bonds deposited thereunder.

A further deposit agreement, bearing date March 15, 1915, and covering certain other indebtedness of the insolvent railroad, was also made. This last agreement provided:

"The period of five years is specified as the period within which the depositors will be entitled to the return of the securities which they have deposited hereunder, or the receipt of new securities on reorganization or readjustment."

Certain of the bonds under the last-mentioned deposit agreement are stated by the petitioner to be first lien bonds issued to pay for coal lands. The petition goes on to say that the coal property was ordered sold by the United States District Court in Chicago, but that the foreclosure was not completed as to the Indiana property until December 18, 1918, and as to the Illinois property until March 19, 1919. Meanwhile, the petition alleges, the stockholders' deposit agreement had expired, and the deposit agreement covering the coal bonds had also expired. It further states that the expiration of the latter agreement was "before the committee announced the purchase of the coal properties" and the transfer of the title to the present nominal holding company, the Indiana & Illinois Coal Corporation. * * *" The charge is made that the equity in these coal lands has been lost to the holders of the stock and securities other than the coal bonds deposited with the committee because of this sale.

It is apparently the case (although the papers do not set it forth with any degree of clearness) that the coal property will not be, or may not be, turned over to the new railway company while the other assets which are in the hands of the receivers of the Chicago & Eastern Illinois Railroad Company are to be turned over to it upon the issuance of various securities authorized by the Interstate Commerce Commission by its order of the 3d of February, 1921. The petitioner alleges that the proposed transfer is an invasion of the rights of the stockholders and bondholders of the Chicago & Eastern Illinois Railway Company, whom he represents, on either one of two grounds: (1) Because the three committees represented antagonistic interests and were exploiting the coal properties and neglecting to include them in the proposed reorganization; (2) because the deposit agreements covering the stock and coal bonds had expired.

He further alleges that he is seeking, in a suit in the New York Supreme court, to cancel the sale of the coal lands.

The petition then proceeds to ask that the order of the Interstate Commerce Commission be set aside:

(a) Because the Commission did not examine the reorganization plan before making an order authorizing the issue of securities by the new company which proposes to purchase at the foreclosure sale.

(b) Because the application to the Interstate Commerce Commission, signed by Joseph P. Cotton and George Wellwood Murray, was legally invalid (apparently on account of the alleged expiration of the deposit agreement), and could not be cured by the filing of a second application by the new company.

(c) Because the Interstate Commerce Commission, if they had learned that it was proposed to disregard the coal lands, might have, and apparently it is claimed should have, insisted upon a modification of the schedules of securities to be issued by the new company.

By an order of Judge Mack, copies of the petition were served upon the secretary of the Interstate Commerce Commission, and the Attorney General of the United States, and notice was given also to George C. Van Tuyl, Jr., Joseph P. Cotton, George Wellwood Murray, and W. H. Lyford, of the hearing on the present petition.

The United States attorney, appearing on behalf of the respondent, moves to dismiss the petition upon substantially three grounds: (1) That the petitioner shows no interest entitling him to maintain the petition; (2) that no order of the Interstate Commerce Commission is involved which is subject to the injunction process of this court; (3) that no cause of action against the United States is set forth.

Blackburn Esterline, Sp. Asst. Atty. Gen., and Francis G. Caffey, U. S. Atty., F. A. McGurk, Asst. U. S. Atty., and Joseph P. Cotton, all of New York City, for the motion.

E. H. Miller, of New York City, opposed.

Before HOUGH, Circuit Judge, and LEARNED HAND and AUGUSTUS N. HAND, District Judges.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). The first objection to the foregoing petition is that Mr. Miller comes into court neither as the owner nor holder of any stock or bonds of the Chicago & Eastern Illinois Railroad Company, and if he were such a stockholder or bondholder, there appears to be no provision of law which would entitle him to sue.

[1] Assuming for the purposes of argument that the petitioner is the owner of stock or bonds of the Chicago & Eastern Illinois Railroad Company (a fact not alleged in the petition, and disclaimed at the time of argument), the petition would under such circumstances have to be denied.

Section 268 (a) of the Railroad Bill, which regulates the issue of security by common carrier, so far as relevant, provides merely that the Interstate Commerce Commission may authorize a carrier to issue new shares or bonds. This it must do, section 272 (6), upon notice to the Governor of each state through which the carrier passes. The state authorities may oppose, and the Commission may hold hearings if it sees fit. Apparently no one else can object. The purpose of these provisions of law is only to prevent overissues of securities, and the Commission has no jurisdiction to determine whether the property received will belong to the carrier when received, or whether there are liens upon it. All the Commission does is to say that the securities may be issued for that property, and nobody interested in the property is or can be affected by the order, except as he becomes a holder of the new securities.

Here, the new corporation, the railway company, has applied for, and been given, leave to issue certain stock and bonds. It is of no mo-

ment to the petitioner here whether the securities are authorized or not until he gets them, and if he does so either voluntarily, or because compelled to, his interest will be in sustaining the order. If he has interests in the property to be transferred, he may wish to prevent the transfer; but his time to object is when some court, in this case the United States District Court in Chicago, directs that his property be delivered to the railway company in exchange for the new securities. The order of the Interstate Commerce Commission does not, and could not, make that direction. It only puts the railway company in a position where, if it succeeds in getting the proposed consideration, its own bonds and shares will be valid, which they could not otherwise be.

[2, 3] So much for the basis of the application. As for the alleged defect in the powers of the committees, it is irrelevant because the railway company's application is enough. The investigation required of the Commission may be informal. Whatever they think necessary, and no more. Even if it be without seeing the reorganization plan, there would be no irregularity. The Commission does not pass upon that, but upon the propriety of exchanging new securities for old property; if the property be adequate, it is unnecessary to go into the validity of its acquisition by the railway company.

In view of the foregoing conclusions, it is unnecessary to discuss whether the provisions limiting the operation of the deposit agreements to a term of five years from their respective dates were such as to deprive the committees of all power to deal with the securities. Apparently the petitioner, after the five years had expired, represented depositors before the Commission, and no request has been made for the return of the securities. If the depositors object to the plan of reorganization, there is nothing to prevent them from withdrawing their securities. If they wish to participate in it in either its present or an amended form, the objection based upon the expiration of the five-year period seems groundless.

The contention that the Interstate Commerce Commission, if it had learned that it was proposed to disregard the coal lands, should have insisted upon a modification of the plan for the transfer to the railway company and the issue of new securities, is met by what we have already said as to the powers of the Commission. The failure of the Indiana & Illinois Coal Corporation, which holds the legal title to the coal lands, to turn over these lands to the railway company, if they really belong to the latter, is a right which can only be asserted by the latter company. On the other hand, if that company holds the title as trustee for the old railroad company or the security holders, of whom the petitioner represents a part, it is manifest that relief must be sought against it in some appropriate forum. No relief can be given in such a proceeding as the present one.

The motion of the United States attorney is granted, and the petition dismissed.

THE ST. PAUL.

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

1. **Shipping ⇐137—Ship loading cargo for unlicensed voyage unseaworthy.**
   A ship of United States registry, licensed only for coastwise business, which loaded a cargo at New York for Mediterranean ports, *held* unseaworthy for the voyage, and the owner not entitled to any of the exemptions from liability provided by Harter Act, § 3 (Comp. St. § 8031).
2. **Shipping ⇐133—Lien between ship and cargo attaches when cargo is loaded.**
   The mutual lien between ship and cargo attaches when the cargo is loaded on the vessel, and whenever any event happens which renders the lien enforceable, it relates back to that time.
3. **Shipping ⇐125—Delay from seizure by marshal of unseaworthy vessel after loading held deviation.**
   Where a ship, after loading for a voyage for which she was unseaworthy, was seized and held by the marshal on process, the incident delay constituted a deviation from the voyage, which rendered the owner liable for damage to the cargo from a fire which occurred during the custody of the marshal and the sinking and subsequent salving of the vessel, and entitled the cargo owners to a lien, dating from the time of loading, for all such damage, for freight prepaid, and for the cost of loading and unloading.
4. **Maritime liens ⇐37—Liens for repairs and supplies held superior to those for damage to cargo.**
   Furnishers of repairs and supplies to fit a vessel for a voyage have a lien superior to that of cargo owners for damage to cargo resulting from deviation from the voyage; but liens for freight prepaid, which put the vessel in funds for the voyage, stand on a parity with those for repairs and supplies.

In Admiralty. Suit by J. Aron & Co., Inc., against the steamship St. Paul, consolidated with other causes. Decree for libelant.

George H. Mitchell, of New York City, for repair libelant Hamilton-Beers Corporation.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for repair libelants Sullivan and Baird.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for cargo libelants.

MAYER, District Judge. The essential facts are well set forth in the report of the commissioner noted in the margin.[1] The questions

[1] To the District Court of the United States for the Southern District of New York:

By an order of the court entered July 3, 1919, the above cause, and 44 other specified causes against the steamship St. Paul, were consolidated into one cause, for reasons and under circumstances stated in the order, but without prejudice to the proceedings already had in each cause, or to the priority of any libelant's claim, and it was referred to me, the undersigned, as commissioner, to take proofs and report as to the issues and all questions of priority among the libelants.

The St. Paul having thereafter been sold by the marshal under order of the court, and the proceeds of sale having been paid into the registry, a further order was made in the consolidated cause, under the above title, on March 8, 1920, whereby the first-mentioned order was modified in certain

here involved may be divided under two heads: (1) What liens attached to the vessel; and (2) the priority of the liens. Certain claims, such as those for the wages of seamen and for salvage, are not in controversy and have been disposed of. Claims for repairs, supplies, and

particulars, and it was referred to me, as commissioner, to marshal the liens of the various libelants, and to report as to the priorities among them, taking such proofs as might be material in determining the relative rank of the asserted liens, and it was ordered that such libelants as had not yet proved their damages should produce their proofs forthwith before me; the time for the production of such proofs being limited to 90 days from the entry of the order, any libelant failing to make his proofs within said period to be foreclosed from proving his claim against said proceeds, and his claim to be deemed abandoned.

Subsequently to the entry of said order of consolidation, the Steamship Operating Company, on July 23, 1919, filed a libel against the steamship St. Paul for the recovery of $41,029.97. That cause was never consolidated with the other causes, and on May 15, 1920, an interlocutory decree was entered therein, upon default, whereby it was referred to me to ascertain and report the amount due said libelant. The time to present proofs was subsequently extended as to that cause to July 12, 1920. The proofs taken therein within said extended time have been or will be filed with my report to the effect that the Steamship Operating Company had no lien on the steamship, that no amount was due to it from the proceeds, and that, if there were a lien, the same would be subordinate to the liens of the other libelants who had proved their claims.

I hereby report that, pursuant to notice given to all parties appearing of record to be interested in the distribution of said proceeds, sundry of the libelants appeared before me by their respective proctors on the 19th day of March, 1920, and on subsequent dates to which the matter was duly adjourned, and that testimony was offered which, with the exhibits, is filed herewith. Said notice of hearing, with proof of service as aforesaid, is filed herewith as Exhibit 1. I further report as follows:

The St. Paul was built at South Chicago, in 1897, for service on the lakes, and was originally operated as a lake freighter; but in 1916 she was brought to the Atlantic seaboard and made over for the coasting trade, the work of reconstruction being finished about July 1, 1917. She was then enrolled and licensed for the coasting trade under the American flag. A certificate of enrollment put in evidence shows that she was at first documented in Boston, but at the time in question was documented at New York, and that the owner was the St. Paul Steamship Company. The certificate was dated February 17, 1919. The St. Paul Steamship Company was a New York corporation.

Although the ship had never been licensed, or otherwise authorized, to go trans-Atlantic, on February 28, 1919, she began to load at Brooklyn for Mediterranean ports, and she continued to take on cargo for such ports until April 4. On April 5, when there was still some cargo to go aboard, but only a small amount, she was shifted from the pier to an anchorage off Tompkinsville, Staten Island. The explanation for the shifting is that the parties in control of the pier wanted to use the berth. In the evening of the day she was shifted she was arrested by the United States marshal for this district, under process issued on the libel filed by the Hamilton-Beers Corporation, one of the libelants in the consolidated cause, for an unpaid bill for repairs. This was followed by seizures under other libels. Later she was ordered from the Tompkinsville anchorage by the harbor authorities, and was anchored elsewhere in the Bay. She remained at this anchorage until May 26, when it was discovered that she was afire. Efforts were made by those on board to extinguish the fire; the city fire boats also came, and under orders of the fire chiefs the ship was sunk to put the fire out. She was subsequently raised by the Merritt & Chapman Derrick & Wrecking

services to the vessel aggregate apparently $25,489.49, and these claims are, without question, entitled to a lien. The sole question in respect of these claims is their position in the marshaling.

The damages of the cargo libelants include physical damage to the

Company, and under orders of the court was brought to a pier on the North River, where her cargo was discharged. All this time she was under arrest by the marshal and in his custody. The cargo was for the most part badly damaged by fire and water, the discharge and incidental expenses were heavy, and the cargo owners suffered serious losses.

The ship was twice sold by the marshal under orders of the court. The first sale was set aside for inadequacy of price. On the second sale, which took place November 24, 1919, the vessel brought $100,300, and this sale was confirmed.

The following claims for seamen's wages were proved before me under orders of reference, and were reported by me as follows: [Twenty-four claims, aggregating $2,286.98.] * * *

On August 25, 1919, the Merritt & Chapman Derrick & Wrecking Company, libelant in one of the consolidated causes, obtained a decree for salvage services rendered the steamship and her cargo in connection with the fire and sinking, and for costs amounting to $968.96; the sum of $3,000 being the award against the steamship, and the ship's proportionate share of said costs being $223.62. It is not disputed by any of the parties that said $3,000 and said $223.62, in all $3,223.62, have priority over all other decrees and claims, and that said libelant is entitled to be first paid out of the said proceeds to the extent of said sum.

In addition to those above mentioned, two classes of claims were proved before me under the orders of reference, and the same were found by me to be liens upon the steamship. All these arose subsequently to January 1, 1919, and all were in suits included in said order of consolidation. The first class consisted of claims for repairs, supplies, and services to the steamship as follows, made and rendered by the following libelants about the following dates in 1919, all at the port of New York except the first, which was at Boston: [Seventeen claims, amounting to $25,489.49.]

The second class consists of claims of cargo owners arising out of the arrest of the ship April 5, 1919, and her subsequent detention under process of the court, the fire aboard, her sinking, and matters connected therewith. Claims of this kind, made by the following libelants, were proved, and reports were made for the following amounts, no one appearing to contest in any instance: [Fourteen claims, totaling $143,210.65.]

The above damages of the cargo libelants include physical damage to the cargo by fire and water, and each shipment's proportionate share of the discharging expenses, a lien for which was imposed and has been paid. For reasons hereinafter stated, I do not think that such items are recoverable in these suits, and I now consider my reports erroneous in that respect.

It is maintained by the cargo libelants that their claims are in tort, and for that reason have priority over the repair and supply claims. The following are the grounds upon which the claim of tort is made: (1) That the owners falsely represented that the vessel had or could obtain a trans-Atlantic license. (2) Deviation of the vessel. (3) The owners allowed the vessel to lie in the lower harbor from April 4 to May 26, under-manned, and without taking proper precautions for the care of the cargo. (4) Negligence of the master in the custody of the cargo. (5) Failure of the owners to care for and discharge the cargo after the fire.

A. *As to False Representations Concerning the License.* In January, 1919, a company called the American Steamship Company, Limited, said to be a Canadian company, authorized Mr. Van Praagh, a loading agent at New York, to book the St. Paul for designated Mediterranean ports, the bills of lading to be issued in the name of another company, called Transfer Steamship Company, for which Mr. Van Praagh was to sign as agent, and which,

cargo by fire and water, and each shipment's proportionate share of discharging expenses aggregate $143,210.65. So far as concerns the physical damage to cargo, the question is whether there is any lien, and, if so, the rank to which such lien is entitled. The commissioner

it was testified, owned the American Steamship Company. It was not explained what connection these two companies had with the ship or with the St. Paul Steamship Company. A Mr. Moulton, who said he was manager of both the American Steamship Company and the Transfer Steamship Company was a reluctant witness for the cargo owners. He was evasive and insincere, and left the matter a mystery. But the inference from other testimony is that the American Steamship Company and the Transfer Steamship Company were among numerous shipping corporations controlled by Mr. Charles W. Morse, and that this was his own way of operating the ship. The St. Paul Steamship Company was also one of those corporations. In the letter authorizing Mr. Van Praagh to make the freight contracts for Mediterranean ports, the St. Paul was referred to by the American Steamship Company as a Canadian ship. Mr. Van Praagh understood she had a Canadian registry, and he testified that he was so assured. He secured the cargo and collected the prepayable freights, which he said amounted to approximately $100,000, and which he handed over to the Transfer Steamship Company. The subsequent history of this considerable sum of money is not disclosed, but it was not used to pay the bills for the contemplated voyage. Some time after the arrest of the ship Mr. Van Praagh discovered that she had no license to go trans-Atlantic, whereupon he went to Washington to investigate, after having tried to straighten out the situation in New York. He was told at the Shipping Board offices in Washington that the ship was owned by the St. Paul Steamship Company, a subsidiary of one of Mr. Charles W. Morse's companies, that Mr. Morse had sold her and three other vessels to Mr. Moulton, "apparently on a paper deal," but that the Shipping Board would not assent to the transfer to Canadian ownership and the British flag until Mr. Morse settled a claim of about $250,000 which the government had against him for other matters. He was also told that Mr. Morse had given checks to be cashed "at deferred dates," when he would probably collect freight moneys to pay them. There is no further explanation of this in the testimony. Mr. Hanscom, president of the St. Paul Steamship Company, could shed no light on the transaction. He said that he personally had little to do with the matter. He was identified with other companies in which Mr. Morse was interested.

The testimony indicates that an arrangement had been made for vesting the title to the vessel in a Canadian corporation, and obtaining a Canadian registry, and a license for trans-Atlantic traffic. Apparently this could have been done, the Canadian laws being less stringent than the United States laws, under which she could not obtain the required license without changes in her hull and equipment. I have no doubt that Mr. Morse and his associates fully expected that before the cargo was aboard the transfer would be made, and the ship put under the British flag, with a Canadian license for trans-Atlantic service. But, as no such license was ever issued, the ship must, I think, be considered to have been unseaworthy for the voyage she had undertaken, since she could not lawfully make it, and did not meet the legal requirements in hull and equipment. There was therefore a breach of the implied warranty of seaworthiness as to each cargo owner.

B. *The Deviation Alleged by the Cargo Owners.* They cite many decisions to support their contention, among them The Indrapura, 171 Fed. 929 (District Court, Oregon), decided upon exceptions to a libel for damage to cargo. There a vessel which had taken on her cargo was placed on a dry dock by the owners, to have her bottom painted, when it was not a maritime necessity. While on the dry dock the vessel caught fire, as a result of which the cargo was damaged. The court held that there was a deviation, which made the ship liable for the damage to the cargo. In a subsequent case

has reported that the cargo libelants are entitled to a lien on a parity with the repair and supply liens in respect of prepaid ocean freight, ocean insurance, cost of loading, and the estimated cost of discharging shipments in sound condition, and possibly other items which are the

arising out of the same occurrence, where it was shown that dry-docking with cargo aboard was in accordance with custom, the same judge held that there was no deviation. The Indrapura (D. C.) 238 Fed. 853. The first decision was based on the principle, apparently well established, that any conduct of a ship which tends to vary or increase the risk is to be regarded as a deviation, since it is not the risk with reference to which the parties contracted. Unreasonable delay in starting on the voyage is a deviation. The recent case of The Elizabeth Dantzler, 263 Fed. 596 (District Court, Eastern District of Virginia), is also referred to. There a vessel bound from New York to Charleston with a combustible cargo went into Hampton Roads justifiably, but she needlessly remained there for more than six weeks, and during this time the cargo was damaged by spontaneous combustion. The vessel was held liable as for a deviation. The decisions also hold that when there is such deviation the shipowner is not protected by the exceptions in the contract, but becomes an insurer, and liable for all loss and damage, even unavoidable casualty. See Carver on Carriage by Sea (6th Ed.) § 287; The Citta di Messina (D. C.) 169 Fed. 472.

It is undeniable that the shippers of the St. Paul's cargo contracted, as the cargo libelants contend, that their goods should be carried to the ports of destination in the customary manner and with the customary dispatch. The vessel had been held in the harbor for nearly two months when the fire broke out. If she had been in charge of the owners, and under their control, during that time, and not in the custody of the court through the marshal, the ship would probably be liable for all damage the cargo sustained by fire and water, and for all incidental losses; the fire clause in the Limited Liability Act (U. S. R. S. § 4282 [Comp. St. § 8020]) being no protection to the ship under such circumstances. But she finished loading April 4, went into the stream April 5, and on the same day was arrested by the marshal. She was never out of the marshal's custody again until sold at marshal's sale. I cannot see that there was a constructive deviation, and, if there was a deviation, it did not create a lien on the vessel, for reasons hereinafter stated.

C. *As to the Charges of Negligence in the Care and Protection of the Cargo, and Failure of the Owners to Attend to the Discharge after the Fire:* If the owners were in fact negligent in these particulars, I do not think that their negligence could create a lien on the vessel, since she was in the possession and custody of the law as represented by the marshal and his deputies and employees aboard the vessel, the voyage had been broken up by the seizure, and the power of the owners to create liens on the vessel had terminated. The Young America (D. C.) 30 Fed. 789; The Esteban de Antunano (C. C.) 31 Fed. 920; The Augustine Kobbe (D. C.) 37 Fed. 702; The Glen Island (D. C.) 194 Fed. 744; The Rupert City (D. C.) 213 Fed. 263; Kjaer & Isdahl v. Etier, 222 Fed. 243, 137 C. C. A. 659.

In the Esteban de Antunano, supra, it was said (31 Fed. 924): "While the ship was in the custody of the law it is doubtful whether on any account, or for any service (except, perhaps, for salvage, or through a collision) any lien could arise on the ship; certainly not without the express authority of the court having the property in possession."

Proctors for the cargo owners attempt to distinguish the cases above cited. They maintain that the expressions of the courts refer to contract liens, and do not apply to tort claims. Assuming that the cargo claims here are in tort, no such distinction has been made in the cases, and on principle no reason is apparent why there should be a distinction. It may be that the owners of the ship continued to be under a duty to watch and safeguard the cargo, the marshal's custody of the ship not being disturbed; but the failure

proximate result of furnishing an unseaworthy vessel. As might be expected, the fund in hand is insufficient to pay all claims.

1. The libels for the cargo owners were concededly brought on the contracts made by the bills of lading with the exception of two (Nichol-

to perform that duty would not give rise to a lien on the vessel, although it might create a right of action in personam against the owner.

The testimony shows that after the seizure on April 5 the crew drifted away from the vessel one or two or more at a time, because their wages were not paid, until the only man left was a colored cook. The master remained by the ship to the end, although his wages, also, were in arrears. There was also a marshal's keeper from the beginning. The captain called repeatedly at the offices of the companies supposed to be interested in the ship, but could get no action, and finally he complained to the marshal about the insufficient force aboard the vessel. This resulted in an application to the court by proctors interested in some of the claims, and an order was made on April 16 directing the marshal to secure sufficient help and provide for their keep. In consequence of this an engineer, two seamen, and a cook were procured for the marshal and put on board. The marshal was authorized by the court to take the captain and these men into his employment, and to tax their wages and keep in his costs, and these expenses were subsequently so taxed. From May 16, or shortly thereafter, the force aboard consisted of the captain and these men and the marshal's keeper, all employed by the marshal, and they were in charge when the fire broke out.

In the brief for the cargo owners it is argued at length that there was negligence in not discovering the fire sooner, and guarding against it, and in not taking seasonable measures to extinguish it; the captain particularly being criticized. The captain's deposition was taken on behalf of the cargo owners, but he was not questioned about the negligent performance of duty alleged against him. He testified that he thought the fire was due to spontaneous combustion in the coal bunkers. The charges against him are based on the testimony of the engineer and the keeper; the latter an Italian of small intelligence, scarcely able to speak English. It is doubtful that he appreciated the significance of what he said, and some of his statements were flatly contradicted by the deputy marshal, who was his immediate superior. The engineer was a garrulous and consequential person, chiefly interested in exploiting his own efficiency and alertness, and belittling everybody else aboard. He also appeared to have a strong animus against the captain. It is sufficient to say, however, that all the men aboard, the captain included, were in the employment of the marshal, and the owner had no control over them. Whether or not the owners should have provided additional men in the interest of the cargo owners is a matter with which we are not concerned here.

D. Proctors for the repair and supply libelants maintain that the Harter Act (Comp. St. §§ 8029–8035) also precludes recovery on the part of cargo owners for anything happening after the seizure. That act (section 3 [Comp. St. § 8031]), provides that the vessel and owners shall not be liable for losses arising from "seizure under legal process," if the owners have used due diligence to make the vessel seaworthy and properly equipped. Not only was there no proof of such due diligence, as required by the act, but it affirmatively appeared that the vessel was not seaworthy, as shown above. I do not think that it is necessary to show that the damage resulted from unseaworthiness, as the repair and supply libelants maintain. However, in the only reported decision applying this provision (The Brunswick, District Court, E. D. Louisiana, 263 Fed. 907), the court gave the ship the protection of the clause because there was no doubt the damage resulted solely from the seizure of the vessel under process.

E. I am therefore of the opinion that the cargo libelants are not entitled to recover against the ship for physical damage to their goods by fire and water or for anything else arising after the arrest on April 5, 1920, whatever

son File Company and Microutsicos Bros.), the form of which was in tort; the bills of lading being treated as receipts only. This court (per Judge Augustus N. Hand) denied a motion for leave to amend the libels which set forth causes of action in contract to causes of action in

their rights against the owner may be; but I think that they are entitled to recover the damages which were the proximate result of furnishing an unseaworthy vessel as above found; that is, a vessel that could not lawfully make the voyage contracted for, and was not physically fit for the same under the law of her flag. These damages should consist, I think, of the prepaid ocean freight, ocean insurance, cost of loading, and the estimated cost of discharging the shipments in sound condition. Possibly there may be other items. The testimony does not furnish information which would enable me to report the damages of the several cargo libelants on this basis.

F. The libels for the cargo owners were concededly brought on the contracts made by the bills of lading with the exception of two, the form of which was in tort, the bills of lading being treated as receipts only. It is now insisted on behalf of the cargo libelants that all the libels should be considered tort actions, and when so regarded it is claimed that they all have priority over contract claims for repairs, supplies, etc. To support this reference is made to the John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, where it was held that a claim by a tow against the tug for damages arising out of a collision with a third vessel by reason of the tug's negligence was in tort, and had priority over a claim in contract for supplies previously furnished. The contention is of small, if any, importance if the cargo owners may recover only for breach of the warranty of seaworthiness, and the damages are limited as I have found above. In that aspect the claims of the cargo owners are on contract.

I understand that the court has denied a motion to so amend the libels which are in contract form as to make them sound in tort. Apparently the form was considered important; but it would be extraordinary to give a preference to the tort libels, and deny it to the contract libels, when the recovery in all the cases is on precisely the same state of facts. In one of the cases cited by the cargo owners it is said that in admiralty the court will determine cases upon equitable principles, and that "it is never made a point of pleading whether the case rests upon contract or tort." The California Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, 124 C. C. A. 139. It would certainly be inequitable under the facts here disclosed to subordinate the very recent, if not contemporaneous, repair and supply claims to the cargo claims, when the former are presumed to have enhanced the value of the res and the amount of the proceeds.

G. This being an ocean-going vessel engaged in making voyages of some duration, either the "voyage" or the "yearly" rule applies. The J. W. Tucker (D. C.) 20 Fed. 129; Proceeds of The Gratitude (D. C.) 42 Fed. 299; The Glen Island (D. C.) 194 Fed. 744; The Bethulia (D. C.) 200 Fed. 876; In re New England Transportation Co. (D. C.) 220 Fed. 203; The Samuel Little, 221 Fed. 308, 137 C. C. A. 136. It is immaterial which rule is adopted, since all the liens arose between January 1 and April 5, 1919, and, with the exception of the salvage claim, all were in connection with the contemplated voyage to Mediterranean ports. All except the salvage claim were contract liens, and are therefore on a parity, except the wages claims, and those have been paid. If there is a deficiency the contract liens share in the proceeds pro rata after payment of the salvage claim in full.

Under the order of March 8, 1920, above referred to, I am directed to make a preliminary report showing the general character of the liens, to group them in classes, if that be desirable, and to report how they should be marshaled as to priority. I respectfully suggest that this be deemed the preliminary report referred to, and that, if the court should sustain my conclusions, it be referred to a commissioner to ascertain and report the damages of the cargo owners on the basis above mentioned.

tort, and the court must, on this hearing, accept that disposition as the law of this case. For reasons, however, which will appear infra, this ruling is immaterial, because the cargo rights spring ex contractu, and the fire which damaged the goods becomes immaterial as matter of law.

[1] The commissioner has found that there was a breach of the implied warranty of seaworthiness, and with that conclusion I fully agree, for the reasons stated by the commissioner, except that I am not so confident, as he is, that Morse and associates had ground to believe that the necessary license would be obtained. The commissioner, however, has found that there was no deviation from the voyage.

[2] The question brings up at once a discussion of the lien of the cargo. From the earliest times it has been established in the maritime law that a ship is bound to her cargo, and the cargo to the ship, and that the ship and cargo are so bound, and the lien attaches when the cargo is loaded on the vessel. See the interesting review in Judge Hough's opinion in The Saturnus, 250 Fed. 407; The Schooner Freeman, etc., v. Buckingham et al., 18 How. 182, 15 L. Ed. 341; Dupont de Nemours & Co. v. Vance et al., 19 How. 162, 15 L. Ed. 584; The Eddy, 5 Wall. 481, 18 L. Ed. 486; The Lady Franklin, 8 Wall. 325, 19 L. Ed. 455; The Keokuk, 9 Wall. 517, 19 L. Ed. 744.

"Undoubtedly, the owner of the cargo has a lien by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the shipowner has upon the cargo for the freight, as expressed in the maxim, 'Le batel est obligé a la marchandise et la marchardise au batel.' Subject to the exception that the lien of the shipowner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter party or bill of lading, the rule is universal as understood in the decisions of the federal courts, that the ship is bound to the merchandise and the merchandise to the ship for the performance on the part of the shipper and shipowner of their respective contracts. Shipowners contract for the safe custody, due transport, and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfillment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement. * * * Such a lien is regarded as being in effect an element of the original contract. * * * Courts of justice, and text-writers, everywhere concede that the ship, under the maritime law, is bound to the merchandise and the merchandise to the ship, independent of any local usage or statute. * * *" The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772.

From the moment, therefore, that the cargo was aboard the St. Paul, the lien attached. It is argued, however, that this lien was "inchoate," in the meaning of not being perfected, because of the use of that expression in The John G. Stevens, 170 U. S. 113, 115, 18 Sup. Ct. 544, 42 L. Ed. 969. It is "inchoate" only in the sense of enforceability. In other words, the lien is discharged, ipso facto, when the ship performs its duty to the cargo. If it does not, then the enforcement "relates back to the period when it first attached"; for the lien is born and exists, until discharged, from the moment the cargo is aboard. When, therefore, the marshal seized the vessel under process, the lien still existed, and nothing which he did or might do could destroy the lien.

If it be assumed that an owner, complying with the Harter Act, is not to be held "responsible for damage or loss resulting from * * * seizure under legal process," that is not this case. The third section of the act (Comp. St. § 8031) provides:

"If the owner of any vessel transporting merchandise * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from * * * seizure under legal process."

The testimony shows that the owner did not exercise due diligence to make the vessel "in all respects seaworthy." The burden of proving compliance with the statute has not been sustained by the owner, and, indeed, the contrary is affirmatively shown. The mere fact that the ship perhaps was to receive some "cases of milk" (Seaborne, p. 4), and that, perhaps, some "cargo was left on the pier" (Barker, p. 26), does not change the situation. Neither before nor after the cargo of these libelants was loaded on the ship, did she have a license, and she never had any prospect of getting one.

She was unseaworthy at all times, and therefore the protection which is afforded to shipowners under the act, supra, cannot be invoked. The reason is plain. Just, and often unjust, claims may place the vessel in custodia legis. Where an owner has performed his duty, Congress, no doubt, realized that damage or loss resulting from seizure under legal process might visit great hardship upon, or perhaps ruin, such an owner. The exemptions of the act were, of course, intended to encourage shipping, and this was one of the safeguards; but at the same time Congress, no doubt, appreciated that, when the vessel was not seaworthy, seizure by legal process might very often be the direct result of the owner's failure, and to allow exemption in such circumstances would be to encourage, instead of discourage, violations of duty.

[3] When, therefore, in this case, the marshal seized the vessel, it still remained the duty of the owner to carry out his contract of affreightment. This, by virtue of his own wrong, he was at no time able to do. "It is undeniable," as the commissioner states, "that the shippers of the St. Paul's cargo contracted * * * that their goods should be carried to the ports of destination in the customary manner and with the customary dispatch." The failure by the ship to carry out this contract does not rest upon the fact that there was a fire. This unseaworthy ship by its own fault was long delayed before the fire. The Coventina (D. C.) 52 Fed. 156, 157.

The point, then, is that there was a deviation, and that the marshal's custody, so far as concerned delay and lack of "customary dispatch," did not affect the rights or lien of the cargo, because the owner had not exempted himself under the Harter Act, and he cannot now be heard to say there was no delay, and hence no deviation, because of seizure. The result of deviation is concisely stated by Carver in Carriage by Sea, § 287, as follows:

"When a vessel has deviated from her proper course, the shipowner is not only liable for the delay, but he becomes absolutely responsible for any loss

or damage to the goods which may occur during the deviation and which can be attributed to it. He is not protected by the exception of perils in the contract."

See The Citta di Messina (D. C.) 169 Fed. 472, 475; The Indrapura (D. C.) 171 Fed. 929 (useful for its discussion and cases cited); The Elizabeth Dantzler (D. C.) 263 Fed. 596.

The case at bar does not fall with that class of cases where the broad principle is that a lien cannot arise or be created by the owner after the ship is in the custody of the law. The Esteban de Antunano (C. C.) 31 Fed. 920; The Augustine Kobbe (D. C.) 37 Fed. 702; The Rupert City (D. C.) 213 Fed. 263. The lien, to repeat, was created the moment the cargo was loaded on the ship, and the unseaworthiness of the vessel and the deviation, constituting, as they did, breaches of contract, did not fix the date of the lien, but merely created the occasion for its enforcement.

It will be noted that the vessel, her owner et al. are relieved only from damage or loss "resulting from" seizure under legal process. In other words, the damage or loss must result from the fact that the vessel is seized under legal process. That is but another way of saying that the damage or loss must be the proximate result of the seizure. If there were no exemption in the statute, the vessel or its owner would be liable for damages resulting from delay or deviation. The fact that she was seized by legal process would manifestly prevent her, in most instances, from proceeding on her voyage with customary dispatch, and as a consequence there would be a deviation from her voyage. In the case at bar, by virtue of the seizure she was long delayed, and that delay constituted a deviation within the principles of the cases on that subject. But she would nevertheless have been excused, if seaworthy, or if her owner had exercised due diligence to make her so, and otherwise not.

On this theory of the case, it is immaterial whether the fire was caused through the negligence of the owner or not. I agree with the commissioner that there is no proof of negligence, and I accept his conclusions as to the weight to be accorded to the testimony of the various witnesses. But that does not make any difference. The fire was in no sense the result of the seizure. It was an independent occurrence, having no relation to the fact that the vessel was in the custody of the marshal, but not because it was in his custody. The fact of the seizure did not cause the fire, but it did cause delay and deviation. The ship never delivered the cargo at the ports of destination. The cargo owners, under their contract, were entitled to such delivery of their goods. To the extent that those goods were not so delivered in sound condition, and that costs and expenses were incurred in connection therewith, the cargo owners have been damaged. Because there was deviation, unexcused, because of failure of compliance with the Harter Act, the principle applies that the shipowner becomes an insurer and is liable for all loss and damage, even unavoidable casualty. Carver on Carriage by Sea (6th Ed.) § 287; The Citta di Messina, supra. Once the deviation occurs, it becomes immaterial how the damages are occasioned.

It is therefore held that the cargo owners have a lien for the physical damage and proportionate share of discharging expenses, aggregating $143,210.65, and also for the prepaid ocean freight, ocean insurance, cost of loading, and any other proper outlays made prior to the arrest.

[4] 2. *Priority.* From what has been set forth supra, it will be seen that The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, does not apply. Except as to two cargo owners, the libels do not sound in tort; and, as had been pointed out supra, the evidence does not warrant the conclusion that the fire was caused by negligence; and, finally, such a tort, when the ship was in the marshal's custody, would not give rise to a lien against the vessel. The Esteban de Antunano (C. C.) 31 Fed. 920.

The cargo claims and the supply and repair claims thus resting on contract, the question is whether or not they should be treated in parity. In determining priorities, principles must be applied in the light of facts. It is, of course, well settled that priority of lien in point of time is not controlling, but that priority is often determined by the service rendered or the thing done. The important result to be attained is to keep the ship moving in commerce. As she starts for her destination, she must be supplied, and often repaired. As is illustrated in this case, many of these repair and supply bills are small, and those who make repairs and furnish supplies necessarily rely in whole or in part on the security of the ship. What they do is for the benefit of the ship, and without what they furnish the ship could not sail. Cargo is, of course, of high importance. The freights justify the venture and the voyage, but the cargo owner can protect himself by insurance, and safeguard his shipment in a way not open to the supply or repair men. If it were to be held, as matter of law, that the lien of cargo was always superior to that of the furnishers of supplies and the makers of repairs, great difficulty might be found in obtaining supplies and having repairs done; for, as is seen in this case, the cargo liens naturally would be so large, that they might wipe out or seriously impair the lien for repairs and supplies, and the repair and supply men might well hesitate or decline to extend credit on the faith of the ship.

In receiverships of railroads, it is a settled equitable principle that for a reasonable period prior to the receivership (in this circuit four months) those who furnish supplies and materials to keep the road going are entitled to a preference over lienors, and also over general creditors whose claims antedate the reasonable period. Surely those who make the repairs and furnish the supplies which enable the ship to sail—and "repairs and supplies have long stood upon the same basis," The Glen Island (D. C.) 194 Fed. 744, 747—are entitled to protective consideration.

There is nothing in the case at bar which indicates any laches or neglect on the part of these repair and supply lienors. Indeed, they were thoroughly diligent. It seems to me, therefore, that on the facts in this case the repair and supply claims have an equity superior to that of the cargo claims, and are of a beneficial nature higher than those of the cargo, whether for physical damage or for the items mentioned in the commissioner's report at page 15 [paragraph E], except prepaid

ocean freight. Such services are among those which "benefit the vessel, make her better, preserve her, contribute to save her, or improve her, or keep her in running or going order for the benefit of all who have prior liens or claims on her." The Frank G. Fowler (C. C.) 17 Fed. at page 656.

The prepayment of the ocean freight helps put the vessel in funds for the purposes of her voyage. A claim for such prepaid freight arising out of circumstances, such as are here disclosed, is entitled to equitable consideration on a party with claims for repairs and supplies.

There may be a decree, therefore, in accordance herewith, ordering the payment first of the repair and supply claims and the ocean prepaid freight and then ordering the payment of the balance of the cargo claims.

Settle decree on five days' notice.

BARNETTE v. WELLS FARGO NEVADA NAT. BANK OF SAN FRANCISCO et al.

(District Court, N. D. California, Second Division. November, 1920.)

No. 441.

1. **Mortgages ⇐79—Conveyance in trust to pay claims of bank depositors held invalid for duress.**

Complainant and her husband, who had formerly lived in Fairbanks, Alaska, where the husband was president of a bank, removed to California. On failure of the bank and appointment of receivers, the husband received anonymous threats of personal violence if he did not return, and complainant, thinking that, by reason of her long residence in Alaska and wide acquaintance, she could be of help, returned with him, taking her two young children. On arrival at Fairbanks, they found public opinion extremely hostile to both, and threats were made by unknown creditors of the bank of personal violence to complainant and her husband, and of kidnapping of her children. Under these circumstances her husband made a conveyance of all his property in trust to the receivers as additional security for depositors, and complainant joined with him in a similar conveyance of her separate property, consisting of valuable real estate, the income from which, and the property itself, were to be used, if necessary, in paying claims of depositors in the bank; the conveyances having been accepted by order of the court. Complainant, her husband and children left Fairbanks at night under guard of officers, and returned to California. There was no agreement to forego suits or prosecutions against the husband, and he was afterwards indicted and tried on various charges, of all of which, except one, he was acquitted. Complainant had no interest in or connection with the bank, and was under no legal or moral obligation to pay its debts. *Held*, that her conveyance was without valid consideration, and was void, as made under legal duress, and that she was entitled to its cancellation.

2. **Cancellation of instruments ⇐34(3)—Suit for cancellation of instrument held not barred by laches.**

Delay of complainant, a married woman, in bringing suit to cancel a conveyance made under duress, pending criminal prosecutions against her husband and threats of personal violence to him, growing out of related

transactions which might be prejudiced by such suit, *held* not laches which barred her of relief.

3. Courts ⊜524—Property held by receivers as trustees held not in custody of court.

Where a conveyance of property in trust for the benefit of depositors in an insolvent bank named the receivers of the bank and their successors as trustees, with directions to collect the revenues from the property, pay the taxes and expenses, and to "return to the court and its receivers the net amount of such rents," and also the proceeds of any of the property sold, the receivers, in the handling of the property and collection of the revenues, *held* to act as trustees of a private trust, and not as receivers, and sums collected by them, until so turned over and set apart for distribution to the beneficiaries, *held* not to have passed into the custody of the court, so as to deprive another court of jurisdiction of a suit against the receivers, as trustees, to determine rights therein.

In Equity. Suit by Isabelle Barnette against the Wells Fargo Nevada National Bank of San Francisco and Fred G. Noyes, individually, and as receiver. Decree for complainant.

W. H. Chapman and R. P. Henshall, both of San Francisco, Cal., for plaintiff.

De Journel & De Journel and Heller, Powers & Ehrman, all of San Francisco, Cal., for defendants.

DIETRICH, District Judge. The defendant Wells Fargo Nevada National Bank of San Francisco, Cal., is in the possession of certain funds of which the plaintiff claims to be the owner. The funds were deposited in due course by the defendant Fred G. Noyes, receiver of the Washington-Alaska Bank, a Nevada corporation (hereinafter referred to as the bank), formerly doing a banking business at Fairbanks, Alaska. Upon the petition of creditors, its property and affairs were, on January 5, 1911, placed in charge of receivers by an order of the District Court of Alaska. Shortly thereafter Noyes was made the sole receiver, and has continued to act as such down to the present time. At the time of the failure of the bank, E. T. Barnette, then the plaintiff's husband, was one of its directors and its president. The news of the failure came to him at Seattle, where he was endeavoring to arrange for additional credit for the bank. About the same time he received an anonymous letter threatening violence if he did not return to Fairbanks and straighten up the bank's affairs. There were also suggestions from friends and others that such a course would be advisable.

The plaintiff and her two young children were then in Los Angeles, to which place the family had moved from Fairbanks in 1910. By reason of a long residence and wide acquaintance in Alaska, she hoped, by going with her husband, she would be able to give him valuable assistance, and, delay appearing to be inexpedient, enfeebled though she was as a result of a recent surgical operation, she insisted upon accompanying him. Accordingly, after enduring great hardships, they arrived in Fairbanks about the middle of February.

By circumstances which need not be detailed, they were immediately apprised that the sentiment of the community was inflamed against them, and, acting upon the advice of their attorney and other friends,

they concluded it safer to live at a hotel than at their old home, which they still owned. Though the plaintiff had never had any financial interest in the bank, and had nothing to do with its management or control, she was soon made to realize that the esteem in which she had formerly been held would be of little avail.

Not only were there threats of indicting her husband, but suggestions of personal violence and injury to both of them, and of kidnapping their children. These threats, it may be assumed, came from unorganized sources; but, taken all together, the circumstances were such as to give to the plaintiff reason to fear for her children as well as for her personal safety, and more particularly for that of her husband. Under such conditions, and after she had been in Fairbanks about six weeks, during which time the bank's affairs were more or less constantly under discussion, she consented to join with her husband in turning over her separate property, as well as his personal estate, to the trustee, to be used, if necessary, in satisfying the depositors. That she was led to take the step partly through a not unreasonable fear of violence to herself and her family is scarcely open to question.

Instruments of conveyance in trust to one of the depositors for the benefit of all were prepared and tendered, but for reasons not now of importance they were found to be unsatisfactory to some of the interested parties, and, for the purpose of meeting the objections, two other instruments were prepared, which, after execution by plaintiff and her husband, were tendered to the receivers.

Being in doubt touching their authority to accept the same and the expediency of so doing, they required express authorization from the court. Accordingly the grantors presented to the court a petition for an order authorizing the acceptance; but the court, being of the opinion that the matter should originate with the receivers, declined to entertain the petition, and directed that the deeds be turned over to them for their consideration.

Two days later, on March 18, 1911, they presented to the court an "application for instructions," in which they represented that on March 18th the Barnettes had delivered to them "two trust deeds, properly executed, wherein" they were "named as trustees, * * * said deeds being in trust on the terms and conditions therein specified; the object and purpose being as therein expressed to secure and ultimately pay the depositors and owners of unpaid drafts of the defendant bank any balance that may remain after the property and assets of said bank are credited and applied in payment thereof." It was further represented that the instrument conveyed to them as trustees all property in Alaska belonging to plaintiff's husband, of which they had any knowledge, and "some valuable real estate that is the separate property of Isabelle Barnette." They expressed the view that by accepting the trust they would waive the right to proceed against the plaintiff's husband in a contemplated suit to fix his liability (presumably as stockholder and officer), and prayed for instructions as to whether they should accept the "trust deeds and undertake the duties and responsibilities entailed thereby, or return the same to the grantors."

Upon consideration, it was ordered that the deeds be accepted and

that the receivers take the proper and necessary steps to secure the property and the issues therefrom "to the payment of the liability of the Washington-Alaska Bank, in connection with your [their] duties as receivers." Accordingly the receivers accepted the trust, and the plaintiff, accompanied by her husband, left Fairbanks under cover of night, attended by deputy marshals to guard against possible violence, and returned to California, where she has since continued to reside.

The fund in question is made up of rents coming to the receiver's hands from the plaintiff's separate property so conveyed and the proceeds of a sale of one item. One of the deeds relates to property in which the plaintiff had no separate interest, and is therefore immaterial to the present issue. The instrument covering her estate runs from her and her husband, as first parties, to "F. W. Hawkins and E. H. Mack, receivers of the Washington-Alaska Bank, * * * and their successors in office, * * * trustees," as second parties. It recites the failure of the bank, the relation of the plaintiff's husband to its management, her desire to assist him in paying the depositors, and her information that a civil action is about to be commenced against him, and conveys "to the parties of the second part and their successors in the office of receiver of said bank, in trust," certain described properties, all being real estate in the town of Fairbanks.

Thereupon follows a recital of the history of the bank, the probability of a deficit, the undertaking of E. T. Barnette to pay depositors and holders of unpaid drafts in full, with interest, the understanding that the amount of such deficit is to be determined on or before November 18, 1914, and it is thereupon agreed that the second parties should take immediate possession of the properties conveyed, and collect the income therefrom, and pay all taxes and other charges, and "return to the said court (the receivership court) and its receivers the net amount of such rents, issues, and profits, the same to be disbursed by the said court through its receivers pro rata to the said depositors and the owners of unpaid drafts." It is further provided in the instrument that, "if at any time after the delivery of this trust deed the said trustees and their successors or successor and the said parties of the first part shall deem it more advantageous to sell," then the property may be sold by the said trustees, "and the proceeds * * * shall by the said trustees be delivered to the said court or its receivers, and be disbursed under orders of the court," etc.

But it was further provided, if there was still a deficit on November 18, 1914, then the second parties, receivers, "as such trustees or trustee," were empowered to sell at private sale any or all of the property and turn the proceeds into court, to be disbursed under the order of the court, to extinguish such deficit, the overplus, if any, to be paid to the first parties. If the depositors and holders of unpaid drafts should be otherwise satisfied, the second parties were to reconvey the property to the first parties, and if, upon the other hand, there still remained a deficit after applying the proceeds of the property, the first parties obligated themselves to pay it.

In view of the defense that the res of the suit is in the actual possession of the Alaska court, and that therefore we are without jurisdic-

tion to grant relief, I have set forth, in substance or literally, all the provisions of the deed and of the application of the receivers for instructions and the order made thereon, bearing upon the question of the capacity in which the receivers took, and the defendant Noyes now holds, the property and the income therefrom. The petition presented by the plaintiff to the Alaska court is referred to only in a general way, because, as we have seen, the court declined to consider it, and hence it cannot be regarded as having any direct relation to the acceptance of the instrument of trust. The case is one where the plaintiff and her husband tendered to the receivers the written instrument of trust, and they, in turn, exhibited it to the court with their application for instructions, and thereupon the court, upon consideration of such application and the instrument of trust, made the order pursuant to which the receivers acted. The status of the property, therefore, is to be determined in the light of the deed itself and the conditions of its acceptance, as set forth in the application for instructions and the order made thereon.

Subsequently indictments were returned against the plaintiff's husband, upon some of which, it appears from the record, supplemented by statements of counsel, he was tried, with verdicts of acquittal upon all except one count, charging him with false entries in a report of the condition of the bank. On November 16, 1914, the plaintiff commenced a suit in the Alaska court, setting forth, as here, that the deed was procured by duress, and praying for its cancellation and for other appropriate relief. Her attorney, having learned in May, 1918, of the deposits of the funds in question in the San Francisco bank, communicated the information to her San Francisco counsel, who thereafter, on July 24, 1918, filed the complaint herein. The Alaska case having been set down for trial and the plaintiff failing to appear, the same was dismissed for want of prosecution on August 1, 1918. Whether, as is contended, she suffered a dismissal because she could not be present and give her testimony, or because she was advised that her rights could better be protected in the California case, is not entirely clear and not highly material.

By her bill here she asserts that the proceedings in the Alaska court in the receivership suit were void for want of jurisdiction, and that the trust deed was obtained by threats and intimidation, and she prays for a cancellation of the deed and for a decree awarding to her the income and proceeds of the property described therein; that is, the fund or a part of the fund deposited in the defendant bank. In their answer, as amended, the defendants deny that the Alaska court was without jurisdiction, and also deny duress, and set up a number of affirmative defenses, some of which raise questions of law appearing upon the face of the bill. These questions of law were presented to Judge Van Fleet by motion, upon which his ruling was adverse to the defendants' position. The cause is now submitted upon evidence taken in open court.

[1] Upon the primary issue of duress, as already intimated, I find for the plaintiff. I attach little importance to the threat of indictment, but the peril of personal violence to plaintiff and her husband, and the suggestion that her children might be kidnapped, considered in the light

of all the surrounding circumstances, were such as not unreasonably to cause plaintiff to yield to a feeling of fear. Such was her natural solicitude for the safety of her family that she was incapable of exercising the degree of free will necessarily involved in legal competency, and it must be held that she contracted under compulsion of fear amounting to duress in law. 9 Cyc. 450; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134.

The specific threats came from but few of the depositors, it is true; but there was a general attitude of menace, and it is difficult to believe that those who represented the creditors were unconscious of the prevailing atmosphere of intimidation. When analyzed, the transaction itself is strongly suggestive of some extraordinary influence. The plaintiff had had nothing to do with the bank's affairs and was in no wise responsible for its failure. She could not have been actuated by a sense of any legal or moral obligation. Her husband was turning over apparently all his personal estate.

What consideration could have induced her to add her separate holdings? There was no claim against her to settle or compromise. In a civil action against her husband the most that could be hoped for was to take such property as he had, and that he was turning over by deed, to avoid the waste of litigation, and, even so, neither the receiver nor the creditors agreed to withhold either civil suits or criminal prosecutions. Counsel for the defendants draw attention to the plaintiff's acknowledgment of the execution of the instrument before a duly authorized officer, and her petition asking the court to direct the receivers to accept the trust. But these facts are without great significance. Once persuaded that, for the protection of her husband and children, it was necessary for her to give up her property, the means to such an end became of incidental importance only; naturally, she was willing to comply with any formalities and resort to any procedure to accomplish the purpose, and to hesitate before the acknowledging officer or to decline to sign the petition would have been as perilous as originally to have refused to attach her name to the deed.

The question of whether or not E. T. Barnette is an indispensable party was necessarily involved in the ruling upon the motion, and hence it will not now be considered.

[2] If the defenses of laches and limitations, as they now appear under the evidence, are not fully covered by Judge Van Fleet's ruling upon the motion, I am still inclined to think they do not constitute a bar. Assuming that in executing the deed the plaintiff was actuated by fear, she could not reasonably be expected openly to repudiate her act the moment she left Fairbanks. The danger she feared was of such character that it was not easily guarded against. From the great majority of the 1,400 depositors she doubtless feared no evil, but she was without means of knowing who the few were who would be unwilling to yield to the restraint of the law and would resort to violence for the purpose of intimidation or revenge. For her to have repudiated the deed as soon as she got out of Alaska would have been to intensify rather than to allay the prevailing bitterness, and possibly to stir to action some one already inclined to resort to extreme measures.

Besides, her husband was under indictment, and she might reasonably conclude that such action upon her part would prejudice his chances of a fair trial. The feeling was such in Fairbanks and vicinity that after a considerable length of time had elapsed the court felt constrained to grant a change of venue, and incidents occurring at Fairbanks following the trial clearly indicate that even at that time the passions excited by the failure had not become extinct.

It is not entirely clear under what one of the several statutes of limitation, cited from the laws of Alaska and of California, the case falls; nor is it necessary to decide. In view of all the conditions it is doubted whether any one of them that may reasonably be invoked would constitute a bar in the state or territorial courts. But, however that may be, while federal courts, in applying the principle of laches, measurably conform to, they are not bound by, such statutes. With this rule in mind, it is thought that the plaintiff's delay has not been so unreasonable that she should be denied all relief. The receivership estate should, of course, be reimbursed for any reasonable outlays that have been made in handling and preserving the property, including a reasonable allowance for the services of the receivers and their counsel, performed in relation thereto. With such an adjustment the receivership estate will have lost nothing which rightfully belongs to it.

The case presents but few elements of estoppel. Criminal prosecutions were not stayed or prejudiced by the execution of the deed. There is a suggestion, but no proof, that the receivers refrained from bringing civil actions against Barnette for this reason. Neither the deed here nor the other deed conveying his individual holdings was given or accepted upon the condition that any existing right of action be waived. Nor is it perceived how the acceptance of this deed could, as a matter of law, operate to extinguish any such right. So far as appears, he had no other property that could be reached by execution. That it was the only property he had in Alaska was the belief of the receivers when they applied for instructions, and in the absence of evidence to the contrary it is reasonable to assume that they withheld civil actions because they were convinced that any judgment they might obtain would be worthless. There is no pretension that they ever had any right of action against the plaintiff.

[3] There remains for consideration the defense that the res is in the possession of the receivership court, and hence within its exclusive jurisdiction. The same point was made upon the motion, but is not foreclosed by the ruling thereon, for the reason, as we have seen, that in the complaint it is alleged that all of the receivership proceedings are void for want of jurisdiction, and if, as, for the purpose of the motion, it must have been assumed, these averments were true, there was no ground for contending that the property was in custodia legis. But the plaintiff has now abandoned this branch of the complaint, and relies exclusively upon the claim of duress.

The familiar rule that when, through its receiver, a court of equity has taken possession of property, it draws to itself exclusive jurisdiction to determine all claims and controversies in relation thereto, is, of course, recognized. And it is further understood that without its con-

sent its possession may not be disturbed; nor, except in so far as permitted by section 3 of the act of August 13, 1888 (25 Stat. 436; section 66, Judicial Code [Comp. St. § 1048]), may its receiver be sued without its permission. Comment upon the numerous decided cases collected in the defendants' brief, in which these principles have been applied and the statute construed, would serve no useful purpose, for in one view of the record the transaction under consideration is without precedent, and the controlling question is one of fact rather than of law.

Undoubtedly it was understood when the deed was executed that the property was to be held in trust for the benefit of depositors, upon the conditions expressed. But in what capacity were the trustees to hold it—as individuals or as officers of the court? In itself the phraseology of the deed would seem quite clearly to import the former view. Apparently the grantees were to act as trustees of the property as well as receivers of the insolvent estate, and they are referred to in the deed as receivers only for the purpose of description, and of providing a line of succession in the trusteeship. In support of this view it is to be noted that no objection was raised to the deeds first tendered because they named an unofficial depositor as trustee; true, this depositor was averse to accepting the trust, but the general objection related to other features. It is further to be observed that in the deed in question the incumbent receivers and their successors are designated as trustees, and not merely receivers.

Moreover, as we have seen, the instrument expressly provides that the trustees are to collect the revenue and pay the taxes and other expenses, and "return to the said court and its receivers the net amount of such rents," etc. And again it is provided that, in the contingency of a sale of the premises by the "trustees," the proceeds shall "by the said trustees be delivered to the said court or its receivers, and be disbursed," etc. In these provisions there would seem to be a clear recognition of the fact that two distinct trusteeships were vested in the same persons or person; the one being official and relating to the insolvent estate, and the other being private and relating to the individual property of the plaintiff.

Possibly the suggestion of the receivers, in the application for instructions, that, if they should accept the trust, it would be impracticable for them to proceed against the plaintiff's husband in a civil action, signifies a different conception upon their part; but aside from that one feature there is nothing in the application out of harmony with this view. Certain phraseology in the court's order or instructions is not so easy to reconcile; but in that connection it is to be noted that the instructions relate to the lands of E. T. Barnette in Mexico, as well as to property in Alaska, and it may be doubted whether the court was of the opinion that the receivers could, as such, exercise any authority or assert any property rights in a foreign country.

Upon the whole, I am inclined to regard the language of the deed as controlling, and hence to adopt the view that until, in conformity with the terms and conditions expressed, the property was converted into money and set apart for distribution to the beneficiaries, it was to be

held by the trustees in a private rather than an official capacity, and hence would not be in the custody of the court.

If the view were taken that possession of all the property is held by the defendant in his capacity as receiver, it would still be appropriate to grant a part of the relief prayed for. Upon that theory the acceptance of the deed would be a transaction of his in carrying on the business of the receivership, and under the terms of the statute cited, supra, he could be sued in respect thereto. We would then have a case where the defendant, as receiver, has accepted a deed obtained from the plaintiff by duress, and she asks that it be canceled. The order of the Alaska court directing that it be accepted presents no insurmountable obstacle; while, of course, no duress was practiced directly upon either the receivers or the court, the order is one of the direct consequences of the duress practiced upon the plaintiff. The entry of a judgment upon confession made by a party under threats amounting to duress would be promptly set aside or nullified for extrinsic fraud. So here the order in question was the natural outcome of the execution and tender of the deed. Hence, even if it could be accorded the dignity of a judgment, it would not be immune from attack, for a judgment obtained by extrinsic fraud may be nullified by a decree in equity, and the victim thereof is not, in seeking relief, limited to the tribunal in which it is entered. Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137.

Without further discussion it is concluded that the plaintiff is entitled to a decree canceling the deed and terminating all authority of the trustee or trustees thereunder. What specific relief, if any, should be granted as to the fund arising out of the rents and proceeds of the property depends upon facts not fully disclosed. As already suggested, if these moneys have passed into the hands of the defendant as receiver and by him, as an officer of the court, are held for application to the discharge of the indebtedness of the bank, pursuant to the terms of the trust deed, they must be deemed to be in the possession of the Alaska court, and that we are not at liberty to invade. In such case plaintiff's remedy would be to seek intervention in the receivership proceeding and there ask for an order directing the receiver to deliver the funds to her.

Upon the other hand, if they are still held by the defendant in his capacity as trustee under the deed, a decree should be entered adjudicating the right and title thereto to be in the plaintiff. In any event, it may be that, under the peculiar circumstances of the case, considerations of comity will require the plaintiff to apply to the Alaska court for a direction to the defendant to relinquish to her possession of both the real property and the fund. In that connection it is to be noted that by the concluding clause of the statute authorizing suit against a federal court receiver, supra, it is provided that the suit shall nevertheless "be subject to the general jurisdiction of the court in which such * * * receiver is appointed, so far as may be necessary to the ends of justice."

At the close of the hearing there was an understanding that, if the finding upon the general issues should be in favor of the plaintiff, it probably would be necessary to take further evidence as to the amount

of the fund subject to the jurisdiction of this court. It may be that this understanding did not reach to the precise question whether the fund is held by the defendant as trustee or as receiver; but that issue is deemed to be of such importance, and, touching it, the evidence is so fragmentary and inconclusive that it is thought to be proper to direct that the further hearing shall extend to it, as well as cover the question of the precise amount which the defendant holds in the one capacity or in the other, both on deposit in the defendant bank and in custody in Alaska.

Accordingly the defendant Noyes will be directed to produce, for the inspection and use of the plaintiff in evidence, all accounts and vouchers disclosing the manner in which the proceeds and rents from the property have been received, held, and deposited, to the end that the amount thereof now on hand may be shown, and also the capacity in which he holds the same. He may also adduce evidence of any charges which ought in equity be made against the fund, for services in caring for the property and in collecting and safe-keeping the rents and issues, for consideration, in case it is held that the plaintiff is entitled thereto, for in any event the plaintiff can recover only upon condition of doing equity.

If counsel are unable to agree upon further procedure, upon motion, appropriate orders will be made.

THE CREOLE.*

THE JAMES WILLIAM.

(District Court, S. D. New York. January 17, 1920.)

1. **Collision ⇐43—Obligation of steamer meeting schooner is very great.**
   The obligation of diligence on a steamer which is approaching a schooner to avoid collision is very great, and the higher the speed the greater the care required.

2. **Collision ⇐75—Schooner's light, complying with statute, is sufficient.**
   If the red light of a schooner complied with the statutory requirement that it be visible for two miles, it was sufficient, though the evidence showed the position of the light and the lens were not properly adjusted to give the best results.

3. **Collision ⇐43—Positions and courses immaterial, if schooner could be seen.**
   In determining the liability for a collision between a steamship and a schooner, it is unnecessary to determine just what were the positions and courses of the two vessels prior to the collision, since, whatever their courses, it was the steamer's duty to keep out of the way, if the lights of the schooner could be seen and the schooner's duty to maintain its course and speed.

4. **Collision ⇐75—Schooner's claim that her light was lit just before collision held not sustained.**
   On libel for a collision between a steamer and a schooner, testimony by witnesses for the steamer that just before the collision they saw a red light moving along the schooner's deck *held* insufficient to show that the

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

*Decree affirmed 277 Fed. 122.

schooner's red light was lit just before the collision, since the natural method of lighting would have been to take the light out from the screen, in which case it would have shown white, not red.

In Admiralty. Cross-libels by the Carmichael Ship Company against the steamship Creole, and by the Southern Pacific Steamship Company against the schooner James William, to recover damages for collision. Decree rendered, holding the steamship solely at fault.

Chauncey I. Clark, of New York City, for the James William.

Robert S. Erskine and Leslie de Grove Potter, both of New York City, for the Creole.

HOUGH, Circuit Judge. There is only one assignable reason for this collision, the Creole did not see the James William in time to avoid her. There are but two possible reasons why the schooner was not avoided: Either her red light was not seen, because it was not there to be seen, or on a fairly good night for seeing lights the steamer's lookouts failed in due diligence.

As to character of the light when lit, I cannot think that there is much difference of opinion. At the very moment of collision the red light was burning, and the Creole's master saw it; and while, as is usual in the case of a steamship commander whose vessel is equipped with electric lights, he is very contemptuous of the James William's port light, it was in his opinion as good as is usual with schooners, and capable of being seen the statutory distance. In other words, it complied with the law, and no vessel is bound to more.

[1] The obligation of diligence on the steamer is very great; the higher the speed, the greater the care. See The Alaska (D. C.) 22 Fed. at page 552. This case may be stated in the language of The Helen G. Moseley, 128 Fed. at page 404, 63 C. C. A. at page 146.

"Under well-settled principles, unless there can be shown some cause due to the schooner why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault."

I take it this puts the burden of proof on the steamer, although I am very loth to dwell much on presumptions or proof burden in collision cases. The position of the steamer is, I think, thus:

(1) The story told from the schooner's deck is so detailed, and shows such extreme care, as to invite suspicion.

(2) The place of collision, as stated by the steamer is impossible of reconciliation with her course as sworn to and her noon position.

(3) Her tack, as observed by the Creole's master at collision, cannot be reconciled with a north-northeast course. Wherefore:

The schooner's testimony is discredited; the maxim, "falsus in uno," etc., should be applied, and the evidence from the steamer's pilot house should be accepted, viz. that the port light was lit almost in the jaws of the collision, and was not seen earlier because it was not there to be seen.

[2] Adverting to the quality of the light for a moment, I think it true that its construction was such as always to have the center of the

flame below the center of the Fresnel lens. This means that the light was not as good as it might have been, considering its size, kind of wick, etc. It was not properly co-ordinated, but I think it was a good red light for two miles and more, and that is all the statute demands.

I am unable to say that I think the story of great care told by the schooner's crew is so uniformly superexcellent as to invite criticism. Any seaman knew that the schooner was in the path of all coastwise traffic, and nothing sworn to is more than or different from what is often done even on merchant vessels.

[3] It is true that the place of collision as given by the schooner seems an impossibility, but I cannot think this is a material point. Errors in scientific or mathematical calculations are not nearly so important as able seamanship in cases of this kind.

As to the courses of the two vessels, I accept as the best evidence obtainable, and as something perfectly natural under the circumstances, that the Creole was steering south 21 degrees west. I think it also plain from the stories of both sides that, if those on the steamer had seen any light on the schooner, it was the red light that would have been visible. The schooner agrees that she was showing a red light, being on a north-northeast course, with the wind about east, which means that the vessels were nearly on opposite parallel courses.

It is, of course, impossible to imagine how on such courses the schooner's red light could ever have been seen on the starboard bow of the Creole almost immediately before collision; and it is equally impossible to imagine how (according to the schooner) the Creole, steering a steady course, could have shown her red light a point and a half on the schooner's port bow, and ever got into collision with the schooner without materially changing her direction.

I find it impossible to reconcile these tales, and do not think it necessary. I arrive at this result because it makes no difference where the schooner was, nor how she was approaching, if she was properly lighted, and there was no fog, and her master had reasonable cause to believe that the steamer could see him; the sailing vessel was justified in maintaining her course and speed, whatever they were. The law requires the steamer to keep out of the way.

[4] Thus the whole case comes down to the question whether the schooner's light, good enough for the law, was lit or relit so soon before the collision as to exonerate the steamer. As to this point it rests on the testimony, or absence of it, of three men: The lookout never saw any light, and I doubt whether he ever saw the schooner until collision. Cadet Cranmer, on the starboard side of the pilot house, saw a red light nearly dead ahead, which "was not stationary, or did not appear to be stationary; appeared to be moving, as if being placed there by some one." Second Officer Schaeder saw a red light at substantially the same location that Cranmer did, and "it appeared to me that it was moving along the deck of the schooner." At this time he thought the schooner "couldn't be more than a hundred yards" distant. Doubtless the light was moving, for the schooner was; but the testimony substantially says that at a distance estimated at a hun-

dred yards or less the light was seen to be moving along the deck of the James William.

There was no fog; on the whole evidence, there was small obstruction to vision on the night in question, and it should have been possible, and indeed must have been possible, to see with considerable accuracy what kind of a light was moving on the schooner's deck, as distinct from merely moving with the schooner.

The running lights of the schooner have been produced; and, while there is no direct evidence on the point, I may assume that the red and green lantern containers are fastened in and to the screens permanently affixed to the schooner's standing rigging. What may be moved for cleaning, filling, and lighting are two lanterns, which are inserted into the containers as night comes on; and these lanterns are round hand lights of white glass; it makes no difference which lantern goes to port and which to starboard. If the port light went out, the natural thing to do in a hurry would have been to take out the lantern and light it. To detach the container from the screen, and lug that heavy and clumsy apparatus, would have taken more time, and should, and I think would, have been seen from the steamer—so short was the time from seeing the light to collision. The quickest thing to do would have been the natural thing to do, especially for a frightened man; and the schooner's crew might well have been frightened at the oncoming steamer. The natural action would have produced a white light moving on the schooner's deck.

The tale from the Creole is not merely of a moving light, but of a moving red light. I cannot believe this story, and must find, despite the number of qualified men who were standing lookout on the Creole, decree in favor of the schooner.

Let one decree be entered; there will be but one bill of costs.

THE CREOLE.

THE JAMES WILLIAM.

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

No. 12.

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

Cross-libels by the Carmichael Ship Company against the steamship Creole, of which the Southern Pacific Steamship Company was claimant and by the Southern Pacific Steamship Company against the schooner James William, in which the Carmichael Ship Company was claimant, to recover damages for a collision. From a decree finding the steamer solely at fault (277 Fed. 119), the Southern Pacific Steamship Company appeals. Affirmed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, Harry D. Thirkield, and Carleton L. Marsh, all of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MACK, Circuit Judges.

PER CURIAM. Decree affirmed.

MASSEY v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. December 30, 1921.)

No. 7810.

1. **Internal revenue ⟸7—Corporation, paying taxes on bond interest, pays for bondholders.**
   Under Revenue Act 1917 tit. 12, § 1205, subd. (c), being Comp. St. 1918, § 6336i, requiring the normal income tax to be withheld by a corporation issuing bonds which contain a tax-free covenant or contract, the money so withheld and paid directly to the United States by the corporation is the money of the bondholder, and the tax paid is the tax on the bondholder, and not on the corporation.
2. **Internal revenue ⟸7—Tax paid by corporate obligors is income of bondholder.**
   The normal tax paid directly to the government by a corporation on bonds containing a tax-free covenant is part of the income of the bondholder, and returnable and taxable as such.
3. **Internal revenue ⟸7—Tax paid by corporate obligors is levied on bondholders.**
   The provision of the Revenue Act of 1917 (Comp. St. 1918, § 6336⅜a et seq.) that a corporation cannot deduct from its gross income the amount withheld by it as the normal tax on its bonds containing tax-free covenant does not show that the tax so paid was the tax of the corporation, and not of the bondholders, since Congress also refused to allow such corporations to deduct all interest paid by them.

At Law. Action by George V. Massey against Ephraim Lederer, Collector of Internal Revenue. Judgment entered for defendant.

C. Berkeley Taylor, of Philadelphia, Pa., for plaintiff.

T. Henry Walnut, Asst. U. S. Atty., and George W. Coles, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This is a suit brought against the defendant, as collector of internal revenue for the First district of Pennsylvania, to recover the sum of $21.31, being the amount of additional income tax alleged to have been unlawfully assessed against the plaintiff for the year 1917 under Revenue Acts Sept. 8, 1916 and Oct. 3, 1917 (Comp. St. 1918, § 6336⅜a et seq.) and paid under protest to the defendant. The facts are as follows:

In February, 1918, the plaintiff filed with the defendant a return of his taxable income for the year 1917. Of his gross income, the sum

of $8,880 was received as interest on bonds of certain corporations containing covenants, varying in form, but to the same effect, agreeing to pay to the bondholder interest at the prescribed rate without deduction of taxes imposed under any law of the United States. The normal tax of 2 per cent. upon the income thus derived was $177.60, which was accordingly so assessed by the Commissioner of Internal Revenue, and withheld and paid under the provisions of title 12, § 1205, subd. (c), of the Revenue Act of October 3, 1917, amending subdivision (c) of section 9 of the Revenue Act of September 8, 1916 (Comp. St. 1918, § 6336i), by the corporate obligors of said bonds In September, 1919, the plaintiff was notified by the Commissioner of Internal Revenue that, upon an office audit of his income tax returns for 1917, the said amount of $177.60 payable by the several corporations under the tax-free covenants of the said bonds was "in the nature of additional income to bondholder," and was subject under the Revenue Acts of 1916 and 1917 to additional taxes of $21.31. Taxes to that amount were accordingly assessed and paid by the plaintiff under protest. A claim for refund having been duly made and rejected by the Commissioner of Internal Revenue, the instant suit was brought.

The question involved is whether the sum of $177.60, representing the aggregate of the normal 2 per centum tax, withheld by the corporate obligors and by them respectively paid to the defendant, constitutes an increment of taxable income which should have been included in the plaintiff's return as part of his gross income for the year 1917. There is no dispute in the case that the taxes assessed upon the amount in question were assessed under the applicable provisions of the acts of 1916 and 1917 as to percentage.

Title 12, § 1200, of the Revenue Act of 1917 (Comp. St. 1918, § 6336b), defining the net income of taxable persons provides:

> "(a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from * * * interest, rent, dividends, securities, * * * or gains or profits and income derived from any source whatever."

The situation may be stated as follows: The plaintiff was the holder of corporate obligations by the terms of which the obligors, respectively, contracted to pay interest annually at a certain rate upon the principal debt. They contracted in addition that the amount paid should be without deduction for taxes due the United States. It goes without saying that this covenant included taxes otherwise payable by the individual upon the principal or interest received.

[1] Under the statutes, interest received by the bondholder is made subject to an income tax at varying rates, and title 12, § 1205, subd. (c), of the Revenue Act of 1917, requires that the normal tax shall be withheld by corporate obligors where the obligation contains a tax free covenant or contract. In such case the tax is imposed upon the individual owning the obligations but instead of being paid by him, and recoverable by him from the corporate obligor, Congress, in order to prevent multiplicity of collections and obtain direct payment, has provided that the tax shall be paid to the government by the corporation,

which has obligated itself to pay the tax for the bondholder. The money paid by the corporate obligor pays the debt of the individual owner to the United States, and not a debt of the obligor to the United States; it being under its contract obligated only to the bond owner, but by statute required to pay directly to the government and not to the owner. It pays under the statute because of its contract with the owner, and not because of any tax assessed against it. By assuming to pay the interest free of taxes, when the interest accruing to the bondholder is made subject to taxes and it pays those taxes to the government for the individual, the same situation is created as when a tenant under a lease covenants to pay the taxes upon real estate. The rental of the leased premises is thereby increased by the amount of the taxes, and the total becomes income to the lessor, subject under the revenue acts to deduction, but nevertheless income equally with the rent named in the lease.

The tax-free covenant in the bonds is equivalent to an agreement of the obligors to pay to the owners the agreed rate of interest plus the taxes, and it is immaterial whether the taxes are paid by the owners of the bonds to the government and the amount thereof paid by the obligors to the owners, or whether under the covenant and the statute the taxes are paid direct to the government by the obligors. This conclusion is sustained by the reasoning in the case of Houston Belt & Terminal Railway Co. v. United States, 250 Fed. 1, 162 C. C. A. 173, Blalock v. Georgia Railway & Electric Co., 246 Fed. 387, 158 C. C. A. 451, and Rensselaer & Saratoga Railroad Co. v. Irwin (D. C.) 239 Fed. 739, affirmed in 249 Fed. 726, 161 C. C. A. 636.

[2] The taxes paid for the plaintiff by the corporation come within the definition of income as "gains, profit, and income derived from any source whatever," in the act of 1917.

[3] The contention of counsel for the plaintiff is that the duty imposed upon corporate obligors by the act of 1917, where their obligations contain tax-free covenants, constitute in effect an imposition of the tax directly upon the corporation, and that the argument is strengthened because the corporation is not allowed to deduct taxes so paid under tax-free covenants from its gross income, while deducting certain portions of the interest paid upon its obligations. I perceive nothing in this argument to indicate that the tax is laid upon the corporation rather than upon the individual. It is the normal tax of 2 per cent. upon the individual which the corporation is obliged to withhold.

The argument that Congress intended to lay the tax on the corporation, because it did not permit the tax so paid to be the subject of a deduction, has little weight, when we find that Congress also did not allow corporations a deduction for all of the interest paid by them, but only for interest upon the amount of their indebtedness, not in excess of their paid-up capital stock, or, if none, the amount of capital employed plus one-half of the interest-bearing indebtedness then outstanding. The net income upon which taxes are payable is what remains out of gross income after deduction of what is permitted to be

deducted by law, and we cannot draw the broad conclusion that Congress intended the 2 per cent. normal tax imposed on the individual to be construed as a tax not upon him, but upon the corporate obligor because of the denial of the right to deduct such taxes so paid from the gross income of the obligor. Traylor Engineering & Manufacturing Co. v. Lederer (D. C.) 266 Fed. 583; First National Bank of Jackson v. McNeel, 238 Fed. 559, 151 C. C. A. 495.

The conclusion is that the plaintiff is not entitled to recover, and judgment will be entered for the defendant.

UNITED STATES v. DOBSON et al.

(District Court, E. D. Pennsylvania. January 13, 1922.)

No. 96.

Indictment and information ⇐87(8)—For conspiracy to defraud Emergency Fleet Corporation held insufficient for uncertainty as to whether entered into after passage of act defining offense.

An indictment charging that defendants conspired on October 23, 1918, and on divers dates before and afterward, to defraud the Shipping Board Emergency Fleet Corporation, in which the United States owned stock, in violation of Criminal Code, § 35, as amended by Act Oct. 23, 1918 (Comp. St. Ann. Supp. 1919, § 10199), *held* insufficient, in the absence of any certain allegation that the conspiracy was entered into subsequent to the passage of such act.

William M. Dobson, George McCann, Jr., W. John Dubree, Ralph Lovell, and William Burlingham were indicted for defrauding or conspiring to defraud a corporation in which the United States owned stock. Demurrer to indictment sustained.

T. Henry Walnut, Asst. U. S. Atty., and George W. Coles, both of Philadelphia, Pa., for the United States.

Fletcher W. Stites and Owen B. Jenkins, both of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. In the indictment it is attempted to charge an offense under Act Oct. 23, 1918, c. 194, 40 Stat. 1015 (Comp. St. Ann. Supp. 1919, § 10199), which amends section 35 of the Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock. It is charged that Dobson, McCann, and Dubree, as respectively president, treasurer, and salesman of the Marine Decking & Supply Company, and Lovell and Burlingham, as respectively chief engineer and assistant to the chief engineer in the technical division of the United States Shipping Board Emergency Fleet Corporation, conspired on October 23, 1918, and on divers dates before and afterward, to defraud the Fleet Corporation by obtaining and aiding to obtain payment and allowance of false and fraudulent claims. It is charged that the defendants contemplated that the Marine Company would enter into a contract with the Fleet

Corporation for furnishing ash ejectors in accordance with specifications prepared by the Fleet Corporation, and that, after the contract was entered into, Lovell and Burlingham would approve changes in the specifications wherein the cost of construction of the ash ejectors and their value to the Fleet Corporation would be reduced, and that the articles would be in accordance with the changes in the specifications; that Lovell and Burlingham would cause them to be approved as if they had been made in accordance with the specifications of the contract; that Dobson, McCann, and Dubree would cause to be submitted vouchers for the ash ejectors made pursuant to the specifications in the contract and claim payment at the price fixed in the contract; that the claims would be false and fraudulent, in that the ash ejectors would be made in accordance with the change in the specifications.

Prior to the passage of the Act of October 23, 1918, the offense charged was not an offense against the United States. Therefore the conspiracy, in order to be proved under that act, must be charged as having been entered into upon a date or dates when the act was effective. The offense is charged as of dates both before and after the passage of the act, and there is nowhere any allegation with any certainty that the conspiracy was entered into subsequent to the passage of the act. From what appears in the indictment, the conspiracy may have been entered into in relation to contracts not in contemplation of the defendants after the passage of the act, but in relation to contracts already made and existing prior to its passage. There is no direct allegation that changes were to be made in the specifications. From what appears in the indictment, the changes in the specifications, if any, were to be made before it was an offense against the United States to conspire to defraud the Fleet Corporation. The same may be said as to the charges of approval of the changes in the ash ejectors at the instance of Lovell and Burlingham. The only date set out with certainty is that of the alleged overt acts on April 17, 1919, as the date when the claims for payment for the ejectors were presented to the Fleet Corporation.

If the government intended to charge a conspiracy made unlawful by the Act of October 23, 1918, entered into thereafter, to defraud the Fleet Corporation in relation to contracts already entered into, changes in specifications already made, and inspection of the articles already approved, prior to the passage of the act, by which conspiracy, coming into existence subsequent to the act, the defendants conspired to obtain from the Emergency Fleet Corporation payments for claims they knew to be fraudulent, an indictment could readily have been drafted upon such charge. The indictment under consideration, however, is vague and uncertain, and does not sufficiently set out an offense to which the defendants can be required to plead.

The demurrer is sustained.

In re ELLSWORTH et al.

(District Court, W. D. Washington, N. D. March 3, 1919.)

Bankruptcy ⇐20(1)—Adjudication supersedes jurisdiction of state court in suit against bankrupt.

The jurisdiction of a state court in a suit is at once superseded by an adjudication in bankruptcy against the defendant therein, and it is without authority to proceed thereafter; but, where it does so, its judgment against the bankrupt may be accepted by the bankruptcy court as a liquidation of the plaintiff's claim, under Bankruptcy Act, § 63b (Comp. St. § 9647).

In Bankruptcy. In the matter of P. C. Ellsworth and others, bankrupts. On petition to stay proceedings in state court. Granted.

McClure & McClure, of Seattle, Wash., for petitioning creditors.

Paul Carrigan and A. J. Collett, both of Seattle, Wash., for respondents.

NETERER, District Judge. In this matter, creditors of the bankrupts presented a petition to stay proceedings in the state court in a cause which was brought on for trial following the date of the filing of the petition for adjudication in this court; the cause in the state court having been theretofore duly and regularly assigned. In this court it appears that the cause was tried in the state court, and the judge announced conclusion directing judgment for the plaintiff in the amount claimed. Some further observations were made with relation to some property held by the applicant, with a view to requiring a reconveyance. No formal judgment or decree appears to have been entered.

"The jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." In re Watts & Sachs, 190 U. S. at page 27, 23 Sup. Ct. 724, 47 L. Ed. 933.

From this it necessarily follows that the jurisdiction of the state court is at once superseded upon the adjudication in bankruptcy, and that there is no authority in that court to proceed thereafter. In re Louis Neuburger, Inc. (D. C.) 233 Fed. 714; Id., 240 Fed. 947, 153 C. C. A. 633. Provision is made, however, in Bankruptcy Act, § 63b (Comp. St. § 9647), which provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against the estate."

I think that the proceedings in the state court should be stayed, except that the claim due from the defendants in that case to the plaintiff may be liquidated, and the amount found due by the judge of the state court may be entered, and the claim may thereafter be proved before the referee in the manner which is allowed by law and the rules of court.

Such will be the order.

SKEFFINGTON, Immigration Com'r, v. KATZEFF et al.

(Circuit Court of Appeals, First Circuit. January 11, 1922.)

No. 1508.

1. **Aliens ⇐53—May be deported for any reason deemed sufficient by Congress.**

An alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government.

2. **Aliens ⇐54—Deportation hearing need not be conducted under rules applying to criminal trials.**

Deportation, when ordered by the proper executive officer of the government, is not visited on the alien as a penalty for any crime, and the fact that the reason assigned for his deportation may constitute a crime under the local laws does not make the deportation hearing a trial in a criminal case, to be conducted under the rules of evidence that apply to such a trial.

3. **Aliens ⇐54—Decisions of executive officers, arrived at after fair hearing, final.**

The decisions of executive officers charged with the execution of the deportation statutes, if arrived at after a fair hearing and on substantial evidence; and with no abuse of the discretion committed to them by statute, are final.

4. **Aliens ⇐54—Finding in deportation proceeding may be reversed, when unauthorized or not sustained by evidence.**

While the findings of fact by executive officers in deportation proceedings are final, yet, if they are not authorized by the statute, or are not sustained by substantial evidence, they may be reversed.

5. **Habeas corpus ⇐111(1)—Error to discharge alien ordered deported, when all evidence not before the court.**

On habeas corpus by an alien, ordered deported by the Assistant Secretary of Labor, it is error for the court to order his discharge, where it does not appear that all the evidence presented to the Assistant Secretary is before the court.

6. **Aliens ⇐53—Member of Communist Party bound by declarations of purposes in manifestoes and constitution.**

As respects liability to deportation, under Act Oct. 16, 1918 (Comp. St. Ann. Supp. 1919, § 4289¼b), as a member of an organization believing in, teaching, or advocating the overthrow by force or violence of the United States government, a member of the Communist Party, who in his application declared his adherence to the principles and tactics of the party and the Communist International, is bound by the declarations of purposes and program found in the manifesto of the Communist International, or in the manifesto and constitution of the Communist Party of America.

7. **Aliens ⇐54—Immigration officials warranted in finding that force and violence was contemplated by Communist Party.**

The declarations of purposes and program found in the manifesto of the Communist International, and manifesto and constitution of the Communist Party of America, advocating the disarmament of the armed forces of the existing state, the arming of the laborer, and formation of a Communist army to protect the proletariat, *held* substantial evidence warranting the immigration officials in finding that force and violence are necessary instrumentalities for the accomplishment of such purposes, and are contemplated.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Habeas corpus by Morris Katzeff, on relation of William T. Colyer and others, against Henry J. Skeffington, Commissioner of Immigration. From a decree (265 Fed. 17) discharging the petitioners, the respondent appeals. Reversed, petition denied, and relators remanded to the Commissioner's custody.

Essex S. Abbott, Sp. Asst. U. S. Atty, of Haverhill, Mass. (Robert O. Harris, U. S. Atty., and Lewis Goldberg, Sp. Asst. U. S. Atty., both of Boston, Mass., on the brief), for appellant.

Harry Hoffman and Morris Katzeff, both of Boston, Mass. (Hoffman & Vernon, of Boston, Mass., on the brief), for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the District of Massachusetts ordering the discharge upon a petition for a writ of habeas corpus of William T. Colyer and Amy Colyer. Frank Mack and Lew Bonder were the relators in another petition and, the issue upon appeal being the same in both cases, they have been heard as one case.

The relators were arrested on January 3, 1920, upon warrants issued by the Department of Labor on the charge that they were included within the class of persons covered by the Act of Congress approved October 16, 1918, Comp. Stat. Ann. Supp. 1919, § 4289¼b (1), which, so far as material, is as follows:

"Aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government * * * shall be excluded from admission into the United States."

The reasons assigned for their arrest and deportation were, in substance, that they were members of or affiliated with an organization that believed in, taught and advocated the overthrow by force and violence of the Government of the United States.

A hearing in accordance with this statute was had before the immigration inspector and his findings were submitted to the Commissioner General of Immigration and the Acting Secretary of the Department of Labor, together with his recommendation that they be deported. His findings and recommendation were reviewed and approved by the Assistant Secretary of Labor and a warrant for the deportation from this country of each of the relators was issued by him.

The District Court has ordered the relators discharged on the ground that there was no evidence before the immigration inspector tending to show that the Communist Party, to which the relators admitted they belonged, believes in, advocates, or teaches the overthrow of the United States government by force or violence, within a fair

meaning of the words "overthrow, force, and violence" as used in this act.

It is conceded that the relators were all aliens, three of them subjects of Great Britain, and one a subject of Russia. It was found by the District Court that they were all afforded a fair hearing before the inspector, and this finding is admitted to have been warranted by the facts.

[1] It is too well settled by the decisions of the Supreme Court of the United States to require any citation of authorities that an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government.

[2] Deportation, when ordered by the proper executive officer of the government, is not visited upon the alien as a penalty for any crime, and the fact that the reason assigned for his deportation may constitute a crime under the local law does not make the hearing upon deportation a trial in a criminal case, to be conducted under the rules of evidence that apply to such a trial. Bugajewitz v. Adams, 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978; Sibray v. United States, 227 Fed. 1, 7, 141 C. C. A. 555; United States v. Uhl (C. C. A.) 266 Fed. 34, 39.

[3] It has also been definitely settled and is not controverted that the decisions of the executive officers charged with the execution of the Deportation Act, if arrived at after a fair hearing and upon substantial evidence and with no abuse of the discretion committed to them by the statute, are final.

In Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 735 (56 L. Ed. 1165), the court said:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

In United States v. Uhl (C. C. A.) 271 Fed. 676, a case decided February 2, 1921, in the Second Circuit, it was said:

"Review by the District Court, or on appeal by this court, is limited to habeas corpus. United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; and such review extends only to the inquiry whether the discretionary powers of the executive (large as they are) have been exceeded. There is no judicial power to review or reverse a finding of fact based upon evidence. * * * And this court has recently pointed out that, while we may inquire on habeas corpus as to whether the deportation proceedings have been fair, the rules of evidence do not in strictness apply (Diamond v. Uhl [C. C. A.] 226 Fed. 34), and the hearing, though it must be fair, may be summary, and the findings of fact made by the executive department are conclusive (Rakics v. Uhl [C. C. A.] 266 Fed. 646)."

[4] While the findings of fact by executive officers are final, yet, if such findings are not authorized by the act or are not sustained by

substantial evidence, they may be reversed. Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218; Kwock Jan Fat v. White, 253 U. S. 454, 457, 40 Sup. Ct. 566, 64 L. Ed. 1010.

The question, then, presented upon this appeal is narrowed to this: Whether there was any substantial evidence which justified the order of deportation for the reason assigned.

The record contains no report of any oral testimony taken before the Inspector and reported to the Secretary of Labor. The only evidence reported consists of the government exhibits which contain the manifesto and program of the Communist International and the manifesto program and constitution of the Communist Party of America.

[5] It is not clear that the judge sitting in the District Court had before him all the evidence that was presented to the Secretary of Labor and upon which he based his order of deportation, and it does not affirmatively appear in the record that he did. If the court below did not have before it all the evidence considered by the Secretary of Labor relating to the ground upon which the deportation was ordered, it was not within the power of that court, nor is it within the power of this court, to say whether the evidence before the Secretary was sufficient to warrant the finding upon which the deportation was ordered or not. For this reason alone we think the court below erred in discharging the respondents. But if it be assumed that the District Court had all the evidence before it that was before the Secretary of Labor, and that it consisted solely of the government exhibits containing the manifesto and program of the Communist International and of the manifesto program and constitution of the Communist Party of America, the question is whether these documents offered substantial evidence to justify the deportations for the reason assigned.

We have carefully examined these exhibits for the purpose of ascertaining whether they contain statements which, giving to language its ordinary meaning, would warrant any reasonable mind in reaching the conclusion that the Communist Party teaches or advocates the overthrow by force and violence of this government as now constituted.

[6, 7] Following are some of the declarations of purposes and program which, whether found in the manifesto of the Communist International or in the manifesto and constitution of the Communist Party of America, are binding upon a member of the latter, for in the application for membership the applicant declares "his adherence to the principles and tactics of the party and the Communist International":

"Communism does not propose to 'capture' the bourgeoise parliamentary state, but to conquer and destroy it. As long as the bourgeoise state prevails the capitalist class can baffle the will of the proletariat. * * *

"The state is an organ of coercion. * * *

"Therefore it is necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoise. Proletarian dictatorship is a recognition of that fact; it is equally a recognition of the fact that in the communist reconstruction of society the proletariat alone counts as a class. * * *

"The proletarian class struggle is essentially a political struggle. It is a political struggle in the sense that its objective is political—overthrow of

the political organizations upon which capitalist exploitation depends, and the introduction of a proletarian state power. The object is the conquest by the proletariat of the power of the state. * * *

"The organized power of the bourgeoise is in the civil state, with its capitalistic army under control of bourgeoise-junker officers, its police and gendarmes, jailers and judges, its priests, government officials, etc. . Conquest of the political power means not merely a change in the personnel of ministries, but annihilation of the enemy's apparatus of government; disarmament of the bourgeoise, of the counter-revolutionary officers, of the white guard; arming of the proletariat, the revolutionary soldiers, the red guard of workingmen. * * *

"The revolutionary era compels the proletariat to make use of the means of battle which will concentrate its entire energies, namely, mass action, with its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance. * * *

"Civil war is forced upon the laboring classes by their arch-enemies. The working class must answer blow for blow, if it will not renounce its own object and its own future, which is at the same time the future of all humanity.

"The communist parties, far from conjuring up civil war artificially, rather strive to shorten its duration as much as possible—in case it has become an iron necessity—to minimize the number of its victims, and above all to secure victory for the proletariat. This makes necessary the disarming of the bourgeoise at the proper time, the arming of the laborer, and the formation of a communist army as the protector of the rule of the proletariat and the inviolability of the social structure. Such is the red army of Soviet Russia, which arose to protect the achievements of the working class against every assault from within or without. The Soviet army is inseparable from the Soviet state."

We think it would be going far afield to say that, from such statements of purpose, no reasonable man could reach the conclusion that force and violence are the necessary instrumentalities for its accomplishment and are contemplated, and that, if consummated, it would overthrow government as now instituted. On the contrary, it seems to us that a program which advocates the disarmament of the armed forces of the existing state, the arming of the laborer and the formation of a Communist army to protect the rule of the proletariat, affords substantial evidence that the Communist Party, of which the relators are confessed and avowed members, teaches and advocates the overthrow of government by force and violence.

The entry in each case must be:

The decree of the District Court is reversed, the petition for writ of habeas corpus is denied, the writ is discharged, and the relators are remanded into the custody of the Commissioner of Immigration.

WILLIAMS v. TRAVIS et al.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1922.)

No. 3688.

1. **Fraudulent conveyances ⟸214—Liability of national bank stockholder is contractual "debt or demand" within Florida statute.**

The liability of stockholders of insolvent national banks created by 38 Stat. 273 (Comp. St. § 9689), is contractual in its nature, since it cannot attach without the consent of the party subject thereto, such consent being evidenced by his becoming a stockholder, and is a "debt or demand" within the meaning of the Florida statute of frauds, declaring every gift or grant, executed with intent to hinder or defraud creditors of their just debts or demands, void as against the creditors.

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

2. **Fraudulent conveyances ⟸218—National bank stockholders' liability becomes fixed on failure of the bank.**

The statutory liability of a national bank stockholder becomes fixed upon the failure of the bank, so that a conveyance of property by the stockholder to prevent enforcement of such liability made after the bank's failure, but before action was begun to enforce the liability, is fraudulent and void.

3. **Fraudulent conveyances ⟸74(3)—Voluntary conveyance of all property is conclusively fraudulent.**

Voluntary conveyance by a debtor of substantially all the property he owns, which is subject to execution, the necessary consequence of which is to hinder, delay, and defraud his creditors, raises a presumption of fraudulent intent, which is irrebuttable and conclusive, and renders inadmissible inquiry into his motives.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by C. L. Williams, as receiver of the Heard National Bank of Jacksonville, against S. F. Travis and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

John C. Cooper, John C. Cooper, Jr., and H. P. Osborne, all of Jacksonville, Fla., for appellant.

C. M. Cooper, Charles P. Cooper, and J. J. G. Cooper, all of Jacksonville, Fla., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. After the appellant, the receiver of the Heard National Bank of Jacksonville, Fla., had recovered a judgment, in the sum of $13,601.43 and the costs, in a suit brought by him against S. F. Travis, who at the time of the failure of said bank and of the appointment of the receiver, was a director thereof and the owner of 124 shares of its capital stock, to recover the amount due from said Travis under an assessment of $100 a share made against the bank's shareholders by the Comptroller of the Currency, and after a return of nulla bona on an execution issued on that judgment, the bill in equity in this case was filed to subject to the satisfaction of that judg-

ment 496 shares of the capital stock of the S. F. Travis Company, a Florida business corporation, and the income from said shares, 495 of which, at the time this suit was brought, stood in the name of Eliza W. Travis, the wife of S. F. Travis, and 1 of which stood in the name of R. L. Travis, a son of S. F. Travis, or, in the alternative, to subject to the satisfaction of that judgment described real and personal property transferred by S. F. Travis to the S. F. Travis Company after the failure of said bank and the appointment of the appellant as receiver. The pleadings and evidence adduced showed the following:

Between the date of the appointment of the receiver on January 17, 1917, and the date of the making of the assessment against the bank's shareholders on October 10, 1917, the S. F. Travis Company was incorporated; S. F. Travis, with knowledge of the failure of the bank and the appointment of the receiver, transferred to that company all property belonging to him or standing in his name, except his above-mentioned shares in the Heard National Bank, evidence adduced tending to prove that the property so transferred was worth in excess of $300,000; and S. F. Travis transferred to his wife 495 of the 496 shares of the stock of the S. F. Travis Company issued to him when that company was organized, its total capital stock being 500 shares. The other 1 share of that stock issued to S. F. Travis was transferred by him to his son, R. L. Travis, soon after the making of the assessment against the shareholders of the bank and before the bringing of this suit. Nothing was paid to or received by S. F. Travis (hereinafter referred to as Travis) for the property so disposed of by him.

Nothing in the opinion rendered by the District Judge indicates that there was a finding that Travis was not the sole beneficial owner of the property disposed of by him as above stated. The evidence adduced did not warrant a finding that he was not the sole or part beneficial owner of that property until he parted with the legal title to it. The testimony of Travis himself is what must be relied on to support a finding that any one other than himself was beneficially interested in that property or any of it. He testified to the following effect:

The source of properties which stood in his name was a business which was started in 1882, and was carried on successively under the names J. W. Brown & Co., New York Clothing Company, and S. F. Travis & Co., until it was taken over by the S. F. Travis Company. Mr. Brown was a Western man, who spent part of several winters in Florida. While there on one of his visits he furnished $3,000, the entire capital with which the business of J. W. Brown & Co. was started. Brown and Travis were equal partners in that business, to which Brown contributed only the cash capital with which it was started, and Travis contributed his services. Not long after the business was started, Brown sold his interest, accepting therefor six notes, for $500 each, payable to him and signed "New York Clothing Company," the name given to the business when Brown sold his interest. Some time after Brown returned to his home in the West, he sent the six notes, with a letter stating that he wanted them to be given to

Mrs. Travis. Thereafter the business was continued without interruption, and without, so far as appears, the relation of Travis to it ceasing to be that of an owner. For more than 30 years it was conducted under the name S. F. Travis & Co. There was no evidence to support a finding that Travis parted with his interest in that business and in properties standing in his name and representing invested assets of that business until he did so, as above stated, after the failure of the Heard National Bank.

The opinion rendered by the District Judge shows that the dismissal of the bill was the result of the conclusions that Travis was not indebted on his stock in the failed bank when he gave away his property, and that the evidence did not show that the attacked transfers were made with actual fraudulent purpose of defeating the enforcement of his liability as the holder of that stock. We are of opinion that the ruling of the court was erroneous.

[1] The liability of stockholders of national banks, provided for by statute (38 Stat. 273, § 23 [Comp. St. § 9689]) is contractual. Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; Benton v. American National Bank (U. S. Circuit Court of Appeals, 5th Circuit) 276 Fed. 368. Expressions used in the opinion in the case of McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500, are relied on by counsel for the appellees to support the contention that the liability of Travis as a stockholder of the failed bank was not, when the attacked transfers were made, a debt or demand within the meaning of the Florida statute of frauds declaring "every feoffment, gift, grant," etc., "made or executed * * * to the end, purpose or intent to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts," etc., to be utterly void as against those "so intended to be delayed, hindered or defrauded." Revised General Statutes of Florida, § 3864. The question whether the liability of a stockholder of a failed national bank is a debt or demand within the meaning of the statute of frauds was not involved in that case.

It was decided in that case that the provision of the Washington statute of limitations applicable to a suit brought by a receiver of a national bank to enforce an assessment against stockholders was the one which provided that "an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued" (Ballinger's Ann. Codes & St. § 4805), and not the one prescribing a three-year limitation for the commencement of "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" (section 4800). We do not think that anything said in that opinion supports the above-mentioned contention of counsel for the appellees. The following is an extract from that opinion:

"In Matteson v. Dent, 176 U. S. 521, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the state law, but not that it was a true contract."

[2] There was no indication of an intention to depart from or modify the ruling in Matteson v. Dent. The liability of Travis was fixed on the failure of the bank before the attacked transfers were made. Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696. That liability, though it is the creature of the statute, is contractual, because it cannot attach without the consent of the party made subject to it; that consent being evidenced by the act of such party in becoming a stockholder, the law charging him with notice of the responsibility he incurs by becoming a stockholder of a national bank. The statute gives to the fact of one becoming such a stockholder the effect of an agreement by him to be individually responsible, to the extent prescribed, for the payment of the bank's debts in the event of its failure while he is a stockholder or within 60 days after he shall have transferred his stock or registered the transfer thereof.

Decisions of the Supreme Court of Florida show that the words "creditors and others," in the statute of frauds of that state, are given the most liberal construction, and embrace the beneficiaries of contingent liabilities, such as those of guarantors or sureties, from the time those liabilities were stipulated for. Alston v. Rowles, 13 Fla. 117; Reel v. Livingston, 34 Fla. 377, 16 South. 284, 43 Am. St. Rep. 202; Hayden v. Thrasher, 18 Fla. 795. Under the statute the liability of one who is a stockholder of a national bank at the time of its failure is, to the extent of the par value of his stock in addition to the amount invested therein, the same as it would have been if, by express contract and to the same extent, he had become the bank's surety for all its contracts, debts, and engagements. The statute providing for the enforcement of stockholders' individual liability on voluntary dissolution of a national bank by a bill in equity, in the nature of a creditors' bill, brought in behalf of all creditors of the bank (19 Stat. 63), is a recognition of the existence of the relation of debtor and creditor between a liquidating bank's stockholders and its creditors. That relation exists between the stockholders of a failed bank and its creditors before the accrual of a right of action to enforce the payment of the ascertained amount required to be paid. We are of opinion that at the time Travis made the above-mentioned gifts of his property his relation to the bank and its creditors was such as to make those gifts void as against those creditors, who are represented by the appellant.

[3] The attacked transfers being purely voluntary so far as they disposed of substantially all property owned by Travis, and the necessary consequences thereof being to hinder, delay, and defraud his creditors, the presumption of fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible. Central Bank of Washington v. Hume, 128 U. S. 195, 211, 9 Sup. Ct. 41, 32 L. Ed. 370; Alston v. Rowles, supra.

It is not to be supposed that the statute prescribing the individual liability of stockholders of national banks would have been enacted if it had been contemplated that a stockholder, after the failure of the bank, could defeat the enforcement of his liability by giving away all his property subject to execution. It seems that to give that effect

to such a disposition by a stockholder of all his property in such circumstances is incompatible with the statute having the intended operation and effect. Pierce v. United States, 255 U. S. 398, 41 Sup. Ct. 365, 65 L. Ed. —.

The decree appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

COREY v. ATLAS COAL & COKE CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1922.)

No. 3573.

1. **Appeal and error ⟸1008(2)—Findings of fact of trial court conclusive, where jury waived.**

   Where a jury has been waived, a reviewing court must accept the findings of fact made by the trial court, if sustained by any substantial evidence, as final and conclusive of the facts in controversy.

2. **Appeal and error ⟸842(2)—Question whether correspondence constituted contract of sale held before appellate court.**

   Where court found "that no contract was made between the parties hereto for the sale of coal by the defendant to the plaintiff," and that there was no general custom to execute a formal written contract, and as a conclusion of law that "the correspondence * * * does not constitute or include a binding contract between the parties, and the defendant was not obligated to sell or deliver any coal to the plaintiff," and the finding as to the custom practically eliminated all facts extrinsic to the correspondence between the parties, the record presented for the consideration of the appellate court the question whether such correspondence constituted a contract, as claimed by the plaintiff, or, as claimed by the defendant, was merely a negotiation looking to the execution of a formal contract.

3. **Sales ⟸87(1)—No presumption cash payments intended for series of deliveries.**

   The rule that, where a contract does not provide in terms for delay in payment, the presumption obtains that cash payment is intended, does not apply to a contract of sale providing for five separate deliveries of coal each week for one year.

4. **Sales ⟸52(5)—Finding of no contract to deliver sustained.**

   In action for damages for breach of an alleged contract to deliver coal, evidenced by letters and telegrams, a finding that no contract was made between the parties *held* sustained by the evidence.

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

Action by Charles C. Corey against the Atlas Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

On the 9th day of November, 1916, Charles C. Corey brought an action against the Atlas Coal & Coke Company in the circuit court of Wayne county, Mich., to recover damages in the sum of $15,000 for breach of a certain contract in writing, dated August 9, 1916, by the terms of which the defendant agreed to sell and ship, to the order of plaintiff, five cars per week for one year of "Red Comet nut and slack" coal at 90 cents per ton, commencing September 1, 1916, which contract was evidenced by letters and telegrams exchanged between the parties. There are copied into this declaration and the amendment thereto, filed October 12, 1918, the letters and telegrams

which, the plaintiff claims, constitute the written contract between him and the defendant.

The defendant, for answer thereto, denied that it had entered into any contract with the plaintiff, and averred that the letters and telegrams copied in plaintiff's declaration and amendment thereto were merely negotiations in reference to a proposed contract that was never actually made between the parties.

In pursuance of written stipulations, signed by counsel, the evidence was heard by a master, who made and reported to the court separate findings of facts and conclusions of law, and recommended that an order be entered finding no cause of action in favor of the plaintiff. To these findings and conclusions of the master exceptions were taken by both the plaintiff and the defendant. Attached to the master's report are copies of all of the telegrams and letters exchanged between the parties in July, August, and September of 1916, which the plaintiff claims constituted the written contract between them. The first 14 letters and telegrams, omitting the addresses of the respective parties, appear in the margin.[1] Some further letters were exchanged between the parties; the plaintiff asserting and the defendant denying that a contract had been made; but these other letters, copies of which are attached to the master's report, are in no way important in the determination of the question involved in this litigation.

Upon the hearing of the exceptions to the master's report, the District Court made special findings of fact and law, and entered a decree dismissing

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[1] July 31, 1916.

Wisconsin Steel Company, Benham, Ky.: Wire price any part thirty thousand tons screenings yearly contract. C. C. Corey.

August 1, 1916.

C. C. Corey: Expect to have in two weeks five cars weekly for two years Red Comet two-inch slack. Can you use at ninety cents?

Atlas Coal & Coke Co.

August 3, 1916.

Mr. C. C. Corey—Dear Sir: Our mines at Benham have sent to us your wire inquiry of July 31st asking for price on 300 tons of screenings on yearly contract.

The Atlas Coal & Coke Company are disposing of our output and we understand that you have already communicated with them.

Very truly yours, Wisconsin Steel Company.

August 3, 1916.

Mr. C. C. Corey—Dear Sir: Your telegram addressed to Wisconsin Steel Company asking price on a contract, three hundred tons of two-inch slack per week has been referred to us, as we handle the entire output of coal produced by the above firm.

We expect to have about five cars of two-inch nut and slack per week that we may offer on a contract to extend for one or two years at a price of 90 cents per net ton mines. We would not be ready to begin shipments on this order if accepted for at least three weeks from date.

The situation in Eastern Kentucky is becoming more acute each day, owing to a car shortage that seems to be assuming alarming proportions, and, if it does not become better, we anticipate dollar or better slack in the near future.

Yours very truly, Atlas Coal & Coke Co.

August 7, 1916.

Atlas Coal & Coke Co.: We accept offer five cars per week one year Red Comet nut and slack ninety cents. C. C. Corey.

August 7, 1916.

Atlas Coal & Coke Co.—Gentlemen: We wired you today accepting your offer of contract for five cars per week for one year of Red Comet two-inch nut, pea and slack at a price of 90 cents per ton f. o. b. mines. We also note that you will not be ready to begin shipments on the order for at least three weeks. If anything should occur in the meantime we would appreciate your

plaintiff's petition at his cost, to all of which exceptions were taken by the plaintiff. The defendant also filed exceptions to the overruling by the court

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advising us as we will need the coal. Please draw up a form of contract and send to us for signature.

Yours very truly,

C. C. Corey.

August 7, 1916.

Mr. C. C. Corey—Dear Sir: We are in receipt of your following telegram: "We accept offer five cars per week one year Red Comet nut and slack ninety cents."

Will it be agreeable for you to have shipments begin at about September 1st and shall contract be made, dating from that period?

In making steam contracts through jobbers, we require the name of the final consignee.

Kindly supply this information as well as the delivery railroad, in order contract records may be properly enumerated.

Yours very truly,

Atlas Coal & Coke Co.

August 9, 1916.

Atlas Coal & Coke Co.—Gentlemen: Acknowledging your letter of the 7th in reference to the contract on Red Comet nut and slack, this coal will be consigned to the Elevator Cash Coal Company, Newcastle, Indiana, via L. E. & W. We will want the shipments to start at the earliest possible moment if it can be arranged at all prior to September 1st, and you may date the contract either the date you make it up, or the date of our wire, August 7th.

Yours very truly,

C. C. Corey.

August 10, 1916.

Mr. C. C. Corey—Dear Sir: Your letter of the 9th inst. received. We do not find the Elevator Cash Coal Company at Newcastle, Indiana, listed in commercial rating books. Is this a new concern?

We would also like to have some information regarding your financial responsibility. The line of credit that you desire, approximating between $800 and $900 per month, is hardly justified on your cash investment in your business, which is reported at $1,600. Furthermore, we have had some very unpleasant experiences with brokers in Detroit, where it seems to be the fashion when coal is not shipped exactly as it is ordered, a condition frequently impossible to fulfill through traffic or mining complications, to hold out payment of the outstanding account. One gentleman in Detroit literally stole from us the value of two cars of coal on such a false pretext, and before we engage in any business transactions with jobbing firms in Detroit, we want all these matters understood in advance. You are a total stranger to us, and we do not want to have trouble later on.

This is going to be a very trying season and prices on coal are going to be much higher than contract figures, and we want to be assured that when we furnish coal during a period of high prices that the contract will be lived up to and the coal taken in agreed quantity when the situation changes and the market should go the other way.

Yours truly,

Atlas Coal & Coke Co.

August 11, 1916.

Atlas Coal & Coke Company—Gentlemen: We have your communication of August 10th, and in reply beg to state that the Elevator Cash Coal Company is a wholesale and retail concern located at Muncie, Indiana. Any further information you may desire relative to this concern can probably be obtained from Dun's or Bradstreet's. We have reason to know that they are absolutely financially responsible.

As to our own financial responsibility, we are inclosing a signed statement, and in addition to this would respectfully refer you to Williams & Peters, Buffalo, N. Y.; Pittsburgh Coal Company, Pittsburgh, Pa.; Smokeless Fuel Company, Cincinnati; Maynard Coal Company, Columbus, Ohio; or take up with Mr. Thomas Mordu, resident manager Chicago office, Castner, Curran & Bullitt.

We are in no way responsible for any unpleasant experiences you may have had with our competitors, and we take this means of informing you

of its exception to the master's report, and also exceptions to the court's third finding of fact and to its second conclusion of law.

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that Detroit coal concerns as a rule do business in a straightforward, square manner, and should you have any reason to question the ethics of any concern located here, we would be pleased to have you report the matter to the Detroit Coal Exchange, the writer being vice president at the present time of this Exchange.

We expect to go into this deal with you on the square, and hope that you will take care of the business in a manner that will preclude any chance of complications arising during the life of the contract. There is no question of our taking the coal absolutely, no matter what may occur in the coal market, provided you ship us the kind of coal you are selling us and make reasonable effort to take care of the business in a satisfactory manner. If you desire any further information, we will be glad to furnish you same.

Trusting we may be favored with your contract blanks by return mail, we are

Yours very truly, C. C. Corey.

Atlas Coal & Coke Co.

Chicago, August 22, 1916.

Mr. C. C. Corey—Dear Sir: Your letter of the 19th inst. was not answered earlier, as the writer was in the mining fields in Kentucky for the past several days. I was in hopes that we would be able to take on your business early in September, but the car supply and labor shortage in the entire southeastern section of Kentucky have reduced the output fully 50 per cent., so that we are so far still behind on our orders that we are unwilling to take on new commitments before our old obligations are out of the way.

From present indications, we fear it will be impossible for us to take on the tonnage that you spoke for, namely, five cars per week. With the car supply running only 50 per cent. normal, it would be only disappointing you and your customer by extending promises that could not be fulfilled.

Instead of making an annual contract, would it not be better if we sold you ten or fifteen cars at a time? In this way, you would be in a better position to rely on other markets without placing too much dependence on your requirements from us.

Yours very truly, Atlas Coal & Coke Co.

August 25, 1916.

The Atlas Coal & Coke Co.—Gentleman: We note your letter of the 22d in which you intimate that it may be impossible for you to take care of the tonnage quoted on and accepted by us, and we consider that this is no time for you to give us such advice. Immediately upon receipt of your quotation of 90 cents per ton on five cars weekly for two years we got in touch with our party and closed the business, according to our wire August 7th. We feel that we have bought your coal, and inasmuch as we have resold it we must insist upon the full performance of the contract on your part. Our order is inclosed, confirming shipping instructions that were given you August 9th. We will expect you to begin shipments by September 1st.

Yours very truly, C. C. Corey.

August 26, 1916.

Mr. C. C. Corey—Dear Sir: Returning your order No. 2977. The car shortage and labor scarcity in Kentucky is such that it is impossible for us to take on your order.

Yours very truly, Atlas Coal & Coke Co.

August 30, 1916.

The Atlas Coal & Coke Co.—Gentlemen: You have already accepted our order for Red Comet nut and slack by wire, and unless you begin shipments accordingly we will buy the coal on the open market and charge our loss to you. Prompt action on your part is therefore imperative. Our order is being returned herewith.

Yours very truly, C. C. Corey.

Harry Helfman, of Detroit, Mich. (Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., on the brief), for plaintiff in error.

Henry C. Walters, of Detroit, Mich.(Walters & Hicks, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). No written waiver of jury appears of record; nevertheless the final decree in the District Court recites the fact that a jury had been waived by the parties, and there is no controversy now between counsel upon that proposition. On the contrary, when we assume that the trial of this case before the District Court was in pursuance of the statutory waiver of jury, we are but assuming a fact conceded by both counsel. It therefore becomes unnecessary to determine whether the stipulations entered into by counsel on June 13th and November 2d are, in effect, a waiver.

[1] Where a jury has been waived, a reviewing court must accept the findings of fact made by the trial court, if sustained by any substantial evidence, as final and conclusive of the facts in controversy. R. S. § 700 (Comp. St. § 1668); Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Mayes v. Jones & Co. (C. C. A.) 270 Fed. 121. There being no other questions of law arising in the trial of this cause, this leaves for the consideration of this court in this case but two questions:

(1) Are the findings of fact made by the District Court sustained by any substantial evidence?

(2) Do the facts found support the judgment?

There is no conflict in the evidence upon which the first, second, fourth, fifth, and sixth findings of fact are predicated. There is a conflict in the evidence in reference to the third finding that there was no general custom in the coal business in 1916 to execute a formal written contract before the consummation of a binding contract for the sale of coal. There is, however, substantial evidence in this record sustaining this finding. The seventh and last finding and the one vital to this case is as follows:

"I further find that no contract was made between the parties hereto for the sale of coal by the defendant to the plaintiff as alleged by the plaintiff herein."

[2] While the question of whether a contract has been made, where that fact is asserted by one party to the litigation and denied by the other, is, as a rule, a question of fact, to be determined upon all the evidence, nevertheless in this case the third finding of the court, that there was no general custom to execute a formal written contract in the coal business in 1916, practically eliminates all facts extrinsic to the letters and telegrams exchanged between the parties from the consideration of the court in determining this question. The District Court, recognizing that situation, found as the first conclusion of law that—

"The correspondence referred to in paragraph 2 of the findings of fact does not constitute or include a binding contract between the parties, and th defendant was not obligated to sell or deliver any coal to the plaintiff."

For the same reason the trial court also based upon its construction of these letters and telegrams its second conclusion of law, that the execution and delivery of a formal instrument embodying the terms of the contract was not intended by the parties hereto to be, and was not, a condition precedent or essential to the consummation of a binding contract between plaintiff and defendant herein.

The seventh finding of fact and the first conclusion of law are either both right or both wrong. Therefore this record does present for the consideration of this court, regardless of the seventh finding of fact, the question of whether these letters and telegrams constitute a contract, as claimed by the plaintiff, or, as claimed by the defendant, were merely negotiations looking to the execution of a formal contract as a condition precedent and essential to the consummation of a binding contract between the parties.

It is the claim of the plaintiff that defendant's letter of August 7th and the plaintiff's letter of August 9th constitute the contract upon which it relies for recovery, but in order to interpret correctly the meaning and effect of these letters it is necessary to consider, in connection therewith, the correspondence immediately preceding and immediately following these two exhibits.

Defendant's letter of August 7th does not unqualifiedly accept the terms contained in the telegram and letter sent by plaintiff to defendant on August 7th. The letter states that the defendant cannot begin shipments before September 1st. Demand is also made for the name of the consignee. While there is some evidence in this record that the name of the consignee is of no importance to the seller, nevertheless, as appears by defendant's letter of August 10th, the defendant did consider the personality of the consignee of serious importance to it, and states in no uncertain terms its reasons therefor. It is the defendant's mental attitude upon this subject that must control in determining whether the minds of the parties met, regardless of who the consignee might be. Plaintiff's letter of August 9th furnished to the defendant the information desired. Immediately following the receipt of this letter the defendant wrote the plaintiff the letter of August 10th, in which it stated that it could not find the Elevator Cash Coal Company, at Newcastle, Ind., listed in commercial rating books, and it also in this letter requested some information as to the plaintiff's financial responsibility, for the reason, as therein stated, that—

"The line of credit that you desire, approximating between $800 and $900 per month, is hardly justified on your cash investment in your business, which is reported at $1,600."

This letter also referred to past unhappy experiences with brokers in Detroit, one of whom, defendant claims, defrauded it out of two cars of coal. The defendant also explained in this letter its further reasons for demanding this information in the following language:

"This is going to be a very trying season and prices on coal are going to be much higher than contract figures and we want to be assured that when

we furnish coal during a period of high prices that the contract will be lived up to and the coal taken in agreed quantity when the situation changes and the market should go the other way."

This demand upon the part of the defendant was reasonable and right, especially in view of the fact, as found by the court, that this was the first business transaction between these parties, although there had been some correspondence earlier in the same year in reference to another proposed contract, which after some negotiations had been finally abandoned. These letters at best covered only the quantity and price. There was no reference in either telegrams or letters to the time of payment, strikes, car shortages, or other contingencies that might prevent or excuse the defendant from delivering this amount of coal. Therefore it is only fair to presume that, when the defendant wrote the letter of August 7th and inquired, "Will it be agreeable to have shipments begin at about September 1st and shall contract be made, dating from that period?" that defendant then contemplated and expected that a formal contract should be made covering all of these conditions and contingencies, some of which, as appears by defendant's first letter of August 3d, were then threatening the coal industry. That the plaintiff so understood this would appear from its letter of August 9th, in reply to defendant's letter of August 9th, in which he said:

"You may date the contract either the date you make it up or the date of our wire—August 7th."

The conclusion to be drawn from these two letters as to the intention of the parties to execute a formal contract is fully supported by practically all the other correspondence in this case. Plaintiff's first telegram to the Wisconsin Steel Company asked for price of screenings upon yearly contract. Defendant's letter in reply to this telegram of August 3d reads, in part:

"We expect to have about five cars of two-inch nut and slack per week that we may offer on a contract to extend for one or two years at a price of 90 cents per net ton mines."

Plaintiff's letter of August 7th, in reply to plaintiff's letter of August 3d, concluded with this statement:

"Please draw up a form of contract and send to us for signature."

Plaintiff's letter of August 11th concludes with this statement:

"Trusting we may be favored with your contract blanks by return mail."

It would therefore appear from all of this correspondence, without any conflict or dispute in any particular whatever, that it was the intention and purpose of both parties to this transaction to execute a formal written contract covering all the matters and things usual in contracts of this character, such as time of payment, car shortages, strikes, and the like, which contract the defendant did not intend to make until he had fully investigated the standing and character of the consignee and the financial responsibility of the plaintiff.

[3] It is claimed on behalf of the plaintiff in error that, where a contract does not provide in terms for delay in payment, the presumption obtains that cash payment is intended. Undoubtedly this rule would

apply to a contract for the sale and delivery of a single article or a number of articles at the same time, but such a presumption would hardly obtain in reference to a contract providing for five separate deliveries each week for one year. However that may be, it is clear that neither of these parties contemplated payment in cash for each carload of coal at the time of its delivery. In its letter of August 10th, the defendant stated that the plaintiff would require a line of credit between $800 and $900 per month, which the defendant thought not justified by plaintiff's cash investment of $1,600 in his business. The plaintiff's reply to that letter did not deny that he desired and expected this amount of credit each month. On the contrary, he inclosed a financial statement that is usually made by dealers when credit is desired. In this letter plaintiff also gave the names of coal dealers in Buffalo, N. Y., Pittsburgh, Pa., Cincinnati and Columbus, Ohio, and Chicago, Ill., as references to his financial responsibility. He also stated that the Elevator Cash Coal Company was absolutely financially responsible and referred the defendant to Dun or Bradstreet. This letter of the plaintiff would seem to be conclusive of the fact that he expected a monthly credit in the amount stated in the defendant's letter of August 10th. These letters are sufficient to show that neither of these parties then understood that a contract had been consummated between them by the letters of August 7th and August 9th, but, on the contrary, that there was still something further to be done, not only in reference to time of payment, but also to satisfy the defendant that it could safely extend this credit. It was for the defendant, acting in good faith, to say, after the receipt of this letter and financial statement, whether or not it was satisfied therewith.

[4] For the reasons above stated the seventh finding of fact made by the District Court is sustained by substantial evidence, and it necessarily follows that the court did not err in its first conclusion of law construing the effect of these telegrams and letters.

The judgment of the District Court is affirmed.

SOUTHERN TRUST CO. v. VAUGHN et al.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1921.)

No. 5605.

1. **Principal and agent ⟸23(1)—Individual having notice of defenses held not the agent of the bank.**

   In an action by a bank on a note purchased by it, evidence *held* to show that the individual through whom the note was purchased was the agent of the previous holder of the note, and not of the bank, so that the bank was not chargeable with his knowledge of defenses.

2. **Bills and notes ⟸356—Bank had not given value for note merely by crediting account therewith.**

   A bank does not become a purchaser for value of a note merely by giving credit on its books for the purchase price thereof, but is entitled to avoid defenses only to the extent it had actually paid out the money prior to acquiring notice of the defenses.

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3. **Compromise and settlement ⟸16(1)—Fraud in sale of property held settled before notes were given.**

Where the parties to a contract for the purchase and sale of a mine discussed at the time the purchase-money notes were executed alleged fraudulent representations by the vendor when the sale was made several months before, and as a result of the discussion a compromise was effected and the notes given in accordance with its terms, the fraudulent representations were thereby settled, and could not be set up as a defense to the notes.

4. **Bills and notes ⟸489(3)—Fraudulent representations not alleged in answer cannot be a defense.**

In an action on notes given for the purchase price of a mine, where the answer alleged misrepresentations in the sale of the mine, but the evidence showed claims for such misrepresentations had been compromised before the notes were given, the makers of the notes could not set up as a defense to recovery thereon misrepresentations by the vendor at the time the notes were executed which they had not alleged in their answer.

5. **Principal and surety ⟸75—Breach of promise made a condition to liability is defense to action by indorsee.**

Where the recording by the payee of a mortgage given to secure the payment of a note was expressly made a condition precedent to liability on the note of those who signed it as sureties, and who were relying on the security of the mortgage, the failure to record the mortgage by the payee would constitute a good defense to an action on the note by a subsequent indorsee.

6. **Principal and surety ⟸115(2)—Negligent failure to record mortgage bars recovery from surety except by holder in due course.**

Where the principal maker of a note gave the payee a mortgage on its property to secure payment thereof, the negligent failure of the payee to record the mortgage, whereby the security for the note was lost, would bar recovery against those liable on the note as sureties to the extent that they were damaged, if, or to the extent that, plaintiff was not a holder in due course.

In Error to the District Court of the United States for the Eastern District of Oklahoma; R. L. Williams, Judge.

Action by the Southern Trust Company against the Yellow Rose Mining Company, T. H. Vaughn, and others on a promissory note. Judgment for plaintiff against the corporate defendant only, and plaintiff brings error. Reversed, with directions to grant new trial.

Malcolm E. Rosser, of Muskogee, Okl., and T. M. Seawell, of San Antonio, Tex. (Frank Pace, of Little Rock, Ark., George S. Ramsey, of Muskogee, Okl., Edgar A. De Meules, of Tulsa, Okl., and Villard Martin, of Muskogee, Okl., on the brief), for plaintiff in error.

L. C. Andrews, of Pauls Valley, Okl. (J. R. Cottingham and S. W. Hayes, both of Oklahoma City, Okl., and J. T. Blanton and Monroe Osborn, both of Pauls Valley, Okl., on the brief), for defendants in error.

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

JOHNSON, District Judge. Plaintiff in error brought suit in the court below against the Yellow Rose Mining Company and the de-

fendants in error, directors of the company, upon a promissory note dated May 1, 1917, executed by said company and defendants in error, for the sum of $15,000, payable on or before six months after date to the order of one J. L. McCarty. The plaintiff claims to be the holder of the note in due course.

The defendants in error and the company as a defense set up in their answer with some particularity that in February, 1917, J. L. McCarty, by fraudulent representations, had induced the company to purchase certain mining property for a consideration of which the principal sum mentioned in the note in suit was a part; that the company as principal and the defendants in error as sureties had signed said note relying upon the representations so made by said McCarty; that the company by reason of said false representations had been damaged in excess of the amount of the note.

As a defense personal to them the defendants in error alleged that on the 1st day of May, 1917, the company, being indebted to J. L. McCarty for the balance unpaid of the purchase price of the mining property above mentioned agreed to make and deliver a note for such balance payable in six months from date; that they the answering defendants signed said note as sureties at the request of McCarty the payee on the condition that he would secure from the company a mortgage upon all of its property, cause said mortgage to be recorded, and, in case the note was not paid by the company, foreclose the mortgage, sell the property described therein, apply the proceeds on the note, and look to and require the answering defendants to pay the deficiency, if any, only. Defendants then allege that the mortgage was executed by the company; that McCarty received it, but failed to have it recorded as he had agreed to do; that as a result of a conspiracy entered into between him and the Miners' & Citizens' Bank the property described in the mortgage was seized and sold for debts due to the bank, and the lien of the mortgage lost.

As a second defense personal to them the defendants in error alleged, in effect, that by reason of the failure of McCarty to preserve the lien of the mortgage they had been deprived of the benefit which would have inured to them by subrogation upon the payment of the note by them. By reason of their several defenses they prayed judgment that plaintiff take nothing by its complaint.

At the trial plaintiff obtained judgment against the company, but was defeated as to the other defendants. Plaintiff brings error, and has assigned numerous rulings of the trial court as error which will be referred to more specifically hereafter.

The plaintiff acquired the note in this way: J. L. McCarty, the payee, after he had received the note indorsed it to McCarty & Angel, a firm in which he was a partner. Thereafter he applied to the Miners' & Citizens' Bank of Yellville, in the state of Arkansas, to discount the note for the firm. Under the banking laws of Arkansas a bank is not permitted to loan in excess of 30 per cent. of its capital stock to any single borrower. The capital stock of the Miners' & Citizens' Bank was $20,000; it was therefore unlawful for it to discount the note. J. F. Carson, the cashier of the bank, however, agreed, upon his

next visit to Little Rock, to attempt to discount the paper for McCarty in some of the larger banks of that city. Early in October, 1917, he went to Little Rock and applied to the plaintiff to discount the note. After some inquiry as to the financial standing of the signers of the note, the plaintiff bank agreed to take the paper at its face value with accrued interest. It was then discovered that the note had not been indorsed by McCarty & Angel, and it was agreed between Carson and the officer of the plaintiff bank with whom the business was being conducted that Carson should take the note back with him, secure the indorsement of McCarty & Angel upon it, have the purchase price of the note placed to the credit of McCarty & Angel on the books of the Miners' & Citizens' Bank, and forward the note to the plaintiff at Little Rock; and it was agreed upon its receipt by the plaintiff the purchase price of the note would be placed to the credit of the Miners' & Citizens' Bank upon the books of the plaintiff bank. This program was carried out. The indorsement of McCarty & Angel was secured by Carson; the purchase price of the note was placed to their credit by the Miners' & Citizens' Bank on the 11th of October; the note was transmitted to the plaintiff bank at Little Rock and credit given by plaintiff to the Miners' & Citizens' Bank on October 15th. There was considerable correspondence between the plaintiff and the Miners' & Citizens' Bank in reference to the note. This correspondence was routine in form and referred to the note as if it had been purchased from the Miners' & Citizens' Bank. The defendants make this correspondence the basis for the contention that the note was purchased by the plaintiff from the Miners' & Citizens' Bank. They also claim that, in securing the indorsement of McCarty & Angel on the note by Carson and in crediting the account of McCarty & Angel with the purchase price of the note by the Miners' & Citizens' Bank, Carson and the bank were acting as agents of the plaintiff. They argue as a conclusion from these premises that the plaintiff is chargeable with notice of the defense set up in the answer of the defendants respecting the failure of McCarty to record the mortgage, in that they claim there is testimony tending to show that Carson, and through him the bank, had been informed of the agreement of McCarty to record the mortgage and knew that he had failed to do so.

[1] We have read the testimony in the record carefully and are unable to see any ground for these contentions of the defendants. The relation of the parties must be determined by the facts as they are shown to have existed at the time the note was purchased, and, as we view it the subsequent correspondence between the banks, relied upon by the defendants to prove their contentions, was of a routine character and without probative value when considered in connection with the undisputed evidence showing the situation of the parties at the time the note was purchased. Neither the Miners' & Citizens' Bank nor its cashier, Carson, was ever at any time in the course of this transaction the agent of the plaintiff. Indeed, we do not think that Carson was in the transaction representing his bank at all. He was acting in his individual capacity and was the agent of McCarty & Angel. His bank did not own the note; it could not legally acquire it. Carson

did not represent to the plaintiff that his bank owned the note, but, on the contrary, he expressly stated that his bank did not own and could not handle the note. The knowledge or information of Carson, whatever it may have been respecting this defense of the defendants, under the uncontradicted evidence in the case could not be imputed to the plaintiff, and this question should not have been submitted to the jury.

[2] On the other hand, the contention of the plaintiff that it became a purchaser for value when and as soon as the purchase price of the note had been credited on the books of the banks is not well taken. These were mere book transactions. The plaintiff bank became a purchaser for value only when and to the extent that the purchase price of the note was paid, directly or indirectly, to McCarty & Angel before notice to it of the defense of the defendants in error to the note. Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; Dresser v. Missouri, etc., R. R. Co., 93 U. S. 92, 23 L. Ed. 815; National Bank of Commerce v. Armbruster, 42 Okl. 656, 142 Pac. 393; Oppenheimer v. Radke & Co., 20 Cal. App. 518, 129 Pac. 798.

When, if at all, the plaintiff received such notice, or what sum, if any, had been paid on account of the note, we do not, upon the record before us, deem it proper to attempt at this time to determine.

[3] The record shows that the note sued upon was given after J. L. McCarty and the defendants in error, the directors of the company, had thoroughly discussed the false representations alleged to have been made by McCarty at the time of the purchase of the property in February, 1917. The outcome of this discussion was a compromise of the matter by which McCarty surrendered a block of the stock of the company and made other concessions to it, whereupon the company and the defendants in error executed the note in suit. Whatever fraudulent representations may have been made by McCarty at the time of the original transaction in February, were unquestionably waived by this compromise and settlement. The submission to the jury of the defense based upon the transaction with McCarty in February was error.

[4] In the progress of the trial there was testimony received tending to show that McCarty at the time of the settlement in May made certain other representations in respect to the value of the mining property which were false, and that defendants in error relied upon these representations in signing the note sued upon. No such issue is made in the answer of the defendants. This defense against the note was improperly injected into the case, and it was error for the court under the pleadings to submit it to the jury for their consideration.

[5] If the recording of the mortgage by McCarty was by express agreement between him and the defendants in error made a condition precedent to their liability upon the note, then his failure to record the mortgage, if he received it, constituted a good defense to the action. Rice v. Fidelity & Deposit Co., 103 Fed. 427, 43 C. C. A. 270.

[6] If there was no such agreement, it was nevertheless the duty of McCarty to record the mortgage, if he received it, if that was neces-

sary to prevent the loss of the lien upon the property covered by the mortgage. The loss of the lien of the mortgage through the negligence of McCarty in failing to record it, if he had it in his possession, would prevent a recovery on the note against the defendants in error to the extent that they were damaged, if, or to the extent that, the plaintiff was not a holder in due course. Evans v. Kister, 92 Fed. 828, 35 C. C. A. 28; Denny v. Seeley, 34 Or. 364, 55 Pac. 976; 32 Cyc. 216; Brandt on Suretyship (3d Ed.) § 480, vol. 1.

The other errors assigned do not require special notice.

As against the defendants in error the judgment is reversed, and the court below directed to grant a new trial.

Judge HOOK participated at the hearing of this cause, but died before a conclusion was reached and the opinion prepared.

CARTIER et al. v. DOYLE, U. S. Internal Revenue Collector.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1921.)

No. 3541.

Internal revenue ⇐7—Partnership held without "invested capital" for purposes of excess profits.

A partnership having a nominal capital, but with no money or property paid in as capital by the partners, and which conducted its business entirely on money borrowed from a bank on its notes indorsed by the partners, and further secured by collateral deposited by one of them, *held* to have no "invested capital" as defined in Act Oct. 3, 1917, § 207 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336¾h), and to be subject to excess profits tax at the rate of 8 per cent. of its net income under section 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336¾j).

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

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Action by Charles E. Cartier and Edward M. Holland, copartners as the Cartier-Holland Lumber Company, against Emanuel J. Doyle, Collector of Internal Revenue. Judgment for defendant (269 Fed. 647), and plaintiffs bring error. Reversed.

On the 20th day of May, 1912, Charles E. Cartier and Edward M. Holland, entered into a written contract of partnership for the purpose of manufacturing and dealing in forest products, including lumber, timber, ties, shingles, laths, etc., and also timbered, improved and cutover lands.

It was further agreed that the paid-in capital of the partnership should be $30,000, any portion or all of which amount should be furnished to the partnership by Charles E. Cartier, as the requirements of the partnership appear upon the note or notes of the partnership to be paid at the earliest practicable opportunity out of the net earnings of the partnership business, and to bear legal rate of interest.

It does not appear from the evidence that this partnership ever manufactured any forest products, but it did purchase lumber and kindred commod-

ities to fill current orders of its customers, but not for speculative purposes based upon rise and fall of the market. It kept no lumber yard and kept no lumber in stock, and the only lumber owned by it was lumber in transit from the mill from which it was purchased by the partnership, to the partnership's customers. In a few cases, however, where the lumber was rejected by the customer it was held by the partnership until it could be sold to another purchaser. In 1917 the partnership also negotiated sales for timber and secured an option on a large acreage of timber land in its own name, but in fact for William and Samuel Horner, who furnished the $1,000 necessary to be paid for this option and the additional $500 necessary to extend the option beyond the 60 days named therein.

For services in this transaction the partnership received $20,353, which is by far the largest single item in the aggregate of the net income of $47,018 earned by the partnership in 1917.

It further appears from the record that after the organization of the partnership, which was known as the Cartier-Holland Lumber Company, Cartier did furnish it some money and took its notes therefor, but in 1914 a new arrangement was entered into by which the partnership borrowed the money required in its business directly from the bank and executed its notes therefor. These notes were indorsed by both Cartier and Holland, and Cartier left upon deposit with the bank, as collateral to his indorsement of these notes, securities theretofore deposited by him when he borrowed the money in his own name and loaned it to the partnership. It was also further understood and agreed between the bank and the partnership, when these loans were negotiated, that if at any time the collateral deposited by Cartier seemed to the bank to be insufficient to cover his liability as indorser on the notes of the partnership, Holland would furnish further collateral security. This method of transacting the partnership business was continued until and during the year 1917, and in this way the partnership obtained all its capital, including the money required by it to discount its bills for lumber and other commodities purchased by it and sold to its customers.

It further appears that during the time the partnership was operated Cartier drew out of the partnership business $11,556.37, and Holland $18,106.28, which amounts were charged to them on the books of the partnership. If these amounts withdrawn by the partners are reckoned as assets of the partnership, then on January 1, 1917, there was a net surplus of assets over and above liabilities of $22,443.80; otherwise the liabilities of the partnership would exceed its assets by the sum of $7,218.85.

The partnership paid an excess profit tax of 8 per cent. of its net income of $47,018 for the year 1917 under the provisions of section 209 of title 2 of the act of October 3, 1917, amounting to $3,761.44. Later a supplemental return was requested by the Commissioner of Internal Revenue, who then notified the partnership that its claim for assessment based upon the provisions of section 209 of the Excess Profits Tax Law had been disallowed, and that the tax had been computed and assessed against it under sections 201 and 210 and articles 18, 24 and 52 of Regulation No. 41.

This tax, based upon an estimated capital of $118,515.85, amounted to $12,788.90, or a balance over the amount already paid of $9,027.46 which additional tax was paid under protest. Later the partnership brought an action in the District Court of the United States for the Western District of Michigan, Southern Division, to recover the additional tax levied and demanded by the Internal Revenue Commissioner and paid by it under protest.

The parties having expressly waived a jury, the cause was submitted to the District Court upon the pleadings and the evidence, resulting in judgment for the defendant. Findings of fact were submitted by the plaintiff and defendant, but the court refused to adopt these findings or either of them, and ordered that its opinion should constitute its findings of fact and conclusion of law, to which findings, conclusion, and judgment exceptions were taken by the plaintiff in error.

Julius H. Amberg, of Grand Rapids, Mich. (Willard F. Keeney, Roger C. Butterfield, and Julius H. Amberg, all of Grand Rapids, Mich., on the brief), for plaintiffs in error.

Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., and H. M. Darling, Bureau of Internal Revenue, of Washington, D. C. (Carl A. Mapes, Solicitor of Internal Revenue, of Washington, D. C., and Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). The only question presented by this record is whether or not the partnership of Cartier-Holland Lumber Company during the year 1917 had an invested capital within the meaning of sections 201, 207, and 210 of title 2 of the act of Congress approved October 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336⅜b, 6336⅜h, 6336⅜k).

If this question were to be determined separate and apart from the act levying this excess profit tax, then it would be of easy solution. Money invested in a partnership business, whether paid in by the partners or borrowed from a partner or a bank, in the absence of legislation to the contrary, would constitute invested capital in the ordinary meaning and acceptation of that term. Congress, however, evidently for the purpose of protecting the government from claims of inflated capitalization, thought it wise and necessary to define the term "invested capital," which is made the basis of the computation of the tax to be levied under the authority conferred by this act. To that end section 207 provided, among other things, the following:

"As used in this title 'invested capital' does not include stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to the tax imposed by this title nor money or other property borrowed, and means, subject to the above limitations:

"(a) In the case of a corporation or partnership: (1) Actual cash paid in, (2) the actual cash value of tangible property paid in other than cash, for stock or shares in such corporation or partnership, at the time of such payment (but in case such tangible property was paid in prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen, but in no case to exceed the par value of the original stock or shares specifically issued therefor), and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year. * * *"

In the construction of the act of Congress of which this definition is a part, this legislative definition of the term "invested capital" must be accepted as final and conclusive, regardless of any preconceived notion the public generally, or this court, may have as to the meaning of that term.

In the construction of this statute it must also be remembered that it is the settled rule not to extend the provisions of taxing statutes by implication, or to enlarge their operation, so as to embrace matters not specifically covered thereby. Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211.

The trial court based its judgment for the defendant upon the conclusion of law that the collateral deposited by Cartier as security for his liability as an indorser of the partnership notes became a part of the working capital and was used and employed in the business of the company to the same extent as if it had been paid directly into the partnership funds.

This conclusion of law is not supported by the facts found by the court or by any evidence in this record. The articles of copartnership provide that the paid-in capital of the partnership is to be $30,000, any or all portions of which amount are to be furnished to the partnership, upon notes signed by it, and to be paid at the earliest practicable opportunity out of the net earnings of the partnership.

It would seem unnecessary to say that a private contract between these parties would not change or affect in the slightest degree the plain and positive terms of the statute, declaring what shall be included and what shall not be included as "invested capital," for the purpose of this tax. If the articles of copartnership had provided that the paid-in capital of the partnership should be $30,000, one-third of which should be paid in cash or in property by the partners, and $20,000 to be borrowed from a bank upon the notes of the partnership, indorsed by the partners, and further secured by the deposit of such collateral as the bank might demand, the money borrowed in pursuance of such partnership agreement, fixing the total capital of the partnership at $30,000, would necessarily be rejected as invested capital in the computation of surplus income taxes levied under this act. It logically follows that if, under this statutory definition of invested capital, money borrowed could not be included as capital where some substantial amount of cash had actually been paid into the partnership fund by the partners, such borrowed money cannot be reckoned as invested capital where the partners contributed neither cash nor property to the partnership capital.

The original plan of operation written in the partnership agreement was abandoned as early as 1914, and thereafter the money used in the partnership business was borrowed directly from the bank upon the notes of the partnership, payable unconditionally and at certain fixed times, regardless of net earnings or any other contingency. While these notes were indorsed by the individual partners, nevertheless the money was borrowed by the partnership for partnership purposes, and it was primarily liable for the payment of these notes. Collateral held by the bank, a stranger to the partnership, whether the property of one or of both partners, was a mere incident to the loan, and can in no wise affect the character of the transaction.

It is therefore wholly unnecessary to determine whether under the original agreement the money to be furnished by Cartier, to be repaid out of the partnership earnings, would or would not be borrowed money within the meaning of this act. Nor is it important at whose suggestion this plan of operation was changed and the new plan adopted. It is sufficient for the purposes of this opinion to determine the legal effect of these transactions as they occurred during the taxing period of 1917. The evidence in relation to these transactions permits of no con-

clusion other than that the money borrowed from the bank upon the notes of the partnership was "borrowed money," within the meaning of section 207 of the act of Congress approved October 3, 1917.

The clear, positive, and unambiguous language of section 207 of this act is not subject to any other construction, regardless of the exigencies of any particular case. First it provides that borrowed money or other property shall not be included in the term "invested capital" as used in that title. Paragraph A of that section then specifically states what shall be included in determining the "invested capital" of a corporation or partnership as follows: "(1) Actual cash paid in." There is no claim made by the government that there was any "actual cash paid in" to the partnership funds other than the money borrowed from the bank on the notes of the partnership, indorsed by the partners, the indorsement of Cartier being secured by collateral deposited by him. "(2) The actual cash value of tangible property paid in other than cash for stock or shares in such corporation or partnership." In this case there was no tangible property paid in by either partner for the purpose named or for any other purpose. The collateral deposited by Cartier could not upon any reasonable hypothesis be held to be "tangible property paid in" to the partnership. It was not deposited with, transferred, or assigned to the partnership, and the partnership never acquired any right, title, or property interest therein, legal or equitable. This collateral was deposited with the bank as part of the loan transaction. Cartier never parted with the title or ownership therein. The bank held it, not as owner, but as pledgee merely. "(3) Paid-in or earned surplus and undivided profits used or employed in the business exclusive of undivided profits earned during the taxable year."

Whether this partnership used or employed in its business paid-in or earned surplus and undivided profits exclusive of undivided profits earned during the taxable year is a question of fact. The trial court found as a fact that at the beginning of the taxable year the liability of the firm exceeded its assets by the sum of $7,218.85. This court has no authority to determine the weight of the evidence. R. S. §§ 649 and 1011 (Comp. St. §§ 1587, 1672). If the finding of fact made by the trial court is sustained by some substantial evidence, then it must be accepted by this court as a final determination of the facts in issue.

There is practically no dispute in the evidence upon which the trial court made this finding of fact. It had been the custom of each partner, with the consent of the other, practically from the time the partnership was organized, to withdraw earnings of the partnership in advance of the ascertainment of the exact profits and a formal division of the same. These withdrawals were charged against the partners respectively on the partnership books of account, and whenever there was a formal division of the profits the amount due to each partner was credited to his account as against amounts that were withdrawn by him. On the 1st day of January, 1917, it appeared that Cartier had withdrawn in the aggregate, during the life of the partnership, the sum of $11,556.37, in excess of all sums credited to him. Holland had also withdrawn $18,106.28 in excess of his credits. The evidence further shows that these withdrawals were made in anticipation of a distribu-

tion of the profits, to be credited to them as against these withdrawals, that would finally balance their accounts. That this was the purpose and understanding of the partners fully appears by their testimony, and particularly the testimony of Holland, as follows:

"The Court: It would be liquidated by dividends you declared? A. Eventually.

"The Court: And credited yourself with? A. Yes."

In the absence of an express agreement to the contrary, the partnership could not require a partner to return to it his share of the actual profits anticipated by these withdrawals. The strongest inference which anything in this record would justify as to the duties of the partners to each other to repay these items charged against them is that each should repay the amount he had withdrawn in excess of his share of the profits. This would mean in the aggregate $7,218.85, just enough to pay the general debts and leave no surplus. In any event these profits were drawn by the partners and were not used in the partnership business. The claim that they were used in the partnership business as bills receivable, so they would furnish a basis of credit, is not tenable. These partners were the sole owners of the partnership business and in full control of its affairs; they were each individually liable for all the debts of the partnership, so that whether they were liable to the partnership for the full amount of these withdrawals, regardless of profits, could in no wise affect the security of creditors for the payment of their debts.

It would therefore appear that this finding of the trial court is fully sustained by substantial evidence.

Section 9 of this act provides that in the case of a trade or business having no invested capital (and, of course, that means invested capital within the meaning of the act), or not more than a nominal capital, there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section 201, a tax equivalent to 8 per cent. of the net income. This section of the act would appear to have been intended to cover just such conditions as are here presented.

For the reasons above stated, this judgment must be reversed, and the cause remanded for a new trial in accordance with this opinion.

GRAY COUNTY, TEX., v. HAMER.*

(Circuit Court of Appeals, Fifth Circuit. December 13, 1921.)

No. 3665.

1. Highways ⊂=113(4)—County held without authority to pay more than the contract price for work done.

The commissioners' court of a Texas county entered into a contract with defendant to do certain road work in accordance with specifications, for which the county agreed to pay $15,000, as the "contract price." *Held* that, where no more work was done than that provided for in the contract, the court was without power to afterward allow a further sum in pay-

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 317, 66 L. Ed. —.

ment therefor, under article 3, § 53, of the state Constitution, which provides that no county shall be authorized "to grant * * * any extra compensation * * * to a contractor after * * * a contract has been entered into, and performed in whole or in part."

2. Judgment ⊜521—Suit to restrain enforcement held direct attack on judgment.

A suit commenced in a state district court of Texas to restrain enforcement of an order of a county commissioners' court allowing a claim in favor of defendant, and directing issuance of warrants in payment hereof, which order, under the state decisions, constitutes a judgment, *held* a direct and not a collateral attack on the order, and properly brought; the district court being given general supervisory control over commissioners' courts by Const. Tex. art. 5, § 8.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Suit in equity by the County of Gray, State of Texas, against J. F. Hamer. Decree for defendant, and complainant appeals. Affirmed in part and reversed in part.

A. M. Mood, of Amarillo, Tex., for appellant.

W. H. Kimbrough, of Dallas, Tex., and R. E. Underwood and M. J. R. Jackson, both of Amarillo, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellant, a county in Texas, filed its original petition in the state district court. The suit was removed to the United States District Court by appellee, who is a citizen of a state other than Texas.

The amended petition seeks to cancel a series of county warrants, aggregating $15,000, which theretofore had been delivered to appellee, and also to vacate and set aside an order of the county commissioners' court requiring the issuance and delivery to appellee of another series of warrants aggregating $10,000, but which had not been issued or delivered.

June 18, 1917, in pursuance of an order of the county commissioners' court to that effect, a contract was entered into between the county and appellee providing for the construction and repair by appellee of certain county roads and bridges, for the principal sum of $15,000, to be represented by county warrants. The contract contained the following provisions:

"And the said county hereby promises and agrees with the said contractor to employ him, and does employ him, to provide the materials and do said work according to terms and conditions herein contained and referred to for the agreed price, and hereby contracts to pay the same at the time and in the manner and upon the conditions herein set forth. And other specifications as may be necessary to detail and illustrate the work to be done shall be furnished by the engineer, but the same shall be within the meaning of and consistent with this contract. The decision of the engineer, who shall be employed by the county, shall control as to the interpretation of the specifications during the execution of the work thereunder, but this shall not deprive the contractor of his right to redress, if required to do work or furnish materials by the county or engineer not mentioned in the specifications or

in this contract, and in such case the contractor shall be entitled to a reasonable value for such extra material furnished and labor performed.

"It is hereby agreed and understood that all agreements and statements, provisos, and representations made by the county to the contractor, or representatives of either, have been reduced to writing, and signed, by both parties. All agreements, statements, promises, and representations by the above parties, that have not been reduced to writing and signed, are hereby rejected, and by this agreement canceled, and are to have no consideration under this contract. Said county has and does hereby agree and provide to pay the contractor for the building, construction, and repairing of said roads and bridges the principal sum and contract price of fifteen thousand ($15,000.00)," etc.

July 9, 1917, the county commissioners' court entered an order, approving and ratifying its previous order of June 18, 1917, and, September 11, 1917, approved an estimate of $15,147.35 for the work required under the contract. December 10, 1917, the county commissioners' court entered up another order, which contains the following recitals:

"Whereas, at a regular term of this court, held on the 9th day of July, A. D. 1917, an order was passed approving a certain contract between Hamer and Hamilton, and Gray county, on the 18th day of June, A. D. 1917, providing for certain road construction and improvements in said county and containing a unit scale of prices for said work; and

"Whereas, the total amount of work done under said contract, by the said Hamer and Hamilton, and by J. F. Hamer, successor to said partnership, amounted in the aggregate to the sum of twenty-five thousand dollars ($25,000.00); and

"Whereas, 1917 time warrant road and bridge warrants aggregating the sum of fifteen thousand dollars have been issued and delivered to the said Hamer and Hamilton, leaving a balance yet due to the said J. F. Hamer, on said contract, amounting to the sum of ten thousand dollars ($10,000.00): and

"Whereas, the following order should have been entered at said July term, A. D. 1917, of this court:

"It is therefore ordered, adjudged, and decreed by the court that same may now be entered on the minutes of this court, nunc pro tunc, as of July 9, A. D. 1917."

The foregoing recitals are followed by a purported modification of the original contract, so as to include an obligation on the part of the county to pay an additional sum of $10,000. The order contained, among other things, the following:

"It is further ordered that, in accordance with said contract, warrants of Gray county, to be called 'Gray County Road Warrants, Second Series' [to] be issued in the sum of ten thousand dollars ($10,000.00), evidencing the contract price to be paid to the said J. F. Hamer, contractor, by said county for the construction of roads and culverts in and for Gray county, according to said contract and the specifications which are made a part of said contract. Said warrants shall be numbered from 1 to 10 inclusive, and shall be of the denomination of $1,000, each, aggregating the sum of $10,000."

Forms were prescribed for two series of warrants, one for $15,000, and the other for $10,000. The petition averred that the amount of the first series was excessive, and relief was prayed on that account. The petition further averred that the original contract contemplated the expenditure of only $15,000, and was discharged by the issuance of warrants for that amount; that the order for the issuance of the ad-

ditional warrants in the amount of $10,000 was void, as being without consideration, and also because the county commissioners' court was without authority of law to make it.

The answer of appellee averred that the county commissioners' court and appellee fixed the contract price for the road work at $15,000—

"thinking that the same would be sufficient to cover the work contemplated; but, upon completing part of said work to the amount of $15,000, it was found that said issue of warrants to the amount of $15,000 would not complete all of the work plaintiff county was desirous of having defendant do under the terms of said contract, and that said county and the defendant agreed to an extension of said contract to include an additional amount of work and material in the sum of $10,000, in order to complete the work on said road which plaintiff desired to have done in connection with the work previously contracted to defendant," etc.

The road upon which the work was done lies wholly within one county commissioner's district. The member from that district testified that, while he believed the work on the road would cost more than $15,000, he did not express that belief to the other commissioners until the September meeting. All the other commissioners testified that they were not informed that any amount in excess of $15,000 was claimed by the contractor until the entry of the order of December 10, 1917.

After the taking of evidence the District Court denied the relief prayed, and dismissed appellant's petition.

While there was some evidence tending to show that the work was not of the value of even $15,000, we are of opinion that the evidence on the whole was sufficient to sustain a finding to the effect that the contract was valid to the extent of $15,000. But, as we construe the contract originally entered into, the county did not obligate itself to pay more than that sum. That amount is spoken of as "the contract price," and the contract contemplates the payment in installments and by warrants of that amount. Specifications of the work contracted for were recited to have been submitted with the contract, although the testimony discloses that this was not done.

[1] The provision of the contract to the effect that the decision of the engineer should control as to the interpretation of the specifications, but that this should not deprive the contractor of his right to be paid for extra material and labor, did not have the effect of authorizing payments under an additional contract. It is not anywhere contended that the contractor was required to do work or furnish materials not provided for in the original contract. The contractor was not entitled to payments in excess of the contract price merely because the work might cost more than the amount contracted to be paid.

At its session in 1917, the Legislature of Texas enacted a statute which provides that a county commissioners' court should make no contract requiring the expenditure or payment of $2,000 or more out of any county funds without first submitting such proposed contract to competitive bids, and that a contract not complying with the terms of the statute should be void and not enforceable in any court. Vernon's Ann. Civ. St. Supp. 1918, arts. 2268a and 2268b. This statute

became effective on June 19, 1917, 90 days after the adjournment of the Legislature on March 21, 1917. It therefore appears that the contract between the county and appellee would have been invalid, because not submitted to competitive bids, if its execution had been postponed for a single day. The regular meeting day of the county commissioners for June, according to the testimony, had passed, and it was no doubt for that reason that it was considered advisable to have a ratifying order entered up at the regular meeting in July. Every member of the county commissioners' court, save the one in whose district the road work was contracted to be done, dispelled in unmistakable language the idea that a contract for the additional amount of $10,000, or for any amount in addition to that expressed in the contract, was in the contemplation of the parties.

The estimate filed by the engineers at the September meeting and appellee's answer are likewise contradictory of the contention now made that the original contract was intended to authorize an additional obligation. The extra compensation claimed is prohibited by section 53 of article 3 of the Texas Constitution, which is as follows:

"The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer. agent, servant or contractor after service has been rendered or a contract has been entered into, and performed in whole or in part, nor pay, nor authorize the payment of, any claim created against any county or municipality of the state, under any agreement or contract, made without authority of law."

The facts were not as stated in the so-called nunc pro tunc order of December 10, 1917. No additional amount had been authorized prior to the effective date of the statute of 1917. That order was devised to create an obligation which did not exist.

[2] But it is contended by appellee that this order constitutes a judgment, and that appears to be true. It is furthermore asserted that this judgment cannot be attacked collaterally. We concede that also to be the holding of the Texas decisions. The question remains, however, whether this suit is a collateral attack. We are of opinion that it is not, but that it is a direct attack and was properly made in the state district court, where the suit was originally brought by the appellant county. The Constitution of Texas provides (section 8, art. 5):

"The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Without again reviewing the authorities, we content ourselves with a reference to the case of Powell, Garard & Co. v. Erath County (C. C. A.) 274 Fed. 305. Under the Texas decisions, giving the effect of judgments to orders of county commissioners' courts, if suit were brought by appellee against the county, the defense by the county that the additional amount of $10,000 here involved was not collectible against it, because void under the Constitution and statutes of

Texas, would be unavailing; for in defense of such a suit the county would be making a collateral attack. We are of opinion, therefore, that the county had no other adequate remedy, and that this suit is well brought.

The decree is affirmed in so far as it denied the prayer of the petition to cancel the issue of warrants in the amount of $15,000, and is reversed in so far as it refused to cancel the order for the second series of warrants in the amount of $10,000, the costs to be equally divided between the parties, and the cause is remanded for further proceedings not inconsistent with this opinion.

SCHRADER et al. v. PARKER.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1921.)

No. 5737.

1. **Wills ⇐246—Under statute, courts of Kansas without jurisdiction to determine validity of foreign probated will.**

   Under Gen. St. Kan. 1915, § 11807, providing that no proceedings shall be had in the state to contest a will which is executed and proved according to the law of the state of domicile of the testator, a decree of a Kansas court declaring invalid a will executed by a testator domiciled in Missouri *held* void for want of jurisdiction over the subject-matter.

2. **Wills ⇐733(6, 7)—Devisee under foreign will acquires no title to land in Kansas until copy of will is recorded.**

   Under Gen. St. Kan. 1915, §§ 11779, 11784, providing for the admission to record in that state of authenticated copies of wills executed and proved according to the laws of another state, and that no will is effectual to pass title to real or personal estate until admitted to probate or recorded as therein provided, a devisee of land in Kansas by the will of a testatrix domiciled in Missouri, prior to the proving of such will and the admission of a copy to record by the probate court in Kansas *held* to have no title which could be asserted or determined in an action in ejectment in Kansas.

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

Action at law by John W. Parker against A. L. Schrader and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. R. Morrison, of Kansas City, Mo. (G. W. Hurd, of Abilene, Kan., and L. Newton Wylder, of Kansas City, Mo., on the brief), for plaintiffs in error.

Henry S. Conrad, of Kansas City, Mo., for defendant in error.

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

MUNGER, District Judge. The question presented in this case is the effect of a prior judgment as a bar to this action. The action is in ejectment, and judgment was entered for the plaintiff. A jury was waived, and special findings of facts and law were made by the court.

No challenge is made of the findings of fact, and the assignments of error relied upon charge that the judgment is not supported by the findings. The essential facts are few:

The parties claim title to land in Dickinson county, Kan., from a common source in Fanny S. Hallam. Mrs. Hallam on July 4, 1916, executed a will by which she devised the land in question to John W. Parker, the plaintiff below. The next day, July 5, she executed a deed to Parker for the same land. Mrs. Hallam died on August 3, at Kansas City, Mo., and on August 8 her will was admitted to probate there. On August 10 the heirs at law of Mrs. Hallam began suit against Parker in the district court of Dickinson county seeking to cancel the deed made to him by Mrs. Hallam. Parker filed his answer November 20, and plaintiffs replied thereto, and some time after March 12, 1917, a decree was entered for the plaintiff, canceling the deed to Parker. An appeal to the state Supreme Court was dismissed for lack of prosecution and the decree became final. In the meantime, on January 27, 1917, Parker filed in the probate court of Dickinson county an authenticated copy of the will of Mrs. Hallam and of its probate in Missouri and petitioned to have it admitted to record in the probate court of Dickinson county. A protest against this allowance was filed by one of the heirs, but on August 12, 1918, the will was admitted to record by the probate court of Dickinson county, and this order had also become final. On July 2, 1918, the heirs at law conveyed the land to the defendant Schrader.

This suit in ejectment was begun by Parker against Schrader in November, 1918. Parker claims title by reason of the will of Mrs. Hallam and its admission to record in the probate court of Dickinson county. The claim of Schrader is that the decree of the district court of Dickinson county is an adjudication that Parker had no estate, legal or equitable, in the land. In the petition in that suit the plaintiffs not only prayed for the cancellation of the deed, but they alleged that Mrs. Hallam left no valid will, that she was mentally incompetent to transact business, manage her affairs, or to make a conveyance on July 5, 1916, and for a long period before, and also prayed judgment for possession of the land and for equitable relief. The answer of Parker alleged the execution of the will by Mrs. Hallam, its admission to probate by the probate court in Missouri, and claimed a conveyance to him thereby of the land in Dickinson county. The reply again alleged the mental incompetency of Mrs. Hallam to execute the will. The decree found that Mrs. Hallam was incapable of managing her affairs on July 4 and 5, 1916, or of making the deed to Parker and that all allegations in the petition were true. The order was that the deed be canceled and that the plaintiffs recover possession of the land. It is indisputable that the decree in the state court concluded all defenses which were made or which properly might have been made by Parker in that suit. Did that court have jurisdiction to decide the question of the validity of the will? It is a matter that depends upon statutory law, and the portions of the General Statutes of Kansas (1915) which are controlling read as follows:

"Sec. 11779.—Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative to any property in this state, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in this state in conformity with the laws thereof."

"Sec. 11781. A copy of the will and probate thereof, duly authenticated, shall be produced by the executor or by any person interested therein, to the probate court of the county in which there is any estate upon which the will may operate, whereupon said court shall continue the motion to admit such will to probate for the term of two months; and notice of the filing of such application shall be given to all persons interested, in some public newspaper printed or in general circulation in the county where such motion is made, at least three weeks consecutively, the first publication to be at least forty days before the time set for the final hearing of the motion.

"Sec. 11782. If on hearing it shall appear to the court that the instrument ought to be allowed in this state, the court shall order the copy to be filed and recorded, and the will and the probate and record thereof shall then have the same force and effect as if the will had been originally proved and allowed in the same court in the usual manner."

"Sec. 11784. No will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or recorded as provided in this act."

"Sec. 11807. No proceedings shall be had in this state to contest a will executed and proven according to the law of any state or territory of the United States or of any foreign country relative to property in this state; but if the said will shall be set aside in the state, territory, or country in which it is executed and proved, the same shall be held of no validity in this state as to all persons claiming under said will with notice of the same being set aside as aforesaid, and as to all other persons, from the time that an authenticated copy of the final order or decree setting the same aside is filed in the office of the probate judge of the county in which said will is recorded."

"Sec. 11806. The title of any purchaser in good faith, without knowledge of a will, to any land situated in this state, derived from the heirs of any person not a resident of this state at the time of his or her death, shall not be defeated by the production of the will of such decedent unless such will shall be offered for record in the state within two years from the final probate and establishment of such will in the state or territory in which it may have been admitted to probate: Provided, that the rights of persons under legal disability shall not be concluded by any delay or failure to record such will in this state until one year after their respective disabilities are removed."

[1, 2] By the provisions of section 11807, jurisdiction is denied to any court of Kansas to contest a will which is executed and proved according to the law of the state of domicile of the testator. So far as the decree of the state court sought to invalidate the will of Mrs. Hallam for lack of testamentary capacity, its power was therefore exerted without authority or jurisdiction over the subject-matter. The plaintiff in error contends that, even if the state court had no power to contest the will, that it had the power to confirm it, by declaring that the execution of the will and its probate in Missouri conferred an equitable title on Parker to this land, a right to have the legal title transferred to him, and that his failure to assert this equitable title bars his recovery in this action. Was Parker then possessed of any equitable title in the land? The plaintiff in error asserts that because of the death of Mrs. Hallam, her will, and its probate in Missouri, an interest in the land was conveyed to Parker, which conferred upon

him an equitable estate, which he could have set up as a defense in the suit in the state court. Under the established law of Kansas ejectment may be maintained in a state court upon a paramount equitable title, and proof of such title may be made although the petition alleges a legal title. Pope v. Nichols, 61 Kan. 230, 59 Pac. 257; Jones v. Hollister, 51 Kan. 310, 32 Pac. 1115; Riggs v. Anderson, 47 Kan. 66, 27 Pac. 112; Atchison, T. & S. F. R. Co. v. Pracht, 30 Kan. 66, 1 Pac. 319; Simpson v. Boring, 16 Kan. 248; Kansas Pac. R. Co. v. McBratney, 12 Kan. 9; 19 Corp. Jur. 1059.

In the case of Henderson v. Belden, 78 Kan. 121, 95 Pac. 1055, it was decided that a petition in ejectment was demurrable which based a right of recovery on an allegation that land in Kansas was devised to plaintiff by a will, which had been admitted to probate in another state, but which failed to allege that any record of such probate had been made in Kansas, and the decision is based upon sections 11779 and 11784 of the Kansas Statutes which have been quoted, and which provide for the admission to record in Kansas of authenticated copies of wills executed and proved according to the laws of other states and that no will is effectual to pass real or personal estate, unless it has been so admitted to probate or recorded in the proper probate court of Kansas. It has been shown that ejectment could there be maintained upon an equitable title, and this decision therefore necessarily determines that the devisee under such an unrecorded will did not have an equitable title, and therefore Parker did not have an equitable title which the court could determine in the suit in which the state court rendered the decree against him. When Parker procured the admission of the will to record in Dickinson county, after the entry of the decree by the state court, he acquired a title, assertible only from that time, which was in effect an after-acquired title not in existence at the time of the trial and decree in that suit and one which may be the basis of recovery in this action of ejectment, notwithstanding the decree in the state court and notwithstanding the attempt to make the same issues in the pleadings in that suit and the findings of that court upon such issues. Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Landon v. Clark, 221 Fed. 841, 137 C. C. A. 399; Mitchell v. Insley, 33 Kan. 654, 7 Pac. 201; State v. City of Leavenworth, 75 Kan. 787, 90 Pac. 237; Hentig v. Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91.

The judgment will be affirmed.

THE NIELS NIELSEN.

THE SPICA.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 6.

1. **Salvage ⟸26—Elements to be considered in determining compensation of salvors stated.**
   The amount of salvage is to be determined by considering salvors' labor expended, the promptitude, skill, and energy displayed in saving the property, the value of the property employed by salvors, the danger to which it was exposed, the risk incurred in securing the property from the impending peril, the value of the property saved, and the degree of danger from which it was rescued.

2. **Salvage ⟸51—Award of District Court will be interfered with for abuse of discretion, where extravagantly excessive.**
   The Circuit Court of Appeals may reduce or increase salvage awards of the District Court; but, as such awards are matters of discretion, they will not be interfered with, unless the amount awarded indicates abuse of discretion.

3. **Salvage ⟸29—$25,000 salvage compensation to tows assisting vessel to shift position held excessive in a harbor case, and reduced to $10,000.**
   Where two vessels, valued at $1,000,000 and $400,000, respectively, and a loss to the former of $10,135 and to the latter of $6,391 was caused by the larger dragging her anchor, and two tugs, valued at $40,000 and $60,000, assisted the larger to shift position, and the labor was not great, and occupied not to exceed two hours, the tugs responding with promptitude and displaying commendable energy, but the situation not calling for unusual skill and involving no great risk, and no great danger arose from weather conditions, and the work was in harbor where tugs were numerous, *held*, that an award of $25,000 is excessive, where the ordinary charge for the use of such tugs is from $15 to $20 an hour, and the award gave them each more than $6,000 an hour, and the captains recovered $1,500 each, which is assumed to be above six months' pay, for two hours of work, and the owners received between them $15,000, *held*, that the award should be reduced to $10,000 as ample compensation.

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

Libels by the Moran Towing & Transportation Company against the steamship Niels Nielsen, her engines, etc., in which the Dampskieselskabet Niels Nielsen was claimant, and by the Hudson Towboat Company, etc., against the steamship Niels Nielsen, her engines, etc., in which the Dampskieselskabet Niels Nielsen was claimant, and by the Moran Towing & Transportation Company against the bark Spica, her tackle, etc., in which the Societa Arratori Riuniti Liguri Lombardi was claimant, and by the Hudson Towboat Company, etc., against the bark Spica, her tackle, etc., in which the Societa Arratori Riuniti Liguri Lombardi was claimant. The libelants obtained decrees, and the claimants appeal. Decrees modified, and causes remanded, with directions to enter a decree for the libelants in the sum of $10,000, with costs of this appeal to the appellants, with interest from the date of the former decree.

Haight, Smith, Griffin & Deming, of New York City (John W. Griffin, of New York City, of counsel), for appellants.

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

Before ROGERS, MANTON, and MACK, Circuit Judges.

ROGERS, Circuit Judge. These are causes of salvage, and the question presented is the same in each. It is whether the award for salvage services made by a decree entered in the above-entitled actions on August 5, 1920, was so excessive as to require its modification by this court.

It appears that on March 27, 1919, the steamship Niels Nielsen was lying in the New York Harbor at the Bay Ridge anchorage. The anchorage ground being very congested, the steamship shortly after midnight shifted her position and anchored about three-quarters of a mile from Robins Reef Light. Astern and to the southeastward of the steamship were the barks Tana and Spica. During the early morning of March 28th the Niels Nielsen dragged her anchors, and at about 6 o'clock it became necessary to shift her position to keep clear of the barks. After the port anchor had been hove in, and while heaving in on the starboard anchor, the wind swung the vessel to starboard, and while maneuvering to avoid collision with the bark Tana the Niels Nielsen went astern and came into collision with the head rigging of the bark Spica. The starboard anchor was let go during this maneuver, and when the Niels Nielsen fetched up she lay between the two barks in such position that it was unwise for her to attempt to shift without assistance, and the chief officer who was in charge signaled for tugboats.

At that time a strong northwest wind was blowing and the bay was rough. The report of the Weather Bureau shows that between 5 a. m. and 6 a. m. the wind was blowing from the northwest at an average velocity of 29 miles an hour and with a maximum of 36 miles. In response to the steamship's call for assistance, and about 9 a. m., the tugs Catherine M. Moran and Hudson came alongside, and under the direction of the chief officer of the Niels Nielsen took lines from the steamship in order to haul her clear of the two barks. One of the tugs hauled the steamer's bow up into the wind, the steamer at the same time heaving in on her starboard anchor. The other tug meanwhile took a line off the steamer's stern in order to help keep the steamer's stern clear of the bark Spica. While in this position the forward tug parted the towing line and the Niels Nielsen's bow swung into the bark Tana. A second line and a third line, which were passed out, were also parted; but in the meantime the Niels Nielsen's anchor was hove clear of the ground, and when the third line parted the chief officer immediately ordered the engines full speed ahead, and with the wheel hard aport succeeded in clearing the Tana, and thereafter under her own steam, but accompanied by the tugs, which, however, rendered no further assistance, the Niels Nielsen proceeded to an anchorage a short distance away and anchored at 11 a. m. with 90 fathoms on her starboard anchor and 105 fathoms on her port anchor.

The service rendered by the tugboats covered a period of two hours, from 9 a. m. to 11 a. m. The records of the Weather Bureau show that between 9 a. m. and 10 a. m. the average wind velocity was 30 miles and the maximum 33, and that between 10 a. m. and 11 a. m. the average velocity was 41 miles, and the maximum 50 miles. The official in charge of the Bureau testified that, considering the time of the year, there was nothing extraordinary or unusual in these velocities. He also testified that wind within 50 feet of the water only had a velocity of about two-thirds of what it attained on the Whitehall Building, which is about 450 feet above the water level. In the afternoon and evening of the 28th the storm increased and became severe, the wind attaining an extreme velocity of 105 miles an hour; but during the forenoon of the 28th, and when the tugs rendered the services for which the award was made, we must conclude that there was nothing unusual in the weather conditions.

At the time these causes were heard in the court below the parties stipulated and agreed as follows:

"It is stipulated and agreed that for the purpose of this record the value of the ship Niels Nielsen shall be fixed at $1,000,000, that the value of the bark Spica shall be fixed at $400,000, that the value of the tug Catherine Moran shall be fixed at $40,000, and that the value of the Hudson shall be fixed at $60,000. It is stipulated and agreed that the Spica was damaged, at or prior to the time of her being rescued by the tugs, to the extent of $6,391, and that the owners of the Niels Nielsen settled that claim with the owners of the Spica for $5,200, and in addition assumed any liability that the Spica might have for salvage services rendered by the tugs. It is also stipulated and agreed that the Niels Nielsen, at or before the time the services were rendered, was damaged to the extent of $10,135."

The testimony shows, what the libel itself alleges, that the tugs worked under the direction of the steamship's officer. They acted, in fact, as the assistants of the mate of the steamship and in accordance with his orders. The captain and the pilot had left the steamship on the morning of March 27th, and at the time the services were rendered the ship was in charge of the mate, who continued in command during that day and the next. During the whole of the maneuvering he gave the orders to the tugboats as to what they were to do. The following is an excerpt from his testimony:

"Q. Did anybody from either of the tugs get on your bridge and direct the handling of your anchor? A. No.

"Q. At any time? A. Not so far as I know about it; no; did not.

"Q. Did anybody on the tugs, either while on your vessel or on their own vessels, give you any orders or directions to go ahead full speed? A. No; no; no directions at all, I received from none of them."

[1] Where a ship or her cargo has been saved from impending peril by the sea or other navigable water, the persons by whose assistance it has been achieved are entitled to compensation or salvage. In determining the amount of the salvage to be awarded, there are certain circumstances by which the courts are usually guided. In The Blackwall, 10 Wall. 1, 14, 19 L. Ed. 870, the Supreme Court stated them to be:

"(1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued."

The court in that case also took occasion to point out that compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit, or as a remuneration pro opere et labore, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

[2] In the Kanawha, 254 Fed. 762, 166 C. C. A. 208, decided by this court in 1918, we declared that there could be no doubt whatever of our right either to reduce or increase salvage awards of the District Court. We also said that, as such awards are matters of discretion, our practice has been not to do so, even if we disagree with the District Judge as to the amount of an award, unless it be such as to indicate an abuse of discretion. We have no disposition to depart from the doctrine as thus stated and which has governed our decisions both prior to and since the Kanawha Case. We have been compelled, however, recently in several cases to reduce salvage awards, believing that they were so much in excess of what under the circumstances seemed reasonable as to leave us no other alternative. See The George W. Elzey, 250 Fed. 602, 162 C. C. A. 618; The High Cliff, 271 Fed. 202. Both of these cases came from the Eastern District of New York, from which the case now under consideration also comes. We think that an exaggerated idea of the scale on which salvage awards are rendered exists, not only on the part of tugboat captains and owners, but on the part of some of the judges themselves. The compensation for such work should be fair and liberal, but not extravagantly excessive.

[3] The labor expended by the salvors in this case was not great and occupied not to exceed two hours. The tugs responded with all promptitude to the call for their assistance, and they displayed commendable energy in the service they rendered. The situation does not appear to have been one which called for any unusual skill, but, as already stated, the salvors acted under the orders of the officer in charge of the steamship. Those who rendered the salvage service in the case now to be decided incurred no great danger, such as arises in lying alongside of a burning vessel, or one on which explosions are taking place or are liable to occur. Neither was there any great danger to the tugs arising from the weather conditions which were not unusual. Then, too, it has long been settled in this circuit that salvage services rendered in harbor cases, where tugs are abundant and on the ground or near by, are not services of a high order. The High Cliff, supra; The O. C. Hanchett, 76 Fed. 1003, 1004, 22 C. C. A. 678.

Although citations in salvage cases are rarely useful, we venture to direct attention to The Jason (D. C.) 257 Fed. 438, decided in 1919. In that case the steamer Hesperus dragged her anchor at Hampton Roads, in a storm during which the wind blew up to 68 miles an hour,

and collided with the steamer Jason. The Jason was badly damaged by the collision. She was in 52 feet of water, and was sinking rapidly. She was worth $1,000,000, and her cargo, chiefly cotton, was worth at least $2,600,000. A tug, valued at $75,000, succeeded in saving the steamer by beaching her after an hour and a half's work, and thereafter stood by and rendered other minor assistance for five hours longer. The danger to the tug and its crew was probably not very great, though there was some in attempting to handle this large ship in the then weather conditions. In that case the danger was more imminent, the value of the property involved was much larger, and the service was greater, than that rendered in the case at bar, and it extended over a longer period. The award was $15,000.

In the instant case the award of $25,000 is regarded by us as so excessive that it ought not to stand. The ordinary charge for the use of such tugs is from $15 to $20 an hour. The award made gives each of them more than $6,000 an hour and more than $100 a minute. The captains recover $1,500 each, which is assumed to be about six months' pay, for two hours of work. The owners receive between them $15,000. We believe, under all the circumstances, an award of $10,000 is ample.

The decree appealed from is modified, and the causes are remanded, with directions to enter a decree for the libelants in the sum of $10,000, with costs of this appeal to the appellants, and with interest from the date of the former decree.

THE WEST MOUNT. THE JOHN J. TIMMINS. THE MUTUAL.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

Nos. 7-8-9-10-11.

1. **Salvage ⟸51—Appeals solely from amount allowed not encouraged.**
   Appeals relating solely to the amount of salvage allowed are not to be encouraged, unless there has been a violation of some principle.
2. **Salvage ⟸31—Allowance of $85,000 for pulling a vessel from proximity to fire held excessive, and reduced to $40,000.**
   Where a vessel of the book value of $1,561,237.40 was lying at a pier without sufficient steam to move it, and because of a fire in a nearby ship called for assistance, and was pulled out and anchored in about 45 minutes after the salvors' services were accepted, and the weather conditions were fine, *held*, that an award of $85,000 salvage was excessive, and should be reduced to $40,000.

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

Libels by the Mears Towing Company, Inc., by Andrew H. Mills, Inc., by the Red Hook Towing Company, by Edward M. Timmins, as managing owner, etc., of the steam tug John J. Timmins, and by Edward M. Timmins, as managing owner, etc., of the steam tug Mutual, against the steamship West Mount, in each of which the United States was claimant. From decrees therein, awarding libelant salvors $85,-

000, the claimant in each case appeals. Award reduced to $40,000, to be divided in the same proportions as agreed on by counsel below, and the decree, as thus modified, affirmed.

These suits were brought by the owners (for themselves and the crews) of five tugs, to recover "reasonable and proper salvage" for services rendered to the steamship West Mount in the harbor of New York on April 19, 1920. On that day the West Mount, a steel cargo boat of 5,585 tons gross, built at Seattle in 1917–18, and valued by stipulation at $1,561,237.40 "book value" was lying on the north side of Pier 5, Bush Docks, Brooklyn. Her stern was about flush with the end of the pier; she lay bow in, and some 6 or 8 feet from her bow was the stern of the steamship Halfried, also lying stern in. The West Mount was light. Her auxiliary steam was on, but she did not have steam for her engines; she could not move without the aid of tugs. Her officers were on board. She had practically no deck crew; but of her 24 men in the engine and fire room she had 21 in service. The day was fine and the wind moderate from a westerly direction. The slip in which the vessel lay was 150 feet wide, and egress from it unobstructed and easy.

At approximately 12:30 p. m. on the above date, the Halfried was observed to be on fire. That fire was promptly taken charge of by the New York City fire department. Halfried's cargo, at least that in her forward part, consisted of some rather vaguely described chemicals, which in the opinion of the chief of the fire department made a very bad fire. Several explosions resulted, one of severity sufficient to blow off part of the forward deck of the Halfried and thrown into the air pieces of metal, if not parts of the ship's equipment. Fire on the Halfried was confined to her forward portion; smoke, flames, and cinders were blown by the wind across the pier, and not towards the West Mount.

The master of the latter vessel concluded, after watching the fire for about 10 minutes, to get away. Tugs were numerous in the vicinity; there were "30 or 40" of them. The first offering service was the Mutual; that offer was accepted, and the Mutual's master took charge of moving the West Mount, and selected, or at least accepted, the other four tugs concerned in this cause. In about 30 minutes after the Halfried was seen to be on fire, the West Mount, with her five tugs, moved away. The severe explosion on the Halfried occurred just as they were on the point of starting. No lines were cut; the West Mount received no injury whatever, nor did any of the tugs. In about 45 minutes after the Mutual's services were accepted the West Mount was at anchor on the anchorage grounds and the episode out of which these suits grew was ended.

For this service the lower court granted a total salvage award of $85,000. This amount the owners of the salving tugs divided among themselves as to them seemed best and entered decrees accordingly. The West Mount was owned by the United States, and it took this appeal.

W. E. J. Collins, U. S. Atty., of Jamaica, N. Y. (Arthur H. Longfellow and John Hunter, both of New York City, of counsel), for appellant.

Chauncey I. Clark, of New York City, for owners of the Mutual and the John J. Timmins.

G. V. A. McCloskey, of New York City, for owners of the Andrew H. Mills, the Gertrude B. Mears and the Caroline M. Wade.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It was asserted at bar that the decrees complained of were entered upon the consent or agreement of the advocates who tried (as a consolidatd case) these five claims for salvage. After calling for statements from

all of said advocates, and from the trial judge, we are satisfied that, although the District Court believed that an agreement had been reached, it cannot be asserted as a fact that there was any concert of minds to the effect that (1) the services alleged were salvage services, and (2) that they were worth in the aggregate $85,000. That the court below believed itself to be merely registering counsel's agreement is doubtless the reason why we have no considered decision, giving reasons for or seeking to justify the award. Under the circumstances, however, we are compelled to consider this appeal as from a ruling of the court, that in its judgment the evidence showed that $85,000 was "reasonable and proper."

Our opinion in The Niels Nielsen, 277 Fed. 164, filed with this decision, and in a case coming from the same court, dispenses with any lengthened consideration of the rules applicable to salvage generally and harbor salvage in particular. The service rendered the West Mount was of perhaps the most frequent type of harbor service; i. e., the selection in broad daylight from numerous applicants, all eager to earn salvage money, of a sufficient number of tugs to tow out of a berth potentially, if not presently, dangerous, a vessel of no remarkable size.

[1] Doubtless the service amounted to salvage. This appeal relates to nothing but amount; and of such appeals it has been lately said that they are not to be encouraged, "unless there has been some violation of principle." Oelwoerke v. Erlanger, 248 U. S. 521, 39 Sup. Ct. 180, 63 L. Ed. 399. The principles of harbor towage have continuously, and we think consistently, been illustrated in this court from The Bay of Naples, 48 Fed. 737, 1 C. C. A. 81, and The Hanchett, 76 Fed. 1003, 22 C. C. A. 678, to the very recent cases of The Geo. W. Elzey, 250 Fed. 602, 162 C. C. A. 618; The No. 92, 252 Fed. 117, 164 C. C. A. 229, and The High Cliff, 271 Fed. 202.

[2] A reference to these decisions is sufficient to show that by an award of $85,000 for the service above set forth there has occurred a violation of principle. Guffey, etc., Co. v. Borison, 211 Fed. 594, 128 C. C. A. 194, is perhaps the nearest case in the books to the present. In the nature of the danger, the kind of service rendered, and the elements to be considered, the opinion of Pardee, J., renders further consideration by us of the facts herein unnecessary.

It may also be noted, by way of comparison with skillful and difficult deep water salvage, that in The Varzin (D. C.) 180 Fed. 892, affirmed 185 Fed. 1007, 107 C. C. A. 398, and The Melderskin (D. C.) 249 Fed. 776, the values salved were almost identical with the stipulated value in this case; the services were on the high seas, and in each case extended over several days; the salvors displayed great skill as mariners, and the owners' property was exposed to far greater danger of permanent injury than in this case; yet in each instance the award, after much consideration, was $45,000.

It is, however, seriously urged that salvage awards should now be greater than they were at the time of most of the decisions hereinabove referred to, because the dollars in which they are paid are not worth as much as they used to be. It is just as true that the dollars in which

the salved ship's value is expressed are similarly depreciated, and it is in consideration of such values, inflated because of depreciation, that awards are made. The relation between what is salved and what is paid for the salvage necessarily remains unchanged, as long as both value and award are expressed in the same monetary units. But the mere money value of what is salved is never the leading consideration in making award.

The award of $85,000 is reduced to $40,000, to be divided in the same proportions as was agreed upon by counsel below, and the decrees, as modified by this opinion, are affirmed.

PHILADELPHIA RUBBER WORKS CO. v. U. S. RUBBER RECLAIMING WORKS et al.*

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 13.

1. **Appeal and error ⟸1097(1)—Validity and infringement not re-examined on appeal from accounting.**
   The issues of validity and infringement, which had been decided on a previous appeal, will not be re-examined on appeal from the decree rendered after the accounting to fix the damages.

2. **Patents ⟸312(3)—Evidence held to show essential value was derived from infringement.**
   In a suit for infringement of a patented process for devulcanizing rubber, evidence *held* to show that defendant's product essentially derived its marketability and value from the unlawful appropriation of the patented processes.

3. **Patents ⟸318(3)—Process covered by patent to another is not a standard of comparison.**
   In determining the profits of an infringer, other methods of accomplishing results of the patented process cannot be used as standards of comparison, if such methods were covered by other patents, so as not to be available to defendant.

4. **Patents ⟸318(3)—Standard of comparison must have been open to use prior to plaintiff's patent.**
   The standard of comparison for determining profits earned by an infringement must be one which was known and available to the infringers' use prior to date of plaintiff's patent, or at least prior to the date of appropriation.

5. **Patents ⟸318(3)—Process subsequently developed to avoid infringement cannot be standard of comparison.**
   A process, developed by defendant after injunction against infringement was issued to avoid the infringement, cannot be adopted as a standard of comparison in determining the profits due to the infringement.

6. **Patents ⟸312(1)—Infringer has burden of showing portion of profits not resulting from infringement.**
   On an accounting to determine the damages from an infringement, the infringer is liable for all his profits unless he can show, and the burden is upon him to show that a portion of them resulted from something other than the patented process.

⟸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. —.

7. Patents ⊂=318(4)—Profits from finishing held not separable from infringing use.

In a suit for an infringement of a patented process for devulcanizing rubber, where the essential marketability of defendant's product resulted from the use of the patented process, the profits resulting from the finishing and refining could not be separated from the profits resulting from the infringement, so that plaintiff can recover the total profits.

8. Patents ⊂=318(6)—Profits on compounds mixed with infringing products properly disallowed.

Where the infringer of a patented process for devulcanizing rubber compounded his rubber after the vulcanizing was completed with other chemicals, but sold the whole product at the market price for rubber, he cannot claim that a portion of his profits was a profit on the compounds used, but is entitled to deduct only the cost of the compounds.

9. Patents ⊂=318(6)—Special expenses held not deductible from infringer's profits.

In determining the profits earned by an infringer, special payments made by the infringer to its officers, in addition to their regular salaries, legal expenses incurred in defending the infringement suit, and expenses of reorganizing the infringing corporation, cannot be deducted from the gross profits.

10. Patents ⊂=318(6)—Apportionment of expenses to infringing product held correct.

In a suit for infringement of a patent, apportionment by the court in ascertaining the profits of the infringer of the expenses, so as to charge one-half to the mill using the patented processes, *held* proper.

11. Patents ⊂=318(6)—Interest on capital used in infringing business is deductible.

In determining the profits of an infringer, interest on the capital invested in the infringing portion of defendant's business was properly allowed as a charge against the gross profits from the infringing product.

12. Patents ⊂=318(5)—Interest not charged to innocent infringer prior to decree.

Where the infringement was not willful and deliberate, it is inequitable to charge interest on the award of damages from the date of infringement, and interest was properly allowed from the date of the decree, where proof was taken by the court after the master's death, and the findings were made by the court.

13. Patents ⊂=287—Purchaser of infringer, assuming debts, held liable for infringement.

In a suit for infringement of a patent, a corporation which purchased the business of the infringer while the infringement suit was pending, and assumed and agreed to pay all its debts, was liable to complainant, though the promise to pay the infringer's debts was not made for the plaintiff's benefit.

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

Suit by the Philadelphia Rubber Works Company against the United States Rubber Reclaiming Works and others for infringement of a patent. From a decree fixing the amount of damages for the infringement after an accounting (276 Fed. 600, 613), both parties appeal. Affirmed.

Charles Neave and William G. McKnight, both of New York City, for plaintiff.

Hans v. Briesen, of New York City (J. Edgar Bull, of New York City, Simon Fleischmann, of Buffalo, N. Y., and Alexander B. Siegel, of New York City, of counsel), for defendants.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. For convenience we will refer to the parties herein as plaintiff and defendants. The plaintiff and defendants have each appealed from a final decree awarding the plaintiff the sum of $324,597.46 as profits which were realized by the defendants during a period of five years, due to infringement by defendants of plaintiff's patent. The plaintiff appeals for the reason that it contends that the award to it should have been for a larger sum.

The plaintiff instituted the suit originally against the United States Rubber Reclaiming Works for infringement of the Marks patent, No. 635,141, which it owned. This patent involves a process for devulcanizing rubber waste. It was held valid and infringed in the District Court (225 Fed. 789), and this result was affirmed on appeal to this court (229 Fed. 150, 143 C. C. A. 426). The court decided that the Marks patent accomplished a new result by the application of a new process to the reclaimation of rubber waste. The United States Rubber Reclaiming Works conveyed its business and property to the United States Rubber Reclaiming Company, Inc., and later the United States Rubber Reclaiming Company, Inc., transferred its assets and business to the Madison Tire & Rubber Co., Inc. It became necessary to file supplemental bills when each of these transfers took place, bringing in the transferees as codefendants.

The proof as to damages and profits was taken before a master, who died before the completion of his work. Such testimony was submitted to the court, who heard the balance of the proofs offered, and the decree from which this appeal is taken was entered. The court ruled that there was no standard of comparison from which to estimate the profits, and that the plaintiff was entitled to recover the entire profits made by the defendants from reclaimed rubber produced by the infringing process. It refused to allow a deduction of $179,309.24 for alleged profits on the compounds which the defendants claim that they incorporated into the reclaimed rubber sold. It refused to allow the defendants a deduction of $75,946.24 for alleged profits made from operations subsequent to the devulcanizing process, which operations are usual and customary in reclaiming rubber to put the product in condition for sale. To the sum agreed upon by the accountants as the basic figure of profits $610,581.66, the court added $10,982.48, a proportion of $21,507.30 which was deducted in fixing said sum as special expenses, and a proportion of the sum of $21,004.18 legal expenses, and a proportion of the reorganization expenses of $3,461.71. This was held to be improperly charged to the cost of the operation with the infringing process. This is chargable, as proportioned, to mill No. 2. He also added all of the loss—$10,982.48—incurred by the defendants during the first 18 months of the operation of the infringing process.

The District Court reduced the profits by $122,932.57, apportioning certain expenses between the infringing and noninfringing processes; that is, it divided the general expenses equally between the defendants' two mills and allowed this as a deduction. The plaintiff claims that it should have followed the method adopted by the accountants jointly representing the parties. The court allowed a reduction of $197,200.72 for interest on capital invested in the plant and business using the infringing process. It disallowed interest on the judgment, except from the date of the entry of the decree.

It is claimed by the defendants that the court erred in making the Madison Tire & Rubber Company, Inc., a party and, in entering the decree requiring payment of the damages by it.

[1] The process of the Marks patent for devulcanizing rubber waste consists in submerging the finely ground rubber waste in a dilute alkaline solution in a sealed vessel, and in keeping the contents of the vessel at a temperature of 344° F., and in maintaining this temperature for 20 hours, more or less. This court held that the defendants appropriated the essential elements of this process and thereby achieved the same result as the Marks patent accomplishes. It therefore held it was an unlawful appropriation of the same. We are not called upon, in the review on this appeal, to examine the question of validity or infringement. Smith v. Vulcan Iron Works, 165 U. S. 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Illinois v. Illinois Central R. R., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440. Both are established against the defendants by the previous decision of this court.

The Marks process opened a new field for production of reclaimed rubber; that is to say, rubber from highly vulcanized scrap. This had never previously been successfully accomplished. By the acid process. rubber had been reclaimed from boots and shoes and made capable of being used for other purposes. But from the reception of the Marks process in the trade, and particularly by the large companies, and the results accomplished by it, it is apparent that this process was of great monetary and economic value, particularly in reclaiming rubber used in automobile tires. The main ingredients of rubber goods of various kinds are crude rubber, reclaimed rubber, sulphur, and so-called compounding ingredients, which are of a mineral nature, such as oxide of zinc, barytes, and whiting. The properties and their nature which go to make up the rubber articles are dependent upon the nature, amount, and quality of these various constituents. The mineral compounding ingredients, which are added to the rubber, are for the purpose of imparting various characteristics to the manufactured article, such as color, good wearing qualities, etc., and the sulphur is added for use in the vulcanizing process to which it is essential that rubber should be subjected.

Vulcanization, in general, consists in incorporating sulphur into the rubber and subjecting the mixture to heat. There are basic methods of vulcanization, according to whether the heat treatment is carried on under atmospheric pressure or increased pressure. Vulcanization brings changes in the properties, and the physical properties vary ac-

cording to the method of vulcanization. The process in question has to do with the method of devulcanization.

There are two basic methods which have been employed for this purpose; one, the acid process, consisting in grinding the rubber, subjecting it to a dilute solution of sulphuric acid at a temperature above the boiling point of the solution, and continuing this treatment until the destruction of the cotton fiber that may have been in the scrap is completed. The mass is thereupon washed until the acid has been completely removed. It is subsequently placed in a devulcanizer and subjected to the action of live steam at a pressure of approximately 100 pounds for a period of approximately 24 hours.

The other method is the alkali process of Marks, and consists in submerging the scrap rubber in a finely ground condition in a dilute alkali solution in what is known as a digester, which is a cylindrical kettle provided with a steam jacket. Subsequently, live steam under a gauge pressure of approximately 125 pounds is introduced into the jacket surrounding the digester, thus heating the contents of the digester, namely, the solution of caustic soda and the scrap rubber which is submerged in it. The digester is provided with a stirring device, in order that its contents may be kept under agitation. The heat treatment continues for about 20 hours.

In the acid process, the acid is used for the destruction of the fiber and is subsequently carefully removed by a washing, and during the heat treatment the scrap rubber is subjected only to a comparatively low temperature of live steam. In the alkali process, the scrap rubber is subjected to the caustic soda solution while it is being subjected to very high heat. The first is referred to as the two-step process, while the latter is the one-step process.

The acid process is not adapted for reclaiming highly vulcanized rubber goods, such as tires and mechanical goods scrap. The acid process, at the date of the grant of the Marks patent, was unprotected by patents because of the expiration thereof, and it could be utilized by the trade generally, and the record shows that the trade made efforts to reclaim tires and mechanical goods scrap by the acid process, but each failed to produce satisfactory results, and when the Marks patent came upon the market the companies engaged in this business acquired rights under that patent. The acid process was adopted, and widely and extensively used, in reclaiming boot and shoe scrap, which is only slightly vulcanized. The crude rubber possesses plasticity and ability to absorb compounding materials, which properties disappear on vulcanization, resulting instead in a product having high tensile strength and high elongation. It is this presence of plasticity and ability to absorb compounding materials which the reclaimer tries to restore to a maximum extent as a result of devulcanization.

Devulcanized rubber must, on subsequent vulcanization, show a maximum of tensile strength and a maximum of elasticity. The devulcanized rubber must not only possess a maximum plasticity and absorptive ability, but must not lose these properties with age, and the revulcanized reclaimed rubber must show high tensile strength and high elongation, and must retain these properties for a maximum period of

time. Tire scrap devulcanized by the acid process does not exhibit the properties of plasticity and ability to absorb compounding materials as is observed in the stock devulcanized by the alkali process. The result of practical experience shows that, on revulcanization, the alkali stock exhibits superior tensile strength and elasticity, and by virtue of these two properties, and also because of its increased plasticity prior to vulcanization, the alkali stock exhibits a superior abrasive resistance. The alkali revulcanized stock is superior to the acid stock as to aging. The result has been that the Marks patent is described in the record as one of the most successful and valuable rubber patents ever issued. The commercial success of this patent is striking.

The defendants started its infringement about February 1, 1911. It devoted mill No. 2 to this work. The only process used in this mill was the alkali process covered by the Marks patent. The law of the case has been clearly established, in the decision heretofore made, that mechanical scrap consisting of highly vulcanized material was not sufficiently devulcanized by any known acid process, but that in its use an inferior article was produced.

[2] It has been determined below that the process of the patent in suit accomplishes a new result by the application of this new process, and that, prior to the Marks process, scrap rubber, which had necessarily been highly vulcanized, was not sufficiently devulcanized or reclaimed by the acid process then familiar to the art. The new result of the Marks process also produces a product possessing characteristics different from those possessed by the acid reclaimed rubber. The court below, on this record, held properly that the defendants' product essentially derived its marketabiilty and value from the unlawful appropriation of the process of Marks. It therefore awarded the plaintiff the entire profits made by the defendants from the sale of reclaimed rubber produced by the Marks process.

We think the rule of damages applied by the court below was correct, and that there was no process in use or known which could be used as a standard of comparison as contended for by the defendants. The defendants' claim as to the process of 1906, affords no standard of comparison. It was adopted after December 3, 1915, upon the date the defendants were enjoined from the further use of the Marks process. This is the date of the discontinuance of the infringement. What was then used by the defendants was a two-step alkali process, which was more expensive than the one-step process of the plaintiff. It was a noninfringing process.

[3] There were patented methods by which rubber waste, consisting of automobile tires, could be reclaimed; but, because these methods were protected by patents, they were not open to the public, and could not then be a basis for recovery here. Amer. Pneumatic Co. v. Snyder (D. C.) 241 Fed. 274. The question to be determined in each case is, What advantage did the defendants derive from using the plaintiff's invention over what he had in using other processes then open to the public and adequate to obtain an equally beneficial result? In other words, the fruits of that advantage are his profits. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664.

[4] The standard of comparison, to be applicable, must have been known and open prior to the date of the plaintiff's patent. Illinois Central Co. v. Turrill, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. Some courts have held the date of appropriation of the invention by the defendant should be taken. Brown v. Lanyon, 179 Fed. 309, 102 C. C. A. 497; Columbia Wiring Co. v. Kokomo, 194 Fed. 108, 114 C. C. A. 186; Amer. Pneumatic Co. v. Snyder (D. C.) 241 Fed. 274. The field of selection of process which might be used should be, in principle, that which is open to the art at the time the invention is appropriated. Where there is a patent which forbids such use, the question is presented whether it is actually available to the infringer during the period of the infringement. Where the owner of the patent declines to permit its use or grant a license, it cannot be set up as a standard of comparison.

[5] Processes which were developed after the infringement as a substitute for use by the defendants cannot be used as a standard of comparison. This record discloses no process that might be used as a standard of comparison. The rule is therefore applicable which requires the defendants to pay over to the plaintiff all the profits which they derived through unlawful infringement. Westinghouse v. Wagner, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222.

[6] Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits, unless he can show, and the burden is on him to show, that a portion of them is the result of some other things used by him. Elizabeth v. Paving Co., 97 U. S. 126, 24 L. Ed. 1000; Crosby v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809.

[7] It is argued by the defendants that a small portion only of the total profit is due to the devulcanizing step, and that the balance is due to the finishing and refining steps performed subsequent to devulcanization. After the devulcanization of the scrap rubber, the devulcanized rubber is not immediately in condition for sale or use, but is subjected to finishing and refining steps. The defendants' argument is that, of the total cost of producing reclaimed rubber, which is sold, only 18 per cent. of that cost is incurred in the devulcanizing step; that the balance of the cost is due to the subsequent finishing and refining steps. But it is established by the record that the value of the product is due to the devulcanizing process; the reclaimed rubber produced by this process is given characteristics which are wholly different from the characteristics of acid reclaimed tire scrap.

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. The defendants could not have produced vulcanized rubber from highly vulcanized scrap possessing these characteristics, had it not used the Marks process. The fact is that the defendants could not have sold the reclaimed rubber, without first having imparted to that rubber the characteristics resulting from the use of the Marks process. This cannot be separated from the finishing and refining which helps to make the article marketable. It was

impossible for the defendants, without the wrongful use of the plaintiff's process, to carry on their operations as they did. Thus it appears that the entire commercial value of the rubber arises from the use of the patented process and the plaintiff is entitled to recover from the infringer the total profits derived. Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987.

[8] It is urged that the District Court erred in not allowing deductions for alleged profits on compounds which were incorporated in the reclaimed rubber sold. In carrying on its business, the defendants' practice was that, after the completion of the devulcanizing step, and during the progress of the finishing and refining steps, they incorporated into the rubber a little over 7 per cent. of various compounding ingredients, and they now claim the right to deduct from the total profits the profit which they claim to have made on these ingredients. They claim the right to deduct from the net profits realized from the sales of the reclaimed rubber, the sum of $179,309.24. Defendants paid for these compounding materials $57,157.72. The reclaimed rubber, with its contained compounding ingredients, sold for about 20 cents a pound; but there is no proof to show that the defendants received more for the reclaimed rubber containing these compounds than they would have received for the same pure reclaimed rubber without the use of compounds, and there is no proof that these compounds, after being combined with the rubber, were of any greater value than when put in.

The defendants have been credited with the cost of the compounds. It was only possible for the defendants to use the compounds because the rubber was, by means of the infringing process, given a characteristic which created the ability to absorb compounds. The plaintiff had never at any time indulged in the practice of putting compounds in its alkali reclaimed rubber. It sold straight reclaimed rubber. Defendants, on the other hand, during the period of infringement, were selling to customers reclaimed rubber containing 7.13 per cent. of the total weight of compounds; that is, the customer, instead of getting 100 per cent. straight reclaimed rubber, was getting only 92.87 per cent., and was being charged the prevailing market rate for straight reclaimed rubber the whole 100 per cent. We think the District Court properly disallowed this claim for reduction on account of the profits for the compounding materials. It was necessary, in order to make the defendants' articles salable, to obtain the special characteristics which could only be acquired by the infringing process. The plaintiff's profits cannot be subtracted from by the subsequent addition of compounds. Carborundum Co. v. Electric Smelting Co., 203 Fed. 976, 122 C. C. A. 276.

The District Judge accepted, as a basic figure, the profit, $610,581.66, and required a further adjustment by adding thereto $21,507.30, special expenses, $21,004.18 for legal expenses, and $3,461.79, reorganization expenses, which had been deducted in arriving at this basic figure.

[9] The payment under the heading of "Special Expenses" was money to officers of the company who were drawing regular salaries

at the time of the payments. Payments thus made to officers over and above their regular salaries are not allowable. Lee v. Malleable Co. (D. C.) 247 Fed. 795. The legal expenses were for attorney's fees in defending the action for infringement of patent. Such fees are not allowed as a deduction. Nat. Co. v. Dayton (C. C.) 95 Fed. 991. Reorganization expenses were incurred for the reorganization of the defendants' business. This resulted in the necessity for bringing in several defendants as parties to the action because of the sale of the business of the original defendant. We do not think that this is a proper deduction.

[10] The court apportioned these deductions, adding one-half the total sum as a proper charge against mill No. 2. We agree with the action of the court.

[11] The court allowed $197,020.72 for interest on capital invested in the infringing portion of defendants' business. This was pursuant to the rule of law announced in Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 C. C. A. 578. We think the court correctly ascertained the invested capital used in the manufacture of the reclaimed rubber with the infringing process in mill No. 2, and that the allowance of interest on such capital was properly ascertained and calculated. We likewise agree in the apportionment of the general expenses between the defendants' two mills and the allowance of $122,932.57 as a deduction. This division of the general overhead expense seems to us to have been divided equitably.

[12] This was not a willful and deliberate infringement. In view of the history of the litigation in the Sixth Circuit and the conduct of the defendants, we think it undesirable and inequitable to impose an interest charge on the award from the date of the infringement. The circumstances of the case make applicable the rule which allows interest from the date of the decree, because of the finding of the court. Proof was taken by the court after the master's death. Oehring v. Fox Co., supra.

[13] When the Madison Tire & Rubber Company, Inc., purchased the assets and the property of the United States Rubber Reclaiming Company, Inc., it agreed to assume and pay all debts, obligations, and liabilities whatsoever of the United States Rubber Reclaiming Company, Inc., and to indemnify and hold the United States Rubber Reclaiming Company, Inc., its officers, directors, and agents, harmless of and from the same. When this transfer took place, the Madison Company was cognizant of the pending action and fully acquainted with all the proceedings theretofore had. This was one of the obligations assumed by it and the defendant the Madison Tire & Rubber Company, Inc., may be charged as the principal debtor, because the grantee (the Madison Company) has agreed to be primarily liable for the grantor's (United States Company) obligation to the creditor (plaintiff). As between the parties to the agreement, the United States Company is the principal and the Madison Company the surety.

The plaintiff is entitled in equity to maintain this suit against the Madison Company to the same extent as the United States Rubber Reclaiming Company, Inc., could have maintained it. It is immaterial

whether the contract was made and intended for the benefit of the creditor (plaintiff) or of the United States Rubber Reclaiming Company, for the plaintiff has all the rights of both to enforce the obligation as against the Madison Company. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Silver King C. Mines Co. v. S. K. M. Co., 204 Fed. 166, 122 C. C. A. 402, Ann. Cas. 1918B, 571; Dancel v. Goodyear Shoe Machinery Co. (C. C.) 137 Fed. 157. In this action in equity, we think the Madison Company was properly made a party defendant, and that the decree below was proper.

For these reasons, the decree is affirmed.

JOVA BRICK WORKS, Inc., v. CITY OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 15.

1. **Collision ⟸71(3)—City held at fault in keeping scows moored where they obstructed navigation.**

   Where a city, for its own convenience, left scows moored near its disposal plant, so as to obstruct a channel from March 25th to the morning of the 27th, it assumed the risk, and was at fault in connection with a collision with a line of tows being taken through the channel.

2. **Shipping ⟸54—Charterer, failing to return scow in good condition, liable for damages.**

   A charterer of a scow, receiving it in good condition and agreeing to return it in like condition, reasonable wear and tear only excepted, must respond in damages for the sinking of the scow from a collision, unless it establishes a valid defense.

3. **Admiralty ⟸105—Defense not made below not available on appeal.**

   Where a city, sued for damages to a scow chartered to it, by its answer and petition bringing in third parties, and its amended answer and amended petition, alleged that a collision and the resulting damages were due to the fault and negligence of such third persons, and did not plead any negligence on the part of the owner of the scow, it cannot be permitted on appeal to claim negligence on the part of the captain of the scow, who was the owner's appointee.

4. **Shipping ⟸58(2)—Evidence held to show damaged scow was chartered to defendant by broker for libelant.**

   In a suit against a city for damages to a scow, chartered to it and damaged in a collision, evidence *held* to show that the scow was chartered to the city by one acting as broker for the libelant.

5. **Collision ⟸115—Towing company, mooring scow where directed by employer's representative, not liable for subsequent collision.**

   Where a towing company, employed by a city to tow loaded barges to the city's disposal plant, moored them at the point where it was directed to so do by those in charge of the disposal plant, and at the only place where they could be moored, it was not liable for the subsequent sinking of one of the barges from a collision with a line of tows being taken through the same channel.

6. **Collision ⟸71(2)—Tugs with tows not at fault in attempting to pass through channel without requesting removal of barges obstructing navigation.**

   Where a city had moored a number of barges in the Arthur Kill, so as to obstruct the channel, tugs with a fleet of boats in tow were not at

fault in attempting to pass through such channel without sending a scout tug ahead to request the removal or shifting of the barges, though the captain in charge of the tow had been through the channel the night before, and knew the barges were there, in view of the inexcusable and presumably temporary nature of the obstruction.

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

Libel by the Jova Brick Works, Inc., against the City of New York, which brought in the Shamrock Towing Company and another. From a decree for the libelant, the City appeals. Affirmed.

John P. O'Brien, Corp. Counsel, of New York City (Charles J. Carroll, of Brooklyn, N. Y., of counsel), for appellant City of New York.

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

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for impleaded appellees.

Before ROGERS, MANTON and MACK, Circuit Judges.

ROGERS, Circuit Judge. The libelant corporation on March 19, 1918, chartered to the city of New York, through its department of street cleaning, its brick barge, J. J. J. No. 6, to be used by it in the disposition of street sweepings and other refuse material gathered in the streets of the municipality, to be carried from its dumping boards on the water front to its various disposal plants. The barge was delivered into the city's possession, and was operated by it until March 27, 1918, when a collision occurred off the Port Ivory Fill, Staten Island, where the barge had been moored, which resulted in such serious damage that the barge sank. It is alleged that this was due to the negligence of the city of New York in leaving the scow in a dangerous and exposed position.

The city of New York, by petition under what was then the Fifty-Ninth rule in admiralty (33 Sup. Ct. xxxv), brought in the Shamrock Towing Company and the Director General of Railroads, operating the Philadelphia & Reading Railroad. We shall hereafter refer to the city of New York as the city, to the Shamrock Towing Company as the towing company, to the Director General of Railroads as the Director General, and to the barge as No. 6.

The charter was oral, and it provided, among other things, that the owner should deliver No. 6 to the city with one man on board, called a captain, and that it should receive therefor the sum of $15 per day, including the wages of the so-called "captain." The city agreed on its part to return the No. 6 to the owner in the same good order and condition as when received, reasonable wear and tear excepted. By its charter the city became the owner of the scow pro hac vice.

The city engaged the towing company to do the towing. On March 25, 1918, the loading of No. 6 having been completed, the towing company, acting under its contract to perform the towage service, started

out with the No. 6 and three other loaded scows for the disposal plant at Port Ivory in charge of its tug, the Robert J. McGuirl. In a cove at Port Ivory the city had a row of spiles, at which it moored vessels while waiting to be discharged. In length the spiles provided berths for three scows, making it possible to make fast three tiers of scows. The city also had a dredge on the shore between the spiles and the bridge, which it used in unloading its scows. On the same day the towing company had taken down four other scows in charge of its tug Elizabeth McGuirl. At Elizabethport the tugs combined their two tows into one tow of eight barges, believing that by so doing they could handle and land them to better advantage.

When they reached Port Ivory they asked the representative of the city in charge of the plant where he wished the boats landed, and he told them to make fast alongside of the other scows, which were then lying at the spiles. One of the tugs then held the scows abreast of the spiles, and the other shoved the boats in, where they were made fast. The tugs then shifted the various scows and evened them up, so as to have the same number in each tier. As finally adjusted, the Jova was the outside boat in the middle tier. At the request of the city's representative they also took out the scow Hannah E. W. and shoved her over to the digger, to be unloaded in the morning. After this had been done, the masters of the tugs asked the captains of the various vessels in the tow whether they were all right, and, on receiving an affirmative reply, they left and came back to New York.

The city, instead of proceeding with the unloading of the vessels, did nothing during the day and night of the 26th, and on the morning of the 27th, while the Philadelphia & Reading tugs were coming through with a heavy tow of 28 loaded vessels, the tail of the tow got out of line and swung so far to starboard that it came into contact with the moored scows, and so damaged No. 6 that she filled and sank.

The evidence shows that the city had undertaken to make an improvement at its plant at Port Ivory. Among other things, it had dredged the channel into and in the vicinity of its digger, so as to permit the unloading of more than one vessel at a time. The work had so far progressed by March 22d that the city contemplated having the dredging finished and its plant ready to operate by the morning of March 25th. On the latter date it had either four or seven loaded vessels lying at the spiles, and in order to keep the plant busy it ordered the towing company to tow the eight loaded scows in question down to and leave them at the plant. The city, however, made a mistake in its calculations to the extent that it did not complete its dredging until the evening of March 26th. Although it was perfectly well aware of the situation, it did not countermand the order, but sent the scows to its plant on March 25th, and kept the scows at the mooring spiles from the evening of that day until the morning of the 27th, when the collision occurred.

[1] If it had discharged the cargoes on the morning of the 26th, as it had contemplated, the accident would not have occurred. It preferred, for its own convenience, to leave the boats where they were, and in doing so assumed the risk, and must be held in fault.

[2, 3] It appears to be admitted that, at the time the No. 6 was delivered to the city, she was in good condition. Under the terms of the charter the city was under obligations to return her in like condition, reasonable wear and tear only excepted. This obligation the city did not fulfill, and clearly it must respond in damages therefor, unless it can satisfy the court that it has a valid defense to this suit. It seeks now to find such a defense in the claim, advanced for the first time in the argument in this court, that the "captain" of the No. 6, who was the appointee of the libelant, should have shifted her position between the time she was moored and the time of the collision, and that his negligence in that particular is to be attributed to the libelant, his master. It is answer enough to this contention to say that the position thus taken has no support in the pleadings. In the city's answer to the libel, and in its petition to be permitted to bring in the towing company and the Director General, it alleges that the collision was caused solely by the fault and negligence of the towing company, and of the tugs Bern, Pencoyd, and Wyomissing, which tugs were owned and operated by the Port Reading Railroad Company.

The city subsequently filed an amended answer and amended petition and in both it again charged that the collision and damages resulted solely from the fault and negligence of the towing company and its tugs Bern, Pencoyd, and Wyomissing. It not only did not plead the libelant's negligence, but it made no suggestion, when the case was in the court below, that it in any way attributed negligence to the libelant. It certainly cannot be permitted, after it comes into this court, to introduce into the case an issue not raised by the pleadings, and not before the court below.

The evidence conclusively shows that the city, through its officials and employees, directed where the No. 6 should go, and on her arrival at her destination the city's representatives in charge of the disposal plant directed where she should be placed.

[4] The allegation in the libel is that the libelant leased the No. 6 to the city. The city in its answer denies that allegation, and asserts that it chartered the scow from the towing company. In other words, the claim of the city is that the towing company chartered its own vessel to the city, towed its own property to the Port Ivory spiles, and itself created an obstruction to navigation, for which it alone is liable.

The president and treasurer of the towing company testified that he had barges of his own that he had chartered, and that as broker he also chartered barges for other people; that at the time involved herein he had the No. 6 in his hands to charter for her owner, the libelant; that the street cleaning department called him up on March 19th, and asked him if the towing company had any scows to charter, and he replied that it had not and all its boats were busy; that he informed the department that there were three or four of the company's customers in the brick business who had light scows on account of navigation being closed in the Hudson river, and that he would like to charter them to responsible people; that he informed the department he was acting as agent and broker for these scows and chartered them

on a commission; that he could charter the No. 6; that she was sound, safe, and seaworthy, and must be returned in the same condition, or could not be taken; that the price to be paid was $15 per day; and that a little later the department called him up and instructed him to take the scow to Ninty-Sixth street, North River, and put her under the city's dump; that the No. 6 was towed to Ninty-Sixth street and delivered over to the department; that he chartered the scow as an individual broker, and not as the towing company, and the department was so informed.

This conversation appears to have been had with one Mr. Green, who represented the department of street cleaning, and whose testimony does not contradict that given by the broker. The court below was satisfied, and this court is equally so, that the No. 6 was chartered to the city by Mr. McGuirl, acting as a broker for the libelant, and that the libelant can recover as owner of the No. 6 for the breach of the charter, in that it did not return the vessel in the same order and condition as when it received it, reasonable wear and tear being alone excepted.

The manner in which the city paid the charter hire has not the controlling significance which we are asked to give it. The city paid the towing company for the use of all the scows, including the No. 6, and the towing company then paid over to the libelant the amount of the charter hire to which it was entitled, less the commission which it paid to the broker. This was a mere matter of convenience for all parties, and was in accordance with a course of business which had existed for a number of years. It does not overcome the testimony of the broker that the charter was given by libelant to the city.

[5] We fail to find any ground of liability on the part of the towing company. That company was employed by the city to take the barges to the disposal plant at Port Ivory. This duty it performed, and on arrival at the plant the captain having charge of the tow inquired of those in charge of the plant where the No. 6 should be moored, and he placed her where he was instructed to put her. He testifies that there was no other place there where he could have moored the tow. The acting foreman at the plant, and who was in charge and on duty that night, when the tow arrived, testified there was no other place to put the boats. The man who had charge of the plant next morning was asked why he did not have the boats moved, and he testified that he had no place to put them. The towing company having put the scows exactly where it was instructed to place them, and in the only place where it was possible to put them, and having arranged them as well as the conditions there permitted, is free from fault. When a tug leaves her tow in the place selected by the owner of the vessel, her obligation is at an end; the accident being in no way due to the fault of the tug. The Nellie, Fed. Cas. No. 10,094, 8 Ben. 261. It is difficult to understand how it can be seriously argued that a breach of the contract of towage is made out.

And certainly the city, having directed the towing company to place the tow where it was put, cannot thereafter hold the company respon-

sible for doing what it instructed it to do. See The New York Central No. 18, 257 Fed. 405, 168 C. C. A. 445. The contention that the tug was in fault for not disobeying the orders of the city to tie up its scows at its own wharf carried with it its own refutation. Certainly the towing company was not an insurer of the city's scows, against its own acts and its own method of doing business.

[6] But the city also contends that the Director General is liable, because, in operating the Philadelphia & Reading Railroad, the tugs belonging to that corporation took an unwarranted and unmanageable tow of 28 coal boats through the Arthur Kill, and because of the careless and negligent manner in which the tow was handled, one or more of the scows included in the tow got out of tier and caused the collision in question. This contention of the city cannot prevail. It seems to be admitted that the tow was carefully handled. But it is said that, as the captain in charge of the tow had been through the channel the night before and saw the scows there, he should not have attempted to navigate through the next morning, or else sent a scout tug ahead with a request to remove or shift the barges.

We cannot assent to either of these propositions. In the case of the Wyomissing, 232 Fed. 453, 146 C. C. A. 447, we held that under the circumstances of that case it was incumbent to send a tug ahead to request that a government dredge, which was obstructing navigation, should be moved. But in that case the dredge was lawfully where it was in the discharge of government work. In a case such as the one now before the court, where the obstruction to navigation is wholly unlawful and inexcusable, and presumably temporary, it would impose a wholly unwarranted burden on shipping to say that, while the illegal obstruction continued, the right to navigate the waters was suspended, or could only be exercised by sending a tug ahead to request its removal.

At the time of the collision the scows used by the city, including No. 6, and which were moored at the row of spiles as the city had directed, and which was the only berth the city provided, constituted an obstruction to navigation. The court below so found. He stated that the city "had created an obstruction in the channel, and, in view of the traffic through these particular waters, a serious obstruction." Without going into details, it may suffice to say that in our opinion the finding is amply justified by the testimony.

Decree affirmed.

THOMAS LASTING WAVE CO., Inc., v. E. FREDERICKS, Inc., et al.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 19.

1. **Patents ⟸328—1,164,101, claims 1, 7, and 8, for hair-curling apparatus, held to lack invention.**

   The Kremer and Unger patent, No. 1,164,101, claims 1, 7, and 8, for an apparatus for curling hair, which differed from the prior art only in that it was smaller, so as to be adapted to curl the newly grown hair close to the scalp without curling that which had been previously curled, *held* void for failure to disclose invention.

2. **Patents ⟸328—1,103,506, claims 1, 2, and 7, for hair-steaming device, held to lack invention.**

   The Unger patent, No. 1,103,506, claims 1, 2, and 7, for a device for steaming hair to impart to it a permanent wave, *held* void for failure to disclose invention.

3. **Patents ⟸328—1,164,102, claim 1, for hair-waving process, held to lack invention.**

   The Kremer and Unger patent, No. 1,164,102, claim 1, for a process for permanently waving hair, which differed from the prior art only by limiting the process to the newly grown hair close to the scalp, *held* void for failure to disclose invention; also, not infringed.

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

Suit for infringement of a patent by the Thomas Lasting Wave Company, Inc., against E. Fredericks, Inc., and another. Decree for defendants, and plaintiff appeals. Affirmed.

Appeal from a decree dismissing the original and supplemental bills for noninfringement of certain claims of three patents: (1) No. 1,164,101, dated December 14, 1915, granted upon an application filed December 4, 1913, to George Kremer and Ernest Unger, for an apparatus for curling hair. (2) No. 1,164,102, dated December 14, 1915, granted upon an application filed October 15, 1914, to George Kremer and Ernest Unger, for process for permanently waving hair. (3) No. 1,103,506, dated July 14, 1914, granted upon an application filed January 3, 1914, to Ernest Unger, as assignee of Grosert, for a hair-steaming device.

William A. Redding and Warren S. Orton, both of New York City, for appellant.

Charles H. Wilson, of New York City, for appellees.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). Plaintiff is the owner of the Unger patent, and is also owner of an undivided one-half interest in the two Kremer patents. Kremer is the owner of the other undivided half interest in the Kremer patents, and was made an unwilling defendant, so that the whole controversy could be disposed of in this suit. There were certain preliminary motions made in the District Court in respect of joining defendant Kremer as a party. One of these motions was passed upon by the writer, but as no error has been assigned, and as counsel for appellees, in open court,

waived any question of misjoinder, the question by consent is no longer in the case.

The claims involved in patent No. 1,164,101 are Nos. 1, 7, and 8; in patent No. 1,103,506, Nos. 1, 2, and 6 (claims 4 and 7 having been withdrawn on the argument); in patent No. 1,164,102, No. 1 (claims 2 and 3 having been withdrawn on the argument).

The art is the so-called "permanent" waving of hair, an extravagant commercial expression, which really means that for a few months human hair on the head, when treated in any one of several ways, will remain wavy in appearance. However, the field of business enterprise in which the art is employed apparently has become highly lucrative, and hence has arisen the desire to monopolize every improvement, however slight, and however obvious to the worker skilled in the art.

The earlier history of the art was fully considered in Nestle Patent Holding Co. v. E. Frederics, Inc. (C. C. A.) 261 Fed. 780, affirming (D. C.) 258 Fed. 627, and need not be here repeated. Prior to the time when the patents in suit were applied for, "permanent" waving, so called, was well known. It was thought and believed that during the period when the hair remained waved, new hair grew out an inch or two. It is said, because this new hair is unwaved, that it destroys the effectiveness of the waved hair. The alleged problem, then, was to provide a device and a process for waving this new-grown hair, without subjecting the rest of the hair to a repetitious waving.

For purposes of prior art discussion in this suit, we will consider the patents in their relation to each other in the following order: No. 1,164,101, first; No. 1,164,102, second; No. 1,103,506, third. The application filed by Kremer and Unger December 4, 1913, was regarded by the Patent Office as covering "two separate and distinct inventions." Then, after procedure lasting several months, Kremer canceled the process claims and filed his application for the process patent, No. 1,164,102, on October 15, 1914. Whether, on the facts, the case falls within Benjamin Electric Mfg. Co. v. Dale Co., 158 Fed. 617, 85 C. C. A. 439, we need not determine, for reasons which will appear infra.

[1] 1. *Patent No. 1,164,101.*—The specification states:

"My invention consists of a new and improved form of an electric hair-curling device, and is adapted particularly to curl and treat the roots of the hair.

"It has been the fashion for a number of years with a large number of women to have their hair treated in such a way that it will be curled and stay permanently curled. This is done by taking a number of strands of hair and curling them around a metal hair curler, and then placing the curler with the hair curled around it in an electric tubular heater, approximately six or eight inches long, so that the hair is subjected to great heat for about 20 minutes, and when taken out of the heater it is curled and remains permanently curled. Experience has shown that, in the course of a month or two, the hair will, of course, grow out, and when it does so it leaves a space of approximately an inch or two inches which is then uncurled, or in other words is substantially straight. Experience has demonstrated that if an attempt is made to curl this portion of the hair near the roots, by subjecting the whole length of the strands of hair to the heating process again, the part which has been once curled is injured by the reheating and in many instances has been wholly destroyed.

"It is the object of my invention to subject the roots or uncurled part of the hair near the head to the same process of curling and heating as has been previously done to the whole length of hair, without reheating that portion of the hair which is already curled. I accomplish this result by making the heater of approximately one inch in depth, or at the outside two inches, but preferably one inch."

Claim 1, in suit, as it finally came out of the Patent Office, reads:

"1. A heater for curling the newly grown portions of hair previously curled without reheating the old hair, comprising a short spool having a core made of heat conducting material with an uninterrupted bore from end to end through which the hair to be treated is entirely passed until only the new growth of hair is contained therein, and a resistance coil closely embracing said core."

This is one of the cases where the file wrapper is illuminating. The application for this patent as originally filed was for a "method and apparatus for curling hair." Claim 1 in this application in its original form was for:

"The method of curling hair by subjecting the roots of hair near the head to heat without heating the strands of hair already curled."

In commenting on this claim, the examiner, with humor unconscious, perhaps, and rarely discovered in a file wrapper, observed:

"Moreover this claim covers merely the obvious way of producing the result desired by applicant, since obviously the only way to curl the straight hair, leaving the curled hair untouched, is to curl the straight hair."

Claim 2 was for:

"A device for curling the roots of hair that has been already curled without heating the rest of the hair, said device consisting of an electric tubular heater approximately the length of that portion of the hair to be treated."

In respect of this and other claims the Examiner stated that—

"The dimensions of the heater and making the heater comparatively short cannot be considered to render patentable claims otherwise unpatentable."

If the office had adhered to this conclusion, time and money would have been saved.

This is not a case of the ever-present long-felt want argument. What happened here was that the hair dressers, or the customers, or both, discovered that the "permanent" wave was not as persistent in its permanency as it might or ought to have been, and a little more waving was needed now and then, because one or two inches of new grown hair menaced permanent wave stability. Whereupon the art said to the hair dresser:

"Make a short heater to curl one or two inches of hair near the scalp, without heating the rest of the hair."

This presented the simplest of problems to any one skilled in the art, and the phraseology of the claim of the patent in suit, quoted supra, so demonstrates.

Grosert and Unger, No. 1,029,361, was sufficient to negative invention. This was appreciated by the patent solicitors in their effort to distinguish the then pending application from No. 1,029,361. They

had answered the examiner's observation by stating that, "obviously, the only way to curl the straight hair is to curl the straight part that has not already been curled." "But," they continued, "the manner of doing this is not obvious. We ask how can it be done, other than by the use of a short curler, which will heat the straight part?" They then admit that Grosert and Unger, in No. 1,029,361, "put their heat at the end of the tube near the head," but urge that "the great difficulty with the Grosert and Unger device is that, while it is true that the heat is kept at one end, * * * the heating apparatus at the end heats the whole inner tube."

What Grosert and Unger were concerned with was a "hair-steaming device"; the object being to provide a heated tube adapted to surround the coil of wet hair to steam it. They accomplished their object by what they characterized as "certain novel details of construction and arrangements of parts." They had not directed their attention to heating only the one or two inches of new-grown hair, but to a hair-steaming device generally, and, quite irrespective of the other prior art, they had shown enough to negative completely the propositon that any invention is disclosed in claims 1, 7, and 8 of this patent in suit. Indeed, the solicitors for the applicant were driven, in effect, to the contention:

"Where, as in this case, a new and long-desired result is attained by changing the dimensions of device or material, by making them either larger or smaller, then patentability exists. * * *"

The most which can be said is that the advantage, if any, of plaintiff's heaters, is, as the District Judge put it:

"Purely one of size and lightness in weight, involving no new function. It is evident that such a feature in a curler operating in the old way would not confer patentability." Brown v. Crane Co., 133 Fed. 235, 66 C. C. A. 676; Faultless Rubber Co. v. Star Rubber Co. (C. C.) 191 Fed. 982.

These claims of this patent are therefore held void for lack of invention.

[2] 2. *Patent No. 1,103,506,* in view of the foregoing, needs little discussion. The object here is the same as that of No. 1,164,101. The mechanical detail is merely somewhat more elaborate. Claim 1 is illustrative and reads as follows:

"A device of the class described, comprising an open-ended tubular member of relatively high heat conductivity, having a cylindrical bore adapted to contain a portion of a coil of hair intermediate its ends, and permit other portions to extend beyond opposite ends thereof, an outer tubular member having a conical nose affixed thereto at one end, and a heating means disposed between said members, and filling the space adjacent the connection between the inner and outer tubular members, whereby a high degree of heat may be concentrated at one end of the device, to heat the portion of the coiled hair adjacent the head."

It is contended, inter alia, that the feature as to the connection between the inner and outer tubes is novel, and, of course, that the whole combination is novel. This, however, is one of those solemnly worded claims which, translated into lay English, is very simple. It might read:

"(1) A heat conductive tube with an open end, in which tube is a part of the hair, while the rest sticks out; (2) an outer tube, with a nose like a cone at one end; and (3) some heating means put between the tubes and filling the space next to the connection between the two tubes, and then you get enough heat concentrated to heat the hair next to the scalp."

If this be an operative device, we fail to discover invention. In view of the prior art, this detailed apparatus represents no more than any mechanic skilled in the art should have been able to construct.

We hold the claims of this patent void for lack of invention.

[3] 3. *The Process Patent, No. 1,164,102.*—The sole claim in issue on appeal—i. e., claim 1—reads as follows:

"In the art of permanent hair waving, the process for waving the newly grown hair on a head of hair which has been previously waved, without damaging the previously treated old hair, which process consists in separating the hair into strands, arranging the newly grown straight hair of each strand adjacent to the person's head into a tightly wound spiral, while permitting the previously waved hair to remain in a position so as not to be affected by any heating action, confining said spiral portion, saturating the same with a saline solution, subjecting said confined saturated portion to the action of heat gradually ranging from room temperature to a maximum temperature, to give the hair a steaming treatment, said heat being directed thereto, so as not to affect the previously waved portion, permitting said heated portion to remain confined in its spiral form for a short period of time after the application of heat thereto has been discontinued, washing the hair to remove any saline solution present, and finally combing both the previously waved and the newly waved portions across the juncture of these portions."

We have searched in vain to discover any ground upon which validity can be based, if the Kremer apparatus patent is void. We doubt whether the heaters are used as described, and as illustrated in the drawing of the patent. But we need not develop that point. If, as disclosed, this is an operative process, then claim 1 does not disclose invention over the Nessler process described in 261 Fed. 780, and processes existent prior thereto. In any event, however, the art had so narrowed that any claim under this patent must be held to its specific details. With this test in mind, the proof failed to show infringement.

The District Judge correctly summed up the evidence when he stated, in his opinion:

"Defendant steams all the hair equally, except in cases where by some special means he protects it from the heat. He rarely has attempted to steam only a portion of the hair, and where he has done this he has employed a method of protection from the heat not disclosed by the patents in suit. The dimensions of the heater have in no case affected the situation."

With his conclusions and his analysis of the testimony in respect of noninfringement, we agree.

Decree affirmed, with costs.

SIT SING KUM et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 45.

1. **Aliens ⟸32(8)—Evidence held not to support claim of Chinese that they were born in the United States.**
   Where the testimony of two Chinese persons, ordered to be deported, that they were born in this country, was not corroborated, and their testimony in other respects was contradicted by other witnesses, their testimony as to the place of their birth need not be believed.

2. **Aliens ⟸32(1)—Chinese previously entering can be deported under Immigration Act of 1917.**
   Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj) of which authorizes deportation of an alien who entered the United States in violation of any law of the United States, and expressly provided that it should be applicable to such aliens, irrespective of the time of their entry, applies to Chinese who entered this country in violation of Chinese Exclusion Act, §§ 6, 7 (Comp. St. §§ 4308, 4320), though they entered before 1917, so that such persons can be deported after executive hearing under the Immigration Act, and are not entitled to the judicial hearing given by the Chinese Exclusion Law.

3. **Aliens ⟸32(8)—Chinese have burden of proving right to remain.**
   Under Chinese Exclusion Act May 5, 1892, § 4 (Comp. St. § 4318), requiring any person of Chinese descent to be adjudged to be unlawfully within the United States, unless he establishes his right to remain, the burden is on Chinese persons to prove their right to remain, and they can be deported if they fail to sustain such burden.

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

Proceedings for habeas corpus and certiorari by Sit Sing Kum and another to procure their discharge from warrants of deportation. From an order dismissing the writs, petitioners appeal. Affirmed.

Dilworth M. Silver, of Buffalo, N. Y., for appellants.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (Francis E. Kerwin, Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. This is an appeal from an order dismissing writs of habeas corpus and of certiorari remanding Sit Sing Kum and Jeu Bou to the custody of the United States immigration inspector in charge at the port of Buffalo, in the state of New York, to be deported to Canada. In some respects, this is an extraordinary and amazing case, and the facts disclose an administration of the law which ought not to happen in this country. Wherever the fault lies, the administration of the Exclusion Law should not be made ridiculous and ineffective by allowing persons who are not entitled to remain in this country to go substantially at large for a period of six years after their arrest. The facts are as follows:

The appellants are Chinese, and they were first placed under arrest on September 16, 1915, when they were leaving a ferryboat on the mainland at Buffalo, which boat had just come from Grand Island, an island in the Niagara river lying between the Canadian and United States borders. Subsequently a writ of habeas corpus was granted, and, after argument, was dismissed by the District Judge, from whose decision an appeal to this court was taken, which appeal was later withdrawn. The order dismissing the writ of habeas corpus provided that the relators should be deported to China, and this order, during the pendency of the appeal, was modified on November 7, 1917, by the District Judge, in conformity with an opinion in two other cases handed down by this court, so that the relators were ordered deported to Canada, instead of China, and, if such deportation should not be made within 15 days from the date of the order, then the relators were to be discharged from custody absolutely. The relators were discharged, and immediately thereafter rearrested on a warrant of arrest issued under the provisions of the Immigration Law of February 5, 1917, and particularly section 19 of that act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj).

A hearing was held on November 6, 1917, before the immigrant inspector in charge at Buffalo, at which appellants were represented by counsel. At hearings testimony was given tending to show that both appellants had been seen in Toronto about 2½ years before the hearing; that on September 16, 1915, they were found coming from Grand Island in a ferryboat; that they had no certificates of residence. The appellants both testified that they had no certificates of residence; that they were Chinese laborers; that each had a mother alive in China; that the father of each had died in China, but they both claimed to have been born in the United States. Sit Sing Kum testified that he had been at Grand Island, and that he had been taken over to Grand Island in a rowboat, and was on his way back when arrested. Grand Island is wholly within the United States. In the hearing in the case of Jeu Bou testimony was given tending to show that Jeu Bou at the time of his arrest was wearing articles of wearing apparel of Canadian manufacture.

A warrant of deportation under the provisions of the Immigration Act of February 5, 1917, was thereupon issued by the Assistant Secretary of Labor, dated January 8, 1918, which warrant directed the deportation of the appellants to China. Thereafter writs of habeas corpus were granted, and it is the order dismissing the writs from which this appeal was taken.

The testimony of Sit Sing Kum was that he was of the Chinese race, but was not a citizen of China, having been born in San Jose, Cal. His testimony is that his father and mother returned to China when he was 15 years old; that his father is dead and his mother is living in China. The following are excerpts from his testimony:

"Q. How do you know you were born in San Jose? A. My father and mother told me.

"Q. Is there anybody in the United States who can testify as to where you were born? A. Yes.

"Q. Who? A. Sing Wem and Wee Sing, but I don't know the name they gave on their certificate of residence.
"Q. Are these friends or relatives? A. Friends.
"Q. Where do they live now? A. I don't know where they are living at the present time, because I left them since I left California.
"Q. How old were you when you left San Jose? A. Fifteen years old. * * *
"Q. Where did you go from San Jose? A. San Francisco.
"Q. Who did you go with? A. My uncle. * * *
"Q. Where is he now? A. He is now in California.
"Q. Do you know his address? A. No.
"Q. How long did you live in San Francisco? A. One year. * * *
"Q. From San Francisco where did you go? A. To New York.
"Q. Who went with you, if any one? A. My same uncle.
"Q. What address did you go to in New York? A. 17 Doyer street.
"Q. How long did you remain in New York? A. Four years.
"Q. What did you do there? A. Worked in a laundry, but I didn't have any regular employment.
"Q. From New York where did you go? A. Astoria, Long Island.
"Q. What did you do in Astoria? A. I worked on a farm there. * * *
"Q. Are there any other Chinese farmers in that vicinity? A. Yes.
"Q. How many? A. I don't know.
"Q. Do you know the names of any them? A. I don't know.
"Q. What kind of stuff did you raise on that farm? A. Chinese vegetables.
"Q. How large a farm was it? A. I don't know.
"Q. How long did you live on this farm? A. Three or four years."

Jeu Bou, like Sit Sing Kum, claimed to have been born in California, and to have been left there when his parents returned to China, when he was about 10 years old. His father, too, died in China, and his mother was still living there. After their return to China he came to New York. The following is an excerpt from his testimony:

"Q. With whom did you come? A. With some of my relatives.
"Q. What relative was it? A. With a man of the same family as mine.
"Q. What was his name? A. Jew Fung Chung.
"Q. Where is this man now? A. He went back to China.
"Q. How long did you live with him? A. A few years. * * *
"Q. Did you go to school? A. I attended no other school except a Sunday school.
"Q. Where was the Sunday school? A. When I went to visit Stamford City, I attended the Sunday school there.
"Q. How long did you live in New York City? A. A few years. I don't remember exactly. * * *
"Q. Where did you work? A. In a restaurant.
"Q. What restaurant? A. I don't remember the name of the restaurant where I worked.
"Q. From New York where did you go? A. I don't remember.
"Q. In what other cities, except San Francisco and New York, have you lived in the United States? A. I lived in Stamford City, and also in so many different other cities, and I don't remember their names.
"Q. Where did you live in Stamford? A. I don't remember.
"Q. What kind of work did you do there? A. I didn't do any work there at all. I only went there seeking employment.
"Q. How long did you stay? A. About one week.
"Q. Can you give us the name of any other city in the United States, except San Francisco, New York, and Stamford, where you lived? A. I don't remember the other names."

Both men testified they had never been in China and had never been in Canada. The evidence showed that at the time of his arrest Jeu

Bou wore a hat, collar, and underwear which bore well-known Canadian labels. Asked as to this, he testified they had been given to him by a friend as a present. Asked as to the name of his friend, he answered that he did not remember his name. There was very positive testimony by two gatemen at the Union Station in Toronto, and by a police constable in Toronto, that they saw these two Chinese in the Union Station in Toronto.

[1] There was no testimony corroborating the testimony of the Chinamen that they were born in the United States. The testimony contradicting their statements that they had never been in Canada destroys all confidence in their truthfulness, and we cannot believe their story as to the place of their birth. In Lauria v. United States, 271 Fed. 261, we held that Immigration Act Feb. 5, 1917, § 19, relating to deporting of aliens, was retrospective, and authorized the deportation of aliens who entered before its passage, and who prior to entry had been convicted of crime. The Supreme Court affirmed the judgment in an opinion not yet reported. In that case the conviction took place in 1895, the alien entered in 1914, and the warrant of deportation was issued on May 5, 1920. See, also, Ex parte Gin Kato (D. C.) 270 Fed. 343.

If these men had proved their citizenship, the order for their deportation would have to be set aside. If they failed, the order of deportation must be recognized as binding, and one with which the courts cannot interfere. It was plain to the District Judge, and it is plain to us, that these men failed to prove that they were born in the United States. It also appears that they have had a hearing before the immigration inspectors, that at that hearing they were represented by counsel, that it was conducted in a fair manner, that they were granted their full legal right, that the minutes and report of the proceedings were forwarded by the immigrant inspector in charge to the Secretary of Labor, and that the Assistant Secretary of Labor has ordered their deportation, acting under section 19 of the Immigration Act of February 5, 1917. Under that act his decision is final.

[2] Immigration Act Feb. 5, 1917, § 19, is set forth in the margin in its material provisions.[1] The Secretary of Labor is given authority

[1] The section provides in part as follows: "That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States * * * shall upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * [Third Proviso.] Provided further, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. * * * [Fifth Proviso.] Provided further that any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

to arrest and deport on departmental warrant alien Chinese persons found within the United States in violation of the act, or in violation of any other law of the United States. It is to be observed, too, that the section 19 is by express provision made applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States.

The warrant of arrest recited that the aliens, naming them—

"landed near the port of Buffalo, N. Y., on or about the 15th day of September, 1915, are subject to be taken into custody and returned to the country whence they came under section 19 of the Immigration Act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese Exclusion Law, for the following among other reasons: That they have been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the Act of November 3, 1893 [Comp. St. § 4320], being Chinese laborers not in possession of certificates of residence, and that they entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888 [Comp. St. § 4308], and rule 1, Chinese Rules."

The counsel for the appellants claims that they are entitled to have their hearing under the provisions of the Immigration Act of February 20, 1907 (34 Stat. 898), and not under that of 1917, above referred to, as he claims that they were here prior to the passage of the act of 1917, the further claim being advanced that under the act of 1907, the Secretary of Labor has not jurisdiction to deport Chinese to China, but that upon arrest they were entitled to a hearing under the Chinese Exclusion Law, which provides for a judicial deportation proceeding, and he cites in support of his claim United States v. Woo Jan, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466. That case would support the argument if the act of 1907 and not that of 1917 is applicable to the appellants; but as we have already pointed out the act of 1917 is expressly made applicable, irrespective of the time these men entered the United States. It is idle, therefore, to argue that it does not and cannot have a retroactive application. The courts have in a number of cases held that the act of 1917 applied exclusively to Chinese persons found in the United States in violation of the Chinese Exclusion Acts. Mayo, Immigration Commissioner, v. United States ex rel. Lee Wong Hin, 251 Fed. 275, 163 C. C. A. 431; Ng Leong v. White, 260 Fed. 749, 171 C. C. A. 487; Ng Fung Ho v. White (C. C. A.) 266 Fed. 765. And this court as already pointed out has decided the question in the Lauria Case.

[3] Under Act May 5, 1892, c. 60, § 4, 27 Stat. 25 (Comp. St. § 4318), any Chinese person or person of Chinese descent, arrested as being unlawfully in the country, "shall be adjudged to be unlawfully within the United States," unless he establishes by affirmative proof to the satisfaction of the judge or commissioner his right to remain. The burden of proof was on these appellants, and they have not sustained it.

The order dismissing the writ of habeas corpus is affirmed, and the appeals are dismissed.

MALLORY S. S. CO. v. THALHEIM et al.

(Circuit Court of Appeals, Second Circuit. Decided October 13, 1921. Opinion Filed November 16, 1921.)

No. 155.

1. **Interpleader ⟸18—Right to relief held barred by laches, where action at law had been pending for a long time.**
   A steamship company, which delivered goods covered by an order bill of lading to a party not having the bill, and was sued by the holder for conversion, *held* barred by laches from obtaining injunctive relief, and relief by way of interpleader, where, though it knew the facts when it filed its answer at law, it did not seek such relief until the case, after having been pending for over a year, had appeared more than a dozen times on the day calendar, and could have been immediately tried, and after the plaintiff therein had thoroughly prepared his case for trial at great expense.
2. **Interpleader ⟸10—Not maintainable by carrier intentionally delivering goods to party not having bills of lading.**
   A steamship company, which intentionally delivered goods covered by order bills of lading to one not having the bills of lading, is not entitled to maintain a bill of interpleader against the holders of the bills, who are suing or threaten to sue for conversion, since such a bill cannot be sustained, where the complainant is a wrongdoer as to any of the defendants, or where there is a question to be tried as to whether complainant, by reason of his own act, has rendered himself liable to each of the defendants.
3. **Interpleader ⟸1—When maintainable stated.**
   The right of a court of equity to compel an interpleader exists where two or more persons claim the same thing under different titles, or in separate interests, from another person, who does not claim any title or interest in himself, and, not knowing to which of the claimants he ought to deliver that which he has in his custody, is either molested by an action or actions brought against him, or fears he may suffer injury from the conflicting claims of the parties.
4. **Interpleader ⟸6—Not maintainable by party not in possession of property or fund in dispute.**
   A bill of interpleader ordinarily assumes that the person filing it is in the position of a stakeholder, and has the property actually in his possession which is severally claimed by two or more persons, and it cannot be maintained by one who is not in possession of the property or fund in dispute.
5. **Interpleader ⟸6—Not maintainable by carrier after delivery of goods.**
   Bill of Lading Act Aug. 29, 1916, §§ 17, 18 (Comp. St. §§ 8604i, 8604ii), authorizing a carrier to require all known claimants of goods to interplead where more than one person claims title to the goods, does not authorize a carrier who has parted with possession of goods to compel the claimants to interplead and determine to which one of them he should have made delivery.
6. **Injunction ⟸26(4)—Carrier delivering to one not having bills of lading not entitled to sue holders to prevent multiplicity of suits.**
   Where a steamship company delivered goods covered by various bills of lading negotiated by the shipper to different persons to one not having the bills of lading, and the holders of the bills, who have no unity of claim, title, right, or cause of action with each other, are suing or threatening to sue for conversion, the steamship company cannot maintain a suit to prevent a multiplicity of actions by having a complete determination in

one suit, as a mere community in interest in matters of law or fact does not authorize a bill to avoid multiplicity of actions.

7. Injunction ⟸26(4)—Suit held not maintainable against holders of bills of lading covering goods wrongfully delivered to prevent multiplicity of suits.

Where a steamship company delivered goods covered by order bills of lading to B. & Co., which did not have the bills of lading, and the several holders of the bills are suing or threatening to sue for conversion, the fact that B. & Co. may in a certain contingency sue the holders of the bills of lading, or that the shipper's trustee in bankruptcy may find it necessary to have an accounting with B. & Co., does not authorize a suit by the steamship company to avoid a multiplicity of suits.

8. Injunction ⟸26(4)—Multiplicity of suits to which complainant will not be party does not confer equity jurisdiction.

The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party, and a multiplicity of suits against the defendants, to which the complainant will not be subjected, affords no ground for coming into equity.

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

Suit by the Mallory Steamship Company against Julius Thalheim and others, trustees doing business as the International Credit Trust, and others. From an order denying an injunction pendente lite, petitioner appeals. Affirmed.

The petitioner is a corporation organized under the laws of the state of Maine, but has an office for the transaction of business in the city and Southern district of New York. It is a common carrier. None of the respondents are citizens of Maine and the controversy is one between citizens of different states. The petitioner seeks an injunction to restrain the prosecution of four actions at law, brought against it for conversion and pending in the District Court, and also asks for interpleader. The motion for an injunction was denied by the District Judge, who also refused to require an interpleader.

Jerome S. Dumont and George Mogensen are copartners trading under the name of George Mogensen, and are exporters engaged in business in the city of New York. In December, 1919, they delivered to the steamship Henry R. Mallory, owned and operated by the petitioner, merchandise of the value of $350,000. The steamship company issued to George Mogensen negotiable order bills of lading for said merchandise. The bills of lading provided that the merchandise covered thereby was to be delivered "to the order of George Mogensen, notify Leo Brill & Co."—Leo Brill & Co., being a firm in Bucharest, Roumania.

Mogensen thereupon, in the usual course of business and for value, duly negotiated, indorsed over, and delivered these bills of lading to the respondents herein, Bank of Dunellen, Berkowitz, Goldsmith & Spiegel, Emanuel Gross, and the International Credit Trust. Upon the arrival of the vessel at Constanza, the petitioner, through its local agent there, delivered this entire cargo to Leo Brill & Co. notwithstanding that the firm had none of the bills of lading; the bills of lading being then, as now, in the possession of the respondents herein, either as absolute owners through outright purchase, as they claim, or, as having advanced and paid to Mogensen large sums of money thereon. It seems that this cargo was so delivered to Leo Brill & Co., not through inadvertent error or mistake on the part of the petitioner's local agent at Constanza, but deliberately, on the strength of and because of certain indemnity which that firm then and there furnished to the petitioner, in the shape of a bond executed by the Marmorosch Blank Bank, of Roumania, as the condition of the delivery of the cargo to it.

The petitioner now comes into a court of equity and prays for its extraordinary aid in restraining the several holders of these various bills of lading from prosecuting their several suits against it, at law and in admiralty, three of them pending in this jurisdiction, and one in Maine, to recover of the petitioner herein their several damages as for the separate conversions by the petitioner of the respective lots of merchandise covered by the respective bills of lading, when it delivered the merchandise to Leo Brill & Co., in Roumania, without the production of any of the bills of lading, and without paying any of the drafts attached thereto for an aggregate of several hundred thousand dollars. The basis for this suit is, the petitioner alleges, "equitable interpleader," because, although Brill & Co. already has the cargo, and has had it since January, 1920, Brill & Co. now make claim to the damages for which the Mallory Steamship Company is being sued; i. e., the money value of the cargo, which the petitioner fears that it may ultimately have to pay to these various holders of the bills of lading in the law and admiralty suits, and that the trustee in bankruptcy of Mogensen likewise claims or may claim, either indirectly from or through the petitioner, or from the respondents herein, to the extent of the difference between what they paid for or advanced on the bills of lading, and the amount of their respective verdicts—i. e., the full value of the cargo, that being the measure of damages, in an action at law for conversion. So that, these six claimants, four being already ad litem, and the two others threatening, constitute, so the petitioner avers, the "multiplicity of suits" which it fears, and to restrain which, it argues, a court of equity ought, in the exercise of its sound discretion to give its redress by bringing them all into court in one suit. It is noted that the petitioner does not offer to turn over to the plaintiffs in the law and admiralty suits the indemnity which it received from the Marmorosch Blank Bank, and which was accepted by the petitioner in lieu of the cargo, and probably for the full value thereof.

The respondent Thalheim, as assignee of the International Credit Trust, began an action at law on August 4, 1920, against the petitioner claiming $100,000 as the alleged value of certain merchandise on account of which advances had been made on the security of certain of the bills of lading which had been delivered by the firm of George Mogensen and assigned by it to the International Credit Trust, and which were by the said Trust assigned to Thalheim. That action is brought to recover for the conversion by petitioner of the merchandise by its unlawful delivery of the same at Constanza. A like action was commenced on the same date by the respondent Mitchell, as assignee of some of the bills of lading similarly issued by the firm of George Mogensen, and because of which it is claimed title passed to certain of the merchandise which it is alleged was similarly misdelivered; damages being asked in the sum of $105,000. A libel was filed on January 10, 1920, in the same District Court, by the respondents Berkowitz and Spiegel, holders of certain of the assigned bills of lading claiming damages in the sum of $91,813.82, for conversion of the merchandise, represented by said bills, because of its misdelivery. The First National Bank of the Borough of Dunellen, N. J., on September 2, 1920, brought an action at law against the petitioner in the United States District Court for the District of Maine, alleging conversion and claiming damages in the sum of $150,000.

All the aforesaid actions are alleged to be pending and undetermined, and the actions brought by Thalheim and Mitchell are alleged to be upon the day calendar of the court. The petition contains the following further allegations:

"Thirtieth. Your petitioner has no assurance of the solvency of said firm of Leo Brill & Co. or the ability of said firm to respond over to your petitioner for any judgment or decree that may be recovered against it in the aforesaid proceedings. The members of said firm, being residents of Roumania, are not within the jurisdiction of this court, or other court in the United States, and your petitioner may be subjected to the risks and difficulties of litigation in Roumania or other foreign countries. The value of Roumanian currency in exchange with the currency of the United States

has fallen far below parity and is at the present time less than one-fifteenth of parity.

"Thirty-first. Your petitioner is further advised and believes that if it is compelled to pay in any of said actions to the plaintiff or libelant therein the full amount of the value of such goods, wares, and merchandise as were represented by the bills of lading so transferred, and your petitioner in turn recovers from said Leo Brill & Co. by action against said firm, then Leo Brill & Co. intend to prosecute a claim against the plaintiff or libelant so recovering the sum paid under such judgment for the total amount thereof, or for such part thereof as represents the excess of the sum so paid over and above the amount of the advance made by the purchaser of the draft or drafts involved in such action advanced at the time of the purchase of said draft by such purchaser to George Mogensen.

"Thirty-second. Your petitioner is further advised and believes that if it be established, as claimed by said firm of Leo Brill & Co., that title to said goods, wares and merchandise did pass to said firm of Leo Brill & Co., as hereinabove set forth, said firm of Leo Brill & Co., will be entitled to recover such excess from such plaintiff or libelant, as the case may be.

"Thirty-third. By reason of the foregoing facts your petitioner is advised and believes that, unless a court of equity shall intervene to avoid such multiplicity of actions and such circuity of actions, your petitioner will be greatly and unduly harassed and put to heavy expense and trouble to protect its rights and to prevent a miscarriage of justice.

"Thirty-Fourth. Your petitioner is further informed and believes that said Thomas E. Huser, trustee in bankruptcy as aforesaid, makes claim that at the time that said sum of $200,000 was paid by said firm of Leo Bril & Co. to said firm of George Mogensen, such payment purporting to have been made on account of the contract of July 22, 1919, there existed an indebtedness from said firm of Leo Brill & Co. to said firm of George Mogensen, to the payment of which said sum of $200,000 or a substantial part thereof, was properly applicable; so that only a part, if any, of the sum so paid can justly be claimed by said firm of Leo Brill & Co. to have been actually made on account of said contract and of the purchase of the goods, wares and merchandise contained in the cases so shipped, as hereinabove set forth, by said steamer Henry R. Mallory; and your petitioner is further informed and believes that to determine the truth with regard to said claim of said trustee in bankruptcy and to determine the state of said account between said firm of Leo Brill & Co. and said firm of George Mogensen at the time when said payment was so made will require the analysis of a series of transactions, and the accounts relating thereto, between said two firms, which determination can be properly made only by a court of equity; and your petitioner is further advised and believes that it is essential and necessary that the state of account between said firms shall be duly determined in order that its liability, if any, shall be limited to the amount justly and equitably due to the plaintiff or libelant, as the case may be, in each of said litigations hereinabove fully set forth."

While the petition asked that the several respondents named therein be required to interplead, and that a preliminary injunction be entered restraining the parties in the several actions above referred to from proceeding further with the actions at law and with the libel in admiralty, the order which the court entered, and from which the appeal is taken, was confined to two of the actions, and reads as follows: "Ordered that said motion for an injunction pendente lite restraining the prosecution of the action of Julius Thalheim, plaintiff, against Mallory Steamship Company, and the action of Samuel Mitchell, plaintiff, against Mallory Steamship Company, defendant, be and the same hereby is, in all respects denied."

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper and Carl G. Stearns, both of New York City, of counsel), for appellant.

Leo Oppenheimer, of New York City (S. H. Kaufman and P. Kupfer, of New York City, of counsel), for respondent Thalheim.

Jacob M. Leibner, of New York City (Samuel I. Frankenstein, of New York City, of counsel), for respondent Mitchell.

Before ROGERS, MANTON, and MACK, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). There are conclusive reasons why the application of the Mallory Steamship Company, the appellant herein, for injunctive relief and interpleader was properly denied.

[1] In the first place, it is to be observed that the appellant was dilatory in making his application. The maxim is ancient, "Vigilantibus non dormientibus æquitas subvenit, and its meaning sufficiently obvious. The courts of equity have applied it in many cases, in which the right to equitable relief has been otherwise clear, simply because a party has slept upon his rights. As Lord Camden declared in Smith v. Clay, 5 Bro. C. C. 639:

"Nothing can call forth this court [chancery] into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."

Now, what are the circumstances under which the appellant seeks the stay of the proceedings at law? An action for conversion was commenced on August 4, 1920, by the respondent Thalheim as assignee of the International Credit Trust against the Mallory Steamship Company, defendant, the petitioner and appellant herein. The steamship company filed its answer on September 9, 1920, in which it merely denied all the material allegations of the complaint and set up no affirmative defenses, legal or equitable, despite the fact that at that time all of the material allegations of the present petition were known to it. Issue in that action was joined on September 20, 1920. After the joinder of issue in that action its attorneys notified the attorney for Thalheim that at the trial of the action strict proof of all the allegations of the complaint would be required, including, not only proof of the misdelivery of said merchandise, but of all the facts necessary to show the contents, packing, and shipping of the great number of cases delivered to the steamship company and for which it issued its bills of lading.

In preparing the action for trial it was necessary for counsel for Thalheim to visit various states, to take depositions of witnesses familiar with the facts connected with the packing and shipment of some of the cases to George Mogensen which were subsequently delivered to the steamship company. The law action first appeared on the day calendar for trial during the month of April, 1921, and was adjourned at the request of the defendant until May. During the month of May, it again appeared on the day calendar, and was marked ready for trial, and held by the court until June, 1921. During the month of June, when the case again appeared on the day calendar, it was again marked ready, but at the suggestion of the judge who was presiding the case was passed until September. The action again appeared on the calendar for trial on September 12, 1921. At the request of the defendant it was arranged that the case should be held ready, so that the trial should not begin before September 15, 1921. The case was marked

ready by both sides on September 15th, again on September 16th, and again on September 19th. On the morning of September 19th, when the calendar was clear and the case could have immediately proceeded to trial, counsel for the complainant stated to the court that it was about to serve a bill in equity to bring in various alleged claimants, and as incident thereto would apply for a temporary injunction staying the trial of the law action. The judge thereupon directed that the case hold its position on the calendar and passed it until September 21st. A similar disposition of the case was made on September 22d. On September 23d, an application was made to the District Court for an order staying the trial of the law action upon an unserved petition, which constitutes the moving paper herein.

It thus appears that the allegations of the bill in equity were as well known to the appellant on the date when the answer was served as they are to-day, and, though they could have been asserted by way of equitable defense, the appellant contented itself with a general denial. Now, after the law case had appeared more than a dozen times on the day calendar, and could have been immediately tried, and after the respondent Thalheim had thoroughly prepared his case for trial at great expense, the appellant sought to stay his action.

The petitioner seeks to excuse this laches in not bringing the alleged facts constituting the equitable defense to the attention of the court sooner on the ground that Leo Brill & Co. is a Roumanian partnership, and that it has refused to submit itself to the jurisdiction of this court hitherto. It is significant that the guaranty received by the complainant herein was not executed by Leo Brill & Co. It was executed by the Banque Marmorosch Blank & Co., which has large offices at No. 29 Broadway in this city, and has a managing agent on whom the process of this court could have been served. It maintains large bank accounts in this city, and jurisdiction could have been acquired by attachment had the appellant seen fit to do so.

It seems to us that the application to stay the action at law comes too late, after a party with full knowledge of all the facts has allowed the suit to go to issue and to be ready for trial, and then comes at the last moment to stay the action to prevent a multiplicity of suits. Richardson v. Davidson, 53 Hun, 630, 5 N. Y. Supp. 617. What has been said would be true, if the appellant originally had grounds for equitable relief. But it is our opinion that upon the facts as they are disclosed by the record no reason has existed at any time for its coming into equity for the relief for which it is seeking. The relief sought is that of requiring the respondents to interplead, and thus relieve the appellant of the danger it is thought to be in from the claims which they assert. But the appellant's position is quite untenable.

[2] Where it appears that as to any of the defendants the complainant is a wrongdoer, his bill of interpleader cannot be sustained. Slingsby v. Boulton, 1 Ves. & B. 334; Morristown First National Bank v. Bininger, 26 N. J. Eq. 345; Hatfield v. McWhorter, 40 Ga. 269; Conley v. Alabama Gold & C. Ins. Co., 67 Ala. 472. It is apparent that the condition in which the steamship company finds itself is of its own intentional creating in that the merchandise for which it had

issued order bills of lading was delivered by it to one who, as it knew, did not have the bills of lading, and this misdelivery of the goods made the petitioner an intentional wrongdoer as to the holders of the bills, the respondents whom it now seeks to compel to interplead. This it cannot do.

A complainant cannot have an order that defendants interplead, when one important question to be tried is whether by reason of his own act he has rendered himself liable to each of them. Desborough v. Harris, 5 DeG., M. & G. 439; Cochrance v. O'Brien, 8 Ir. Eq. 241; National Life Insurance Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93. And in the actions pending the act complained of is the alleged conversion of the goods by the steamship company, through its intentional misdelivery of them, thereby incurring liability to the defendants herein as holders of the bills of lading.

[3] A bill of interpleader ordinarily supposes that the plaintiff is the mere holder of a stake, which is equally contested by the other parties, and as to which the plaintiff stands wholly indifferent between them. The right of a court of equity to compel an interpleader exists where two or more persons claim the same thing under different titles, or in separate interests, from another person who does not claim any title or interest therein himself, and, not knowing to which of the claimants he ought to deliver that which he has in his custody, is either molested by an action or actions brought against him, or fears he may suffer injury from the conflicting claims of the parties. 2 Story's Eq. Jurisprudence, § 806.

[4] The bill ordinarily assumes that the person filing it is in the position of a stakeholder, and that he has the property actually in his possession which is severally claimed by two or more persons, and that he does not know to which of the claimants he ought to deliver it, and he therefore prays that they may be required to interplead and to state their claims, so that the court may adjudge to whom the property in controversy belongs. It is elementary that the bill cannot be maintained by one who is not in possession of the property or fund in dispute. Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; Marvin v. Ellwood, 11 Paige Ch. (N. Y.) 365; Mt. Holly, etc., Turnpike Co. v. Ferree, 17 N. J. Eq. 117. It is too late to file the bill after the property has been delivered over. Henderson v. Watson, 23 Grant, Ch. (U. C.), 355; Burnett v. Anderson, 1 Meriv. 405, 35 Eng. Reprint, 723.

[5] The appellant, however, relies upon the federal Bills of Lading Act, the shipment of the goods being in foreign commerce and subject, therefore, to its provisions. The statute referred to is the Act of August 29, 1916, c. 415, 39 Stat. 538 (Comp. St. §§ 8604aaa–8604w). The material provisions of the act, as concerns the matter now under consideration may be found in the margin.[1]

[1] Sec. 2. That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that

That the bills of lading which were issued in this case were order bills is conceded. It is the ingenious argument of the appellant that it has a right to interplead the various alleged claimants under sections 17 and 18 of the Bills of Lading Act (sections 8604i, 8604ii). Section 17 of the act, set forth in the margin, provides that the carrier may require all known claimants to interplead, where more than one person claims the title to the goods; and section 18 authorizes the carrier to bring legal proceedings to compel all claimants to interplead and excuses it from liability for refusing to deliver the goods because of adverse claims made.

In the enactment of the statute it was not the purpose of Congress to revolutionize the law relating to interpleader by authorizing one who had parted with the possession of the goods to compel thereafter the claimants to interplead and determine to which one of them he should have made delivery. The obvious purpose of the enactment is the protection of a carrier who has not parted with the possession of the goods, and is in doubt as to the proper person to whom delivery should be made, and who refuses to deliver to either. When the goods arrived at their destination, the carrier under section 14 (section 8604gg) might have made delivery of the goods on a court order as therein provided or by interpleading the claimants as provided in sections 17 and 18. But when it made delivery of the goods to one claimant it lost any right it up to that time possessed of requiring the claimants to interplead.

it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this act unless upon its face and in writing agreed to by the shipper.

Sec. 7. That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by (a) an offer in good faith to satisfy the carrier's lawful lien upon the goods; (b) possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and (c) a readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier. In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 11. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 14. That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery, of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any

But the appellant also seems to think that the bill can be maintained as a bill of peace to avoid multiplicity of suits. Where the various causes of action are purely legal, and equity has no jurisdiction of each of them separately, but its jurisdiction is founded exclusively on the existence of its power to prevent a multiplicity of actions, a somewhat stricter rule appears to be enforced than in those cases where the numerous different causes of action are of an equitable nature. In Street's Federal Equity Practice, § 429, that writer says:

"Where all the causes of action are of an equitable nature, the chief consideration is that of convenience; where they are exclusively of a legal nature, the court has to take notice of the general rule that equitable jurisdiction cannot be exercised, if the remedy at law can be considered adequate. Hence, from the mere fact that the maintaining of a single suit in equity would lessen the number of actions at law, it does not necessarily follow that equity will entertain the bill."

In this case the appellant seeks to have a court of equity wrest jurisdiction from a court of law, on the ground that several persons have brought actions for conversion against it for the misdelivery of goods for which they held distinct and separate bills of lading. In Hipp v. Babin, 19 How. 271, 15 L. Ed. 633, Mr. Justice Campbell, speaking for the court, said that—

person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without order of court shall be binding on the parties thereto. The delivery of goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19. That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 31. That a person to whom an order bill has been duly negotiated acquires thereby (a) such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and (b) the direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Comp. St. §§ 8604aaaa, 8604b, 8604d, 8604dd, 8604f, 8604gg, 8604i, 8604ii, 8604j, 8604p.

"Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

[6] The circumstances under which a court of equity will assume jurisdiction in order to avoid a multiplicity of suits is one upon which the courts have not been in entire accord. The subject was considered by this court at some length in 1914, in Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520; the court not being, however, in full accord relating to the matter. The majority opinion held that a mere community in interest between plaintiffs in matters of law and fact did not make it admissible for all such plaintiffs, each of whom had a separate cause of action at law against the defendant for a tort, to join in a suit in equity in order to avoid a multiplicity of actions. In that case there were 38 plaintiffs, and it was said that practically the same evidence would have to be produced 38 times, with the same questions of law to be determined. The court then said that—.

"An examination of the authorities convinces us that a mere community of interest in matters of law and fact does not make it admissible to bring all plaintiffs into one suit in equity in order to avoid a multiplicity of actions."

And it was also said that—

"The mere fact that a defendant has committed a tort by which he injured one of a hundred parties cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages."

It needs no extended argument to show that if 38 plaintiffs cannot file a bill to avoid a multiplicity of suits against a tort-feasor, under the circumstances stated, the tort-feasor certainly cannot maintain one to compel them to give up their right to sue at law. Neither is it necessary to point out that, if the plea to avoid a multiplicity of suits is unavailing where 38 actions are involved, it is much less so where 4 or 5 are involved.

In the case now before us for determination it appears, however, that none of the parties are suing or claiming under more than their own particular bills of lading. They all hold separate sets of bills of lading covering different and separate lots of merchandise. Furthermore, Brill's alleged claim, whatever it be, is said to be paramount to any of the bills of lading; hence the suit, if any, should be his, and not that of this petitioner, and the holders of the bills are making no claims against each other nor against Brill, but each has a separate title to separate bills of lading, separately acquired at different times, and under which the steamship company, if liable, is solely and separately liable. Hence there is no unity of claim, no unity of title, and no unity of right or cause of action. Furthermore, the separate rights do not grow out of some single alleged wrongful act, but the right of each holder of a bill of lading arises from the alleged separate wrongdoing in delivering to Brill the goods covered by that particular bill of lading. There is also no privity between any or either of the parties

mentioned in the petition either as to estate, rights, titles, liabilities, or obligations.

[7] Moreover, the fact that the appellant fears that Leo Brill & Co. may in a certain contingency bring suit against the plaintiffs in the actions at law, and that Thomas E. Huser, as trustee in bankruptcy of the firm of George Mogensen, may find it necessary to determine the state of the account between Leo Brill & Co. and the firm of George Mogensen, does not justify the application of the appellant to be permitted to file this bill and avoid a multiplicity of suits. If the steamship company misdelivered the merchandise, it expiates its wrongful conversion by a money judgment. The equities between the respondents are adjustable between themselves, and the misdelivering steamship company is not concerned in them.

[8] The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party. A multiplicity of suits against the respondents, to which the complainant will not be subjected, certainly affords it no ground for coming into equity with its present application. Thomas v. Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428; Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520; Scruggs v. American Cent. Ins. Co., 176 Fed. 224, 100 C. C. A. 142, 36 L. R. A. (N. S.) 92. It does not rest with the appellant to urge as a foundation for its bill that it will save the respondents from a multiplicity of suits. Equitable Life Assurance Society v. Brown, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. Ed. 682.

The order appealed from is affirmed, and the application for an injunction pendente lite was properly denied.

WINSLOW et al. v. FEDERAL TRADE COMMISSION.*

NORDEN SHIP SUPPLY CO., Inc., v. SAME.

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

Nos. 1887, 1892.

1. **Commerce ⇐40(1)—Ship-chandlers selling goods brought from other states not engaged in interstate commerce.**

That commodities dealt in by ship-chandlers in the state of Virginia were in large part transported into that state from other states, from which they were procured, did not constitute the sales made in Virginia interstate commerce, within the jurisdiction of the Federal Trade Commission; the interstate transportation having ended when the goods reached their destination and were placed in the ship-chandlers' warehouses.

2. **Commerce ⇐40(1)—Ship-chandlers, selling supplies to vessels within the state, not engaged in foreign commerce, though supplies used on the high seas.**

Ship-chandlers, selling goods from their storehouses in Virginia to ships lying in Hampton Roads, within the territorial limits of that state, were not engaged in interstate commerce, within the jurisdiction of the Federal Trade Commission, though the goods were used for the most part in navigating the high seas, and though the sales were made under

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 271, 66 L. Ed. —.

contracts, solicited and entered into in England, especially where such contracts were nothing but mere options given to the shipowners, of which they might or might not avail themselves.

On Petitions for Review of Orders of Federal Trade Commission.

Original petitions by D. A. Winslow and others, a partnership doing business as D. A. Winslow & Co., and by the Norden Ship Supply Company, Incorporated, for review of orders of the Federal Trade Commission. Orders set aside and annulled.

Herbert G. Cochran and Henry Bowden, both of Norfolk, Va., for petitioners.

John W. Davis, of New York City (Adrien F. Busick, of Washington, D. C., Acting Chief Counsel of Federal Trade Commission, and Charles S. Moore, of Washington, D. C., on the brief), for respondent.

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

KNAPP, Circuit Judge. Each of these suits is brought, by petition filed originally in this court, to set aside and annul an order of the Federal Trade Commission requiring the parties named therein to cease and desist from certain practices, presently to be described, which are declared to be "unfair methods of competition in interstate and foreign commerce." The same questions arise in both cases. They were argued together and may properly be disposed of in one opinion.

In the case of D. A. Winslow & Co. the findings of the commission are reproduced in the margin,[1] but a shorter statement will dis-

[1] 1. That the respondents, D. A. Winslow, J. Jones, and D. H. Robishaw, are copartners doing business under the name and style of D. A. Winslow & Co., with their principal places of business located at Norfolk and Newport News, state of Virginia, and are now and at all time hereinafter mentioned have been engaged in selling provisions, merchandise, and other supplies for ships engaged in coastwise and foreign commerce, causing said commodities to be delivered to ships reaching ports in the state of Virginia while engaged in transporting passengers and commodities between ports in various states of the United States and in transporting passengers and commodities between American ports and ports in foreign countries, in due course of commerce among the several states of the United States or with foreign nations; that such supplies so sold by respondents are for consumption and use by the purchasers thereof upon the high seas in and beyond the territorial jurisdiction of the United States, said business being conducted by the respondents in direct competition with other persons, partnerships, and corporations similarly engaged.

2. That in the course of their business as described herein, the respondents purchase provisions, merchandise and other supplies for ships in the various states of the United States, transporting same from said places of purchase through other states to their places of business in the state of Virginia, where they are kept and stored for their trade in furnishing supplies for ships as aforesaid.

3. That in the course of their business of selling supplies for ships as described herein, the respondents in some instances secure orders for the sale of supplies from captains of ships after arrival at ports in the state of Virginia, dealing directly with the captains without having arrangements in advance with the owners to furnish their ships with supplies when calling at these ports; that approximately 90 per cent. of the respondents' business, amount-

close the practices held to be unlawful. The petitioners are ship-chandlers, having their principal place of business in Norfolk, Va., with a branch in Newport News. In those places they keep in stock and sell to ships coming to that port supplies of various kinds. Ninety per cent. of their business is with English ships, and they appear to cater to that trade. Deliveries are made by launches from their warehouses to ships lying at anchor in Hampton Roads, which is in the state of Virginia.

ing to as much as $750,000 in some years, is initiated with the owners of ships in foreign countries through contracts entered into and agreed upon, by a representative of the respondents soliciting business in those countries, in which the respondents agree to furnish ships with supplies when calling at Norfolk, and other ports in the state of Virginia, at prices named in the contracts, excepting when circumstances reasonably beyond the respondents' control compel them to vary such prices.

4. That upon the arrival of a ship and after arrangements have been made, either by contract or otherwise, for the respondents to furnish a ship with supplies, the captain, after some preliminary negotiations, usually visits one of the stores of the respondents in Norfolk or Newport News, and there selects and orders such supplies and in such quantities as he may determine his ship will require for its use in port and at sea; that after the supplies have been delivered and inspected and the ship is about to depart, the captain calls upon the respondents, checks over the bill for the supplies, and on his approval of same by signing it, the respondents secure payment of same from the agents of the owners at these ports authorized to pay the ship's disbursements, or by draft on the owners.

5. That in the course of their business of selling supplies for ships as described herein, the respondents for several years last past have given to the captain of practically all of the vessels to which they have furnished supplies, without the knowledge and consent of their employers and without other consideration therefor, large sums of money, amounting in some instances to as much as $400 or 5 per cent. of their bills as inducements to purchase and as gratuities for purchasing for the owners of the vessels operated by them, provisions, merchandise and other supplies for ships from the respondents.

6. In many instances where the respondents have contracts with shipowners to supply their vessels when calling at the ports at which respondents do business, such owners also have contracts or arrangements with ship-chandlers in other ports of the United States to furnish their ships supplies when calling at those ports; that the captains of vessels whose owners have such contracts or arrangements with ship-chandlers for supplies as herein described and found to exist, are required to purchase from ship-chandlers with whom the owners have such contracts or arrangements; that vessels of such owners frequently call at several ports of the United States on the same trip, and that captains are clothed with discretion to make their purchases at such port as they may select; that the payment of commissions and the giving of gratuities by respondents, as found in paragraph 5 hereof, have been for the purpose of inducing captains to purchase supplies from them rather than from their competitors at Norfolk or other ports; that failure of respondents to pay commissions and give gratuities has resulted and will result in captains purchasing supplies at other ports where ship-chandlers under contract or other arrangement with the owners will or may pay gratuities. In the case of what are termed "free ships," the owners do not have subsisting contracts with ship-chandlers to furnish supplies to the vessels when calling at ports of the United States, but the captains of such vessels have authority from the owners to purchase supplies at such ports, from such ship-chandlers, and in such quantities as the captain may deem necessary and advisable; that the payment of commissions and the giving of gratuities by respondents in such cases, have been to induce the captains to purchase supplies from the respondents.

When the transaction with a given ship has been completed by delivery of the supplies on board and receipt of payment therefor, the petitioners usually give the captain a gratuity, or commission on the purchase price, which is sometimes as much as 5 per cent., and amounts in instances to a considerable sum. They say that the making of such gifts, the purpose of which is obvious, is a custom of long standing, generally observed in the ship-chandlery trade, and well known to all ship owners. It is this payment of gratuities or commissions to captains purchasing supplies for their ships which the Federal Trade Commission holds to be unfair competition, and the order under review directs discontinuance of the practice. Other facts will be referred to in the brief discussion which follows:

[1] In carrying on the business thus outlined, were the petitioners engaged in interstate or foreign commerce? This is the fundamental question to be determined, since if they were not, the commission was without jurisdiction. The claim that they were engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this transportation ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News. They are then incorporated in the general stock of merchandise there held for sale, and become subject, so far as now concerns us, to the exclusive jurisdiction of the state of Virginia. Their subsequent sale and delivery within that state, with which alone the condemned practices are connected, is in no sense interstate commerce. In short, it is quite beyond doubt that the jurisdiction of the commission over the matter in hand cannot be supported by the prior, but independent and completed transportation of the goods, or some part of them, from another state. Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Robbins v. Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694; Wagner v. Covington, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157; American Harrow Co. v. Shaffer (C. C.) 68 Fed. 750; Ward Baking Co. v. Federal Trade Commission (C. C. A.) 264 Fed 330, directly in point; Roselle v. Commonwealth, 110 Va. 235, 65 S. E. 526.

[2] Were the petitioners engaged in foreign commerce? Their business is simply this: From stocks held in their storehouses in Virginia they sell and deliver supplies to ships lying in Hampton Roads, within the territorial limits of Virginia; that is, in waters under the jurisdiction of that state. The Abby Dodge, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390. Their dealings in all cases are carried on and concluded in the state of Virginia. True, the supplies may be used by the ships—doubtless are used for the most part—in navigating the high seas, but with that use or other use the petitioners have nothing to do. Their relations with the ships cease entirely when the supplies are put on board and payment therefor is received. What becomes of them afterwards is beyond their control and in no wise their concern. This being so, how can it be said that the petitioners are engaged in foreign commerce? Surely not because, and solely because,

the ships to which they sell supplies in a Virginia port go from that port to foreign countries. The mere statement of the facts refutes the contention. Nor are we referred to any case in which such transactions as here appear are held to be foreign commerce, or in which similar transactions are held to be interstate commerce. It is indeed a novel proposition, to take a concrete example, that one who sells coal to an interstate railroad, which coal is necessary for and actually used on locomotives hauling interstate trains, is for that reason himself engaged in interstate commerce. To state the proposition is to reject it. Decisions under the Employers' Liability Act are not in point, or at most but beg the question. Could an action be maintained under that act by an employee of the coal dealer, in the case supposed, who was injured in delivering coal to the railroad, or by an employee of petitioners injured in delivering supplies to a ship? Only a negative answer can be given to either question, because it is manifest, as we think, that neither would the coal dealer be engaged in interstate commerce nor are the petitioners engaged in foreign commerce. The underlying principle as regards interstate commerce, equally applicable to foreign commerce, and in our judgment decisive of the instant case, is stated in Hooper v. California, 155 U. S. 648, 655, 15 Sup. Ct. 207, 210, 39 L. Ed. 297, as follows:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

The circumstance that many and perhaps most of the sales in question are brought about by solicitation of the shipowners in England, and contracts entered into with them in that country, cannot serve to make foreign commerce of the business carried on by petitioners. In point of fact the so-called contracts are nothing but options given to the shipowners, of which they may or may not avail themselves; but, even if they be regarded as binding agreements for supplies to be furnished the ships in the port of Norfolk, in accordance with which the supplies are there delivered, the transactions would not on that account constitute foreign commerce. The petitioners send no goods abroad either as principals or agents or otherwise. The ships transport nothing for them or belonging to them or in which they are interested. Between them and the ships there is no relation of shipper and carrier, but only the relation of vendor and vendee. It therefore can make no difference, as respects the matter in dispute, whether the supplies are furnished under contracts previously made in England or under contracts made at the time with "free ships" in Norfolk harbor. As is said in Ware & Leland v. Mobile County, 209 U. S. 405, 413, 28 Sup. Ct. 526, 529 (52 L. Ed. 855, 14 Ann. Cas. 1031):

"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract

obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

We see no occasion to expand the argument or multiply citations, since upon principle and authority alike it seems to us beyond serious question that the commission was without jurisdiction, because the business carried on by petitioners, and with which the condemned practices are connected, is neither interstate nor foreign commerce. And this conclusion makes it unnecessary to consider the other grounds upon which the invalidity of the commission's order is asserted.

The same facts in substance appear in the case of Norden Ship Supply Company, except that its dealings are mainly with ships from Scandinavian countries, and that it solicits business in those countries, and not in England. What is said above applies equally to this case and need not be repeated.

In each case a decree will be entered setting aside and annulling the order of the Federal Trade Commission for lack of jurisdiction.

GOLDBERG v. UNITED STATES.

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

No. 5766.

1. **Conspiracy ⟸43(6)—Indictment for conspiracy to receive and conceal merchandise unlawfully imported held sufficient.**

   In an indictment under Criminal Code, § 37 (Comp. St. § 10201), for conspiracy to receive and conceal whisky after its unlawful importation into the United States, knowing the same to have been imported in violation of law, in violation of Rev. St. § 3082 (Comp. St. § 5785), it is not necessary to allege the facts relating to the importation of the whisky.

2. **Conspiracy ⟸43(6)—Indictment for conspiracy to commit an offense required to describe such offense only with certainty to a common intent.**

   In an indictment for conspiracy to commit an offense, it is necessary to describe the offense which is the object of the conspiracy only with certainty to a common intent, sufficient to identify the offense.

3. **Conspiracy ⟸43(6)—Indictment held sufficient.**

   An indictment for conspiracy to receive and conceal whisky imported into the United States contrary to law, knowing that it had been so imported, in violation of Rev. St. § 3082 (Comp. St. § 5785), and alleging as overt acts that defendants removed the whisky from the railroad cars in which it had been brought into the United States for the purpose of concealing the same, *held* not insufficient because it did not allege the time of such importation, where the importation of whisky was absolutely prohibited by a well-known act of Congress in force several months prior to the overt acts charged, nor because it described the importation in the language of the statute as "contrary to law," without specifying the statute violated.

4. **Indictment and information ⟸71—Test of sufficiency of indictment.**

   The true test of the sufficiency of an indictment is that it sets forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and give him a fair opportunity to prepare his defense, so particularly as to

enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether the facts there stated are sufficient to support a conviction.

5. Customs duties ⟸121—"Contrary to law," in criminal statute, held not limited to laws then in force.

Rev. St. § 3082 (Comp. St. § 5785), which makes it an offense to import merchandise "contrary to law," or to receive or conceal such merchandise after importation, knowing it to have been imported contrary to law, is general in its terms, and is not limited to cases of dutiable merchandise imported in violation of the customs laws, or to importations in violation of some law existing at the time of its enactment or its latest amendment; but the words "contrary to law" are to be given their natural and obvious meaning, and the statute applies to an importation in violation of any law in effect at the time of the alleged offense.

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

6. Customs duties ⟸121—Statute against knowingly receiving or concealing liquor imported contrary to law not repealed.

The provision of Rev. St. § 3082 (Comp. St. § 5785), making it an offense to receive or conceal merchandise imported contrary to law, knowing it to have been so imported, as applied to whisky, *held* not repealed or superseded by Act Aug. 10, 1917. § 15 (Comp. St. Ann. Supp. 1919, § 3115½*l*). prohibiting the importation of distilled spirits, nor by Act Nov. 21, 1918, § 1 (Comp. St. Ann. Supp. 1919, § $3115^{11}/_{12}$gg), prohibiting the importation of intoxicating liquors during the continuance of the war, neither of which acts prohibits or penalizes the receiving or concealing of liquor imported in violation of its provisions.

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 Saul Goldberg. Judgment of conviction, and defendant brings error. Affirmed.

James E. Markham, of St. Paul, Minn. (A. J. Hertz, of St. Paul, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

SANBORN, Circuit Judge. The defendant below in this case was indicted, tried, and sentenced for conspiring with others named in the indictment against them, in violation of section 5440 of the Revised Statutes, section 10201, United States Compiled Statutes, section 37, Criminal Code, to commit, in violation of section 3082, Revised Statutes, section 5785, United States Compiled Statutes, the offense of receiving, concealing, facilitating the transportation and concealment of whisky, after its importation, contrary to law, knowing it to have been imported into the United States contrary to law. He demurred to the indictment, requested the court, after the evidence on the part of the government had been introduced, to instruct the jury to return a verdict in his favor, offered no evidence in his own behalf, made a motion in arrest of judgment, and took the proper exceptions to the court's adverse rulings on these applications.

[1] His counsel argue that the indictment charged him with no offense, and that there was no evidence at his trial that he had committed any offense, and on these grounds they ask a reversal of the judgment against him. They first contend that the indictment does not expressly and directly allege the importation into the United States from the Dominion of Canada of the intoxicating liquors which the defendants are accused of having conspired to receive, conceal, facilitate the transportation and concealment of within the United States. But the defendants were not charged either with importing the liquor or with conspiring to import it. Section 3082 provides: (1) 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 (2) 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, etc. Conceding that direct averments that the defendants knowingly imported the merchandise contrary to law would have been required properly to charge that offense, they were not indispensable to a sufficient indictment for a conspiracy to receive and facilitate the transportation and concealment of merchandise imported contrary to law, knowing that it had been so imported, because the latter charge does not include the offense of unlawfully importing, or of conspiring unlawfully to import, and because the gist of the offense charged in this indictment is neither of the offenses denounced by section 3082, but the conspiracy to commit, not the first, but the second, offense there described, and it is not necessary, in an indictment for a conspiracy to commit an offense, to allege the facts constituting the offense which is the object of the conspiracy with the particularity requisite in an indictment for the commission of that offense.

[2] The conspiracy and the offense which is its object are separate crimes. The gist of the former is the conspiracy and "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary in stating the object of the conspiracy." Williamson v. United States, 207 U. S. 425, 449, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. Claflin, 25 Fed. Cas. 433, 435; United States v. Rabinowich, 238 U. S. 78, 85, 86, 87, 35 Sup. Ct. 682, 59 L. Ed. 1211; Anderson v. United States, 260 Fed. 557, 558, 171 C. C. A. 341; Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Lemon et al. v. United States, 164 Fed. 953, 90 C. C. A. 617; Brown v. United States, 143 Fed. 60, 74 C. C. A. 214; Gould v. United States, 205 Fed. 883, 126 C. C. A. 1. The failure to make more express and direct allegations than were contained in the indictment of the importation from the Dominion of Canada of the whisky which the defendant was charged with conspiring to receive, conceal, and to facilitate the transportation and concealment of, was not fatal to that pleading.

[3] The indictment contained averments that on December 20, 1919, at Minneapolis, Minn., the defendants Saul Goldberg, Frank Bank, David Posnick, Michael Weisman, and others conspired and agreed

together to commit the offense against the United States and its laws, of receiving, concealing, and facilitating the transportation and concealment of a large quantity of whisky after importation, knowing the same to have been fraudulently imported into the United States and into the city of Minneapolis from the Dominion of Canada, by unloading, taking possession and control thereof, and reloading the same upon motor trucks and other vehicles for the purpose of moving and transporting this whisky to warehouses or other storage houses wherein it was to be concealed, "which whisky had been imported into the city of Minneapolis aforesaid from the Dominion of Canada, in barrels upon freight cars, the number and initial of two of said cars being as follows: PMCKY 40479 and Penn. 281781; the initials and numbers of other freight cars being to the grand jury unknown, and said barrels of whisky were concealed and hidden in such freight cars under loads and cargoes of scrap iron as consignments of scrap iron, and moved from Winnipeg, in the province of Manitoba, Canada, to Minneapolis aforesaid, over and upon the lines of the Canadian Pacific Railway Company and Minneapolis, St. Paul and Sault Sainte Marie Railway Company, the aforesaid PMCKY 40479 car containing twenty-five (25) barrels of the aforesaid unlawfully imported whisky was on the 7th day of January, 1920, on a railroad side track near Eighteenth avenue and Second Street North, in the city of Minneapolis aforesaid; the aforesaid Penn. 281781 car, containing twenty-four (24) barrels of the said unlawfully imported whisky, was, on the 16th day of January, 1920, on a railroad side track near Eighteenth avenue and Second Street North, in the city of Minneapolis aforesaid; another car, containing fifteen (15) barrels of the aforesaid unlawfully imported whisky, the initials and number of said car being to the grand jury unknown, was, on the 2d day of January, 1920, on a railroad side track near Sixteenth avenue and Second Street North, in the city of Minneapolis aforesaid."

The second and third contentions of counsel for the defendants are that it was error to overrule the demurrer to the indictment because it contained no averment of the time or times when the whisky was imported, and because it did not set forth the specific law in violation of which it was imported, nor specify it by title or by reference to the book or page where it might be found. At the time the conspiracy was alleged to have been formed, December 20, 1919, and on the 7th, 8th, and 16th days of January, 1920, when the overt acts therein named were alleged to have been committed, the importation of the whisky from Canada into the United States was and after August 10, 1917, had been prohibited. Food Control Act of August 10, 1917, 40 Stat. 276, 282 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛*l*); Act of November 21, 1918, 40 Stat. 1045, 1046 (Comp. St. Ann. Supp. 1919, § 3115$^{11}/_{12}$gg). The indictment contains averments that the whisky had been imported contrary to law and that it was on the railroad side tracks in Minneapolis on specific days between January 1 and January 17, 1920, and its importation had been prohibited ever after August 10, 1917. In view of these facts and of the customary time within which railroad freight must be unloaded from the cars,

the defendant could not have inferred or supposed that the whisky had been imported prior to the prohibition of its importation on August 10, 1917, and the failure of the government to aver the times when it was imported, was not a serious defect in its pleading.

Nor was the fact that the government described the importation as it was described in section 3082 as "contrary to law," and did not go further and specify the act of Congress contrary to which it was made, fatal to this indictment, especially in view of the well-known fact that, at the time when this conspiracy is alleged to have been formed and to have been in process of execution, the condition of the Prohibition Acts of Congress was a matter upon which the attention of the citizens of the nation was fixed by the public prints and by the constant discussion of the policy of the government they evidenced, and in view of the further fact that the importation contrary to law was not the offense with which the defendant was charged, but a mere element in the description of the offense which was alleged to have been the object of the conspiracy with which alone he was charged and for which alone he was tried. Counsel cite in support of their objections to the indictment here Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505; United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; United States v. Hess, 124 U. S. 483, 486, 487, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; People v. Albow, 140 N. Y. 130, 35 N. E. 438; State v. Howard, 66 Minn. 309, 68 N. W. 1096, 34 L. R. A. 178, 61 Am. St. Rep. 403, and the opinions of the courts in those cases have been examined before reaching the conclusion which has been stated. That the general rules of law and practice announced in those opinions are sound is not denied, but the offenses charged in those cases were not conspiracies to commit other objective offenses, and the fact is that the objections under consideration go rather to the sufficiency of the description of the offense which was the object of the conspiracy than to the sufficiency of the charge of the conspiracy.

[4] The true test of the sufficiency of an indictment is that it sets forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether the facts there stated are sufficient to support a conviction. United States v. Hess, 124 U. S. 483, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399; Armour Pkg. Co. v. United States, 153 Fed. 1, 16, 17, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; Fontana v. United States (C. C. A.) 262 Fed. 283, 286. This indictment has been repeatedly read and thoughtfully tried by this test, and our conviction is that it clearly complies with every requisite thereof.

[5] Counsel for the defendant contend with great ability, ingenuity, and zeal that the indictment under consideration is insufficient, because it fails to set forth facts which show that the object of the conspiracy, the receiving, concealing, facilitating the transportation and conceal-

ment of the whisky imported contrary to law, knowing it to have been imported contrary to law, constituted a violation of section 3082, and that for these reasons: (1) Because the term "contrary to law" in that section is limited in its meaning to contrary to the provisions of the Customs Act—of which it forms a part—which prescribe regulations for the importation of dutiable merchandise, the collection of the duties thereon, and the penalties for failures to comply with them, and the whisky was not dutiable merchandise in 1916 and 1917 when the conspiracy was formed and executed; (2) because the term "contrary to law" in that section was restricted in its meaning to contrary to a law in force at the time of the enactment of section 3082 or of its last amendment, and at those times the importation of whisky was not prohibited, as it was by the later acts of August 10, 1917, and November 21, 1918, but was permitted upon the payment of duties and compliance with the provisions of the Customs Act; and (3) because the provisions of section 3082 which denounced the offense of receiving, concealing, facilitating the transportation and concealment of whisky, knowing it to have been imported contrary to law, are inconsistent with the provisions of the act of November 21, 1918, which provided that no distilled or other intoxicating liquors should be imported into the United States during the continuance of the present war and the period of demobilization. 40 Stat. 1047.

Counsel cite authorities to the conceded rules of construction that penal laws should be strictly construed, that if they are ambiguous, or their meaning is doubtful, the accused should receive the benefit of the doubt, and that the intent of the Legislature should be derived from the entire acts, and not from particular parts of them, without a careful consideration of all their parts. But other cardinal rules of interpretation are that such laws must receive a rational, sensible construction, one that will advance the remedy and repress the wrong, if that construction be consonant with their terms; that where a statute is plain and unambiguous, and its meaning clear, construction and interpretation have no place; that it is the intention expressed in the statute and that alone to which the courts may give effect; that they may not assume or presume purposes or intentions which the terms of the statute do not indicate, and then by judicial legislation add or expunge terms to accomplish these supposed intentions; that the natural and obvious meaning of a statute should be preferred to a curious recondite signification discovered by the study and ingenuity of unusually acute and powerful minds; and that when the Congress or other legislative body has made a clear general grant, prohibition, or provision, and makes no exception thereto, the legal presumption is that it intended to make none, and it is not the province of the courts to do so. "Where the Legislature makes a plain provision, without making any exception, the courts can make none." French v. Spencer, 62 U. S. (21 How.) 228, 238, 16 L. Ed. 97; McIver v. Ragan, 15 U. S. (2 Wheat.) 25, 29; Madden v. Lancaster County, 65 Fed. 188, 195, 12 C. C. A. 566; Omaha Water Co. v. City of Omaha, 147 Fed. 1, 13, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25; United

States v. Deans, 230 Fed. 957, 961, 145 C. C. A. 151; Soliss v. General Electric Co., 213 Fed. 204, 205, 129 C. C. A. 548; Northern Pacific Railway Co. v. United States, 213 Fed. 162, 129 C. C. A. 514, L. R. A. 1917A, 1198; Elder v. Western Mining Co., 237 Fed. 966, 973, 150 C. C. A. 616; Brun v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

Section 3082 prohibited clearly and generally the importation of merchandise contrary to law and denounced the concealing, facilitating the transportation or concealment of such merchandise after importation, knowing it to have been imported contrary to law. The contention is that in the enforcement of this statute the courts should except from the phrase contrary to law (1) such merchandise imported contrary to law as was not imported in violation of some provision of the Customs Act; and (2) such merchandise imported contrary to law as was imported contrary to any law that was not in force at the time when section 3082 or its last amendment was enacted. A patient and deliberate consideration of the arguments and authorities presented has failed to satisfy that it was the purpose or intention of Congress to modify or limit the plain terms and natural obvious meaning of the general words "contrary to law" in this section 3082 by either of these exceptions. The natural meaning of that phrase, the signification which first comes to the mind, and which, after deliberation in view of the rules of interpretation cited, rests in abiding conviction, is contrary to any law in force at the time of the alleged violation of the statute, whether it was contrary to the provisions of the Customs Act or to the provisions of some other act of Congress, and whether it was contrary to the provisions of a law existing at the time of the enactment of section 3082 or its last amendment, or was subsequently enacted. Support is lent to this conclusion by the weight of authority. This section has been held to include merchandise imported contrary to law that was not dutiable, as well as merchandise that was dutiable. Estes v. United States, 227 Fed. 818, 820, 822, 142 C. C. A. 342; United States v. Nine Trunks, 27 Fed. Cas. pages, 161, 162, No. 15,885; Goldman v. United States (C. C. A.) 263 Fed. 340, 343; Daigle v. United States, 237 Fed. 159, 164, 150 C. C. A. 305; Ruehl v. United States (C. C. A.) 263 Fed. 376, 377.

It has been held to include merchandise imported in violation of a law which was not in force when section 3082 or its last amendment was enacted, but was subsequently passed. The Goodhope (D. C.) 268 Fed. 694; United States v. One Bag of Paradise, Etc., Feathers, 256 Fed. 301, 304, 167 C. C. A. 473; United States v. Four Packages of Cut Diamonds (D. C.) 247 Fed. 354, 357, 358; Feathers of Wild Birds v. United States (C. C. A.) 267 Fed. 964, 966, 967. And our conclusion is that the indictment set forth facts describing the objective offense in violation of section 3082 which it charged the defendant with conspiring to commit.

[6] The next question is: Was the portion of section 3082 which prohibits the offense of receiving, concealing, facilitating the transportation of or concealment of whisky imported contrary to law after importation, knowing it to have been imported contrary to law, repealed or

superseded by that portion of the act of November 21, 1918, which declares that after the approval of the act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the then present war and the period of demobilization, under a penalty of imprisonment not exceeding one year, or a fine not exceeding $1,000, or both such imprisonment and fine. 40 Stat. 1047 (Comp. St. Ann. Supp. 1919, § 3115¼/12ggg). It is argued that this question should be answered in the affirmative, because the prohibition of the importation of the whisky by this act of November 21, 1918, was inconsistent with the permission of its importation upon payment of the duties and compliance with the requirements of sections 3061 to 3082 of the Customs Act, and in support of this position United States v. One Ford Automobile (C. C. A.) 262 Fed. 374, 376, is cited, wherein the Circuit Court of Appeals of the Second Circuit held, contrary to the conclusion at which this court has been forced to come, that section 3082 was not applicable to the importation of merchandise not subject to duties, and that one who had been fined and had paid his fine for importing whisky under the act of August 10, 1917, could not be deprived of the automobile in which he imported it by forfeiture under section 3062 (Comp. St. § 5764). Our conclusion that section 3082 applies to the importation of merchandise not dutiable, the fact that the acts of 1917 and 1918 neither prohibit nor penalize the offense of receiving, concealing, or facilitating the transportation or concealment of merchandise imported contrary to law, and the wide divergence between the facts of that case and of this, deprive the opinion and decision here cited of authoritative or persuasive force in the case at bar.

Counsel also cite many of the cases in which the courts have held, as has this court, that the National Prohibition Act (41 Stat. 305), whereby the importation, manufacture, and sale of intoxicating liquors were prohibited under severe penalties, repealed or superseded, because inconsistent therewith, such provisions of the Customs Act as imposed penalties for a failure to register a still or distilling apparatus, section 3258 (Comp. St. § 5994); a failure to give a bond to comply with the provisions of law relating to the duties and business of distillers, section 3260 (section 5997); for carrying on the business of a distiller with intent to defraud the United States out of the tax on the spirits distilled, section 3257 (section 5993); for failing to place and keep the words "Registered Distillery" on a distillery wherein accused worked, carried distilled spirits from and raw materials to, section 3279 (section 6019); for failing to pay the special tax for carrying on the business of a rectifier, liquor dealer, or manufacturer of stills, section 3242 (section 5965); and other similar provisions. Ketchum v. United States (C. C. A.) 270 Fed. 416; United States v. Windham (D. C.) 264 Fed. 376; Reed v. Thurmond (C. C. A.) 269 Fed. 252; United States v. Yuginni (D. C.) 266 Fed. 746; The Goodhope (D. C.) 268 Fed. 694; United States v. Stafoff et al. (D. C.) 268 Fed. 417; United States v. Fortman (D. C.) 268 Fed. 873; United States v. One Haynes Automobile (D. C.) 268 Fed. 1003.

But the opinions and decisions in these cases do not rule the legal question presented in this case because when the conspiracy in this

case is alleged to have been formed and the overt acts in its execution are alleged to have been done the National Prohibition Act had not taken effect. Hence the most that can be persuasively claimed for these opinions and decisions is that they furnish an argument by analogy for the position that the portion of section 3082 which denounces and penalizes the offense of receiving, concealing, facilitating the transportation and concealment of whisky after importation knowing it to have been imported contrary to law, was superseded or repealed by the act of August 10, 1917, or the act of November 21, 1918. But when a comparison is made between the relation of the portions of the Customs Act superseded and repealed and the National Prohibition Act on the one hand, and the relation of the portion of section 3082 here under consideration and the prohibitions of the acts of August 10, 1917, and November 21, 1918, the similarity requisite to sustain the argument by analogy utterly disappears. Section 35 of the National Prohibition Act provides that all provisions of law inconsistent with that act are repealed only to the extent of their inconsistency. The acts of August 10, 1917, and November 21, 1918, contain no provision for the repeal thereby of any law or any part of any law.

The provisions of the Customs Act which have been held to be repealed or superseded by the National Prohibition Act are utterly inconsistent with the absolute inhibition of the manufacture, sale, and importation of intoxicating liquors under new and heavy penalties contained in that act as the authorities which have been cited demonstrate. On the other hand, the portion of section 3082 that conditions the disposition of this case is perfectly consistent with the prohibition of the importation of intoxicating liquors contained in the act of August 10, 1917, and in the act of November 21, 1918. And these latter acts contain no denunciation whatever of and prescribe no penalty whatever for the receiving, concealing, facilitating the transportation and concealment of merchandise imported contrary to law after its importation, knowing it to have been imported contrary to law, but leave the specification of that offense and the penalty therefor to section 3082 alone. In this state of the case this argument by analogy fails to persuade, and no logical way of escape is found from the conclusion that the portion of section 3082 which alone describes the offense which was the alleged object of the conspiracy here, and which alone prescribes the penalty for its commission, was neither repealed nor superseded by the act of August 10, 1917, or by the act of November 21, 1918, when the conspiracy in this case was alleged to have been formed and executed, and the court below committed no error in overruling the demurrer to the indictment.

At the close of the evidence for the United States counsel for the defendant Goldberg moved the court to direct the jury to return a verdict in his favor, the court denied that motion, the defendant excepted, and his counsel contend that this ruling was erroneous, because there was no substantial evidence of his guilt. But an examination of the record of the evidence has left no doubt in our minds that there was substantial, competent evidence therein to sustain a verdict against

the defendant, and there was no error in the ruling of the court denying this motion.

After the motion for a directed verdict was denied, the defendant, without offering any evidence, pleaded guilty, and was sentenced to pay a fine of $5,000 and to be imprisoned in the penitentiary for 1 year and six months. His counsel have requested that in case this court should be of the opinion that there was no error in the trial of this case, and that the judgment must be sustained, it modify the sentence by remitting that part which imposes the imprisonment, or that it direct the court below to entertain a motion to set aside the judgment, to permit the plea of guilty to be withdrawn, and to grant a new trial. But this is a court for the correction of errors of law, and no error of law in this trial or in the other proceedings in this case has been discovered. Our judicial system and the act of Congress under which the defendant has been convicted intrust the determination of the extent of the punishment to be imposed within the limits prescribed by the statutes, not exceeding a fine of $10,000 or imprisonment not exceeding two years, or both, not to the appellate court, but to the trial court, to the judge who sees the parties and sees and hears the witnesses, and who is better qualified than the judges of the appellate court to exercise discretion in this matter.

There is no evidence of any abuse of his discretion by the judge who tried this case in prescribing the sentence, and, even if this court has the power under these circumstances to modify or set aside the judgment below as requested, it is convinced that there is nothing in the record here to justify it in pursuing so unusual a course, and the judgment below must be affirmed.

It is so ordered

BANK v. UNITED STATES.

POSNICK v. SAME.

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

Nos. 5828, 5829.

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

Criminal prosecutions by the United States against Frank Bank and against David Posnick. Judgments of conviction, and defendants bring error. Affirmed.

Charles B. Elliott, of Minneapolis, Minn., for plaintiffs in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

SANBORN, Circuit Judge. By consent of the parties these cases were consolidated for hearing with case No. 5766, Saul Goldberg v. United States of America, 277 Fed. 211, and submitted to the court on the briefs and arguments in that case. They involve the same questions decided in that case.

The judgment below must accordingly be affirmed, upon the opinion in the Goldberg Case; and it is so ordered.

WEISMAN v. UNITED STATES.*

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

No. 5852.

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 Michael Weisman. Judgment of conviction, and defendant brings error. Affirmed.

Ernest S. Cary, of Minneapolis, Minn. (Frank W. Booth, of Minneapolis, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

SANBORN, Circuit Judge. This case was argued and submitted to the court at the same time that the arguments were made and submitted in Saul Goldberg v. United States (No. 5766) 277 Fed. 211, in which every question in it has been considered, and in the opinion in which the conclusion of the court concerning each of them has been stated.

The judgment in this case is therefore affirmed, upon the opinion in that case, which is handed down herewith.

MORGAN CONST. CO. v. DONNER STEEL CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 36.

1. **Patents ⇐328—863,841, claims 1–4, 7, for cooling bed for steel bars, held not infringed.**

The George patent, 863,841, claims 1–4, 7, for cooling beds for steel bars, the patentable element in which was the relation between the supporting and lifting bars, whereby the steel rods were moved forward step by step in notches registering with each other, *held* not infringed by defendant's apparatus, on which the steel bars rolled by gravity into the notches of the supporting bars.

2. **Patents ⇐26(2)—Combination of old elements must cause new effect.**

A combination of elements, all of which are old, is not patentable, unless there is found in the co-operation of the elements some novel and useful effect, resulting from the combination, and not found in the prior art.

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

Suit by the Morgan Construction Company against the Donner Steel Company, Inc., for infringement of a patent. Decree for plaintiff (269 Fed. 389), and defendant appeals. Reversed and remanded, with directions to dismiss the bill.

Suit is upon patent to George, No. 863,841, dated August 20, 1907, and assigned before issue to plaintiff, a corporation of which Mr. George is, and was long before the date of patent, an important employee, if not officer. The invention covers a "conveyer for metal rods," and is what is known in the art of rolling steel shapes as a "cooling bed," a structure which receives the

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 271, 66 L. Ed. —.

red-hot bars or shapes from the finishing rolls, and transports them as they lie on the bed sidewise, usually to the shearing mechanism. The red-hot steel forms are expected to cool during this transport.

Cooling beds are and have been of several types, and plaintiff is the best known maker of the same; approximately three-fourths of all the merchant bars made in the United States are handled on beds of plaintiff's construction, and largely under prior patents familiarly known to Mr. George. The patent in suit, however, has practically lain unused; only one bed has ever been made thereunder, and that one does not conform strictly to the patent specification. So far as influence on business is concerned, the patent may fairly be called "paper."

Defendant is a manufacturer of steel; it desired a cooling bed for a particular mill making (or capable of making) a particular product. Plaintiff was consulted as to furnishing same, and the patentee was sent to examine defendant's plant, and confer. He did not suggest the use or application of the patent in suit; the suggestions he did make were not thought useful, and defendant's superintending engineer in ignorance of the existence of said patent, designed and built the cooling bed now said to infringe. By specification, the invention "relates to that class of conveyers which comprise supporting bars for supporting the metal rods during a forward step by step movement, and a series of lifting and carrying bars by which the rods are moved."

This means that "shuffle bar" beds were already widely used. They exhibit a series of rigid flat bars supporting the hot rods lying across them, combined with interplaced parallel, but movable flat bars, also capable of supporting the hot rods, and actuated by shafts to which are given a circular or elliptical motion, resulting in the movable bars rising, lifting the hot rods from the rigid bars, moving forward while sinking again to the plane of the rigid bars, and so at any precalculated rate advancing the hot rods along the bed, by a step by step actuation.

The specification then points out that in the shuffle bar beds "the upper surface of both lifting and supporting bars are straight and in horizontal planes," whereas the patentee makes the upper surface of his supporting bars "of a serrate form," and the same surface of his lifting bars of "wave shape," to the end that the angular form of the notches on the supporting bars, and their arrangement in parallel sets across the conveyer, with their corresponding sides in the same plane, serve the purpose of correcting any bends or distortions in the rods themselves, "as the weight of the heated rods in their plastic state," when supported by the symmetrical angular sides of the notches or serrations, "tends to straighten the rods" until by cooling they become rigid. This desirable function of straightening the rods while hot, by means of aligned notches, was also confessedly known and practiced, and was accomplished by the prior art "gravity escapement" and "universal" beds (Edwards patents, 701,024 and 793,926), both manufactured by plaintiff.

The patentable novelty asserted by the specification was to so co-ordinate the waves, serrations, depressions, or notches of the two sets of bars that, "when the lifting bars have passed through one-quarter of their circular movement," the "depressions" in said lifting bars "will correspond with the notches in the supporting bars"; consequently, whatever is in the said notches will be lifted out of the same, resting in the lifting bar "depressions," which lifting bars, continuing to rise and advance in obedience to the circular actuation of their shafts, will at "three-quarter revolution" have brought their "depressions" into register with the next set of rigid, or supporting bar "notches," and then, continuing to sink in the last quarter-revolution, leave "deposited in the notches of the supporting bars" whatever was thus carried over a serration separating two notches. Thus is accomplished the step by step advance across the serrated cooling bed of the originally red-hot bar or shape.

The claims relied on are 1, 2, 3, 4, and 7. Of these the first is most general, and the seventh was inserted after some conflict in the office, and may be taken as a definition of invention after discussion. They are as follows:

"1. In a conveyer for metal rods, the combination of supporting bars having serrated upper edges, lifting bars normally entirely below said serrated upper

edges of said supporting bars, and means for moving said lifting bars in a circle whereby the upper surface of said lifting bars passes entirely above the serrated upper edges of the supporting bars."

"7. In a conveyer for metal rods, the combination of fixed supporting bars provided with a series of notches arranged in sets transversely across the conveyer, with the sides of said notches in each set in the same plane, a series of movable notched bars, and means for actuating said movable bars to lift a metal rod from one set of notches in said fixed bars and deposit it in another set of notches."

Defendant's alleged infringing device has supporting and lifting bars, and both are notched; to the lifting bars a circular actuation is given as in the old shuffle bar bed, but the two sets of notches or serrations, are intentionally not so correlated or co-ordinated that they ever register as to their notch angles. The defendant's lifting bars never deposit what they lift in the next notch angle of the supporting bars; on the contrary, they are so designed as to leave their load at such a point on the slope of the notch wall that it rolls or slides into the notch angle. This tumbling movement is intentional, and for defendant's purpose and product is thought advantageous.

The trial court held the patent valid and infringed, and defendant appeals.

Frederick W. Winter and Jo. Baily Brown, both of Pittsburgh, Pa., for appellant.

Geo. H. Kennedy, Jr., of Worcester, Mass., for appellee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). If this patent covers any combination or co-ordination of serrated rigid supporting bars, with serrated lifting bars, capable of elevating the thing lifted over a saw tooth in the rigid bars, and leaving that thing at any point or place in the next depression between two teeth, the decision below was right.

We are not able to accord to this invention such wide scope. Cooling beds generically were old, the shuffle bar mechanism was well known, and the lifting, advancing, and then sinking function of a horizontal surface moved by a circularly actuated shaft had been used in many arts. It is, we think, admitted that merely making depressions, troughs, serrations, or notches in the previously flat bars of the prior art, for the purpose of assisting straightening of hot forms, would not be invention; and, if not admitted, it is true, in the light of Kellogg, No. 265,265, a patent of 1882, showing a cooling bed of troughs separated by elevations which (in vertical section) are segments of a circle, with means for lifting a round form to the top of the elevation, after which it rolls down into the next trough. This was a straightening device, and the same result is the prominent merit of plaintiff's escapement and universal beds, which likewise utilize gravity by inclining the bed.

There is not a new element in plaintiff's combination; hence, to reach validity, there must be found in the co-operation of old elements some novel and useful effect resulting from the combination, and not found in the prior art. Office, etc., Co. v. Fenton, etc., Co., 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058. It is the inventive thought that vitalizes and indeed interprets a patent; in this invention we think that thought is the entire abandonment of gravity as a means of assisting the hot steel form on its way. As the patentee said in testifying:

"This patent of mine covers a construction which straightens the bars and keeps them straight during the cooling process, and *also keeps them separated when desired.*"

They are kept separate by a lifting process, which ends in a "deposit," without tumbling or rolling, and, by thus "depositing" what is lifted, a plurality of bars or forms can be advanced step by step across the bed, without jostling against each other. This last is the one use to which the patented device has been put.

Of the claims quoted, the first will undoubtedly, if read literally, cover defendant's device; but this is not final. It remains to inquire whether the alleged infringement displays "substantial identity" with the thing invented. Westinghouse v. Boyden, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Geoghegan v. Ernst, 256 Fed. 670, 168 C. C. A. 64. What was invented usually depends in large part on what was left unrevealed to the skilled man by the prior art, and this is not inconsistent with interpreting patents "so as to uphold the right of the inventor" (Turrill v. Railroad, 68 U. S. [1 Wall.] 491, 17 L. Ed. 668), for the question is fundamental, What right has the inventor, under the circumstances?

The only field left to this inventor is just what he described in his specification—a means for depositing articles lifted from one depression, in another and succeeding depression of a cooling bed, without rolling, tumbling, or jostling. This defendant does not attempt nor accomplish. The difference in the means of the two parties is very small; but plaintiff's field of invention was also of the smallest.

Decree reversed, with costs, and cause remanded, with directions to dismiss the bill for noninfringement, also with costs.

PACIFIC IMPROVEMENT CO. v. WEIDENFELD.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 31.

1. Pledges ⟸56(1)—Where railroad delivered bonds for advances to plaintiff, who pledged them, he could not complain that bonds were sold by pledgee after receiving credit on his indebtedness to pledgee in amount greater than that due from railroad.

Where railroad, to secure advances, delivered bonds to plaintiff, who delivered bonds to defendant to secure his indebtedness to defendant, and where it was agreed between the railroad, plaintiff, and defendant that the railroad should make note for advances to plaintiff, which plaintiff should indorse to defendant, who agreed to collect note from the railroad for the account of the plaintiff, and credit his personal account with such amount, and where such note was in fact executed to plaintiff, and indorsed by plaintiff to defendant, pursuant to such agreement, but was not paid by the railroad, and where, on plaintiff's failure to pay indebtedness, the collateral, including such bonds, was lawfully sold, and plaintiff given credit on his indebtedness to defendant for amount of proceeds of bonds in an amount greater than the face and interest of the note, the plaintiff, having suffered no damage by reason of the sale of the bonds, could not complain thereof.

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

2. Witnesses ⟸246(1)—Jurors should not be permitted to interrupt witnesses with unnecessary questions.

Jurors should not be permitted to interrupt witnesses with unnecessary questions, since a jury should listen to evidence and counsel should elicit it.

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

Action by Camille Weidenfeld against the Pacific Improvement Company. Judgment for plaintiff on the verdict of a jury, and defendant brings error. Reversed, and new trial ordered.

See, also, 267 Fed. 699.

Larkin, Rathebone & Perry, of New York City (Adelbert Moot, of Buffalo, N. Y., of counsel), for plaintiff in error.

Walter Jeffreys Carlin and Herman J. Witte, both of New York City (Walter J. Carlin and Francis M. Scott, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The facts of this case, as pleaded, admitted, or proven beyond any doubt, are in our judgment sufficient to dispose of the litigation. We shall therefore state their substance, leaving without comment several matters of law much argued at bar.

The gist of complaint is that plaintiff (Weidenfeld) was in 1893 the liquidating partner of his firm, and in respect of the transactions producing this litigation may be spoken of as the sole actor, although it had been the firm that had long dealt with defendant. He had deposited with defendant (Pacific Company) in or before 1893 various securities, including "over 300" bonds of a railroad company, as collateral to his indebtedness to Pacific Company. Of these bonds 208 had previously been delivered by the railroad company to plaintiff as security for advances made to that company by him. While the said 208 bonds and others of same issue (to wit, the above-mentioned "over 300") were in possession of Pacific Company, and hypothecated for plaintiff's debt, as above set forth, it is alleged as agreed (necessarily between plaintiff, defendant, and the railroad company) that the railroad should make its promissory note to Weidenfeld for the amount of his advances to it, formally pledging these same 208 bonds (already pledged by Weidenfeld to Pacific Company and in the latter's possession) as security; Weidenfeld would then indorse such note to Pacific Company, which would then "collect the said note from (the railroad company) for account of the plaintiff, and credit his personal account with the said amount." When and if the note was paid, the 208 bonds were to be turned over to the railroad company.

The complaint further avers, that when (long before the note incident) Pacific Company received the 208 bonds from Weidenfeld, it had "due notice" that they "were the property of the" railroad company, and that when the note was given and indorsed Pacific Company agreed "to release the said 208 bonds from any lien" created by Wei-

denfeld's previous hypothecation of the same, and to hold them only as collateral to and for the said note. This last allegation was duly denied in the answer.

As next alleged a note for $74,746.87 was given in 1897 (specifying the 208 bonds as collateral therefor) by railroad company to Weidenfeld, and was duly indorsed by the latter to Pacific Company, all in pursuance of the agreement above outlined. The gravamen of action as pleaded is that railroad company never paid the note, that Pacific Company still has both note and the 208 bonds, and refuses to return either to plaintiff, wherefore Weidenfeld has suffered damage in the sum of $459,466.67; and he sues for that amount, apparently the face of the note and interest, plus the assumed value of the bonds.

Of this complaint it may be noted that it states no facts entitling plaintiff to the judgment prayed for. He might have been entitled to the redelivery of the note and collateral; but the damages for failure to redeliver could never exceed what he would lose by any failure to collect and "credit his personal account." The trial evidence showed without contradiction that in or before 1893 Weidenfeld hypothecated as a small part of the collateral to his debt to Pacific Company of about $4,000,000, 333 bonds of said railroad company; that company complained to defendant that as to the 208 above mentioned (or some of them) he had no lawful right to use them as collateral to his own debt. The railroad was actually indebted to Weidenfeld, and the note scheme as pleaded was carried out, with the important exception that there was not the least evidence that upon due consideration the Pacific Company ever released the 208 bonds from the lien created by Weidenfeld's pledge of 1893.

Whatever may have been the true relation between Weidenfeld and the railroad as to these 208 bonds, no attack was ever made upon the rights of Pacific Company as pledgee. The railroad bonds were evidently of doubtful value, at least for purposes of sale in open market, and the intent and effect of the transaction incompletely set forth in complaint, was that, if railroad company paid to Pacific Company what it owed Weidenfeld, the latter company would hand back to the railroad the bonds, and credit Weidenfeld's indebtedness with the note proceeds; and it may be noted that the complaint nowhere claims that defendant was to collect the amount of the note, and hand the cash over to Weidenfeld. He was to get credit for this comparatively small sum on a debt of millions; in effect, the arrangement was but one way of possibly realizing on some very poor collateral.

The railroad company did not pay the note, nor did plaintiff pay defendant $4,000,000; whereupon in 1897, on due notice, the collateral to the indebtedness of Weidenfeld to Pacific Company, including the 208 bonds, was lawfully sold. That the sale included these bonds is so clearly proved that we do not discuss the matter. The collateral was insufficient to extinguish Weidenfeld's indebtedness by over $800,000, and in that sum he has remained indebted to defendant ever since.

[1] These particular 208 bonds were separately sold, they brought more than the face and interest of the note pleaded, and Weidenfeld

admittedly had credit for the whole amount. The railroad company has not complained so far as we know, and whether it did or not is immaterial in this action. But as to Weidenfeld we hold it self-evident on these facts that he has suffered at the hands of defendant neither injuria nor damnum, and a verdict should have been directed for defendant.

The jury was permitted to give verdict, practically for the amount of the note and interest. But the note had been satisfied out of the collateral, even according to the tenor of the complaint, and if the railroad, which (according to plaintiff) owned that collateral, had any cause of complaint, this plaintiff certainly had none. So far as we know the railroad has remained satisfied for over 20 years.

[2] Much of the confusion in this case arose from the conduct of certain jurymen, who, unchecked by the court, interrupted with unnecessary questions upwards of 35 times, not infrequently at some length. A jury should listen to evidence, counsel should elicit it, and the court should discourage, and, if necessary, suppress, such idly curious jurors as this record displays.

Judgment reversed, with costs, and a new trial ordered.

DAYTON BRASS CASTINGS CO. v. GILLIGAN, U. S. Collector of Internal Revenue.*

(Circuit Court of Appeals, Sixth Circuit. December 15, 1921.)

No. 3533.

Internal revenue ⟸9—Manufacturer of munition parts under contract from material furnished held subject to tax; "disposition."

The munition manufacturers' tax, under Act Sept. 8, 1916, is a tax imposed on the business of manufacturing measured by the profits received from the "sale or disposition" of the product, and a manufacturer of parts for fuses under a contract, though from metal furnished by the other party, *held* subject to the tax on the net profits made under the contract; its deliveries thereunder being a "disposition" within the meaning of the statute.

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

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

Action by the Dayton Brass Castings Company against A. C. Gilligan, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 267 Fed. 872.

Lawrence Maxwell, of Cincinnati, Ohio (J. Sprigg McMahon, of Dayton, Ohio, on the brief), for plaintiff in error.

James R. Clark, U. S. Atty., of Cincinnati, Ohio (R. T. Dickerson, Asst. U. S. Atty., of Cincinnati, Ohio, and Carl A. Mapes, Sol. of Internal Revenue, and P. C. Alexander, Atty., Treasury Dept., both of Washington, D. C., on the brief), for defendant in error.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 272, 66 L. Ed. —.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. In May, 1915, the Canadian Car & Foundry Company had a contract for the sale of shrapnel shells to, or for the use of, the Russian government, and had sublet, to a machine company at Dayton, a contract for making the fuses which were to be parts of the completed shells. The machine company then entered into a contract with the Dayton Brass Castings Company by which the castings company was to receive from the machine company brass ingots and put the same through its foundry, molding the same into small castings, which were by the machine company to be united with other parts to complete a fuse. For this service the castings company was to receive a specified price per pound. This contract was carried on during the year 1916.

By the provisions of title 3 of the act of September 8, of 1916 (39 Stat. 780), and known as the "munition manufacturers' tax," a tax was imposed upon every person manufacturing (among other things) "any part of" fuses, the tax to be 12½ per cent. of the entire net profits actually received or accrued during the year from the sale or disposition of such articles manufactured within the United States. Under this provision, the Commissioner of Internal Revenue imposed a tax upon the castings company, which paid the tax under protest, and brought this suit against the collector to recover the amount paid. The court below heard the case by stipulation, without a jury, and made a finding of facts, and entered judgment for defendant.

Two propositions were considered in the court below. One was that, since plaintiff had to do with only one part of the fuse, it was not a manufacturer within the meaning of the act. In this court plaintiff does not make this contention, but recognizes the applicability of the decisions which hold that one who makes a part which is intended to be and does by the act of another become merged into the kind of munition specified in the act is a manufacturer subject to tax. Carbon Steel Co. v. Collector, 251 U. S. 501, 40 Sup. Ct. 283, 64 L. Ed. 375; Worth Bros. v. Collector, 251 U. S. 507, 40 Sup. Ct. 282, 64 L. Ed. 377.

The plaintiff's present contention is that the plaintiff did not receive profits "from the sale or disposition of such articles," but was in effect only paid for work and labor expended on the property of another. Taking together the sections of this act, we conclude that the tax was imposed upon the business of manufacturing, and was measured by the profits received upon the sale or disposition. If there were no profits, the tax would be nothing. Here profits were undoubtedly received by plaintiff from the carrying out of its contract; and we come to the definition of "sale or disposition." It is clear that plaintiff did not make sales. It is equally clear that plaintiff did make a disposition of these articles. Having received the metal and having cast it into form, plaintiff disposed of the castings and so far disposed of the subject-matter of the contract as to turn these articles over to the machine company and get its pay therefor. It cannot be questioned that what plaintiff did amounted to a "disposition" of the articles within common dictionary definitions of that word. The substantial con-

tention is that under the doctrine of ejusdem generis the statutory phrase can only include dispositions of the character of a sale. This rule may not prevail to the exclusion of the other rule which requires every word and phrase to be given force and meaning, if possible; and no reasonably probable course of conduct by manufacturers has occurred to us or been suggested by counsel which would not be a sale and yet would be the "disposition" contemplated by this statute, if this conduct by this plaintiff should not be so named.

There is no room to suggest that the plaintiff, in making this contract, had any intent to evade this law; the law was not then in existence; but it is none the less important, in construing the law, to observe that, if plaintiff's contention is right, the statute could be evaded in very large part or wholly by just such contracts as this; and the same reasons which led the Supreme Court to conclude (Carbon Steele Co. v. Lewellyn, 251 U. S. 504, 40 Sup. Ct. 283, 64 L. Ed. 375) that the law could not be evaded by dividing the manufacturing process into several steps by separate persons apply with distinct force against plaintiff's contention here.

The line between manufacturing a part and merely furnishing work and labor thereon may be very difficult to draw in some cases; but that contingent difficulty does not induce hesitation where the facts of a case do not bring it near the line; and we are clear that, while this transaction might be called, in the abstract, either "manufacture" or "work and labor," yet that, if it is to be classified as one rather than the other, it must be the former.

In reaching our conclusion, we put no dependence on the claim that plaintiff had a lien upon the material, which gave an interest in the title, and therefore made its release more directly in the nature of the sale of an interest. The claim is at least of doubtful applicability to the facts of this case concerning delivery, and to sustain it is unnecessary in order to make out a defense.

Nor do we overlook the suggestion that the cost of the raw material is one of the things which section 302 prescribes for deduction from the gross profits in computing net profits; but even if—as here—there was no cost of raw material, it does not follow that there was no sale or disposition and no tax; it follows only that there is nothing to be deducted for that cost. The same section provides for the deduction of several other items of expense or cost, which, in a given case, may not exist at all. Their nonexistence does not demonstrate that there can be no tax.

It is true that a taxing statute should not be construed to materialize a tax not clearly intended (Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211; U. S. v. Mullins [C. C. A. 6] 119 Fed. 334, 56 C. C. A. 238); but we think the intent is here clear enough. Every reason which would justify taxing a sale seems to justify a tax reaching this "disposition," and Congress could not well have chosen a more completely inclusive term.

The judgment is affirmed.

THE NEPTUNE.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 27.

1. Salvage ⟸39, 41—No lien by crew on vessel earning salvage money through their efforts; crew's lien on other vessel not lost by their owner's act.

The members of the crew of a vessel, at a time when the vessel rendered salvage services to another vessel, have no lien for their share of the salvage money on their own vessel, on the ground that it was through their services that it earned the salvage money; and this is true, although the owner of their vessel at the time of the salvage service demanded and received from the owner of the other vessel a sum in "full payment for the salvage services," and thereafter sold the vessel and became "execution proof," their remedy being either resort to salvage lien on the other vessel, as to which the former owner's settlement, made without their consent, would not bind them, or ratification of his settlement and suit in personam against him for their share.

2. Maritime liens ⟸26—Not extended by construction.

The secret lien maritime is and always has been stricti juris, and therefore not to be lightly extended by construction or inference.

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

Libel in admiralty by Alfred S. Walling and another against the steam tug Neptune, her engines, etc., in which one Hans Swensen (libelant in another cause against the same vessel) intervened. Decree for libelants, and intervener appeals. Reversed and remanded, with directions to dismiss the libel.

Foley & Martin, of New York City (Geo. V. A. McCloskey, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), amicus curiæ.

Joseph P. Nolan, of New York City (Edward J. Garity, of New York City, of counsel), for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Libelants were members of the Neptune's crew at a time when she rendered salvage services to the barge Columbia. They sue for themselves and the rest of said crew, but by what authority they represent their fellows does not appear.

The owner of Neptune, at time of salvage service, demanded and received, by private treaty, from Columbia's owners, a sum of money which (between the two owners) was deemed to be "full payment for the salvage services" aforesaid, and he neither paid nor offered to pay any portion thereof to libelants or other crew members. Shortly thereafter the Neptune was sold under process in certain undefended suits in rem. A fund was thus produced, and another alleged lienor was admitted by due order, to defend against the claim of this libel.

It being admitted that libelants joined in the salvage service to Co-

lumbia, and had liens upon that vessel for their labors, the theory of libel is that, because, in the words of the pleader, "the said tug Neptune earned as the result [of libelants'] services [certain money], and no portion [thereof] has been paid to any of the libelants," therefore libelants have a maritime lien upon the Neptune for whatever the court deems their fair share of the settlement money. The court below adopted this view, gave decree for libelants (and other crew members who never appeared), and the intervener took this appeal.

That hitherto no one has suspected the existence of this asserted lien, is admitted. Changing conditions of human activity continually require the law to keep step with humanity, and any legal system which cannot do this fails in one of its highest duties. But when there confronts us no new condition, no new human necessities, the assertion of a new right is justly viewed with distrust; and, as has been often said, the silence of the books is eloquent.

In the situation presented there is nothing new, though such meanness as that apparently exhibited by the former owner of Neptune is happily rare. There is no necessity for inventing a new maritime lien (if that can ever be done); and it remains only to ascertain whether existing law recognizes any analogies compelling belief that, although unused, this lien has been and now is in the armory of admiralty. If not admitted, it is too plain for more than mention that the claim is not for salvage. It does not fall within rule 19 (now 18) of the General Admiralty Rules (267 Fed. xi). The opinion in Sheldrake v. The Chatfield (D. C.) 52 Fed. 495, renders further discussion unnecessary.

It is sought either to use the wages lien as an analogy, or to treat this demand as one for, or like, wages; because libelants, as members of the crew, enabled the Neptune to earn salvage; therefore they benefited that vessel, and consequently have a lien for (apparently) the pecuniary value of such benefit. There is in this a misapprehension of the nature of the wage lien. It is based on contract; the moment one joins a crew by agreement, the ship is his security for wages, contractual, reasonable, or statutory, as the case may be. But many a discovered stowaway has worked quite as hard, and quite as much for the vessel's benefit, as many crew members; but, unless he were put on the articles, he would have no lien for wages.

Nor does every maritime contract for wages supply a lien, for the master has none; yet his is a large share in most salvage awards, and it cannot claim any kinship to a wage lien. But salvage service, though nowadays often rendered in pursuance of contract, is essentially something voluntarily given, and outside the positive engagements of those giving, wherefore it is the policy of the law to encourage generosity and boldness by reasonably liberal awards.

But a seaman by his shipment contract is not bound to salve; the law encourages him so to do, by rewards out of what he saves. "No cure, no pay," is the essence of salvage (Roff v. Wass, Fed. Cas. No. 11,999, Id., Fed. Cas. No. 12,000; and for a curious differentiation between salvage and wages see The Centurion, Fed. Cas. No. 2,554. It logically follows that, while the seaman's contract exists, he is as much bound to labor for his ship in storm or misfortune, as at other

times; wherefore he cannot, qua seaman, demand salvage from his own ship. See The Triumph, Fed. Cas. No. 14,183, and especially The York, Fed. Cas. No. 18,140, where Sprague, J., held a man left aboard alone by his mates, escaping after collision, released from his engagement by such abandonment, and therefore entitled to salvage for having, unaided, sailed the injured vessel to a harbor of refuge. There is no resemblance or analogy between salvage and wages, lending aid to libelants' contention.

It is not doubted that the Neptune's crew had a lien on the Columbia; they still have it, though now probably too stale for enforcement. The so-called settlement by their owner, made without their consent, does not bind them, because the owner cannot release what is not his own; i. e., the independent rights of each and every officer or seaman, who contributed to a successful salvage effort. The Lowther Castle (D. C.) 195 Fed. 604. Nor is it doubted, that seamen may ratify an owner's settlement, and sue in personam for a share thereof; (The Olive Mount [D. C.] 50 Fed. 563; Conekin v. Lockwood [D. C.] 231 Fed. 541); but the fact (asserted in briefs) that this settling owner has absconded, or is "execution proof," is assuredly no reason for converting a claim against him into a lien on a vessel he used to own.

There being no direct authority for this alleged lien, and finding no controlling analogy therefor, we point out, in conclusion, that the secret lien maritime is, and always has been, stricti juris (Piedmont, etc., Co. v. Seaboard, etc., Co., 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. ——, The Saturnus, 250 Fed. 407, 162 C. C. A. 477, 3 A. L. R. 1187), and therefore not to be lightly extended by construction or inference.

Decree reversed, with costs, and cause remanded, with directions to dismiss the libel, with costs.

BAKER v. TOWN OF MANITOU, COLO.

(Circuit Court of Appeals, Eighth Circuit. December 31, 1921.)

No. 5751.

1. **Municipal corporations ⇐741(1)—Minors are not excepted from requirement of giving notice of injuries.**
   Under the Colorado statute requiring notice of injuries to be given to a municipal corporation as a condition precedent to recovery therefor, which does not except minors from its requirements, the courts cannot make an exception, and must deny recovery to minor who failed to give the notice.
2. **Constitutional law ⇐70(3)—Courts cannot make exceptions, where Legislature has made none.**
   Courts cannot make exceptions to statutes, where the Legislature has made none.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Frank Baker, by his next friend and special guardian, Monett Baker, against the Town of Manitou, Colo. Judgment for

defendant, on sustaining demurrer to the complaint, and plaintiff brings error. Affirmed.

J. A. Orr, of Colorado Springs, Colo., and T. J. Leahy and C. S. Macdonald, both of Pawhuska, Okl., for plaintiff in error.

C. W. Dolph and Martin M. Burns, both of Colorado Springs, Colo., for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

JOHNSON, District Judge. Plaintiff in error, a minor 16 years of age, brought suit by his next friend in the court below to recover damages for personal injuries alleged to have been suffered by him through the negligence of the defendant, the town of Manitou, Colo. Plaintiff was injured on the 31st day of July, 1918. Because of the seriousness of his injuries he was confined in bed under the care of surgeons until the 21st day of November, 1918. On the 13th of January, 1919, he served upon the mayor and board of trustees of the defendant a written notice of his injuries.

It is alleged in the complaint that because of his injuries it was not possible for him to have served this notice at an earlier date. A statute of the state of Colorado enacted in 1903 provides that:

"No action for the recovery of compensation for personal injury or death against any city of the first or second class or any town, on account of its negligence, shall be maintained unless written notice of the time, place and cause of injury is given to the clerk of the city, or recorder of the town, * * * within ninety (90) days and the action is commenced within two years from the occurrence of the accident causing the injury or death." Rev. St. Colo. 1908, § 6661.

The defendant demurred to the complaint of plaintiff on the ground that no written notice was given within 90 days from the occurrence of the accident causing plaintiff's injuries, as required by the statute. The court below sustained the demurrer and dismissed the action. Plaintiff brings error, and assigns the ruling of the court sustaining the demurrer of the defendant to the complaint as error.

It is the contention of plaintiff that his failure to serve the statutory notice within 90 days from the occurrence of the accident is not a bar to his right of recovery because it appears: (a) That he is a minor; (b) that by reason of his physical condition he was unable to serve the notice, or cause it to be served, within the time specified in the statute. Under one or the other of the heads above noted counsel for plaintiff have cited, among others, the following cases supporting their contention: McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476, 2 A. L. R. 1359; Murphy v. Village of Ft. Edward, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916C, 1040; Forsyth v. City of Oswego, 191 N. Y. 441, 84 N. E. 392, 123 Am. St. Rep. 605; Born v. City of Spokane, 27 Wash. 719, 68 Pac. 386; Terrill v. Washington, 158 N. C. 281, 73 S. E. 888.

[1] The questions decided in these cases have not been passed upon by the Supreme Court of Colorado. However, in discussing other

requirements of a statute of similar import which was repealed by the present statute, that court said:

"Municipal corporations organized, as is the city of Colorado Springs, under the general municipal incorporation act, have such rights and powers, and are subject to such obligations and liabilities as the General Assembly sees fit to give or impose. For damages incurred by injuries upon its streets or sidewalks the General Assembly may or may not, impose an obligation upon them to respond therefor. It is competent, therefore, for the General Assembly to pass statutes like these we are considering, making it a condition precedent to the attaching of liability for such injuries, or the right to sue therefor, the giving of a notice of this character." City of Colorado Springs v. Neville, 42 Colo. 219, 93 Pac. 1096.

The right of a minor to maintain a suit for personal injuries, who had failed to give notice within the time specified in a statute of Iowa, was considered by this court in Morgan v. City of Des Moines, 60 Fed. 208, 8 C. C. A. 569, where it is said:

"The act of February 17, 1888, is not an amendment of any previous act on the subject to which it relates. It is new and independent legislation, and complete in itself. It establishes the rule for the class of cases to which it relates. The power of the Legislature to enact the statute is not questioned. It would be entirely competent for the Legislature to enact a general statute of limitations putting minors and adults on the same footing as to all causes of action, and such would be the legal effect of a statute which contained no saving clause exempting infants from its operation. This principle has never been questioned. * * * Technically, an infant cannot maintain a suit, and, in contemplation of law, is ignorant of his rights; but, in fact and in practice, infants, through their guardians and next friends, are commonly the most diligent and persistent of suitors, and the instances are few where any meritorious right is allowed to slumber. The self-interest of those who desire to administer the infant's estate usually results in a speedy action for its recovery. But, however this may be, the argument against the justice and wisdom of the statute which contains no saving clause in favor of infants must be addressed to the Legislature, and not to the courts."

In Shreve v. Cheesman, 69 Fed. 789, 16 C. C. A. 417, this court said:

"Where the Legislature has made no exception to the positive terms of a general statute, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so."

This language has in substance been so frequently repeated by this court that it has almost become a legal maxim in this jurisdiction. Pearsall v. Great Northern Ry. Co. (C. C.) 73 Fed. 940; Robt. J. Boyd P. & C. Co. v. Ward, 85 Fed. 35, 28 C. C. A. 667; Wrightman v. Boone County, 88 Fed. 436, 31 C. C. A. 570; Lafayette County v. Wonderly, 92 Fed. 316, 34 C. C. A. 360; St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 199, 60 C. C. A. 80; Schauble v. Schulz, 137 Fed. 389, 69 C. C. A. 581; United States v. Alamogordo Lumber Co., 202 Fed. 706, 121 C. C. A. 162.

[2] Under statutes similar to the one now under consideration the rule that it is not the province of courts to make exceptions where the Legislature has made none, has been declared and applied in Peoples v. City of Valparaiso, 178 Ind. 673, 100 N. E. 70, and Ellis v. City of Kearney, 80 Neb. 51, 113 N. W. 803. In the case of Peoples v. City of Valparaiso, the court said:

"That the ends of justice might be the better subserved by making exceptions in cases such as this, and possibly others, appears scarcely open to controversy; but the making of such exceptions is a duty solely devolving on the legislative department of our government, and courts cannot rightfully modify the terms of a statute, however meritorious such modification may appear."

The court below did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

CHASE v. DU PONT NAT. BANK OF WASHINGTON, D. C.

(Circuit Court of Appeals, Third Circuit. January 4, 1922.)

No. 2753.

1. **Bills and notes ⇐493(1)—Note imports consideration, which may be rebutted.**
   Promissory note imports consideration, but between the maker and payee the presumption of consideration may be rebutted by evidence.
2. **Bills and notes ⇐493(4)—Proof money was not paid to maker does not rebut presumption of consideration.**
   In an action on a note payable to a bank, evidence that the bank credited the amount of the note to the account of a third party does not alone rebut the presumption of consideration for the note, since the note may have been an accommodation note, as defined by Uniform Negotiable Instruments Law D. C., art. 2, § 29.
3. **Bills and notes ⇐96—Accommodation note is supported by consideration.**
   A note executed by the maker for the accommodation of another, to whom the money is paid by the payee, is supported by consideration.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the Du Pont National Bank of Washington, D. C., against Edward B. Chase. Judgment for plaintiff on directed verdict (272 Fed. 1016), and defendant brings error. Affirmed.

J. Claude Bedford and Roy Martin Boyd, both of Philadelphia, Pa., for plaintiff in error.

Isaac A. Pennypacker and Joshua F. Bullitt, both of Philadelphia, Pa., for defendant in error.

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

WOOLLEY, Circuit Judge. The action is on a promissory note. The facts, pleaded and proved, are briefly these:

Speaking of the parties as they stood below, the plaintiff bank was the payee and the defendant was the maker of a promissory note for $5,500. The plaintiff declared on the note in the usual form. The defendant pleaded that he was asked by the president of the bank to sign a note for $6,000, of which the note in suit is in part renewal; that he received no benefit, nor did the bank at his instance suffer a

detriment, from the note; and that the note was wholly without consideration.

At the trial the plaintiff called its cashier and proved execution and delivery of the note by the defendant, and nonpayment. There it stopped. On cross-examination the defendant brought out from the witness that some one delivered to the bank a note for $6,000, signed by the defendant as maker; that the bank credited the proceeds of the note not to the defendant maker but to the account of one Mary C. Howard; and that upon maturity he, the maker, paid $500 in reduction of the principal and gave the note in suit in renewal for the balance. There the plaintiff rested. The defendant then moved for a nonsuit on the ground that, upon the plaintiff's showing, the bank, instead of crediting his account with the proceeds of the original note, had appropriated them. On refusal of a nonsuit the defendant, relying on the plaintiff's evidence to prove no consideration for the note, declined to present any evidence of his own. After judgment for the plaintiff on a directed verdict the defendant sued out this writ of error, assigning several errors, which, when compressed, raise the one question, whether on the evidence the plaintiff had itself proved that the note was without consideration.

[1, 2] This question turns on well-settled principles. The first is that a promissory note imports consideration. When the controversy is between maker and payee an issue of consideration is simplified by the ease with which the law, as between these parties, allows the maker to rebut the presumption of consideration by evidence. The defendant, however, says that he was not required to overcome the presumption by evidence because the plaintiff itself had destroyed the presumption by its admission that the proceeds of the note had not been credited to the maker. This evidence, we think, did nothing more than prove that the defendant maker, in not receiving money for his note, had not received a money consideration. This fact did not rob the note of validity, for still it may have been—as the defendant's pleadings seem to indicate—an accommodation note, importing consideration of the character implicit in such an undertaking.

By the Uniform Negotiable Instruments Law, enacted by the Congress for the District of Columbia, where the note was made, it is provided:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or endorser, without receiving value therefor and for the purpose of lending his name to some other person. Such a person is liable on the instrument to the holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Article 2, § 29, 30 Stat. 789.

That the defendant regarded the bank as a "holder for value" and considered himself "liable on the instrument" is persuasively evidenced by his payment of $500 on account of the first note.

[3] The obligation of an accommodation maker, though made without value received by him, is none the less an obligation recognized in law to be supported by a valid consideration. To fasten liability upon an accommodation maker it is not necessary that any consideration

should move directly to him. The consideration which supports his promise is that which is parted with by the person taking the note and received by the person accommodated. 3 R. C. L. 927, 928.

We are of opinion that the presumption of consideration of this character was not destroyed by the plaintiff's evidence. On this presumption—it being all there was in the case in the nature of evidence—there was nothing for the court to do but direct a verdict. Just what was the note transaction, where lay the consideration, and why the proceeds were credited to one other than the maker, the plaintiff, resting upon the presumption of consideration which the law offered it, did not have to disclose; and the defendant, for reasons of his own, did not see fit to tell the jury. Though the evidence was meager it was enough, in default of any evidence in rebuttal, to compel and sustain a directed verdict for the plaintiff.

The judgment below is affirmed.

DITTMAR v. SARGENT et al.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 23.

1. **Shipping ⟸54—Towage ⟸11(8)—Duty of master to examine barge, and neither charterer nor tug were liable for his failure.**
   It was the duty of a captain of a chartered barge, as a part of the husbandry thereof, to examine her at the end of a trip through a channel broken through ice 30 feet wide, before leaving her, and neither the charterer nor the tug owner was chargeable with the loss of the barge, which sunk by reason of slight injuries about even with the load water line.
2. **Shipping ⟸54—Ice damages to barge held reasonable wear and tear.**
   A man who charters his vessel for harbor navigation in New York in the winter time must regard careful proper navigation through ice fields as a use reasonably to be expected, and the damage caused by knocks from floating ice is chargeable to reasonable wear and tear, in the absence of unusual conditions and no negligence in the towing.

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

Libel in admiralty by William D. Dittmar against Donald J. Sargent, with the Red Star Towing & Transportation Company, impleaded. From a decree dismissing the libel, libelant appeals. Affirmed.

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

Thomas Cooper Byrnes, of New York City, for appellee Sargent.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee Red Star Towing & Transportation Co.

Before ROGERS, MANTON and MACK, Circuit Judges.

MACK, Circuit Judge. Appeal by libelant, the barge owner, from a decree dismissing his libel, both as to the respondent charterer and

the impleaded towing company, which under engagement with the charterer, had towed her from New York to Stamford, Conn. The coal barge was chartered December 5, 1917, under the usual demise charter with the captain's services for an indefinite time for a trip to Stamford, Conn. She was loaded at Port Reading and delivered at Newtown Creek. There she was taken in tow, on January 16, 1918, by the towing company's tug. On January 18th she was towed to a safe place at Wilson's Point, and remained there with other barges eight days, as Stamford Harbor was frozen up. On the 26th, after the tugs had broken a channel through, over 30 feet wide and half a mile long, they again took her in tow and landed her the same morning at Stamford. Then, at about 11 a. m., the captain, without having examined her, left the barge. If he had inspected her before leaving, he would have discovered that two planks in her port bow, about even with the load water line, had been broken in passing through this channel. Due to his failure to discover this, and to take measures to avoid sinking, she sank at high tide during the night. The captain returned the following day.

[1] We concur in the view of the trial judge that it was "the master's duty, a part of the husbandry of the boat," to examine her, and that all of the damage, except the slight repairs due to the initial punch, was due to his negligence in failing to perform that duty. As to the initial damage, concededly the towing was carefully done, no negligence can be charged either against the tug owner or the charterer, unless it be negligence to tow with the utmost care or to permit the towing under all the then prevailing circumstances.

[2] This barge was demised in the winter time; the parties knew that it would be used when, in all probability, the ice conditions would be more or less severe. And even though, as Judge Hough found, the tug owner refused to tow unless, as between them, the charterer assumed the risk, the conditions that gave rise to these negotiations were not so dangerous or unusual as, in our judgment, to compel the continuous tying up of the chartered boat, and therefore to charge either charterer or tug owner with negligence solely because the barge was then towed to its destination.

We concur in the statement of the trial judge that—

> "This view of the matter makes ice damages under the circumstances shown reasonable wear and tear. * * * A man who charters his vessel for harbor navigation in New York and in the winter time must regard careful, proper navigation through ice fields as a use reasonably to be expected."

Not that ice damage under all circumstances is reasonable were and tear; not that navigation through all ice fields, unbroken, or even broken up, is a use reasonably to be expected. But in the absence of unusual conditions, making the situation more than ordinarily hazardous, the barge demised for winter work may be towed in a broken-up ice field; if there be no negligence in the towing, damage caused by knocks from floating ice is chargeable to reasonable wear and tear.

The decree is affirmed.

WALTON v. GARRETT.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1921.)

No. 3725.

Bankruptcy ⟸136(2)—Order committing bankrupt for contempt held sustained by evidence.

An order finding a bankrupt guilty of contempt in failing to obey an order of the referee to turn over certain property to his trustee *held* sustained by the evidence.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Mississippi; Edwin R. Holmes, Judge.

In the matter of C. G. Walton, bankrupt; J. T. Garrett, trustee. On petition by bankrupt to revise order of District Court. Denied.

J. W. P. Boggan, of Tupelo, Miss., for petitioner.

J. R. Anderson, J. M. Thomas, and J. Q. Robins, all of Tupelo, Miss., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. By petition to superintend and revise, the petitioner, a bankrupt, complains of an order of the District Court ratifying and confirming the action of the referee in finding petitioner guilty of a contempt of court in failing to obey an order of the referee requiring the petitioner to turn over to his trustee in bankruptcy United States Liberty Bonds of the face value of $4,500, and adjudging that petitioner be committed to jail for such contempt.

The court's order is complained of on the ground that there was an absence of evidence to support its finding that at the time the referee's order was made, and at the time it was served on the petitioner, the bonds mentioned (which were found to be assets of the bankrupt's estate) were in his possession or under his control, and that he was able to turn the same over to his trustee. We are of opinion that the ground relied on is untenable, that evidence adduced, as disclosed by the record, was such as warranted the finding made by the court, and that the record does not show that the court erred in making the order complained of.

The petition is denied.

Ex parte TSUNETARO MACHIDA.

(District Court, W. D. Washington, N. D. September 16, 1921.)

No. 6190.

1. Aliens ⟸53—Deportation of those becoming "public charge," "public."

As used in Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), providing for the deportation of "any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequently to entry," "public" means the people or government of the United States and a per-

son becomes a "public charge" when committed to a department of the government by due course of law.

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

2. **Aliens ⊂=53—Alien convicted and sentenced to imprisonment subject to deportation as having become a public charge.**

An alien who before entry committed a crime against the United States, but for which he had not been convicted, and which he did not admit at the time of entry, on his subsequent conviction and sentence to imprisonment within five years *held* subject to deportation under Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), as having become a "public charge."

Habeas Corpus. In the matter of the application of Tsunetaro Machida for a writ to secure release from detention for deportation. Petition denied.

Thos. R. Horner, of Seattle, Wash., for petitioner.

Charlotte Kolmitz, Asst. U. S. Atty., and Robert C. Saunders, U. S. Atty., both of Seattle, Wash., for the United States.

NETERER, District Judge. The petitioner charges that he is worngfully deprived of his liberty by the Commissioner of Immigration. A show cause was issued and return avers that the petitioner is detained for deportation as an alien person not entitled to remain by virtue of an order issued by the Secretary of Labor. To the return is attached the record and file in the hearing before the bureau. The petitioner is directed to be deported for the reason that:

"He has become a public charge within five years after his entry into the United States from causes not affirmatively shown to have arisen subsequent thereto, and that he was a person likely to become a public charge at the time of entry into the United States."

The court record of conviction, which is conclusive here, shows that the alien was responsible for the entry of contraband aliens from Mexico and on being indicted pleaded guilty and was sentenced to the federal prison for two years. He urges that the offense for which he was convicted is not urged as a ground for deportation, and that he is not a person likely to become a public charge, a charge where for some reason a person is to be supported "at public expense by reason of poverty; insanity and poverty; disease and poverty," and not for a reason which is included within the other provisions of the statute with relation to crime and conviction. Section 3, Act. Feb. 5, 1917 (section 4289¼b, Comp. Stat.), excludes:

"Persons who have been convicted of, or admit having committed a felony or other crime * * * involving moral turpitude * * * [and] persons likely to become a public charge."

Section 19 (section 4289¼jj) fixes conduct or condition of aliens admitted for which they may be deported:

(1) "Any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequently to landing; * * *" (2) "any alien who is hereafter sentenced to imprisonment for a

term of one year or more because of conviction * * * of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States. * * *"

A felony is an offense which may be punished by death or imprisonment for a term exceeding one year. Crim. Code, § 335 (section 10509, Comp. Stat.). "Turpitude" is defined by Webster to be inherent baseness or vileness of principal or acting.

"Everything done contrary to justice, honesty, modesty, and good morals is said to be done with turpitude." Bouvier.

And "moral turpitude" is defined as:

"An act of baseness, villainy, or depravity in the private social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man. State v. Mason, 29 Ore. 18; Blackburn v. Clark, 41 S. W. 430; Baxter v. Mohr, 76 N. Y. Sup. 982." 5 Words and Phrases, p. 4580.

[1] "Public" is defined by Bouvier as "the whole body politic or all the citizens of the state." The public in this case is the people, the government of the United States. "Charge" (Webster): "To lay on or impose as a tax, duty or trust." A judgment is a charge upon land. Darling v. Rogers, 22 Wend. (N. Y.) 491. A married woman may charge her separate estate. Radford v. Carwile, 13 W. Va. 658. Charge may be said to be a responsibility peculiar to the person affected, and a public charge to be a person committed to the custody of a department of the government by due course of law.

[2] The alien in this case could not be excluded, because he had not been convicted of a felony, nor did he admit having committed the act at the time of entry. He may not be deported because of the offense, because it was committed before entry. When he was convicted he became a public charge, and a tax, duty, and trust was imposed upon the government by his conduct; and at the time of his entry he was likely to become a public charge by reason of the crime which he had committed. The intent of the Congress unquestionably was to exclude persons unfitted as defined to enter, and made provision that, if within a limited period it was disclosed that they were disqualified at the time of entry, deportation should be made, and, the provision of statute being broad enough to include the charge, which is not covered by any other provision, the writ will be discharged.

THE ASCUTNEY. THE MARIE OLSEN. CITY OF BEAUMONT SHIP CO. v. OLSEN WATER & TOWING CO., Inc.

(District Court, S. D. New York. April 10, 1920.)

1. **Collision ⇐125—Contact held shown to have caused injury.**
   Injury to vessel *held* shown to have been caused by contact with it of another vessel.

2. **Collision ⇐115—Wholly disabled steamer, being brought into slip, not responsible for collision with moored vessel.**
   A wholly disabled steamer, being brought into a slip by tugs, is not responsible for collision with a moored vessel.

3. **Collision ⇐115—Liability held to attach to company having in charge berthing of disabled steamer.**
   Liability for collision with a moored vessel of a wholly disabled steamer being brought into a slip attaches to the company having in charge the berthing of the steamer, where no special fault can be found with the tugs being used.

In Admiralty. Libel by the City of Beaumont Ship Company against the steamship Ascutney, the steam tug Marie Olsen, and other vessels. Decree for libelant against the Olsen Water & Towing Company, Inc., claimant of the above-named steamship and tug.

Decree affirmed, 277 Fed. 243.

Kirlin, Woolsey & Hickox, of New York City, for libelant.

Francis G. Caffey, U. S. Atty., of New York City, for claimant United States.

Foley & Martin, of New York City, for claimants Newark & New York Towboat Co. and Olsen Water & Towing Co., Inc.

Patrick J. Dobson, of New York City, for claimant Kennedy Towing Line, Inc.

KNOX, District Judge. [1] There is no question but that the Ascutney, which was in charge of Olsen Water & Towing Company, Inc., was in contact with the City of Beaumont. Nor is there any doubt that some of the latter vessel's chain plates were damaged. The impleaded respondents and claimants contend that the injury to the Beaumont was done prior to the time when the Ascutney came against her. Three witnesses testify positively that they saw and commented upon the bent chain plates and broken shrouds of the Beaumont upon the morning of December 16, 1918, and before the Ascutney arrived at the slip where the Beaumont was berthed. Furthermore, the master of the Ascutney and the tugmaster of the respondent, who was docking her, testify with much definiteness that the contact of the Ascutney with the Beaumont could not possibly have resulted in injury to the latter. It seems to me that, had the attention of the witnesses on board the Ascutney been directed as sharply to the port side of the Beaumont as they claim it to have been at the moment of contact, they would have taken notice of damaged chain plates and broken shrouds, had these, as a matter of fact, existed prior to the collision. Yet there

is no evidence from any of them to the effect that any damage to the Beaumont then existed.

It is also contended that the Ascutney's sides were smooth, and that there was no projection of any character that could have pulled the plates from the Beaumont's side. It is admitted, however, that fenders, in addition to those made of rope and cork, hung over the Ascutney's sides, and I do not think it beyond the range of possibility that one of these fenders, caught between the Ascutney and the chain plates, and then being subjected to a forward movement, might have occasioned the damage. However, I do not consider it necessary to speculate as to exactly what it was about the Ascutney that caught hold of the plates, if I find that the contact of the two vessels was what gave rise to the Beaumont's injury.

Thomas Ryall, a wholly disinterested witness, not now connected with any of the parties in interest, was a watchman on board the Beaumont. He was within 15 or 20 feet of the place where the damage was done. He had been watching the Ascutney from the time she began to maneuver into the slip, he saw the towed vessel come into contact with his ship, and as she moved forward and brought about the damage he and the mate went to get the name of the vessel. He also swore that the Beaumont was in good order prior to the collision, and, had she been out of order as to her shrouds and chain plates, it is altogether reasonable that he would have known of it.

[2, 3] The circumstances tend strongly to support the libelant's position, and I shall find in its favor. It would seem that the libel as to the Ascutney, which was wholly disabled, should be dismissed, under the authority of Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U. S. 48, 40 Sup. Ct. 66, 64 L. Ed. 130. No specific fault can be found against the tugs, and the liability should, I think, attach to the Olsen Water & Towing Company, Inc., which had in charge the berthing of the Ascutney.

A decree as indicated will issue.

THE ASCUTNEY.

Appeal of OLSEN WATER & TOWING CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1921.)
No. 35.

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

Libel by the City of Beaumont Ship Company against the steamship Ascutney and other vessels. From a decree for libelant against the Olsen Water & Towing Company, Inc., claimant, etc. (277 Fed. 242), it appeals. Affirmed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

HUNGERFORD v. OWEN MAGNETIC MOTOR CAR CORPORATION.

(District Court, D. Delaware. November 23, 1921.)

No. 400.

Receivers ⟸139—Sale of personal property improperly divided into lots set aside.

Under an order requiring receivers to offer personal property for sale in bulk and also in lots, a sale made in lots, but so divided that the lots were not calculated to, and did not, bring an adequate price, *held* prejudicial to creditors and set aside.

In Equity. Suit by Uri T. Hungerford against the Owen Magnetic Motor Car Corporation. On objection to confirmation of sale of personal property by receivers. Objection sustained, and sale set aside.

George N. Davis, of Wilmington, Del., for receivers.

Nathan Bilder, of Newark, N. J., for purchasers of personal property.

William N. Reynolds and Joseph P. Flanagan, both of Wilkes-Barre, Pa., and Reuben Satterthwait, Jr., of Wilmington, Del., for objecting creditors.

MORRIS, District Judge. A creditor has made objection to the confirmation of the sale of the personal property of the Owen Magnetic Motor Car Corporation, held by its receivers, upon the grounds that the sale had was not made in conformity with the order of sale, and that the price received thereat—$136,495—was inadequate. The creditor also undertakes to bid at a resale the sum of $165,000 and for the faithful performance of his undertaking has deposited $40,000 in the registry of the court.

The necessity for maintaining confidence in the stability of judicial sales is beyond dispute, nor do I question the soundness of the rules looking to that end that have been generally adopted and applied by the courts. But it is likewise well established that a departure from the terms of an order of sale, to the prejudice of an interested party, constitutes sufficient ground for a refusal of confirmation. Griswold v. Fuller, 33 Mich. 268, 273; Shroeder v. Young, 161 U. S. 334, 337, 338, 16 Sup. Ct. 512, 40 L. Ed. 721; 16 R. C. L. 91. The order directing the receivers to make sale of the property in question provided in part:

"That said receivers be and are hereby authorized and directed to offer for sale said property at public auction as aforesaid, as an entirety, and to receive and record the bids so received by them, said bids so received to be conditioned upon the sale of said property in separate lots or parcels at a higher price. The said receivers shall then offer said property for sale in separate parcels or lots as in their discretion may appear most likely to obtain the highest price. If the aggregate price of said property so offered in separate parcels or lots shall exceed the highest offer for said property as an entirety, then said receivers shall sell and deliver said property to the bidder or bidders in separate parcels or lots; otherwise, said property shall be sold to the highest bidder for the same as an entirety."

The return of sale made by the receivers shows that the tangible personal property was sold in only four lots, and that one of those lots consisted of 267 catalogued items, and was so large that the bid accepted therefor was three-fourths of the amount bid for the entire personal property. I fail to find from the receivers' return of sale, or from the evidence, either that such parceling was called for by the nature of the property, or that there were other facts warranting a conclusion that such unusual division would produce the highest price for the property. Consequently I am constrained to conclude that the sale was in substance a sale of the personal property in bulk, and that the creditors were thereby deprived of the advantage intended to be conferred upon them by a sale in lots. It likewise appears from the evidence that many of the attachments belonging to the machines, necessary to make them complete and to cause them to sell for a proper price, were not shown upon the catalogue or advertisements of the receivers, were not displayed with the machine, or otherwise in such manner as to enable probable purchasers to know the value of the property being sold.

I also find from the evidence that the sale produced an inadequate price. The impartial appraisers appointed by the court made a most thorough and exhaustive examination of the property, and their testimony shows that their appraisal of the property at the sum of $228,728 was an exceedingly conservative estimate of its value. It is unnecessary to determine whether the inadequacy of price would of itself be sufficient to warrant refusal of confirmation, had the sale been made in conformity with the order, but it is in my opinion sufficiently inadequate to show that the creditors were prejudiced by the failure of the receivers to make a sale as directed.

For the foregoing reasons, confirmation must be refused, and a new sale in keeping with the order directed.

NORTHWESTERN CONSOL. MILLING CO. v. ROSENBERG et al.

(District Court, E. D. Pennsylvania. January 14, 1922.)

No. 8136.

1. **Pleading ⇐17—Allegation of receipt of goods held insufficient as allegation of agency.**

   In a statement of claim, an allegation that goods were received by a warehouse company "on behalf of the defendants" was insufficient as an allegation of agency, and renders the averment of the receipt of the goods insufficient.

2. **Pleading ⇐21—Cause of action for nonacceptance of goods sold and damages claimed held inconsistent.**

   Where plaintiff, in an action for nonacceptance of flour, sued for the difference between the contract price and the market price, according to section 64 of the Sales Act of 1915 (P. L. 543; Pa. St. 1920, § 19712), and contended that the goods had been delivered and accepted, and that defendant had refused to pay for them, in which case the damages, under

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

section 63 (Pa. St. 1920, § 19711), would be the price of the goods, the cause of action alleged is inconsistent with the damages claimed.

3. **Pleading ⊜350(3)—After two unsuccessful attempts to allege a good cause of action, judgment may be entered for the defendant.**

After a failure in two attempts to set out a good cause of action, judgment may be entered for the defendant.

At Law. Action by the Northwestern Consolidated Milling Company against Jacob Rosenberg and others. Judgment for defendants.

Levi & Mandel, of Philadelphia, Pa., for plaintiff.

Englander, Cohen & Korn, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. In the amended statement of claim the plaintiff has endeavored to supply the deficiencies pointed out when the original statement of claim was attacked (see Northwestern Consolidated Milling Co. v. Rosenberg et al. [D. C.] 275 Fed. 878) by averments inferentially implying that in the application for a shipping permit the warehousing company was acting as the defendant's agent and that the flour was delivered by the carrier, who was the agent of the defendant, to the warehousing company, also the agent of the defendants, that the warehousing company received it on behalf of the defendants, and that the defendants called at the Delaware avenue stores of the warehousing company and examined and accepted the flour. There is no sufficient averment that the Delaware Warehouse Company was authorized by the defendant to act as its agent, nor is there any averment of the extent of its authority.

[1] There being no sufficient statement of a memorandum in writing signed by the defendants to take the case out of the statute of frauds provisions of the Sales Act of 1915 (P. L. 543; Pa. St. 1920, §§ 19649–19726), it is contended that the averments of the receipt and acceptance of the flour are sufficient to take the case out of the statute. The section in question of the Sales Act (section 4 [Pa. St. 1920, § 19652]) provides that a contract for the sale of goods of the value of $500 or upwards shall be unenforceable if not in writing, unless, inter alia, the buyer shall accept part of the goods and actually receive the same. There is no sufficient averment in the statement of claim of actual receipt of the goods by the defendant; the receipt alleged being that of the warehousing company "on behalf of the defendants," palpably an insufficient allegation of agency.

[2] The breach of contract alleged is the failure on the part of the defendants to pay the draft for the flour. The damages claimed are for the difference between the contract price and the market price at the time of the alleged breach. There is apparent inconsistency in the cause of action and the damages claimed. If, as contended by the plaintiff, the goods were delivered and accepted, and the defendant failed and refused to pay for them, his damages would be the price of the goods. Section 63, Sales Act of 1915 (Pa. St. 1920, § 19711).

The measure of damages relied on by the plaintiff in the present action is that for nonacceptance of the goods under section 64 of the

Sales Act (Pa. St. 1920, § 19712). The plaintiff, however, in order to bring its case within the statute of frauds provisions of the act, has attempted to allege acceptance, and alleges as the breach the failure to pay the price. If it alleged a breach consistent with its claim for damages, it would be contradicting the averments of acceptance necessary to sustain the contract. If it claims damages for the difference between the contract and market prices, it must allege wrongful neglect or refusal to accept and pay; but if it claims damages for the price of the goods it must allege that the buyers refused to receive them, and that they are held by the seller as bailee for the buyer. It is apparent that, in the endeavor to sustain the contract under the statute of frauds, and to sustain an action for the difference between the contract and market prices, the plaintiff has been impaled on the horns of a dilemma.

[3] As the plaintiff has had two opportunities to set out good cause of action, and has failed to do so, judgment may be entered in favor of the defendants.

INGLE v. LANDIS TOOL CO. et al.

(District Court, M. D. Pennsylvania. January 6, 1922.)

No. 267–A.

Patents ⊂=324(6)—Issue held decided on petition to lower court after reversal and remand, to reopen and admit supplemental answer.

In action wherein plaintiff alleged that he was owner of patent, and asserted infringement by defendant, and case was tried on question of title, and court found in favor of defendant, and directed plaintiff to assign to it the letters patent procured, and the decree was reversed on appeal, and an accounting directed for infringement, defendant, on remand, was not entitled on motion to an order reopening the case with the consent of the appellate court for the admission of proofs and evidence tending to show the invalidity of the patent, since by requesting an assignment he conceded the validity of the patent, and the decision of the appellate court impliedly further recognized a valid patent, and the validity was involved in the issue tried, and therefore settled by the decision rendered.

In Equity. Bill by Arthur H. Ingle against the Landis Tool Company and another. On petition by defendant, on reversal on appeal, to reopen and admit supplemental answer. Petition denied.

See, also, 262 Fed. 150.

Clyde L. Rogers, of Boston, Mass., and James Gardner Sanderson, of Scranton, Pa., for plaintiff.

E. W. Bradford, of Washington, D. C., and Fred C. Hanyen, of Scranton, Pa., for defendants.

WITMER, District Judge. Plaintiff filed his bill of complaint, alleging that he was the owner of a certain patent on improvements to a boring machine, asserting infringement by defendant. The defendant denied infringement, claimed to be the owner of the patented improvements by purchase, and requested the court to dismiss the bill and direct assignment of the letters patent by plaintiff to defendant.

The case was tried out on the question of title, and the court found in favor of the defendant, and directed plaintiff to assign to it the letters patent procured. On appeal, this court was reversed, and an accounting was directed for infringement. Before decree was entered on the mandate, a petition was presented by the defendant for an order reopening the case, with the consent of the appellate court, for the admission of proofs and evidence tending to show the invalidity of the patent in suit. The defendant, relying upon its title to the property purchased from the bankrupt, the Ingle Machine Company, and more particularly being fully persuaded that such title to the boring machine in question included the improved Carey design, with the right to manufacture and sell the same, did not attack the validity of the patent issued to Carey and assigned to Ingle.

Whether good or bad, it is contended, defendant went on the theory that the patent belonged to it; but they went so far even as to request the court to order the assignment of it to the defendant company. In so doing, it is the opinion of the court that its validity was conceded, and was recognized in this court's decision ordering the plaintiff, Ingle, to assign the same to the defendant company. The appellate court reversed the order and directed proceedings of accounting for infringement. This also implies further recognition of a valid patent. In manner as appears, the validity of the patent was involved in the issue tried out by the court, and therefore settled by the decision rendered.

The motion presented must therefore be denied, and a decree be entered, as directed by the mandate of the Circuit Court of Appeals.

TRAYLOR ENGINEERING & MFG. CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. Pennsylvania. January 13, 1922.)

No. 8398.

1. **United States ⟸125—United States Shipping Board Emergency Fleet Corporation suable on contracts like other corporations.**
   The United States Shipping Board Emergency Fleet Corporation is a separate entity, notwithstanding all its stock is owned by the United States, and where it enters into contracts is suable in the same manner as other corporations.

2. **Corporations ⟸484(1)—In absence of statute or charter conferring power, corporation cannot become guarantor or surety, or lend its credit.**
   The general rule is that, in absence of statute or charter conferring the power, no corporation can become a guarantor or surety, or otherwise lend its credit to another person or corporation.

3. **Pleading ⟸350(3)—Sufficiency of defense of ultra vires cannot be determined without charter of corporation.**
   On rule for judgment against a corporation for want of a sufficient affidavit of defense, based on a claim that a contract was ultra vires, *held* that, in the absence of defendant's charter from the record, the question could not be determined, and the rule would be discharged.

At Law. Action by the Traylor Engineering & Manufacturing Company against the United States Shipping Board Emergency Fleet Corporation. On rule for judgment for want of sufficient affidavit of defense. Rule discharged.

Francis B. Bracken, of Philadelphia, Pa., for plaintiff.

Wm. Y. C. Anderson and George W. Coles, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The rule for judgment raises three questions:

[1] 1. Is the suit in substance and effect against the United States, and therefore maintainable only in the Court of Claims? The Supreme Court in the case of United States v. Strang, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. ——, decided that, notwithstanding all the stock of the United States Shipping Board Emergency Fleet Corporation was owned by the United States, it must be regarded as a separate entity; and it has been held by this court and other federal courts throughout the United States that, where it enters into contracts, it is suable in the same manner as other corporations.

2. Was the contract between the parties one of suretyship or guaranty? It is unnecessary to determine this question upon this rule, unless the following question is answered in the affirmative:

[2] 3. Is a contract of guaranty or suretyship within the corporate powers of the United States Shipping Board Emergency Fleet Corporation? The general rule is that no corporation has the power to become a guarantor or surety, or otherwise to lend its credit to another person or corporation. Humboldt Mining Co. v. American Manufacturing Co., 62 Fed. 356, 10 C. C. A. 415; Tod v. Land Co. (C. C.) 57 Fed. 51.

[3] There are exceptions to the rule, based upon the statutes under which corporations have been organized, and upon the powers conferred by their charters. Without the charter of the defendant upon the record, this question cannot be answered upon this rule.

Rule discharged.

In re INTERBOROUGH CONSOL. CORPORATION. Petition of PORGES. Petition of DE ROTHSCHILD FRÈRES et al.

(District Court, S. D. New York. December 7, 1921.)

Bankruptcy ⟸140(3)—Special deposit by corporation, from which it paid interest coupons, held not a trust fund for benefit of bondholders.

Where interest coupons attached to bonds of a corporation recited that they were payable at the office or agency of the corporation, the fact that for its own convenience the corporation, prior to each maturity date, made a special deposit in a bank, on which it drew checks in payment of coupons when presented, *held* not to constitute such deposit a trust fund for the benefit of coupon holders, but, on the bankruptcy of the corporation, the amount remaining in such deposit *held* a part of the general assets of the estate.

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

In Bankruptcy. In the Matter of the Interborough Consolidated Corporation, bankrupt. On petitions of one Porges and another for payment of claims from an alleged trust fund. Denied.

See, also, 267 Fed. 914.

Interborough Metropolitan will be referred to as Inter-Met.; Interborough Consolidated Corporation, as Consolidated; Empire Trust Company, as Empire Co. Porges asks for an order adjudging that the fund deposited with Empire Co. now entered on said Empire Co.'s books in the account entitled "James R. Sheffield, Trustee, Interborough Consolidated Corporation, Interest on Interborough Metropolitan Company 4½% Bonds," is applicable to the payment of the interest which became due on October 1, 1918, and on prior interest dates on the Inter-Met. 4½ per cent. collateral trust bonds, and for other relief incident to such an order.

By order dated April 8, 1921, De Rothschild Frères were allowed to intervene and to be joined as petitioners in the Porges application. They asked for the same relief. The petition of Porges, on behalf of himself and other holders of 4½ per cent. collateral trust bonds of Inter-Met., who have not received payment of interest upon such bonds which became due October 1, 1918, and previously, or on the coupons representing such interest, sets forth:

(1) The appointment of Sheffield as receiver on March 21, 1919, and as trustee on April 25, 1919.

(2) When Sheffield was appointed receiver, $431,910, was held on special deposit by Empire Co. and entered on the Empire Co.'s books in an account entitled "Interborough Consolidated Corporation, Interest on Interborough Metropolitan Company 4½% Bonds." This fund was composed of items deposited from time to time by Consolidated for the purpose of paying the interest accruing on said bonds. The receiver left the fund on deposit with the Empire Co., causing the account to be changed by prefixing his name to it as receiver.

(3) Upon his appointment as trustee, the title of the account was changed, by substituting the title of trustee for the title of receiver, and in that condition the fund is held on special deposit by the Empire Co.; the said Trust Co. having credited interest in the account on the amount deposited.

(4) Consolidated was created by consolidation, pursuant to section 7 of the Business Corporations Law of New York, of Inter-Met. and Finance & Holding Corporation (hereinafter called F. & H. Co.). This consolidation became effective on June 1, 1915. By section 11 of the Business Corporations Law, supra, it is provided as follows:

"*Rights of Creditors of Old Corporations.*—The rights of creditors of any corporation that shall be so consolidated shall not in any manner be impaired, nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such new corporation shall succeed to and be held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damage. * * *"

About 1906 Inter-Met. authorized the execution and issuance of its collateral trust 4½ per cent. bonds to the principal amount of $70,000,000, payable April 1, 1956, and to bear interest from April 1, 1906, at 4½ per cent. per annum, payable on April 1 and October 1 of each year. On March 5, 1906, Inter-Met. executed and delivered to Windsor Trust Company, as trustee, a trust agreement to secure the payment of the principal and interest of these gold bonds (hereinafter referred to as collateral trust bonds). On June 1, 1915, the date when the consolidation of Inter-Met. and F. & H. Co. became effective, Inter-Met. had issued and there were outstanding approximately $67,000,000 of the collateral trust bonds, and there are now outstanding approximately $63,000,000. By article sixth of the trust agreement of March 5, 1906, it is provided, inter alia:

"The company will duly and punctually pay or cause to be paid to every holder of any purchase money bond (referred to herein as collateral trust bonds) the principal thereof and the interest accruing thereon in gold coin of the United States of America of or equal to the present standard of weight and fineness at the dates and place and in the manner mentioned in said bond or in the coupons thereto appertaining according to the true intent and meaning thereof. * * * The interest on the coupon bonds shall be payable only upon presentation and surrender of the respective coupons annexed to said bonds as such coupons respectively mature; and when and as paid all coupons shall forthwith be canceled by the company. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof."

In consequence of the consolidation of the Inter-Met. and F. & H. Co., and of section 11 of the Business Corporations Law of New York (Consol. Laws, c. 4), the Consolidated corporation became obligated to pay the principal and interest of approximately $67,000,000 of the collateral trust bonds of Inter-Met., issued and outstanding on June 1, 1915, when the consolidation became effective. By article sixth of the trust agreement of March 15, 1906, it is provided, inter alia, as follows:

"The company will at all times until the payment of the principal of the purchase-money bonds (herein referred to as collateral trust bonds) keep an office or an agency in the borough of Manhattan, in the city of New York, where bonds and coupons may be presented for payment and where notices and demands in respect to said bonds and coupons or under this indenture may be served."

The first installment of interest on the collateral trust bonds became due on October 1, 1906, and pursuant to article sixth the executive committee of Inter-Met. on September 20, 1906, designated Windsor Trust Company, trustee under the trust agreement dated March 5, 1906, as the agent of the Inter-Met. for the payment of the interest on its collateral trust bonds issued under said agreement, and further designated the office of Windsor Trust Company, at 65 Cedar street, New York City, as the office at which the said interest would be payable.

On or about March 15, 1911, by resolution adopted by the executive committee of Inter-Met., it was determined that interest on the collateral trust bonds issued under the trust agreement, dated March 5, 1906, be paid direct to the holders thereof, instead of through the Windsor Trust Company, and the office of the Inter-Met. was designated as the office in the city of New York for the payment of the interest on the collateral trust bonds. By resolution of the executive committee adopted March 22, 1911, Windsor Trust Company was designated as the agency at which the coupons due April 1, 1911, for interest on the collateral trust bonds, should be paid.

The interest payments after April 1, 1911, were made upon presentation of the coupons at the offices of the Inter-Met. and subsequent to the consolidation effective June 1, 1915, at the offices of the Consolidated by check drawn upon the depositary of the funds "set apart" by the Inter-Met. or the Consolidated to the order of the holders of the coupons.

Pursuant to the resolution of the executive committee of March 15, 1911, the treasurer of the Inter-Met., on or about September 11, 1911, notified Windsor Trust Company that the coupons of the collateral trust bonds were to be paid at the office of the Inter-Met. on and after October 1, 1911, and the funds to cover the interest due on all the said bonds, both coupon and registered, would be deposited with Windsor Trust Company on September 30, and disbursed by the Inter-Met.'s checks drawn against said account with Windsor Trust Company. Thereafter, on or about September 30, 1911, the treasurer of Inter-Met. deposited with Windsor Trust Company a sum sufficient to cover the semiannual interest payment due October 1, 1911, on the collateral trust bonds then issued and outstanding, and directed that the same be held in an account entitled "Interborough Metropolitan Company Bond Interest Account," and further notified Windsor Trust Company that

the funds so deposited would be disbursed to the various bondholders by the Inter-Met.'s check drawn on Windsor Trust Company.

According to Porges, it became the custom of the treasurer, shortly before any installment of interest on the collateral trust bonds became due, "to separate and withdraw" from the general funds of the company sufficient funds to pay the installment of interest becoming due and deposit them with Windsor Trust Company; and the trust company entered the funds so deposited on its books by direction of the Inter-Met. in an account entitled "Interborough Metropolitan Company Bond Interest Account." In or about 1913 the Empire Co. succeeded the Windsor Trust Company, and thereupon the amount on deposit was transferred to the Empire Co., which entered it by direction of the depositor in an account designated "Interborough Metropolitan Company, Interest on Interborough Metropolitan Company 4½% Bonds," and maintained thereafter with the Empire Co. pursuant to the directions contained in a letter of the treasurer of the Inter-Met. to the Empire Company.

On or about February 4, 1914, the board of directors of Inter-Met. adopted a resolution appointing Burnet as deputy treasurer of the company, with power in conjunction with Sayre, coupon clerk, to disburse special funds "set apart" for the payment of dividends and note and bond interest. The president had stated that, in order to facilitate the disbursement of dividend and note and bond payments, it was desired to create special deposit accounts by withdrawal from the general fund from time to time of sums sufficient to meet the different dividend and interest requirements, each such withdrawal to be accomplished by check regularly drawn and signed in accordance with the by-laws, and to comprise a separate and distinct deposit to cover the exact amount of one full interest payment.

Pursuant to the aforesaid resolution the treasurer of Inter-Met. notified Empire Co. that the special checks of the company drawn on them against the account entitled "Interborough Metropolitan Company, Interest on Interborough Metropolitan 4½% Bonds," would be signed jointly by Burnet, deputy treasurer, and Sayre, coupon clerk, but that the resolution did not take away the signing power of himself and certain other officers under the by-laws or any former resolution and that checks might be drawn on the account above referred to, signed by him as treasurer, jointly with the aid of the deputy treasurer or the coupon clerk above named.

Thereafter, from time to time, shortly before any installment of interest on the Inter-Met. bonds became due, the treasurer withdrew from the general funds of the company sufficient money to pay the installment of interest becoming due and deposited it with the Empire Co., who entered it on its books in the account of the Inter-Met. entitled as aforesaid "Interborough Metropolitan Company, Interest on Interborough Metropolitan Company 4½% Bonds." Upon presentation of the coupons at the office of the Interborough Metropolitan Company checks were drawn upon the Empire Co., and were signed by Burnet and Sayre pursuant to the aforesaid resolutions of the board of directors of February 4, 1914, for the several amounts of coupons so presented, and were delivered to the persons presenting the coupons. The checks stated on their face that they were to be paid out of the said fund for the payment of interest entitled as aforesaid. Interest payments to registered holders of registered bonds were made by similar checks drawn to their order and sent to them by mail.

Upon the consolidation of Inter-Met. and F. & H. Co., effective June 1, 1915, by direction of the treasurer of Consolidated, the Empire Co. changed the title of the said interest account on its books so as to read "Interborough Consolidated Corporation, Interest on Interborough Metropolitan Company 4½% Bonds." The funds then held by the trust company, and those afterwards deposited, were applicable and were applied to the payment of such interest, and to no other purpose.

On or about June 3, 1915, at a meeting of the board of directors of Consolidated, the president stated that, in order to facilitate the disbursement of bond interest payments, it was desired to create special deposit accounts

by the withdrawal from the general fund from time to time of sums sufficient to meet the different interest requirements, each such withdrawal to be accomplished by check regularly drawn and signed in accordance with the by-laws and to comprise a separate and distinct acccount to cover the exact amount of one full interest payment, and that he had appointed Burnet deputy treasurer, with power, in conjunction with Sayre, coupon clerk, to sign checks against these special deposit accounts for the purpose of making the payments in question. The board of directors thereupon ratified, confirmed, and approved the appointment of Burnet as deputy treasurer of the company, with power, in conjunction with Sayre, to disburse special funds set apart for the payment of bond interest.

Pursuant to the aforesaid resolutions the treasurer of Consolidated on June 4, 1915, notified the Empire Co. that funds deposited with them in the "Interest Account" would be disbursed upon special checks of the Consolidated drawn on Empire Co. and signed jointly by Burnet, deputy treasurer, and Sayre, coupon clerk. Thereafter, as the interest due dates of the collateral trust bonds approached, the treasurer of the Consolidated, from time to time, withdrew from the general funds of Consolidated sums sufficient to meet the maturing interest payments on the collateral trust bonds, and deposited the same with the Empire Co., who entered the same on their books in the aforesaid "Interest Account." Only one fund was maintained for money deposited to meet the interest payments which came due after April, 1911, to wit, that first established in Windsor Trust Company, and hereinbefore described as "Interborough Metropolitan Company Bond Interest Account," later transferred to Empire Co. as "Interborough Metropolitan Company, Interest on Interborough Metropolitan Company 4½% Bonds," and after the consolidation carried by Empire Co. as "Interborough Consolidated Corporation, Interest on Interborough Metropolitan Company 4½% Bonds."

In this account all money "appropriated" for the payment of interest falling due on and after October 1, 1911, was entered. Such deposits were accepted upon the terms on which they were made, by the Windsor Trust Company and its successor, the Empire Co., who promised to pay the persons who should be entitled to receive it the interest on Inter-Met. collateral trust 4½% bonds out of funds so deposited. Such deposits were made semiannually to pay the April and October interest installments on the collateral trust bonds; the last of such deposits being made on September 30 and October 1, 1918, to pay interest becoming due October 1, 1918. Upon presentation of the coupons at the office of Consolidated, checks were drawn upon the Empire Co., and were signed by said Burnet and Sayre for the several amounts of coupons so presented, and were delivered to the persons presenting the coupons. The checks stated on their face that they were to be paid out of the fund for the payment of interest entitled as aforesaid. Checks for interest payments were likewise sent to the registered holders of registered bonds signed by the said Burnet and Sayre, drawn upon the Empire Co. and payable out of the same fund.

Said deposit to pay interest coming due on October 1, 1918, was made by means of two checks of Consolidated, which were sent to the Empire Co. with a voucher to which was attached a letter from the treasurer of Consolidated to its auditor. To such voucher the Empire Co. attached its receipts and returned such voucher and receipts to Consolidated. Such coupon holders as presented their interest coupons for payment up to the date of the receiver's appointment received payment of interest out of said funds. Interest payable on registered bonds October 1, 1918, was paid.

Porges was, at and before the filing of the petition, the owner and holder of 5 of said bonds, and is the owner of the coupons formerly attached thereto representing the interest upon said bonds which became payable on October 1, 1917, April 1, 1918, and October 1, 1918, amounting in all to $337.50. From May, 1917, until March 21, 1919, the date of the appointment of Receiver Sheffield, Porges was in the military service of the United States and absent from this country and was unable to present his coupons for payment between these dates. Thereafter on or about August 1, 1919, Porges presented

the coupons for payment at the office of the Consolidated and payment was refused. Attached to the petition of Porges are various exhibits, such as copies of resolutions, letters, etc., which for purposes of brevity will not be set forth. The petition of De Rothschild Frères and certain individuals sets forth that De Rothschild Frères and said individuals are the owners and holders of certain enumerated $1,000 Inter-Met. collateral trust 4¼ per cent. bonds and unpaid interest coupons thereof, maturing prior to March 28, 1918. Adopting, in substance, the petition of Porges, the De Rothschild petition sets forth certain facts peculiarly applicable to the holdings of the De Rothschild Frères.

All the petitioners were residents of Paris, France, and in 1911 they deposited all of the bonds for safe-keeping in a safe-deposit vault in a bank in Brussels, Belgium. The bonds were contained in this bank at the time of the invasion and occupation of Belgium by the hostile armies of the Imperial German government, which invasion and occupation commenced August 3, 1914. Access to the bonds was lost July 31, 1914, and subsequent to July 31, 1914, petitioners were unable to secure any of the coupons maturing during 1915 and 1916, owing to the continued occupation of Belgium by hostile troops.

While the formal occupation of Belgium territory by the German armies ceased in or about November, 1918, nevertheless, owing to necessary formalities, access to the bonds was not regained until about June, 1919. Meanwhile, as above set forth, Consolidated had been adjudged a bankrupt, and Sheffield had become trustee and was in possession.

The answer of the trustee does not controvert any of the essential facts set forth in the petitions, but takes issue with the conclusions of law asserted by the petitions.

Zabriskie, Sage, Kerr & Gray, of New York City (George Zabriskie and George Gray Zabriskie, both of New York City, of counsel), for petitioner Porges.

Stroock & Stroock, of New York City (M. J. Stroock, of New York City, of counsel), for petitioners De Rothschild Frères.

Alfred A. Cook, of New York City, for trustee.

William A. Barber and Joseph Diehl Fackenthal, both of New York City, for Empire Trust Co.

MAYER, Circuit Judge (after stating the facts as above). Briefly stated, the question presented on the facts which have been somewhat fully set forth is whether the case falls within Noyes v. First National Bank, 180 App. Div. 162, 167 N. Y. Supp. 288, affirmed on opinion below 224 N. Y. 542, 120 N. E. 870, or within Rogers Locomotive Works v. Kelley, 88 N. Y. 234.

At the outset, it is apparent that the cases dealing with the legal status of dividends duly and properly declared are not applicable. Such a dividend, when declared out of net earnings, is no longer the property of the corporation, but of the stockholders. Jermain v. Lake Shore & Mich. So. Ry. Co., 91 N. Y. 483; In re Interborough Consolidated Corporation (D. C.) 267 Fed. 914, and cases cited.

In the Noyes Case, supra, the railroad company opened an account with a bank with a voucher reading:

"For deposit in coupon account of C., R. I. & P. R. R. Company to meet 6 mos. interest due Sept. 1, 1905, on $17,331,000 of its 5 per cent. bonds of 1913, $433,275."

In the case at bar, the coupon, according to the terms of the mortgage, read:

"(Form of Interest Coupon.)

"No. $22.50

"On the first day of ———, 19—, Interborough-Metropolitan Company will pay to bearer at its office or agency in the city of New York, N. Y., twenty-two dollars and fifty cents, United States gold coin, being six months interest then due on its collateral trust 4½ per cent. gold bond No. ———.

"————, Treasurer."

(Printed Mortgage, page 4.)

It will thus be noted that the theory of the mortgage (as is usual) was that the interest coupon holder was an ordinary creditor, in the sense that the mortgage, of course, did not, by its terms, set aside a specific fund, nor create machinery for that purpose, whereby the interest coupon holder could look to such a fund, as distinguished from his right to present his coupon when interest was due and receive his interest out of the general funds of the corporation. In other words, the ordinary relation of debtor and creditor was set up, and, if interest should not be paid when due, the remedy of the bond and coupon holders under the mortgage was to proceed as set forth in articles 5 and 7 of the mortgage.

It may be, and it will be assumed for the purposes of the argument, that the corporation could so act as to put a fund beyond its control out of which the interest should be paid (although, quære, whether the corporation had such power); but such disposition must be clearly evidenced by acts or transactions which show, in effect, the creation of a trust fund over which the corporation has relinquished control. Nowhere can there be found anything, either in correspondence or in vouchers, which indicates that at any time, if the corporation so desired, it could not have withdrawn the deposit from the Empire Co. and deposited the funds elsewhere, or retained them and paid the coupon holders, if it pleased, with currency over its own counter.

The procedure by which first the corporation deposited with Windsor Trust Company and later with Empire Co. was one of convenience. The fact that Windsor Trust Company and later (because of merger) Empire Co. was the trustee under the mortgage is immaterial.

Under some circumstances, a deposit made with the trustee under a mortgage, qua trustee, might give rise to some debatable questions; but here the deposit was made, so far as may reasonably be inferred, for purposes of ordinary and well-accepted banking convenience.

The many cases cited by the learned counsel for petitioners have been examined and considered, and failure to discuss them at length is due to the fact that, in last analysis, the situation is in principle precisely like the Noyes Case and in accordance with similar principles long since laid down by Mr. Justice Story in his Commentaries on Equity Jurisprudence. 2 Story's Jurisprudence, 1045, 1046.

The facts demonstrate that the Empire Co. did not undertake to do anything beyond honoring the Consolidated checks on the special account. It was under no obligation itself to pay coupon holders, nor to identify them or their right to payment. Its relations with Consoli-

dated were merely those of bank and depositor, with no instructions to pay coupon holders. If it had become insolvent, is there any doubt that the coupon holders could, nevertheless, have recovered from Consolidated?

There was no such situation or relation as that in the Rogers Locomotive Works Case, where the defendant railroad deposited in the hands of brokers $25,000 to meet certain interest coupons, receiving a receipt which stated that the money was received—

"in trust to apply the same to an equal amount of the coupons * * * in the order in which said coupons shall be presented * * * *the said money not to be subject to the control of said company otherwise than for the payment of said coupons.*" (Italics mine.)

In short, the case keeps running around in a circle, always returning to the Noyes Case, and reference to that case would have been sufficient, but for the amount involved and the desire of the court to find some sound reason, if such there were, to assist those whose tardy presentation was due to delay occasioned by war.

The applications of petitioners are denied, and the trustee is directed to deal with the amount in question as general funds of the estate. If the order to be entered upon this opinion is to be reviewed, the trustee will keep the fund intact, pending review.

EVERETT et al. v. UNITED STATES et al.

(District Court, W. D. Washington, N. D. December 3, 1921.)

Nos. 6159, 6193, 6192, 6227, 6234, 6308.

1. **Seamen ⇐22, 27—May enforce claims for wages against the ship, owner, and master.**
   Seamen under the shipping articles have a threefold remedy for their wages against (1) the ship; (2) the owner; and (3) the master.
2. **Seamen ⇐22—General owner liable for wages only when in privity with master.**
   The general owner is liable for seamen's wages only when privity with the master is shown.
3. **Seamen ⇐22—Owner after sale of ship not liable for wages of crew employed by purchaser.**
   Where the owner of a ship makes a bona fide sale, and delivers possession and surrenders control to the purchaser, he is not liable for the wages of seamen employed by the master, who was hired by the purchaser the vessel being navigated by such master and seamen, and the voyage directed by the purchaser or his crew, and the fact that the sale was not consummated by a formal transfer or that security provided for in the contract was not given, and that the ship was still documented in the name of such owner does not change the status, where the crew were not misled thereby; the purchaser being for all purposes of the voyage the owner pro hac vice.

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4. Judgment ⊂=812(2)—Decree in rem for wages does not defeat right to recover deficiency in personam.

A decree in rem for seamen's wages *held* not to defeat the right to recover the deficiency from the master, obligated under the shipping articles to pay such wages.

In Admiralty. Suit by W. Everett and others against the United States, the United States Shipping Board Emergency Fleet Corporation, and Tory Hedemark, heard with five other cases by Walter Starkey and others, by E. Gaupholm, by G. H. Beauchamp and others, by L. E. Oblom; and by P. Sognefest against the same respondents. Decrees for libelants against respondent Hedemark only.

These several causes were consolidated for trial. The several libelants seek to recover from the United States, the United States Shipping Board Emergency Fleet Corporation, as owner, and Tory Hedemark, master, balance due for unpaid wages for voyage from Seattle, Wash., and via ports to Sydney, Australia, thence to such other ports and places in any port of the world as the master may direct, and back to a final port of discharge to be designated by the master in the United States, for a term of time not exceeding twelve calender months. The Agron was built by the United States Shipping Board, through the United States Shipping Board Emergency Fleet Corporation. The vessel was included in a contract of sale between the United States, represented by the Shipping Board and the National Oil Company, dated March 5, 1920. The contract was not recorded in any public record in the United States.

The contract of sale contains, inter alia, the following provisions: "Immediately upon the execution of this agreement the Fleet Corporation agrees to deliver into the custody of the buyer the said five hulls and five bills of material #500. The buyer shall accept delivery of the said hulls and bills of material where they are now, * * * and the buyer agrees at its own expense to complete the same at earliest date possible consistent with good workmanship. It is expressly agreed that the title to the said hulls and bills of material and any additions or improvements made thereto shall remain in the Fleet Corporation until the same shall be completed and documented, and the buyer shall have executed the mortgages and notes hereinafter provided for. The buyer hereby agrees to keep the said hulls * * * free from all liens. * * * The buyer agrees to pay the purchase price of each of said hulls and sets of machinery to the board in gold coin of the United States or its equivalent in current funds as follows: * * * Upon the completion and documentation of each of said hulls the buyer agrees to execute and deliver to the board a first mortgage on each vessel. * * *"

The purchase price was $85,000 for each vessel. The vessel was completed and outfitted and her machinery installed by the said National Oil Company, operating through its representatives or contractors, National Shipbuilding Company and J. H. Price Shipbuilding Company. No mortgage was given to secure the amount due under the contract. The ship was documented June 7, 1920, upon the affidavit of H. R. Bowen, Executive Assistant, Division of Supplies and Sales, managing owner and certificate of registry as follows:

"In pursuance of chapter I, title 48, Regulation of Commerce and Navigation, Revised Statutes of the United States, H. R. Bowen, of Seattle, Washington, executive assistant, Division of Supplies and Sales, having taken and subscribed an oath required by law, and having sworn that the United States, represented by the United States Shipping Board is the only owner of the vessel called the Agron, of Seattle, whereof Tory Hedemark is at present master. * * *"

Tory Hedemark was employed by the National Oil Transport Company, operating company for the National Oil Company, as master of the vessel, some days prior to the date that the vessel was documented. Hedemark was

not employed at any time by the United States or either of its agencies, nor was he designated as the master in the affidavit of Bowen. The seamen were employed by the master of the vessel, representing the National Oil Transport Company. No representations were made to the seamen as to the ownership of the vessel. The seamen knew the vessel was of a type built by the direction of the Shipping Board.

The vessel arrived at Balboa, January, 1921. The seamen not having been paid, and the vessel being out of supplies, the seamen applied to the United States consul for relief; the master being without funds. Provision was made for the seamen. Section 4577, R. S. (Comp. St. § 8368). Several days out from Balboa, the vessel, being short of fuel, by wireless came in contact with the master of the steamship Lake Fanbush, a Shipping Board vessel. The Fanbush took a line from the Agron. The Agron operated her engines, assisted in propelling the vessel, and both vessels reached port with less than a day's delay. Upon arrival at Port Balboa, the master of the Fanbush libeled the Agron for a large sum for salvage. The seamen intervened, and sought to impress upon the vessel the unpaid wage claims. The libel for salvage was dismissed. The case proceeded to decree upon the intervening libels, the unpaid wages were impressed upon the vessel, the vessel sold, and the proceeds applied to the payment of the wage claims. The proceeds were insufficient to pay the claims, and this action is to recover from the master and the owner the balance, together with the cost of transportation and maintenance of the seamen from Balboa to the home port.

The respondents deny ownership, asserting the contract of sale, and contending that the National Oil Company was owner pro hac vice, having equipped and manned the vessel. The seamen were the servants of the National Oil Company, employed to navigate and direct the motion of the ship, as well as places where the ship should go. The respondents contend, further, that the seamen, having proceeded against the vessel, are estopped from proceeding in personam. Libelants contend that, the contract of sale not having been consummated by the execution of the necessary documents and the vessel documented in the name of the United States, the United States thereby assumed ownership, and recognized Hedemark as its master and agent, and is chargeable as owner.

James Kiefer, of Seattle, Wash., for libelants.

MacCormac Snow, of Portland, Or., for the United States and respondent United States Shipping Board Emergency Fleet Corporation.

Bronson, Robinson & Jones, of Seattle, Wash., for respondent Hedemark.

NETERER, District Judge (after stating the facts as above). [1] The seamen under the shipping articles have a threefold remedy for their wages against (a) the ship; (b) the owners; and (c) the master. There is no diversity to this rule, so far as I am advised. The laws of the United States as well as those of England have provided such remedy. Bronde v. Haven, 4 Fed. Cas. 211; Farrell v. McClea, 1 Dall. 392, 1 L. Ed. 192; The Susan, 23 Fed. Cas. 443; Skolfield v. Potter, 22 Fed. Cas. 299; Russell v. Rackett (D. C.) 46 Fed. 200; Wysham v. Rossen, 11 Johns. (N. Y.) 72; Smith v. Oakes, 141 Mass. 551, 5 N. E. 824, 55 Am. Rep. 487; Temple v. Turner, 123 Mass. 125; Calvin v. Huntley, 178 Mass. 29, 59 N. E. 435 (1901).

[2] The general owner is liable for seamen's wages only when privity with the master is shown. Hussey v. Allen, 6 Mass. 163. This principle is applied by Judge Hanford in The General McPherson (D. C.) 100 Fed. 860, where at page 865 he says:

"I consider that the legal authority of Capt. Nelson to bind the ship by his contract ceased when he unlawfully and tyranically took control of her adversely to her owners."

In this case the master was engaged by the owner, and afterwards he appropriated the cargo and ship, and before the master secured the vessel he employed one Poole as cook, and did not pay him, and Poole sought to impress his claim for wages against the ship.

[3] An owner may not escape liability for wages by transfer of ownership pending fulfillment of articles, Bronde v. Haven, 4 Fed. Cas. 211; nor during a voyage, Sheppard v. Taylor, 5 Pet. 707, 8 L. Ed. 269; nor by abandoning the ship to underwriters, Brooks v. Door, 2 Mass. 39; but where the owner makes a bona fide sale, and delivers possession of the ship, and surrenders control to the purchaser, he is not liable for the wages of the seamen employed by the master, who was hired by the purchaser; the vessel being navigated by such master and seamen, and voyage directed by the purchaser or his crew. U. S. v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; The Craigallion (D. C.) 20 Fed. 747; The T. A. Goddard (D. C.) 12 Fed. 174. And the fact that the sale was not consummated by execution of formal transfer, and the ship still documented in the name of such owner, would not change the status. Aspinwall v. Bartlet, 8 Mass. 483; The McPherson, supra. Failure to take a mortgage was the hazard of the respondents, which cannot affect the seamen. The contract of sale provided for a mortgage to secure the purchase price, the title was retained in the respondent conditioned upon payment. The security was not affected; only the terms of payment and the character of the lien. The registry may be shown by parol to be conditional rather than absolute ownership, where third parties are not misled. Morgan's Assignees v. Shinn, 82 U. S. (15 Wall.) 105, at page 110 (21 L. Ed. 87), where Justice Strong said:

"It is not questioned that an instrument absolute in its terms may be shown by parole evidence to be only a mortgage. It is true that if trust and confidence have been reposed in it by third parties, with the honest belief that it was indefeasible, and such parties have been misled by its form, they have a right to insist that, as to them, it shall be what upon its face it purports to be."

While this was not an expression having relation to admiralty, the same rule has application. In Thorp v. Hammond, 79 U. S. (12 Wall.) 408, 20 L. Ed. 419, one of several general owners sailed a vessel on shares under an agreement whereby he became the charterer, hiring his own crew, paying and victualing them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying the other half to the general owners, he was held to be owner "pro hac vice," and is said to be personally liable for tortious collision with another vessel, and the other general owners were not liable. At page 416 of 79 U. S. (20 L. Ed. 419) the court said:

"It is clear, therefore, that he must be considered as having been the owner 'pro hac vice.' This accords with the authorities generally. Notwithstanding this, however, and though Hammond was the special owner, it has been contended on behalf of the libelants that all the general owners are liable for the torts committed by the schooner while she was thus let to charter. The

Circuit Court was of opinion that they are not, and this court is equally divided upon the question. But we are all of opinion that the owner pro hac vice is liable, and that he may be charged in this proceeding."

Justice Clifford in Reed v. U. S., 78 U. S. (11 Wall.) 591, at page 600 (20 L. Ed. 220), in construing a contract of affreightment said:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage."

Justice Field, in Leary v. U. S., 81 U. S. (14 Wall.) 607, at page 610 (20 L. Ed. 756), said:

"If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated."

And the general owner in neither case would be liable. The principle stated in these cases has application here, where the purchaser assumed exclusive possession, command and navigation. Justice Story in Marcardier v. Chesapeake Ins. Co., 8 Cranch. 39, at page 49 (3 L. Ed. 481), said:

"* * * A person may be owner for the voyage who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. * * *"

In which case the owner is absolved from responsibility. The statement in the libelant's brief that the National Oil Company "was a tort-feasor in operating, if it did operate, the Agron," cannot operate to the libelant's advantage. A tort committed against the respondent cannot create a right for the seamen. In any case to bind the owner there must be privity between him and the master. If the master is employed by another who has possession of the ship, and as tort-feasor operated it without the owner's consent there would be no privity and no responsibility could attach.

The seamen in the instant case were not misled. They made no inquiry. The seamen, while testifying to an impression that the ship is of a style built by the Shipping Board, knew nothing about the ownership or registry certificate, and made no inquiry, and no representation of any fact or inducement of any kind as to ownership by the United States was made. The ship was staunch, the motive power adequate, and the seamen had a lien for their wages. And in view of all the circumstances there was no occasion to make inquiry as to the financial responsibility of the owner. Hedemark, the master, employed by the National Oil Company through its representative, the National Oil Transport Company (and he testified he continued in that relation), made no representation to the seamen or claim upon the respondent until he was unable to secure funds from his employer and after the vessel was libeled.

It is contended that by analogy with The Dubuque, 7 Fed. Cas. 1141, the registered owner should be held as owner for the voyage.

The status of a master of a ship and of the owner do not bear the same relation.

It is claimed that the Panama Canal Zone court was without jurisdiction and that the sale of the vessel is void, that the master by timely appearance suggested to the court on behalf of the respondents an exemption from attachment under Act March 6, 1920, and that if the court had jurisdiction the contract of the libelants was merged in the decree. The first suggestion is immaterial here, and the second is material only in so far as the master is concerned.

[4] A decree in rem does not of itself defeat a contractual right to seek a remedy in personam for the balance of an unliquidated claim, if the two remedies exist and the remedy in rem has been exhausted. Toby v. Brown, 11 Ark. 308; Carey v. The Kitty, 5 Fed. Cas. 59; The Cerro Gordo (D. C.) 54 Fed. 391; Whitney v. Tibbol, 93 Fed. 686, 35 C. C. A. 544.

Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S., "Schedule" "Table A" (Comp. St. § 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it cannot be made by the court.

A judgment must be entered against the master for the unpaid wages and return transportation to Seattle for the officers and men, who returned immediately, as provided in the shipping articles:

"Railway tickets, sleeper tickets and $5 a day subsistence for time en route without stopover, mates, chief steward, chief engineer, three assistant engineers will be furnished first-class transportation and sleeper. Remainder of crew, tourist transportation and sleeper. * * *"

If the return was made by boat, the expense necessarily incurred, and the libel dismissed as to the United States and its agencies.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. NEW YORK RYS. CO.

(District Court, S. D. New York. November 21, 1921.)

1. Mortgages ⊜126—Lien of mortgage containing general language held not limited to property specifically described.

The lien of a mortgage containing general descriptive language *held* not limited to property specifically described, as stated "without prejudice to the generality of the language hereinbefore or hereinafter contained."

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

2. **Mortgages ⊂=131—Clause excepting property from mortgage construed.**
A clause in a mortgage excepting therefrom "cash, or any claims to cash, or the proceeds of assets when reduced to cash," in the hands of the court or its receivers, *held* one of identification, and not of time limitation, and such property, on coming into possession of the mortgagor, *held* not subject to the after-acquired property provision of the mortgage.

3. **Street railroads ⊂=54—Clause excepting property from mortgage construed.**
In a first mortgage executed by a reorganized street railroad company, formed by a reorganization committee which purchased the property at foreclosure sale, a clause exempting from the mortgage choses in action owned by the company at its date *held* to apply to rights acquired through the committee, as representing bondholders and other creditors joining in the reorganization, in the purchase money fund or other assets of the old company, under the plan of reorganization.

4. **Street railroads ⊂=54—Bonds held not to pass under mortgage.**
Under a provision of a street railway mortgage that, if the company should acquire certain bonds of other companies, on their deposit with the trustee with a resolution so requesting the trustee should authenticate and deliver to the company bonds under the mortgage to the same amount such bonds of the other companies purchased by the company, but not delivered to the trustee, and for which no mortgage bonds were issued, *held* not to come under the mortgage.

5. **Street railroads ⊂=54—"Cash" not covered by mortgage held to include bonds purchased with, and reconvertible into, cash.**
"Cash" of a street railway company not covered by a mortgage *held* to include, not only money in the treasury or on deposit in banks, but also certain bonds purchased for deposit, in lieu of cash, with state and city departments, and which were reconvertible into cash at any time.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cash.]

6. **Street railroads ⊂=54—After-acquired property clause of mortgage held to cover materials and supplies for current use.**
The after-acquired property clause of a street railway mortgage *held* to cover materials and supplies in reasonable quantity kept on hand for current use in operation or for repairs and replacements.

7. **Corporations ⊂=473—Bonds held not extinguished by purchase by issuing corporation.**
A purchase by a corporation of its own bonds with cash in its treasury *held* not to extinguish the same where it was the manifest intention that they should be kept alive.

In Equity. Suit by the American Brake Shoe & Foundry Company against the New York Railways Company. On determination of certain questions of lien and amount of mortgage debt.

For brevity and convenience, the Guaranty Trust Company of New York will be referred to as Guaranty Company; New York Railways Company as Railways Company; Farmers' Loan & Trust Company as Farmers' Company; first real estate and refunding mortgage as the first mortgage, and the mortgage of which Farmers' Company is trustee as the adjustment mortgage.

Stetson, Jennings & Russell, of New York City (William C. Cannon, Edwin S. S. Sunderland, and Harrison M. Robertson, all of New York City, of counsel), for plaintiff.

James L. Quackenbush, of New York City (J. Tufton Mason, of New York City, of counsel), for defendant Rys. Co.

Geller, Rolston & Blanc, of New York City (Edward H. Blanc, of New York City, of counsel), for adjustment mortgagee.

Samuel Seabury, John V. Bouvier, Jr., Charles Steckler, and Robert H. Ernest, all of New York City (Samuel Seabury, of New York City, of counsel), for tort creditors' committee.

Chadbourne, Hunt & Jaeckel, of New York City (William M. Chadbourne and Cyrus F. Smythe, both of New York City, of counsel), for contract creditors' committee.

Winthrop & Stimson, of New York City (Bronson Winthrop and George Roberts, both of New York City, of counsel), for Receiver Hedges.

MAYER, Circuit Judge. Guaranty Company, as trustee of the first mortgage of Railways Company, is plaintiff in the mortgage foreclosure suit, No. E 16–163.

It asks for a decree which, inter alia, shall determine: (1) The property covered by the lien of the mortgage; and (2) the amount of the obligation secured thereby. Farmers' Company, as trustee under the adjustment mortgage, opposes the granting of any decree at this time. The further progress of the litigation will be later considered; but, whether or not the time has come for a final decree, it is important, from time to time, to dispose of as many controverted questions as possible, and thus to clear up, so far as practicable, the uncertainties as to respective legal rights in a very complicated situation.

1. *The Property Covered by the Lien of the First Mortgage and of the Supplement Thereto.*—The mortgage is elaborately drawn, and, as will appear infra, was part of the machinery by which a reorganization of the old Metropolitan system was effectuated. After the recitals the mortgage grants to the mortgagee:

"All and singular the property described as follows: All and singular the railways, rolling stock, equipment, property, assets, rights, franchises, consents, legislative and municipal grants, leases, leasehold interests and estates, contracts and privileges, choses in action and all other property, real and personal, of every kind, which were sold under the general decree or the refunding decree as aforesaid, and also all other property, real and personal, of every kind owned by the company on the date of the execution hereof or which may be hereafter acquired by it or on its behalf, subject, however, to the exceptions in this indenture hereinafter stated and made.

"The property so described and covered by the lien of this mortgage shall include particularly, without prejudice to the generality of the language hereinbefore or hereinafter contained, the following lots and parcels."

Then, under headings from "Lot 1" to "Lot 12," inclusive, are set forth descriptions of specific railroads, rights, leases, real estate franchises, chattels, stocks, bonds, and buildings. "Lot 13" reads as follows:

"Parcel 1. All and singular the railroads, lands, buildings, structures, fixtures, privileges, franchises, rights of way, trackage rights, contracts, consents, leaseholds, easements, and other rights and interests owned by the Metropolitan Street Railway Company on March 21, 1902; also all and singular the tracks, side tracks or sidings, switches, rails, bridges, fences,

buildings, depots, station houses, power houses, car houses, machine shops, repair shops, and other shops and all other buildings, improvements, erections, and structures, and all dynamos, belting, engines, boilers, regulators, meters, poles, trolleys, conduits, feeders, cables, wires, switchboards, lamps, and machinery for producing, generating, and distributing electricity or power; and also all and singular the rolling stock, equipment, motors, engines, tenders, carriages, cars, trucks, horses, harness, tools, implements, furniture, fixtures, machinery, materials, coal, wood, oil, fuel and other supplies; and also all maps, drawings, profiles, licenses, records, deeds, contracts, and agreements, patents, and patented inventions and processes owned on March 21, 1902, by Metropolitan Street Railway Company; and also all improvements and additions made on March 21, 1902, or at any time prior to December 29, 1911, upon and to any and all of said railroads or property, real and personal, and any and all equipment therefor and renewals or replacements of the same or of any part thereof or of the appurtenances, and also all and every other railroad which the Metropolitan Street Railway Company acquired subsequent to March 21, 1902, or constructed by means of the proceeds of any of the bonds secured by the refunding mortgage, and all power houses, real estate, equipment, and other property, real or personal, appurtenant thereto; also all property acquired by Metropolitan Street Railway Company subsequent to March 21, 1902, in connection with the premises and property described in the granting clauses of the refunding mortgage, and all renewals and replacements of such property, and all additions, switches, side tracks, betterments, and improvements thereto not subsequently released from the lien of the refunding mortgage, and not hereinbefore described and included."

Under "Miscellaneous," the mortgage provides as follows:

"Also all improvements, additions, or betterments which may hereafter be made or acquired to or for the railroads and other properties now owned or hereafter acquired or constructed by the company.

"Also all and every franchise, right, privilege, consent, and easement of whatsoever kind or nature now owned, possessed, enjoyed, or exercised by the company, or which may hereafter be owned, possessed, enjoyed, exercised, or acquired by it under its certificate of incorporation or by virtue of any act of the Legislature of the state of New York, or of any contract or agreement between it and the authorities vested by law with power to consent to the construction, maintenance, and operation of railroads upon, along, across, and over public streets, avenues, and highways in the state of New York, or in any political subdivision thereof, or by virtue of any agreement or lease between it and any other railroad corporation, or under or by virtue of any authority whatsoever.

"Also all other railroads, railroad routes, extensions, and branches thereof now owned, maintained, or operated, or that may hereafter be owned, maintained, operated, or acquired, by the company, together with all the tracks, rails, special work, conduits, poles, stands, switches, turnouts, turntables, electrical switch material, and other electrical equipment, wires, cables, and feeders, channel rails, fire protection apparatus, conductors, lighting and heating fixtures and tools, engineering equipment and tools, plumbing equipment and tools, transfer tables and elevators, connected with or appurtenant to the said railroads, now owned, constructed, or operated, or that may hereafter be owned, constructed or operated by the said company.

"Also all rolling stock, cars, express cars, engines, boilers, generators, snow ploughs, tools, machinery, motors, power houses, substations, car houses, and railroad equipment and plant now owned or possessed or enjoyed by the company, or which may hereafter be owned, possessed, or enjoyed or acquired by it.

"Also all shares of stock, bonds, notes, and other evidences of indebtedness which may be hereafter acquired by or on behalf of the company, in whole or in part, with bonds or the proceeds of bonds authorized to be issued under article second of this indenture.

"Also all real estate, together with the buildings and improvements thereon, and appurtenances thereto, now owned, possessed, or enjoyed by the company, or which may hereafter be owned, possessed, enjoyed, or acquired by it.

"Also all leasehold interests and trackage and traffic contracts now owned, possessed, or enjoyed by the company, or which may hereafter be owned, possessed, enjoyed, or acquired by it.

"Also all and every right of way, interest, or easement in real estate now owned, possessed, or enjoyed by the company or which may hereafter be owned, possessed, enjoyed, or acquired by it.

"And also all property of every name and nature which, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, may be conveyed, mortgaged, pledged, assigned, transferred, or delivered by the company or by any one in behalf of the company with its written consent or approval, to the trustee hereunder as additional security for the bonds issued hereunder; and the trustee shall receive, hold, and apply all such property subject to the trusts of this indenture.

"And also all the rents, issues, profits, tolls, and other income of lines of railway and property, real and personal, privileges, rights, and franchises now or at any time hereafter subject to the lien of this indenture.

"Together with all and singular the tenements, hereditaments, and appurtenances belonging or in any wise appertaining to the said railroads, or to branches and extensions thereof, or to any part thereof, and the reversion and reversions, remainder and remainders, tolls, income, rents, issues, and profits of said railroads, branches, extensions, and appurtenances and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the company in and to the above-described property and every part and parcel thereof, whether now owned or hereafter acquired, and any and all corporate or other rights, privileges, and franchises (including the franchise of being a corporation) which the company now has or which it or its successors hereafter shall acquire, possess, or become entitled to for or appertaining to the ownership, construction, maintenance, use, or operation of the lines of railroad and other property now or at any time hereafter subject to the lien of this indenture; *provided, however, that no part of the foregoing description shall be deemed to include the following excepted property, to wit: Cash, or any claims to cash, or the proceeds of assets when reduced to cash, in the hands of the court, or the receivers of the Metropolitan Company, or W. W. Ladd, as receiver of the New York City Railway Company, or choses in action and shares of stock and bonds owned by the company at the date hereof not in this indenture elsewhere enumerated or specifically described.* * * * [Italics mine.]

"The mortgaged and pledged property includes the property more particularly described (but without prejudice to the generality of the language in the granting and pledging clauses of this indenture contained) in Schedule A annexed to this indenture, and in Schedule B which has been or will be filed with the trustee and which Schedule A and Schedule B are each hereby made a part hereof by this reference thereto."

Schedule A is a list of tracks in public highways and operated by the Railways Company, with their approximate length.

Schedule B is the list and inventory prepared by W. L. Turner, special master, and filed on May 6, 1910, under the provisions of article V of the decree of foreclosure and sale filed on April 6, 1910, in this court in the cause entitled Guaranty Trust Company of New York, Complainant, v. Metropolitan Street Railway Company and Others, Defendants (Stenographer's Minutes, Oct. 15, 1919, p. 25, Q. 11, Complainant's Exhibit No. 36).

The said decree (S. M. p. 20, Complainant's Exhibit No. 28, p. 29) provided in article V:

"That an inventory shall be prepared by the special master and by him filed with the clerk of this court. * * * This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type. * * * This inventory will also state the number and location of the various dynamos, transformers, and converters and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in excess of $100 each, and such additional articles as the special master shall think it wise to include. * * *"

The above extracts have been fully set forth to make clear that the principal controversy as to what was mortgaged revolves around the clause beginning "provided, however," hereinafter for brevity called the "exception clause" or the "exceptions."

[1] It is contended that under Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637, and Westinghouse v. B. R. T. et al. (C. C. A.) 263 Fed. 532, the lien of the mortgage is confined to the specifically described property and to such future acquired property as is described, in one form or another, under the headings "Lot 13" and "Miscellaneous."

There is nothing to this contention. The language is broad, and the phrase "without prejudice to the generality of the language hereinbefore or hereafter contained" was intended to and does eliminate any construction which as between the parties would narrow the property mortgaged to that specifically mentioned or that which was described in "Lot 13" and "Miscellaneous" as susceptible of future acquisition. See Westinghouse v. B. R. T. et al., 276 Fed. 152, opinion of District Court filed October 6, 1921.

The exception clause divides the property into five classes, as follows:

(1) Cash in the hands of the court or the Metropolitan receivers or Receiver Ladd.

(2) Claims to cash in the same hands.

(3) Proceeds of assets when reduced to cash in the same hands.

(4) Choses in action owned by the company on January 1, 1912, not in the mortgage elsewhere enumerated or specifically described.

(5) Shares of stock and bonds owned by the company on January 1, 1912, not in the mortgage elsewhere enumerated or specifically described.

In respect of (4) and (5) supra it will be noted that the language of the exception clause is definite and deals with property or rights then in existence. As to (4) no chose in action is enumerated nor specifically described in the mortgage, and hence any chose in action owned by the Railways Company on January 1, 1912, is not under the lien of the mortgage. If, therefore, at some later date a chose in action owned by Railways Company on January 1, 1912, ripened into property, whether money or securities or any other kind of property, that chose in action or the property which it produced is not subject to the lien of this mortgage, and the after-acquired property clauses cannot reach it.

So also under (5) any shares of stock or bonds owned by the Railways Company on January 1, 1912, not enumerated nor specifically described in the mortgage are not affected by the after-acquired property clauses.

[2] It is contended by the Guaranty Company that (1), (2), and (3) were excepted only so long as they were in the hands of the court, the Metropolitan receivers, and the New York City Railway Company receiver, but that when later they came into the possession of the Railway Company they were after-acquired property which came under the lien of the mortgage. If any such intention existed, the language fails to show it. Such an intention could have been readily expressed by some appropriate clause, for instance, "but if any of such cash, property, or proceeds after they shall have left the hands or shall no longer be under the control or in the possession of the court and the receivers shall come into the possession of the Railway Company, it shall be subject to and comprehended within the" after-acquired property clause.

It is clear that the exception clause was one of identification and not of time limitation. A significant provision, not much discussed by counsel, but very important, is that at the end of article third, section 2, as follows:

"The company also covenants that any and all cash or other proceeds which may at any time come into its possession and which shall constitute or be the proceeds of 'the cash, or any claims for cash, or the proceeds of assets when reduced to cash, in the hands of the court, or the receivers of the Metropolitan Company, or W. W. Ladd, as receiver of the New York City Railway Company,' in this indenture hereinbefore referred to, shall and will from time to time be applied solely as directed and approved by a resolution of its board of directors passed by the affirmative votes of at least three-fourths in number of the members thereof, but only for one or more of the following purposes, to wit: (a) So much thereof as in such resolution may be specified to be necessary for that purpose shall be set apart and solely used as a portion of the cash working capital of the company; and (b) so much thereof as shall be specified in such resolution may be applied to the purchase, acquisition, discharge, or payment of (1) any claims, demands, liens, or charges mentioned in the general decree or in the refunding decree, or in respect of which the court has reserved power or jurisdiction to require payment to be made out of said funds, or by the purchasers or their assigns, or (2) any other claims against the said funds or assets; and (c) so much thereof as shall be specified in such resolution may be applied to and expended for lawful corporate purposes of the company; and (d) so much thereof as may be specified in such resolution may be used and expended for one or more of the purposes mentioned in subsections (1) and (2) of section 5 of article second of this indenture, for which bonds hereby secured are authorized to be authenticated and delivered under the provisions of section 5 and subject to the limitations and restrictions therein set forth. Any and all additional property or shares of stock, bonds or other securities acquired by means of any of said cash or other proceeds, pursuant to the provisions of the aforesaid paragraph (d), shall become and be a part of the mortgaged and pledged property."

If the (1), (2), and (3) of the exception clause would automatically go under the after-acquired clause, why these elaborate provisions in respect thereof?

The provision as to a three-fourths vote of the board of directors was in accordance with the reorganization plan infra. The plan provided, inter alia:

"The holders of adjustment mortgage bonds shall have power, by a vote of a majority in amount thereof present or represented at meetings of the new company or its stockholders held for that purpose, to elect one less than a majority of the members of board of directors of the new company until full interest at the rate of 5 per cent. per annum shall have been paid to the holders

thereof annually for three successive years, and again thereafter for and during a like period whenever a failure to pay such annual interest shall occur. During the period that the aforesaid voting power is operative the holders of said bonds shall also have full power in respect of all other questions upon which stockholders may be entitled to vote. * * *

"The mortgage securing said bonds shall provide for such other protection and for such method or methods of determining net income as the committee shall fix."

The board of directors was thus composed of persons representing the stock and the adjustment mortgage. Neither group controlled three-fourths of the board of directors. The theory of the requirement of a three-fourths vote was that each group could check the other, if it so determined.

If, to illustrate, additional property were to go under the mortgage, such property would, of course, "feed" the mortgage and might so do at the expense of the rights of stockholders.

Hence before any of the excepted property comprised under the headings of (1), (2), and (3) could be used for the purposes set forth in (d) of section 2 of article third, supra, an affirmative act of the board of directors would be necessary—i. e., a resolution "passed by the affirmative votes of at least three-fourths in number of the members thereof."

Under article second referred to in (d), supra, the authentication and delivery of bonds were authorized for various purposes; and thus under section 5 of that article it was provided that bonds might be authenticated and delivered for certain named purposes. It is to these to which (d), supra, refers when it mentions subsections (1) and (2) of section 5 of article second. These provisions read as follows:

"Section 5. From time to time the company, in addition to the bonds in sections 2, 3, and 4 of this article second authorized to be issued, may sign and seal and deliver to the trustee bonds hereby secured, and the trustee shall authenticate and deliver the same to the company or upon its order, signed by its president or one of its vice presidents, but only for some one or more of the following purposes and under and subject to the following conditions and restrictions, namely:

"(1) To pay, or to provide funds to reimburse the company for, sums expended by it after the date of this indenture for the acquisition of additional property (to be subjected to the lien of this indenture as hereinafter provided) and for the construction, completion, extension, and improvement of the facilities and properties of the company; and

"(2) To pay, or to provide funds to reimburse the company for, sums expended by it after the date of this indenture for the acquisition and pledge hereunder of shares of stock, bonds, and other obligations of other street railroad corporations in the city of New York or adjacent territory or of shares of stock of corporations owning or operating a railroad in said city or adjacent territory over and upon one or more bridges across East River or North River and the approaches thereto, or owning street railroad terminals, all the securities of which shall be held by the company and by other street railroad or passenger transportation companies or by holding companies organized for the purpose of holding stock in street railroad or passenger transportation companies in said city or adjacent territory, provided that in the case of any such street railroad corporation at least a majority in amount of the capital stock thereof shall be owned by the company and pledged with the trustee hereunder, or, in case of the acquisition of shares of stock in any such street railroad corporation, that, by and in consequence of such acquisition, the company will own, and there will be simultaneously pledged with the trustee

hereunder, at least a majority of the capital stock of such other street railroad corporation, and provided always that in every case in this subsection (2) provided for such acquisition and the terms thereof shall have been first consented to and approved in writing by the finance committee hereinafter provided for, and provided further and always that at no time shall bonds secured hereby be issued for any of the purposes in this subsection (2) mentioned if thereby the aggregate amount of bonds issued for such purposes and outstanding, including the bonds then requested to be issued for such purposes, shall exceed 25 per cent. of the aggregate face amount of all the bonds hereby secured and then outstanding which shall have been issued as provided in sections 2, 3, and 4 of this article second, including all such bonds issued for the purposes described in the foregoing subsection (1) of this section 5. All stocks, bonds, or other securities so acquired forthwith shall be deposited with the trustee duly indorsed for transfer in blank. * * *" (Then follow details of procedure.)

From all of the foregoing it is plain that it was clearly intended to leave the property referred to in the exception clause outside of the lien of the mortgage. No matter when the "cash" or "proceeds" came into the hands of the Railways Company, neither such cash nor proceeds nor any property acquired therewith could be subjected to the lien of the mortgage, unless affirmatively so decided in the manner set forth in paragraph (d), supra.

But, in addition to the instrument itself, it is permissible to examine into the surrounding circumstances. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637; Westinghouse v. B. R. T. et al. (C. C. A.) 263 Fed. 532; Westinghouse v. B. R. T. et al., 276 Fed. 152, filed October 6, 1921.

There is much antecedent history, but the essentials are herewith stated. It is agreed by counsel that the following is a correct statement of fact:

(1) On January 1, 1912, and on the date of the execution of the first mortgage, there were in the hands of the court or of the receivers of Metropolitan Street Railway Company and New York City Railway Company:

(a) Cash in the hands of the receivers of the Metropolitan Street Railway Company, being income received from the property during the receivership and certain other assets.

(b) Cash in the hands of the court, being the qualifying amount deposited by the joint reorganization committee on the purchase under the Metropolitan foreclosure decree.

(c) The proceeds, consisting of cash, real estate, and securities, of the so-called action at law and suit in equity, brought by the receiver of the New York City Railway Company.

The foregoing items described in (a), (b), and (c) are hereinafter for brevity referred to as the "Ladd fund."

(2) The Metropolitan Street Railway Company (hereinafter called Metropolitan Company) was a consolidation of several companies operating street railways in New York City. It was also the lessee of the property of a number of other companies. By indenture dated February 14, 1902, it let all of its property to New York City Railway Company (hereinafter called the City Company) for a period of 999 years, the rental being the payment of all its charges and a sum equiva-

lent to 7 per cent. per annum upon its capital stock. The Metropolitan Company had two mortgages which are referred to in the first mortgage of the Railways Company as the general mortgage and the refunding mortgage respectively of the Metropolitan Company. The City Company had no mortgages. All of the stock of the City Company was owned by the Metropolitan Securities Company (hereinafter called the Securities Company), the stock of which was in turn owned by the Interborough-Metropolitan Company (the predecessor of the Interborough Consolidated Company).

(3) Receivers were appointed of the City Company on September 4, 1907, and of the Metropolitan Company on October 1, 1907. In 1908 the receivers of the City Company were directed by the court to bring the action at law and suit in equity.

(4) The action at law was based upon the breach of a contract between the City Company and the Securities Company, by the terms of which the Securities Company agreed to furnish certain funds to the City Company in return for securities of the Metropolitan Company which the City Company agreed to deliver to the Securities Company. Judgment for the plaintiff was recovered in the circuit Court (Joline v. Metropolitan Securities Co., 164 Fed. 144), and an appeal was taken to the Circuit Court of Appeals, where the judgment was affirmed (Metropolitan Securities Co. v. Ladd, 173 Fed. 269, 97 C. C. A. 435), and then certiorari was denied by the Supreme Court of the United States (215 U. S. 603, 30 Sup. Ct. 405, 54 L. Ed. 345).

(5) In the suit in equity the receiver of the City Company brought suit against the directors of the City Company, seeking to charge them with the loss suffered by the City Company in a transaction whereby it sold 10-year 3 per cent. debentures at 70 and redeemed them within a year at par. The testimony had been taken in the suit, and the record was ready for submission when a compromise of both the action at law and the suit in equity was brought about.

(6) The compromise was approved by order of the Circuit Court for the Southern District of New York filed July 8, 1910. Copies of the petition of the receiver of the City Company filed June 29, 1910, of the opinion of Judge Lacombe thereon filed July 8, 1910, and of the order filed July 8, 1910, approving the compromise, are on file in this court.

(7) As a result of the compromise there came into the hands of the receiver of the City Company cash in excess of $5,500,000, certain securities, and certain real estate, which were available for distribution among the creditors of the City Company.

(8) In the so-called apportionment proceeding the Circuit Court of Appeals (Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 778, 117 C. C. A. 560), divided between the action at law and the suit in equity the amount received in settlement. It also decided that the proceeds of the action at law were (after reimbursing the city receiver for certain capital expenditures made prior to the receivership by the City Company upon the Metropolitan properties) held in trust by the city receiver for the benefit of the Metropolitan Company, and that this sum should go to the general creditors, and not to the mort-

gage bondholders, of the Metropolitan Company. See Pennyslvania Steel Co. v. New York City Ry. Co., 198 Fed. 778, 117 C. C. A. 560; also Pennsylvania Steel Co. v. New York City Ry. Co., 206 Fed. 663, 124 C. C. A. 463.

There were several classes of general creditors and many creditors and many claims; and, when the physical properties which belonged to the Metropolitan Company were on January 1, 1912, delivered to the Railways Company, these claims were in process of liquidation, but that liquidation had not been completed, nor was it then possible to determine accurately the value of these claims.

Prior to January, 1912, a joint reorganization committee had been organized, and this committee put forward under date of November 29, 1911, a "plan and agreement for the reorganization of the Metropolitan Street Railways Company."

Certain of the features of the plan and agreement will be referred to later, but at this point it is important to emphasize that nowhere in this plan can warrant be found for the contention that it was intended to subject (1), (2), and (3) of the exception clause to the lien of the mortgage.

In view of the foregoing history and the unliquidated situation, it must be concluded that the exception clause was intended to and effectually did exclude the property therein mentioned, not only then, but for all time, from the lien of the first mortgage, unless it were thereafter drawn under that lien by some affirmative acts strictly in accordance with the provisions of the mortgage.

It is next necessary to ascertain what particular property was excepted.

First. It is agreed by all that 3,000 shares of Central Park North & East River Railroad Company stock, which were owned by Railways Company on January 1, 1912, and not specifically described in the mortgage, are not subject to the lien of the mortgage and is within the exception.

[3] Second. What was the chose of action which was excepted? The plan and agreement of November 29, 1911, is the foundation of all which was afterwards done. The joint committee was the committee created by the so-called 5 per cent. committee and the so-called 4 cent. committee, these two committees representing respectively the bondholders of the mortgage of February 1, 1897, and of the mortgage of March 21, 1902. As will presently appear, the plan proposed the formation of a new railroad corporation under sections 9 and 10 of the New York Stock Corporation Law (Consol. Laws, c. 59). These sections provide the machinery for a reorganization upon the sale of corporate property and franchises where, inter alia, such property and franchises are sold pursuant to the judgment or decree of a court of competent jurisdiction.

In section 9 it is provided that—

"Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation."

Under section 10 it is provided that—

"At or previous to the sale the purchasers thereat, * * * may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees, stockholders, * * * of the corporation owning such property and franchises at the time of the sale, and of holders of claims for materials, supplies and equipment furnished, and for injuries and damages sustained. * * * Such plan or agreement * * * shall be binding upon the corporation, until changed as therein provided, or as otherwise provided by law."

From the foregoing it will be seen at once how vital are the plan and the agreement of November 29, 1911, as aids in ascertaining to what the first mortgage referred when it excepted "choses in action * * * owned by the company at the date hereof not in this indenture elsewhere enumerated or specifically described. * * *" The plan contains this clause:

"It is proposed that a new railroad corporation shall be formed under the provisions of sections 9 and 10 of the Stock Corporation Law of New York, and to vest in it the ownership or control of the properties described in said decrees and constituting a part of or pertaining to said Metropolitan system as the same may be acquired by or on behalf of the joint committee at sales under said foreclosure decrees or otherwise, together with all the rights of the old securities acquired by the joint committee in exchange for new securities under the provisions of this plan, subject to the right of joint committee to deal with and dispose of the stocks, bonds, claims, choses in action, and other intangible rights acquired by the purchaser in such manner as the said committee may deem expedient in effectuating the purposes of the plan and the matters therein provided for."

There is only one reference to the Ladd fund in the estimate of cash requirements to carry out the plan, as follows:

"Out of this fund (i. e., the estimate of cash requirements) and the very substantial other funds in the hands of the court which are believed to be available for that purpose, the outstanding receivers' certificates (substantially $5,830,000), claims adjudged or which may be adjudged to be preferential, receivers' liabilities and obligations, costs, allowances, and other sums ordered to be paid by the court will have to be met."

The plan, of course, refers to the proposed issue of the first mortgage bonds and the adjustment bonds. It says:

"Mortgages to secure the aforesaid first real estate and refunding (prior lien) bonds and adjustment (next lien) bonds shall cover all property of the new company therein described and shall be in such form as the joint committee may prescribe."

The plan further provides:

"The estimate of cash requirements made herein is believed to be a fair one. Under the terms of said decrees of foreclosure, however, the purchasers may be called on to make up a sum in excess thereof. In order to raise any additional moneys which may be necessary to comply with the terms of said decrees, carry out the reorganization, or to carry out the purposes of, or discharge the liabilities of, the reorganization and to pay its expenses, the joint committee may, in its uncontrolled discretion, cause the new company (as and to the extent and in the manner permitted or prescribed by law) to issue and sell or dispose of additional securities to such extent as they may deem neces-

sary or wise, to consist of additional new 4 per cent. bonds or other obligations beyond those hereinabove mentioned. The joint committee or the new company may use or dispose of any assets or the proceeds of assets obtained by the foreclosure sales or through deficiency judgments thereon or otherwise in the possession of the committee or its agents or the new company for any purpose which it may deem advantageous for the reorganization."

The plan further says:

"All bonds, shares of stock, notes, and tort claims deposited or acquired pursuant to this plan (including all 5 per cent. bonds and 4 per cent. bonds remaining in the hands of the joint committee or the hands of the 5 per cent. committee or the 4 per cent. committee received in exchange for securities allotted under this plan, together with all rights appertaining thereto, excepting to participate in cash held by the trustees under the mortgages respectively securing the same, which cash, if any, will be distributed by said trustees to the persons respectively entitled thereto) shall be dealt with and disposed of as the joint committee may deem expedient in effectuating the purposes of the plan and the matters therein provided for, and the joint committee shall have authority, in its discretion, to vest such power in the new company."

The agreement annexed to the plan provides as follows:

"Tenth. Any balance of cash received by the joint committee and any balance of securities remaining in the hands of the joint committee (including 5 per cent. bonds and 4 per cent. bonds remaining in the hands of the joint committee or the 5 per cent. committee or the 4 per cent. committee received in exchange for securities allotted under the plan, together with all rights appertaining thereto, excepting to participate in cash held by the trustees under the mortgages respectively securing the same) after paying or fully providing for all sums payable under the decrees or the purchase price of property to be acquired under the plan, and all obligations and expenses of the joint committee, including the compensation of the syndicate hereinbefore mentioned, and the compensation and expenses of the depositaries and of the joint committee, and of the 5 per cent. committee and of the 4 per cent. committee, may be turned over by the joint committee to the new company."

There does not seem to be in the plan or agreement any specific statement or representation that the old bonds, tort claims, etc., which were entitled to participate in the Ladd fund should be assigned to the trustee of the mortgage.

The foreclosure sale took place on December 29, 1911. On that day the purchasers acquired at the sale the physical property of the Metropolitan; also the stocks and bonds of the controlled companies. The purchasers acquired nothing else. At the time of the sale the joint committee had a large majority of the old 5 per cent. bonds and a large majority of the old 4 per cent. bonds. It also had many millions of notes, contract claims, and tort claims against the Metropolitan Company and against the New York City Company, which had for some years been the operating company. These old deposited securities and claims were at this time of a vague and uncertain value. Some of these were claims directly against the New York City Company and entitled to participate in its general assets. Some of them were claims against the Metropolitan Company and entitled to participate in its general or unmortgaged assets. Metropolitan Company had a very large claim against the City Company, so that, indirectly, all the claims against the Metropolitan

Company were entitled to share in the assets of the City Company, if any.

The purchasers at the foreclosure sale did not acquire any interest in this mass of claims, and did not, when they turned over what they purchased to the new Railways Company, give that company any interest therein. All interest in these claims remained in the joint committee, except as the joint committee might part with it to the Railways Company. Previous to the sale there was an agreement of readjustment dated December 27, 1911. That agreement was between the 5 per cent. committee, the 4 per cent. committee, and the joint committee. It declared the plan and agreement of reorganization effective. It designated the purchasing committee and contemplated that the purchasers should purchase the property at the foreclosure sale. It contemplated that the purchasers should form a new company and, further, that the "new company," in consideration of the transfer of the property acquired by the purchasers, should issue to the purchasers the new 4 per cent. bonds, the new adjustment bonds, and the new stock. Article IV described the new mortgage, and, for instance, provided that the new 4 per cent. mortgage—

"shall cover such property vested in or acquired by the new company as may be prescribed or approved by the joint committee."

Article VII provided at the time the purchasers conveyed to the new company that—

"The joint committee may turn over to the new company, for immediate working capital, such amount of the funds from time to time in the possession of the joint committee as it may deem advisable."

This article further provided:

"Upon or before the final accounting provided for in said plan and agreement of November 29, 1911 [Note.—This would seem to be article tenth of the agreement, referred to supra], the joint committee shall have power to assign and deliver to the new company, or set apart and hold or deposit in trust to secure the application thereof to any of the purposes of said plan and agreement or for the uses of the new company, in such manner as the joint committee may deem best, any balance of cash received by the joint committee under said plan and agreement of November 29, 1911, from assessments therein provided for or other source, and any balance of bonds, stocks, notes, claims, or other assets remaining in the hands of the joint committee (including 5 per cent. bonds and 4 per cent. bonds remaining in its hands or those of the 5 per cent. committee or the 4 per cent. committee received in exchange for securities allotted under the said plan and agreement, together with all rights appurtenant thereto, excepting to participate in cash held by the trustees under the mortgages respectively securing the same), whether received from said new company or acquired by the joint committee under said plan and agreement. * * *"

Here followed the various things the joint committee was to do with the new securities, paying the expenses of the purchase and the expenses of the reorganization, etc.

In pursuance of this agreement of readjustment, the purchasers bought the property at the foreclosure sale, organized the new company—i. e., Railways Company—and conveyed to it the property so

purchased by them. This is recited in the first mortgage. But in addition to this deed direct from the purchasers to the new company, there was another agreement made, called "agreement of sale to new company by purchasers under foreclosure decree." This was an agreement made between the purchasers, the joint committee, and the new company, dated December 30, 1911. Under article V the joint committee agreed as follows:

"Upon the final accounting provided for in said plan and agreement of November 29, 1911, the joint committee shall assign and deliver to the company, or set apart and hold or deposit in trust to secure the application thereof to any of the purposes of said plan and agreement or for the uses of the company, in such manner as the joint committee may deem best, any balance of cash received by the joint committee under said plan and agreement of November 29, 1911, from assessments therein provided for or other source, and any 5 per cent. bonds and 4 per cent. bonds, or other bonds, remaining in its hands or in those of the 5 per cent. committee or the 4 per cent. committee, and of any stocks, notes, claims, or other assets received in exchange for securities allotted under the said plan and agreement, together with all rights appurtenant thereto (except the right to participate in cash held by the trustees under the mortgages respectively securing the said bonds) or acquired by the joint committee under said plan and agreement, after. * * *"

Here follows provision for the payment of the various obligations, etc., and for discharging the duties of the joint committee.

This is the chose in action under which the Railways Company acquired its right to receive the old funds in the hands of the court or the receivers.

The first mortgage recites the various agreements. It recites that the purchasers became incorporated under the name of the "New York Railways Company," and that the company acquired all the property from the purchasers. It then recites that, under the agreement of sale above mentioned, the company was obligated to deliver its bonds in part consideration of and in part payment of said property and franchises.

There is no language in the recitals nor in any other part of the mortgage to show that the Railways Company intended to mortgage the property which it would acquire from the joint committee. On the contrary, the reference to "choses in action" in the exception clause and the history and surrounding circumstances point inevitably to the conclusion that it was the scheme of the mortgage not to include the property which was to be acquired from the joint committee whenever the joint committee was so positioned that it could turn over property, whether cash, real estate, claims, or securities to the Railways Company.

Whether, therefore, such property be characterized as the product of the chose in action or as "cash, or any claims to cash or the proceeds of assets when reduced to cash in the hands of the court or the receivers, * * *" the result is the same.

Third. Attached hereto and made part hereof is the carefully prepared and highly useful "analysis" submitted by counsel for the receivers.[1]

[1] See note at end of case.

Reference to the "analysis" will show that the following items of property (omitting those said to be of no value) fall under the "choses in action" and/or (1), (2), (3) provisions of the exception clause:

A. Property acquired from the Ladd fund in kind and now held by Railways Company: (a) Twenty-Third Street Railways bonds. Par value, $50,000 (Analysis, p. 2, No. 1). (b) Mt. Vernon property (Analysis, p. 4, No. 1). (c) Lenox avenue, 140th and 141st street property (Analysis, p. 4, No. 2).

B. (a) Eighth Avenue Railroad Company fire loss fund in litigation (Analysis, p. 4). (b) Long Island Fertilizer Company fund, ultimate status undecided (Analysis, p. 4). (c) Central Crosstown fund (Analysis, p. 4).

[4] Fourth. Turning now to property bought with general cash, it may be well at this point to note the cash situation arising out of the decree of February 15, 1916. Prior to March 21, 1919, the date of the appointment of Receiver Hedges, the Metropolitan and City receivers had turned over to the Railways Company the sum of $5,629,685.25. After March 21, 1919, a further sum of $45,733.26 was turned over to Receiver Hedges, thus making a total of $5,675,418.51 in cash derived from the Metropolitan litigation. This sum was applied as follows:

(Exhibit 53, Schedule I, and Contract Creditors' Exhibit AB–5.)

To the purchase of claims against Metropolitan and New York City Railway Companies, aggregating	$1,570,598.03
To the purchase of $1,000,000 par value of Railways Company 4 per cent. bonds, infra	783,108.85
To the payment of the so-called Oren Root real estate mortgage, infra	950,000.00
To the payment of note of joint reorganization committee	650,000.00
To the payment on March 22, 1916, to receiver of Metropolitan Street Railway Company of balance due on current account. This was first paid out of general cash and general cash was in turn reimbursed from the receivership settlement fund	33,231.45
To the payment of sundry expenses of receivership litigation	23,787.63
Advanced to general cash for working capital purposes	1,618,959.29
Added to general cash of Hedges, as receiver of the Railways Company	45,733.26

In March, 1912, and May, 1913, $600,000 par value of Metropolitan Crosstown Railway Company first mortgage 5 per cent. bonds were acquired out of general cash (Analysis, p. 3, No. 18).

In September, 1918, $210,000 par value Christopher & Tenth Street Railway Company first mortgage 4 per cent. bonds were acquired out of general cash (Analysis, p. 2, No. 6). The maturity date of these bonds at the time of the execution of the first mortgage was October 1, 1918, but that date was extended until 1923.

Under article second, section 3, of the mortgage it was provided:

"Bonds hereby secured shall be * * * delivered from time to time as provided in section 4 of this article second, and not otherwise, for the following purposes: * * *

(a) To refund, pay, redeem, purchase, or otherwise acquire the following outstanding bonds, * * * to wit:

"$600,000 5 per cent. first mortgage bonds of the Metropolitan Crosstown Railway Company due April 1, 1920. * * *

"(c) At the option of the company to refund, pay, redeem, purchase, or otherwise acquire * * * the following described bonds: * * *

"$210,000 of the 4 per cent. extended bonds of the Christopher & Tenth Street Railroad Company, due October 1, 1918. * * *"

Section 4 of article second provided:

"(a) Whenever the company shall deliver * * * to the trustee for the purposes hereinbefore in section 3 of this article second mentioned * * * any of the said bonds * * * referred to in said section 3 of this article second, * * * the trustee, in exchange therefor, upon the request of the company evidenced by resolution of its board of directors, shall, subject to the provisions of paragraph (e) of this section 4, authenticate and thereupon deliver to the company * * * bonds secured hereby in an aggregate principal sum equal to the amount authorized to be authenticated and delivered for such purpose under the provisions of paragraph (e) of this section 4."

"(c) Each and every underlying bond which shall be deposited with the trustee under the provisions of this article second shall be by the trustees stamped with substantially the following words: 'Not negotiable. Held in trust for the purposes declared in the first real estate and refunding mortgage of New York Railways Company, dated January 1, 1912,' * * * and shall be held by the trustee as purchaser, without merger or extinguishment or impairment of lien, in uncanceled form, as part of the security for the bonds issued and to be issued under this indenture unless and until otherwise disposed of as in this indenture authorized or directed."

"(e) Before authenticating or delivering to the company, or on its order, any of the bonds provided to be issued for the purposes mentioned in the foregoing section 3, there shall be delivered to the trustee, in addition to the bonds or cash as hereinbefore required:

"(1) A copy of a resolution or resolutions of the board of directors of the company, * * * requesting the trustee to authenticate and deliver a specified amount of said bonds for one or more of the purposes for which such bonds may be issued, and stating that said amount of bonds is required to refund, pay, redeem, purchase, or otherwise acquire said underlying or subsidiary bonds. * * *"

From all of the foregoing (including the procedural provisions of section 4, not quoted) it is apparent that the scheme of the mortgage was that first mortgage bonds should be delivered against, inter alia, the Metropolitan Crosstown and Christopher & Tenth Street bonds (see, also, paragraph V and Schedule A of reorganization plan and paragraph sixth of the agreement).

When, therefore, these bonds were acquired out of cash, they could not go under the mortgage unless the trustee paid for them by the delivery of first mortgage bonds, in accordance with the provisions of the mortgage supra. This is the controlling reason why the Metropolitan Crosstown and Christopher & Tenth Street Railroad Company bonds are not under the mortgage, although much might be said as to the practical construction of the status of the Metropolitan Crosstown bonds between plaintiff as a banker and the Railways Co. See Mr. Chadbourne's Brief, pp. 26 and 27.

Fifth. 100 shares of Thirty-Fourth Street Crosstown stock par value $10,000 and 2 shares of Broadway and Seventh Avenue Company capital stock, par value $200 (Analysis, p. 2, Nos. 2 and 3), were acquired out of general cash in December, 1913, and are now in the treasury of the Railways Company. These fall under section 5, quot-

ed supra, and, as no bonds were delivered against them, they are not under the mortgage.

Sixth. *The Oren Root Mortgage.*—Under section 3 (a), quoted supra, it was contemplated that bonds should be issued to acquire the "$950,000 bond of Oren Root, Jr., * * * secured by mortgage to the Mutual Life Insurance Company * * * on parcels 1 and 2 of lot 2"—i. e., the Eighty-Fifth and Eighty-Sixth streets and Madison avenue property and the Thirty-Third street property, Madison and Lexington avenue property. Instead, however, of paying off this mortgage with first mortgage bonds, the Railways Company paid it out of the Ladd fund.

The minutes of the meeting of the board of directors of the Railways Company on September 6, 1916, show the action taken as follows:

"Mr. Theodore P. Shonts in the chair.

The president laid before the board the matter of the distribution of the cash, claims for cash, and proceeds of assets when reduced to cash which were in the hands of the court or the receivers of the Metropolitan Street Railway Company or the New York City Railway Company, and which as a result of the amicable adjustment of the receivership litigation had accrued, in the amount of approximately $4,100,000 actually collected or yet to be drawn down, to the benefit of this company. He stated that the matter of the distribution of this cash had been, under direction of the board, under consideration by himself and director Cobb; that they had been advised by counsel that under the provisions of the adjustment mortgage the funds and property in question were not part of the mortgaged property, and therefore that the income thereof did not accrue to the benefit of the adjustment bondholders. He further stated, however, that the fund was at the present time drawing only banker's interest, and not yielding the return which would be possible if it were invested; that the mortgage provided that this fund should be disposed of by a vote of not less than three-fourths of the directors of the company; that he was prepared to recommend as an adjustment of the question that so much of the fund as was necessary to pay off the bond of Oren Root, guaranteed by the Metropolitan Street Railway Company, and due, as extended, to the Mutual Life Insurance Company, on the 15th instant, amounting to $950,000, and to pay off the demand note of this company to the Guaranty Trust Company executed by the reorganization committee of the Metropolitan Street Railway Company for the purpose of meeting reorganization expenses, amounting to $650,000, should be applied to said purposes, the result of such action inuring to the benefit of the adjustment bondholders, but that the remainder of the said fund should be set apart and invested for the corporate purposes of the company, the income and profit therefrom not to be a part of the mortgaged estate, and not to be distributable to the adjustment bondholders, but to be added to the surplus of the company. Director Cobb having expressed his approval of the distribution as recommended, it was thereupon unanimously resolved that so much of the fund constituting cash, or any claims for cash, or the proceeds of assets when reduced to cash, in the hands of the court or the receivers of the Metropolitan Street Railway Company, or W. W. Ladd, as receiver of the New York City Railway Company, which sums as a result of the settlement of the Metropolitan and New York City Railway receiverships had accrued to and been paid over to the New York Railways Company, be, and the same hereby is, appropriated as follows:

"First. Under subsection 1, clause 'b,' section 6, of article third of the adjustment mortgage, to the payment of a note of $650,000 executed by the joint reorganization committee of the Metropolitan Street Railway Company for the purpose of providing funds to meet the expenses of reorganization.

"Second. Under clause 'c' of said section and article, to the payment of a bond of Oren Root, guaranteed by the Metropolitan Street Railway Com-

pany, and secured by a pledge upon real estate of the company at Thirty-Fourth street and Lexington avenue and at Eighty-Sixth street and Park avenue, in the principal amount of $950,000.

"Third. That the balance of said fund, including any invested part thereof, be set aside and held for the corporate purposes of the company, to be invested, expended, or applied in the discretion of the officers of the company, as approved by a majority vote of the directors present at a duly called meeting; the earnings therefrom not to be included as any part of the earnings from the mortgaged estate."

In pursuance of the foregoing the Root mortgage was paid off, and the equity of the first mortgage was enhanced accordingly without the Railways Company receiving first mortgage bonds therefor, whether resort is had to section 3 of article second or to section 2 of article third of the first mortgage. (As the lien of the adjustment mortgage is not now under consideration, no comment is made at this time in respect thereof.)

It is obvious that this payment "fed" the mortgage at the expense of the Railways Company, but, whether this is a diversion, and, if so, whether there is redress therefor available to the general creditors, tort and contract, must be left for determination to the accounting. At this stage there is no lien in favor of general creditors, nor is there a specific trust fund of this amount earmarked for their benefit. The rights of all concerned must be adjudicated when and if a fund is produced by foreclosure sale. The payment of the Root mortgage presents questions of fact and law on the accounting in regard to which no opinion is now expressed.

Funds Derived from the City of New York from Special Franchise Tax Refunds (Analysis, p. 4).—The questions arising hereunder have not been adjudicated, but it is expected that they will be decided by this court before it makes any final decree. If not, it may be well to provide for the sale of all the right, title, and interest, if any, of the trustee in said refunds; but that detail may be deferred for the present.

[5] Seventh. *Cash.*—It is necessarily and frankly conceded by counsel for the trustee that the mortgage does not cover "income, profits of operation of the company which were in existence and in possession of the company at any time prior to the taking possession of the receiver as receiver under the refunding mortgage on July 14, 1919."

Cash, qua cash, could not be mortgaged. This proposition needs little argument to sustain it. Cash is variable and shifting. Because it is a "free asset," it is, and properly may be, relied upon by creditors or taken into consideration when they extend credit. It must be used to pay obligations and liabilities arising out of contract or tort. It must be under full control of the corporation, else the corporation cannot do business. "Cash," however, is not necessarily so many physical dollars represented by currency or by bank deposits. Security used for certain purposes in lieu of cash may be "cash" in the sense in which we refer to nonmortgageable property.

Thus the $82,000 of city bonds deposited with the State Industrial Commission (Analysis, p. 2, No. 7) must be regarded as cash. In order to comply with the requirements of the New York law and the

Industrial Commission, the Railways Company had the choice of depositing cash or securities. This was a transaction in the ordinary course of business, no different in principle from meeting a payroll. These bonds at any time could have been drawn down and sold and cash deposited in their stead. They do not come under the mortgage, not because they were acquired with cash, but because they were cash for all practical purposes. So, too, with the Liberty bonds of $2,550 par value (Analysis, p. 2, No. 8). These were acquired, no doubt, in response to the nation's appeal. They could have been sold at any time, but they were retained in part in the treasury and in part in lieu of cash for deposit with the city comptroller.

[6] Eighth. *Materials and Supplies* (Analysis, p. 4).—The testimony of O'Connor, general storekeeper for the Railways Company and later for Receiver Hedges, shows that the materials and supplies were "mostly in current use and reserve." There were necessarily in reserve materials and supplies which must be on hand so as to be available at any moment. The reserve supplies, according to O'Connor, "are what is termed 'stock'; they are shifting supplies that are renewed from time to time as the quantity on hand is used up or put to use." On any particular date, therefore, there would necessarily be on hand certain materials and supplies which would not at the moment be physically in use or operation. In other words, there might be a rail in the warehouse or a ton of coal physically detached from operation, but necessary for operation at any moment. It is, of course, settled that the New York rule is that a chattel mortgage of after-acquired property is ineffective as against creditors of the mortgagor, and that some further act is necessary in order to make it an effective lien as against creditors. This general rule has been followed in this circuit. In re P. J. Sullivan Co., 254 Fed. 660, at page 662 et seq., 166 C. C. A. 158; Westinghouse, etc., v. B. R. T. (C. C. A.) 263 Fed. 532, at page 537 et seq. But to this rule there is an exception well expressed in Platt v. New York, Sea Beach R. Co., 9 App. Div. 87, 41 N. Y. Supp. 42, affirmed on opinion below 153 N. Y. 670, 48 N. E. 1106. There is nothing in the B. R. T. Case (C. C. A.) 263 Fed. 532, in opposition to the Platt Case. There the question was quite different, and B. R. T. was a holding company, and not a railroad corporation, and the property discussed was not equipment, materials and supplies for a railroad.

Obviously, if an old rail is replaced by a new rail, the effectiveness of a railroad mortgage would be greatly impaired or destroyed if the new rail escaped the lien of the mortgage. The test is whether the materials and supplies are of a character necessary and appropriate for railroad purposes and are intended for use on the railroad for such purposes. If materials and supplies were bought to sell or for speculation, the question would be different. Then the railroad would become a dealer or speculator in materials and supplies and not a user thereof.

The theory is that there is no intent to substitute the supplies and materials for cash (as in the case of the City and Liberty bonds, supra),

but to use them in connection with the construction or operation of the road. In such circumstances it would be highly illogical and drawing an overfine technical distinction to say that the rail in the warehouse which may be needed any moment is not a part of the plant in operation because on a particular day it was not physically affixed or actually used in operation. Of course, the materials and supplies must be such as in the exercise of fair discretion should be kept on hand. If cash has been depleted by improvident purchases in excess of needs justified by prudent foresight, the case may be one of diversion, but that question, if it should arise, must necessarily be left to the accounting. It is therefore held that under the after-acquired clause the lien of the mortgage covers "materials and supplies."

[7] Ninth. *The $1,000,000 of First Mortgage Bonds.*—These bonds are now pledged with plaintiff in its independent capacity as a banker as collateral security to a loan to Railways Company. The following is their history:

At a meeting of the board of directors of the Railways Company on May 23, 1916, it was resolved:

"That the officers of this company be, and they hereby are, authorized to purchase one million dollars ($1,000,000) face value of the 4 per cent. first real estate and refunding mortgage bonds of this company at an average cost of not exceeding 80 per centum out of the undistributed fund recovered by virtue of the adjustment and settlement of the Metropolitan Company and New York City Company receiverships, and that any previous action taken by the officers of this company in investing any portion of the undistributed fund in the bonds upon the aforesaid basis be, and the same hereby is, ratified and approved, the said bonds to be subject to distribution under the mortgages of this company in the same manner as the cash fund."

It will thus be noted that these bonds were purchased with money derived from the Ladd fund, and for reasons supra were not, therefore, under the mortgage. $783,108.85 of the Ladd fund were used for this purpose.

For a time the bonds were held in the treasury of the Railways Company. Thereafter these bonds and a certificate of deposit of $800,000 were pledged with Guaranty Trust Company to secure a loan of $1,200,000. Later this loan was reduced to $400,000 by the application of the certificate of deposit to its reduction, and the trust company now holds these bonds and is asserting a lien upon them to secure the payment of $400,000 still due.

Plaintiff, of course, cannot and does not claim a lien on these bonds, but insists that the bonds are outstanding. Some of the defendants, however (particularly the adjustment mortgagee), contend that the bonds were extinguished, and, inter alia, point to certain correspondence between the Trust Company and Railways Company as disclosing the intent of the Railways Company. In my opinion, however, the record plainly indicates that it was the intention of Railways Company to keep these bonds alive. Such a course is both lawful and proper. It is always a question of intention. Jones on Corporate Bonds and Mortgages has put the point clearly and succinctly, and he is well supported by the cases. He says:

"Sec. 325. A company may purchase its own bonds as an investment and reissue them. If the facts show that there was no intention of paying the bonds, but they were regarded and reported by the company as still outstanding, they are valid in the hands of a subsequent purchaser and are secured by the lien of the mortgage."

In Barry v. Missouri, K. & T. Ry. Co. (C. C.) 34 Fed. 829, Judge Wallace said:

"There is no principle in law of corporations or of mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing a part of them back and reissuing them before their maturity, when the financial interests of the corporation will thereby be promoted, unless the organic law of the corporation prohibits the exercise of such a power."

See Atlantic Trust Co. v. Woodbridge Canal Co. (C. C.) 79 Fed. 842; Memphis, etc., R. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; Progressive Wall Paper Case, 229 Fed. 489, 143 C. C. A. 557, L. R. A. 1916E, 563.

There are bonds thus outstanding to the extent of $18,019,948.24. But a bond cannot be outstanding and yet not outstanding. It is either dead or alive. If alive, it is entitled to share in the proceeds of the foreclosure sale. The situation merely is that plaintiff owns seventeen-eighteenths, in round numbers, and Railways Company owns one-eighteenth, in round numbers, subject to the $400,000 pledge. All the mortgaged property is security for the whole eighteen-eighteenths. Hence plaintiff will be entitled to seventeen-eighteenths and Railways Company (which, in the circumstances, means its creditors) to one-eighteenth, in round numbers, of such sum produced by foreclosure sale, as ultimately may be held to be applicable to the payment of the mortgage debt.

After, therefore, the $400,000 shall have been paid, the proportionate balance, if any, will go to the Railways Company, and will be applicable to the payment of general creditors' claims as between this plaintiff and defendant Railways Company.

Tenth. As there are other questions outstanding and undetermined, this opinion at this time cannot result in a final decree, and can only be regarded as advisory.

I have not mentioned some of the so-called valueless properties, but they can be readily classified in accordance herewith. My suggestion is that the conclusions here stated shall be embodied in an order for purposes of clear understanding hereafter.

I would have preferred that this opinion should have been less lengthy but for the fact that there are many documents, and I have thought that the quotations might save counsel time and be of convenient service.

I take this opportunity of expressing my appreciation to all counsel for their able presentations and briefs, and I think all will agree that court and counsel are greatly indebted to Mr. Winthrop and Mr. Roberts for their painstaking and highly valuable co-operation and assistance.

NOTE.

Analysis of Property Claimed to be Excepted from the Lien of the Guaranty Trust Company Mortgage.

EXPLANATION.

The Tort Creditors and Contract Creditors claim that certain properties, alleged in the proposed decree to be covered by the lien of the mortgage, are not so covered because:

(A) They constitute cash or accounts receivable representing income earned before the appointment of the receiver, or cash either released by its terms from the lien of the mortgage or not capable of being mortgaged as a matter of law. (See Tort Creditors' Brief, p. 4; Contract Creditors' Brief, Points I and II, pp. 10 et seq. and 18 et seq., and First and Refunding Mortgage Trustee's Brief, p. 11 et seq.)

or because

(B) They constitute property specifically excepted by the terms of the mortgage, on account of being the proceeds of a chose in action against the so-called Joint Committee, owned by the company at the date of the mortgage and not therein specifically described or "of assets when reduced to cash, in the hands of the court, etc." (See Tort Creditors' Brief, p. 9; Contract Creditors' Brief, p. 11, and opposing argument in First and Refunding Mortgage Trustee's Brief, p. 7 et seq.)

or because

(C) They constitute stocks or bonds or choses in action not intended to be covered by the general language of the after-acquired clauses. (See Tort Creditors' Brief, p. 15; Contract Creditors' Brief, pp. 22 et seq. and 34 et seq., and opposing argument in First and Refunding Mortgage Trustee's Brief, pp. 2 to 16.)

or because

(D) They constitute after-acquired property, consisting of securities, reserve materials and supplies, and land, which were not a part of the plant in operation when the receiver was appointed, and, therefore, as a matter of law, not covered by the mortgage as against creditors. (See Tort Creditors' Brief, pp. 10 and 11; Contract Creditors' Brief, Point VI et seq., and opposing argument in First and Refunding Mortgage Trustee's Brief, p. 16 et seq.)

or because

(E) They constitute a shifting stock of goods not subject to the mortgage as a matter of law. (See Contract Creditors' Brief, p. 30.)

Counsel for the Receiver have therefore prepared this schedule, in which there have been itemized the various properties which are claimed not to be covered by the mortgage. Under the column marked "Location in Decree" we have indicated the place in the proposed decree where the property is alleged to be covered by the lien of the mortgage. Under the column "History of Item" we have briefly described the acquisition and its present status. By "Evidence" we refer to the exhibits or evidence which describes the property. Finally, under "Alleged Reasons Why Not Covered by the Lien" we have referred to the arguments, as lettered above, on account of which the property is claimed not to be covered by the mortgage.

I. CASH.

Item	*History of Item*	*Evidence*	
1 All cash and accounts receivable on hand at the time of the appointment of the receiver.	In January, 1912, there was received from the Joint Committee on Reorganization $500,000 for working capital. At various other times there was secured from said committee amounts totalling $54,497.24. These amounts are reflected in the current account. On March 22, 1916, there was received by the New York Railways Company from the Receivers of the New York City Railway Company, the Metropolitan Street Railway Company or from the Special Master $5,336,097.88. Of this $1,618,959.29 was set apart, in accordance with the mortgage, as "cash capital," at a directors' meeting on September 6, 1916. There is no evidence that any cash specifically covered by the mortgage was added to this fund. At the commencement of the receivership in the creditors' cause the general cash on hand equalled $408,222.25 and petty cash equalled $23,262.73. When the receiver in this cause was appointed, the general cash equalled $1,317,874.33 and petty cash equalled $28,455.23. In addition there were outstanding certain accounts receivable which may be classified under this heading.	See Exhibit #53, Item 33. See Exhibit #53, Item 28, and especially Schedule 1 to Exhibit #53. See Exhibit BB. See Mr. Samuelson's testimony, pages 93 and 94.	See Argument A. The First and Refunding Mortgage Trustee admits in part the principles alleged. See page 26 of his brief.

II. STOCKS AND BONDS.

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien
1	Twenty-third Street Railway Company Bonds due Jan. 1, 1909	50	$ 50,000.00	Part of Lot Nine, Parcel 3, page 42	These bonds were turned over by the Receiver of the Metropolitan Street Railway Company to New York Railways Company under Receivership Settlement of March 22, 1916. They are now in the Treasury of the New York Railways	See Exhibit BB See Exhibit #53, Item #1 See Exhibit #56, Item #1	See Arguments B, C and D
2	Thirty-fourth Street Crosstown Railway Company Stock	100	10,000.00	Part of Lot One, Parcel 28, page 25	Acquired with general cash, December, 1913—in Treasury	See Exhibit #53, Item #10 See Exhibit #53, Item #10	See Arguments C and D
3	The Broadway & Seventh Avenue Railroad Company Capital Stock	2	200.00	Part of Lot One, Parcel 26, page 25	Acquired with general cash, December, 1913—in Treasury	See Exhibit #53, Item #9 See Exhibit #56, Item #9	See Arguments C and D
4	The Brooklyn & North River Railroad Company Capital Stock	250	25,000.00	Lot Fifteen, Parcel 2, page 51	Acquired with general cash, December, 1913—now in Treasury	See Exhibit #53, Item #2 See Exhibit #56, Item #2	See Arguments C and D
5	Bridge Operating Company Capital Stock	500	50,000.00	Lot Fifteen, Parcel 3	Acquired with general cash, January, 1914—now in Treasury	See Exhibit #53, Item #3 See Exhibit #56, Item #3	See Arguments C and D
6	Christopher & Tenth Street Railroad Company First Mortgage 4% Bonds due 1923		210,000.00	Lot Fifteen, Parcel 4	Acquired with general cash, September, 1918—now in Treasury	See Exhibit #53, Item #4 See Exhibit #56, Item #4	See Arguments C and D
7	City of New York 4¼% Bonds		82,000.00	Lot Fifteen, Parcel 5	Acquired with general cash, June, 1914—deposited with State Industrial Commission	See Exhibit #53, Item #5 See Exhibit #56, Item #5	See Arguments C and D

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien
8	Liberty Loan Bonds U. S. 4¼% (Second Converted 4s)		2,550.00	Lot Fifteen, first two items of Parcel 6	Acquired with general cash, various times—$1,450 in Treasury; $1,100 with City Comptroller account of Kingsbridge Railway Co. Permit	See Exhibit #53, Item #6 See Exhibit #56, Item #6	See Arguments C and D
9	Central Crosstown Railroad Company 351 Shares of Capital Stock	351	35,100.00	Lot Fifteen, Parcel 8	Acquired from Joint Committee on Reorganization, January, 1913—now in Treasury	See Exhibit #53, Item #8 See Exhibit #56, Item #8 See Exhibit CC	See Arguments B and D
10	Central Park, North & East River Railroad Company Capital Stock	3,000	300,000.00	Lot Fifteen, Parcel 11	These were owned by the New York Railways Company on January 1, 1912, but were not specifically described in the First Real Estate and Refunding Mortgage dated January 1, 1912. They are now in the possession of the Guaranty Trust Company	See testimony of Mr. Samuelson on page 92	The mortgage on page 58 specifically excepts "Choses in action and shares of stock and bonds owned by the company at the date hereof not in this indenture elsewhere enumerated or specifically described." See Tort Creditors' Brief, p. 12. The brief of the First and Refunding Mortgage Trustee admits that this stock is not covered (p. 26).
11	People Traction Company Capital Stock	15,000	1,500,000.00	Lot Fifteen, Parcel 12	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #11 See Exhibit #56, Item #11	See Arguments C and D
12	Fulton Street Railroad Company Capital Stock	5,000	500,000.00	Lot Fifteen, Parcel 13	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #12 See Exhibit #56, Item #12	See Arguments C and D

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien	
13	28th and 29th Streets Crosstown Railroad Company Capital Stock	15,000	1,500,000.00	Lot Fifteen, Parcel 14	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #13 See Exhibit #56, Item #13	See Arguments and D	C
14	Edenwald Street Railway Company Capital Stock	250	25,000.00	Lot Fifteen, Parcel 15	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #14 See Exhibit #56, Item #14	See Arguments and D	C
15	Metropolitan Street Railway Company Capital Stock (Scrip)		52.73	Lot Fifteen, Parcel 16	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #15 See Exhibit #56, Item #15	See Arguments and D	C
16	Interborough-Metropolitan Company Fractional Scrip Voting Trust Certificates Common Stock		20.00	Lot Fifteen, Parcel 17	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #16 See Exhibit #56, Item #16	See Arguments and D	C
17	Wall & Cortland Street Ferries Railway Company First Mortgage Bonds—Temporary Receipt of Central Trust Company dated Aug. 26, 1898		1,000,000.00	Lot Fifteen, Parcel 18	Acquired by general cash, December, 1913—now in Treasury	See Exhibit #53, Item #17 See Exhibit #56, Item #17	See Arguments and D	C
18	Metropolitan Crosstown Railway Company First Mortgage 5% Bonds		600,000.00	Lot Fifteen, Parcel 19	Acquired by general cash, March, 1912, and May 1913—now in Treasury	See Exhibit #53, Item #19 See Exhibit #56, Item #19	See Arguments and D	C
19	145th Street Crosstown Railroad Company Capital Stock	20	2,000.00	Lot Fifteen, Parcel 20	Acquired by general cash, February, 1912—now in Treasury	See Exhibit #53, Item #20 See Exhibit #56, Item #20	See Arguments and D	C
20	New York City Railway Company Capital Stock	130,000	13,000,000.00	Lot Fifteen, Parcel 21	Turned over to New York Railways Company under settlements of March 22, 1916, by New York City and Metropolitan Receiverships	See Exhibit #53, Item #23 See Exhibit #56, Item #23 See Exhibit BB	See Arguments B, C and D	

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien
21	Wall & Cortland Street Ferries Railway Company Shares	10,000	1,000,000.00	Lot Fifteen, Parcel 22	Turned over to New York Railways Company under settlements of March 22, 1916, by New York City and Metropolitan Receiverships	See Exhibit #53, Item #24 See Exhibit #56, Item #24 See Exhibit BB	See Arguments B, C and D
22	Metropolitan Street Railway Company Three Year Collateral 5% Imp. Notes dated March 23, 1907		4,000,000.00	Lot Fifteen, Parcel 23	Turned over to New York Railways Company under settlements of March 22, 1916, by New York City and Metropolitan Receiverships	See Exhibit #53, Item #25 See Exhibit #56, Item #25 See Exhibit BB	See Arguments B, C and D
23	Brooklyn & North River Railroad Company 6% Demand Notes		65,329.60	Lot Fifteen, Parcel 24	Acquired by general cash at various times—now in Treasury	See Exhibit #53, Item #26 See Exhibit #56, Item #26	See Arguments C and D
24	Metropolitan Street Railway Co.— (a) Capital Stock (b) 5% Gen. Mort. bonds (c) 4% Refund. M. bonds	499,029	49,902,900.00 12,242,000.00 16,483,000.00	Lot Fifteen, Parcel 25	Turned over from Joint Committee on Reorganization, Metropolitan Street Railway Company	See Exhibit #53, Item #27 See Exhibit #56, Item #27 See Exhibit CC	See Arguments B and D
25	New York Railways 1st R. E. & R. Mortgage Bonds		1,000,000.00	Parcel 29 of Lot One and Lot Eleven	These bonds are with the Guaranty Trust Co. as collateral to a loan. They constitute an investment of cash from receivership settlement	See Exhibit #53, Item #18 See Exhibit #56, Item #18	See Arguments A, B, C and D See especially Brief of Contract Creditors, p. 12. The First and Refunding Mortgage Trustee admits, in its brief (p. 26), that these bonds are not covered by the mortgage
26	Note dated April 1, 1907, New York City Railway Company		500,000.00	Parcel 29 of Lot One and Lot Eleven, in general language cover there	The note is stamped "paid" $265,444.77. Part of settlements of March 22, 1916	See Exhibit #53, Item #22 See Exhibit #56, Item #22 See Exhibit BB	See Arguments B, C and D

REAL ESTATE.

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien
1	Mt. Vernon Property			Lot Fourteen on page 51	Turned over under New York City and Metropolitan Receivership Settlements, March 22, 1916. This property is not a part of the New York Railways plant in operation	See Exhibit #53, Item #38 See also Exhibits BB and AB-3	See Arguments B and D
2	Lenox Ave. and 104th-141st Sts.			Lot Thirteen on page 49	Turned over under New York City and Metropolitan Receivership Settlements, March 22, 1916	See Exhibit #53, Item #39 See Exhibit AB-3 See also Exhibit BB	See Argument B See Contract Creditors' Brief, p. 11.

MATERIALS AND SUPPLIES.

1	Materials and Supplies in inventories DD, EE and FF				These supplies and materials were in warehouses and storerooms ready to replace wornout machinery, etc. They were not yet part of the plant in operation	See Mr. O'Connor's testimony, page 107 thru 112 See Exhibits DD, EE and FF See also Exhibit #53	See Arguments D and E

SPECIAL FUNDS AND CLAIMS.

1	Eighth Avenue Railroad Co. —Fire Loss—Building		64,535.92	Parcel 29 of Lot One and Lot Eleven. The general language of these lots may cover this property	This fund was assigned to the New York Railways Company under the Receivership Settlement of March 22, 1916. The ownership of the principal of the fund is now being litigated between the Receiver of New York Railways and the Eighth Avenue Railroad Company. This fund has been turned over to Receiver of New York Railways and deposited in his general cash under an agreement which reserved the rights of the Eighth Avenue Railroad Company to claim ownership thereto	See Exhibits #53 and #56 See Exhibit BB See Exhibit AB-3	See Argument B The mortgage specifically excepted from its lien "Cash, or any claims to cash, or the proceeds of assets when reduced to cash, in the hands of the court, or the Receivers of the Metropolitan Company, or W. W. Ladd as Receiver of the New York City Railway Company."

No.	Item	No. of Shares or Bonds	Face or Par Value	Location in Decree	History of Item	Evidence	Alleged Reasons Why Not Covered by the Lien
2	In re Long Island Land Fertilizing Co.— Cash Claim against Trustees		 6,064.33 6,269.89	Parcel 29 of Lot One and Lot Eleven. The general language of these lots may cover this property	The cash was received from the trustees, being proceeds of certificates of stock under dissolution of the Long Island Land Fertilizing Company, standing in the name of the 42nd Street & Grand Street Ferry Railroad Company and the 23rd Street Railway Company. The claim is on the same account. The funds are carried as liabilities to leased lines pending legal determination thereof	See Exhibit #53 See Exhibit AB-3	The interest of the New York Railways Company is that of trustee for the 42nd Street & Grand Street Ferry Railroad Co. and the 23rd Street Railway Co.
3	Central Crosstown Railroad Co.— Construction Fund Fire Loss—Cars (2nd Ave. and 96th St. Fire Loss)		 1,733.75 1,067.79	Parcel 29 of Lot One and Lot Eleven. The general language of these lots may cover this property	These funds were derived by the New York Railways Company under the Receivership Settlements	See Exhibit #53, Item #37 See Exhibit #56, Item #37 See Exhibit AB-3	See reasons under Eighth Avenue Railroad Co. Fire Loss Fund
4	Claims against City of New York for Special Franchise Tax Refunds Receivable—Years 1912-1914		377,171.69	Parcel 29 of Lot One and Lot Eleven. The general language of these lots may cover this property	These refunds due by the City of New York to the New York Railways Company under orders of the New York Supreme Court entered December 9, 1917, represent excess special franchise taxes paid by the New York Railways Company covering owned and leased lines for the years 1912, 1913 and 1914	See Exhibit AB-3	See Argument D See Argument C See Argument A

GENERAL ELECTRIC CO. v. ALEXANDER et al.

(District Court, S. D. New York. October 29, 1921.)

1. Patents ⊜328—1,180,159, for an incandescent lamp, held valid and infringed.
   The Langmuir patent, No. 1,180,159, for incandescent lamp, claims 4, 5, 12, and 13, *held* valid and infringed.
2. Patents ⊜328—1,018,502, for filament for electric incandescent lights, held valid and infringed.
   The Just and Hanaman patent; No. 1,018,502, for filament for electric incandescent lights, claims 1, 2, and 3, *held* valid and to cover an invention of the highest order; also *held* infringed.
3. Patents ⊜97—Foreign patent for process does not invalidate United States patent for product which discloses different process; "same invention."
   A patent for a process and one for the product of such process are for the same invention within the meaning of Rev. St. § 4887, as amended by Act March 3, 1897, 29 Stat. 692, under which a United States patent cannot be granted for an invention patented in a foreign country on an application filed more than seven months prior to the filing of the application in this country (now 12 months, Comp. St. § 9431), but a United States patent for a product which discloses a process for its manufacture is not invalidated by a foreign patent to the same patentee for a nonoperative process.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Same Invention.]
4. Patents ⊜312(1)—Burden on defendant to prove that foreign patent for process is identical with United States patent.
   Where, in a suit for infringement of a patent for a product, defendant seeks to avoid validity of complainant's patent, in that the application therefore was filed more than 7 months after filing of application for foreign patent for a process, contrary to Rev. St. § 4887, as amended by Act March 3, 1897, 29 Stat. 692 (now 12 months, Comp. St. § 9431), the burden rests on defendant to prove that the process of the foreign patent will produce the product of the United States patent.

In Equity. Suit by the General Electric Company against F. Alexander, N. Fabian and Alpha Laboratories, Inc. Decree for complainant.

Howson & Howson, of New York City (Frederick P. Fish and Hubert Howson, both of New York City, and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., of counsel), for plaintiff.

Charles J. Holland, of New York City (Cornelius C. Billings, of New York City, of counsel), for defendants.

Suit for Infringement of Claims of Patents Nos. 1,018,502 and 1,180,159.

MAYER, Circuit Judge. The patents and the art here considered were fully discussed in previous opinions of the Circuit Court of Appeals and of this court. General Electric Co. v. Laco-Philips, 233 Fed. 96, 147 C. C. A. 166, affirmed 233 Fed. 96, 147 C. C. A. 166. General Elec. Co. v. Nitro-Tungsten Lamp Co. (D. C.) 261 Fed. 606, affirmed (C. C. A.) 266 Fed. 994.

The Just and Hanaman patent is now attacked upon the ground (a) of invalidity and (b) non-infringement. The Langmuir patent is attacked upon the ground of invalidity.

The bulk of the record is quite disproportionate to the simplicity of all but one of the questions involved. This extensive record is due in part to the fact that the court felt that the widest opportunity should be given to put forward almost any conceivable fact, experiment, or theory directed against validity or infringement as the case might be, in order that litigation, in any event, as to the validity of these patents should some day come to an end, one way or the other. If, in view of prior litigations, it be ultimately held in this case that the claims of these patents are valid, it is difficult to imagine what new matter can later be brought forth.

This introduction is regarded as desirable because otherwise the reason for the brevity of this opinion on certain points might not be understood. The three questions supra will be discussed in inverse order.

[1] 1. *The Langmuir Patent.* There is not a shred of merit to the present attack on validity. The previous case was ably tried for the defense by experienced counsel who did not neglect anything of consequence. The British Sinding-Larsen (Thompson) patent, No. 18,968 of 1899, was fully considered in the Nitro-Tungsten record.

Now it is claimed that the American Sinding-Larsen patent, No. 672,019, invalidates the Langmuir patent. The British and American patents are the same, except that the British patent mentions the pressure of four atmospheres, while the American patent does not specify the pressure, though it calls for a pressure above atmospheric.

No Sinding-Larsen lamps have ever been used, not because of the osmium lamp, but because the Sinding-Larsen theory was wholly wrong. As Langmuir testified:

"The point is that the whole theory of the inventor is a false theory, but the theory shows very distinctly that he had in mind that an external pressure on the material of the filament would improve the life of the filament.

"As a matter of fact, we know to-day, and even Sinding-Larsen could have calculated it in his time, that the pressure on the material of the filament, instead of on the vapor from the filament, would cause an increased rate of evaporation of the filament, and not a decrease. The whole theory is wrong, thermodynamically wrong. You can calculate through rigorous methods that the effect would be just the opposite of what he expects. As a matter of fact, the penetration of a gas into the pores of a filament, if the phenomena are dependent upon the evaporation, could not have any material effect upon the evaporation of the filament."

Sinding-Larsen himself, in his British patent, No. 19,945 of 1900, realized the futility of his earlier patent.

Further, the material in the Sinding-Larsen lamp was carbon, and carbon will not do in the Langmuir co-ordination. The experiments or demonstrations on this score in court are not guides, because life is a basic factor in tests as to lamp efficiency. The point is, as Langmuir said:

"That producing a lamp * * * and running it for a couple of minutes at a high efficiency has no significance whatever as an indication of what a lamp is capable of doing."

The Hopfelt lamp (patent No. 29,285) consists of a small glass tube bent to the shape of an U, containing a drop of mercury and also

containing, substantially in its center, a carbon filament, the whole surrounded by an external bulb like that of an ordinary lamp. The presence of the carbon filament is sufficient to exclude this patent from further consideration, and its theory as to the vapor of mercury which surrounds the filament after the drop of mercury evaporates, being raised to an intense white heat, is not Langmuir's invention.

The same general observations apply to the extract from the Electrotechnische Zeitschrift. In brief, there is nothing of theoretical or practical value in this Hopfelt patent, and, like other prior art, it was a failure.

Claims 4, 5, 12, and 13 are held valid and infringed. The remaining claims need not be considered.

[2] 2. *Infringement of Just and Hanaman Patent.* The opinion of this court as to this patent unanimously adopted by the Circuit Court of Appeals indicated that this patent disclosed invention of a high order in an art which performs a great service to mankind.

The construction of claims of such a patent will not turn upon dictionary fine distinctions. The courts must always ascertain what the claims mean in the light of the state of the art and the accomplishment of the inventor.

Practical experience demonstrated the desirability of counteracting what is known as "offsetting," infra, and for that purpose one of the means or methods employed is to introduce the rare earth oxide known as "thoria." It is contended that thoria does not cohere, and that the tungsten is not pure nor homogeneous, and hence that there is not infringement of the claims. These claims are as follows:

"(1) A filament for incandescent lights consisting of tungsten in a coherent metallic state and homogeneous throughout.

"(2) A filament for incandescent lights consisting throughout of substantially pure metallic tungsten of high fusing point and electrically conductive, the light emitting properties of the filament being due to the coherent, homogeneous metallic nature of the tungsten.

"(3) A filament for electric incandescent lights comprising dense, coherent tungsten metal, having its fusing point approximately 3,200° C., and capable of incandescent efficiency at the rate of less than one watt per candle power and substantially free from perceptible disintegration at that efficiency."

When Coolidge's drawn wire tungsten filament (referred to in the Tungsten Lamp Case) was used, it was found that it differed from the squirted filament (of Just and Hanaman) in that, when used on an alternating current circuit, it was sometimes subject to what is known as "offsetting," and this offsetting has to do only with the life of the filament. As the drawn filament is operated in a lamp, the fibers of which it is composed tend to reform as crystals. This crystal formation may, on an A. C. circuit, produce crystal boundary planes at right angles to the length of the filament, which are planes of mechanical weakness at the temperature at which the filament runs. On these planes slipping may occur, causing one part of the filament to offset laterally from another part. This effect is disadvantageous, as a part of the filament (especially small vacuum lamp filaments) will grow too hot and burn out at the point affected.

Of several ways of preventing this, one is the introduction of thoria. This thoria is in practice usually introduced by a process de-

scribed in the Coolidge patent, which consists in wetting the tungsten powder with a solution of thorium nitrate. In one of the subsequent operations the powder is heated so that the nitrate breaks up, leaving miscroscopic particles of thoria sticking to the very fine particles of the tungsten powder, which latter particles themselves are so small as to be almost invisible to the naked eye.

As the filaments are drawn into wire, these little particles of thoria are drawn out into microscopic rods which naturally are all parallel to the axis of the filament. As the filament crystallizes these microscopic rods break up into microscopic or submicroscopic particles, so arranged and oriented (Langmuir, pp. 795–798, X–Qs. 504–516; page 805, X-Q. 539) as to exert an influence on the character of the crystallization such as to diminish the tendency to create the planes of weakness.

There is much testimony as to tests and microscopic investigations, including microphotographs, all on the questions as to whether the introduction of the thoria destroys or impairs the significance of the words "pure," "coherent," and "homogeneous" as used in the claims.

The evidence is convincing that thoria has a mechanical action and performs a mechanical function and does not have any chemical effect. It does not perform any office in respect of the light-giving characteristics of tungsten, but is a mechanical bracer or resister which prevents the filament from being burned out sooner than might otherwise happen. Colloquially put, it is as if one put some kind of mechanical reinforcement in a coat to protect it from mechanical injury, but did not change the coat nor the wool which composed it.

There is some controversy as to the accuracy of the microphotographs, but, from my point of view, it is unimportant whether a photograph shows a break or hole.

When Just and Hanaman used the words of their claims, such terms as "pure" and "homogeneous" were employed in contrast with the impure, composite filaments of the prior art. It was as if they said:

"For lighting purposes, we shall not mix tungsten chemically with other materials and make a composite filament as did Bottome and de Lodyguine."

It would, indeed, be small reward for a great advance in the art if "pure" and "homogeneous" were construed as meaning that a mechanical action such as this would avoid infringement and make that which was "pure" and "homogeneous" neither one nor the other. Further, the broad proposition of law involved was practically disposed of in the previous case in relation to the Coolidge filament. So as to "coherent"; this word is used to point out the compacted nature of the metal in a true metallic filament as distinguished from powders and the like. Plaintiff is quite right in its contention that—

"There had been so many fruitless attempts to produce filaments from refractory substances, obtainable only as powders consisting of individual small crystals, that when an inventor obtained, or thought that he had obtained, a truly metallic filament manufactured out of such powder, so consolidated as to form a solid structure that would really hang together, he naturally hastened to call attention to the fact that it was so consolidated that it would hang together, or, in a word, that it was coherent."

See Elizabeth v. Pavement Co., 97 U. S. 126, 137, 24 L. Ed. 1000; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; General El. v. Hoskins Mfg. Co., 224 Fed. 464, 140 C. C. A. 150; Edison v. Waring (C. C.) 59 Fed. 358.

It is therefore held that the claims of the Just and Hanaman patent are infringed.

[3] *The Question of Invalidity of the Just and Hanaman Patent.* This defense rests solely on the proposition that there was a German patent prior to the American patent here in suit, and that the American patent is invalid because it falls within the prohibition of R. S. 4887, as that section now reads. Originally section 4887 was as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall be in force more than seventeen years."

By the act of March 3, 1897 (chapter 391, 29 Stat. 692), which applied to all patents granted on and after January 1, 1898, on applications filed after such date section 4887 was amended to read as follows:

"No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country."

It is said that the original form of the section led to certain abuses, in that it made it possible for an inventor to file an application for an American patent many years after the foreign patent was granted, and at any time within two years after an American manufacturer had in good faith commenced the commercial exploitation of the invention.

To correct this situation Congress reduced the period allowed to the foreign patentee for filing his American application, and, since the application had to be filed rather promptly, removed the limitation on the life of the patent.

In the case at bar there was a German patent issued to Just and Hanaman under date of September 8, 1904 (patent in the German Empire from April 15, 1903), while the application for the patent in suit was filed July 6, 1905, or, in other words, "the application for said foreign patent was filed more than seven months prior to the filing of the application in this country."

The original and amended section 4887 are identical in referring to "by reason of its having been first patented or caused to be patented * * * in a foreign country."

The point is that both the original and the amended section 4887 were dealing at all times with protection in respect of a patent, the same abroad as here, and thus cases on this point which arose under the old section may be appropriately cited in connection with the present or amended section 4887.

Obviously in the case at bar this is a defense which defendant is called upon to prove. As Judge Coxe said in considering a case which came up under section 4887 in its original form:

"A patent should never be declared invalid because of the expiration of a foreign patent if there is doubt about the inventions being the same. The burden is upon the defendants, and the doubt should be resolved in favor of the patents." Brush Electric Co. v. Accumulator Co. (C. C.) 47 Fed. 48.

See, also, Brush Electric Co. v. Julien Electric (C. C.) 41 Fed. 679; Westinghouse v. Stanley, 138 F. 823, 71 C. C. A. 189.

The inquiry, then, is to ascertain what it was that the German patent covered. In what we would call the specification the statement is made:

"The present invention relates to the production of incandescent filaments of pure tungsten or molybdenum metal."

The claim is for a process, as follows:

"Process for producing incandescent bodies of tungsten or molybdenum, characterized thereby, that a carbon filament is raised to a high temperature by means of current passed therethrough in the vapor of oxyhalogen compounds of tungsten or molybdenum in the presence of a little free hydrogen, whereby the carbon is replaced entirely by tungsten or molybdenum."

The Just and Hanaman patent, 1,018,502, here in controversy, is for the article itself; i. e., the filament of tungsten in a coherent metallic state and homogeneous throughout. Plaintiff insists that a patent for a process is different from a patent for an apparatus or product. As a general proposition, of course, this is true. Under this statute, however, the real inquiry is not to be embarrassed by fine points of procedure. In Fireball v. Commercial, 239 U. S. 156, 36 Sup. Ct. 86, 60 L. Ed. 191, Mr. Justice McKenna points out:

"That a process may be independent of the instruments employed or designed to perform it. They may be independent or they may be related."

I am inclined to think that this case upon which plaintiff places much emphasis does not go so far as to say that a patent for a process and a patent for an apparatus necessarily represent different inventions in the sense of section 4887.

Where the process is used as the means of creating or developing the product, it is difficult to see how there is any real distinction between the patents for the purposes of section 4887, where one patent claims a process and the other claims a product, but both patents clearly describe the same invention.

If so narrow a construction were placed on section 4887, the result might be the very disadvantage to American business against which this section 4887 was evidently intended to safeguard.

What the controversy in this respect comes down to is whether in point of fact, the same invention is patented abroad as is said to be patented in the United States.

In the German patent it will be noted from the quotation supra that the invention related to the production of a pure tungsten filament, and the specification then went on to show how this result can be accomplished. In the American patent the specification also shows how to produce the pure tungsten filament. There is no difference between the aims of each patent. The only difference is that according to our technique the German patent claims a process while the American patent claims a product or article.

This view, therefore, necessitates further inquiry, namely, whether, as matter of fact, the German patent and the American patent are the same.

[4] Here there must be actual identity. There cannot be introduced into the German patent any after-acquired knowledge or any deviation. The obligation rests upon defendant of clearly satisfying the court that by strictly following the German patent a tungsten filament will be produced which will be the same as the tungsten filament disclosed and taught to the art by the American patent.

In the Tungsten Lamp Case Dr. Liebmann, for plaintiff there, testified that the German patent was inoperative. Prof. Main, on behalf of defendant in that case, attempted to show the operativeness of the German patent, but the distinguished counsel for defendant Laco-Philips Company, the late Thomas B. Kerr, did not press the point. The foregoing, however, is not binding on this defendant, and must be regarded only as argument.

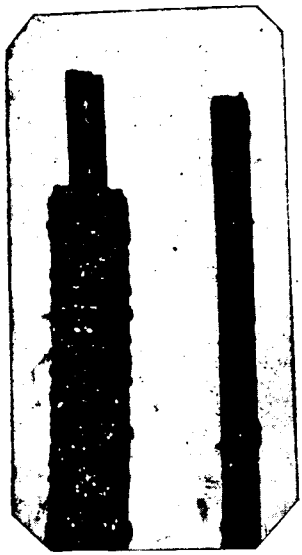
In this case plaintiff produced Dr. Langmuir as its expert. His high qualifications have already been referred to by this court. 261 Fed. 606.

Defendant produced Dr. Scholl, heretofore unknown to this court, but a man of much practical experience in the art, of marked technical equipment, and of infinite patience and industrious application.

Dr. Scholl produced certain lamps, known as Defendants' Exhibits V–1, W–1, and X–1, and certain unmounted filaments Exhibits G–1 and H–1. He asserted that these filaments were made in accordance with the teaching of the German patent and possessed the characteristics of the filaments of the patent in suit.

Dr. Fonda, for plaintiff, who worked in co-operation with Dr. Langmuir, testified that, after repeated attempts to follow the process of the German patent, he could produce only a composite filament; i. e., not the tungsten filament of the patent in suit. The court entertains no doubt of the integrity of Dr. Fonda's experiments. In this case, as in the Nitro-Tungsten Case, 261 Fed. 606, Dr. Fonda impressed me as thoroughly conscientious and fully equipped to do the work which was assigned to him. Indeed, one need but see and hear Langmuir and Fonda to be satisfied that no employment nor retainer would deflect either of them from stating what they believed to be the truth.

The result of Dr. Fonda's testimony is illustrated by Plaintiff's Exhibit No. 36 here inserted.



A composite filament is worthless, as is fully demonstrated in this record. It was the very thing which denoted failure in the prior art and which Just and Hanaman were trying to get away from. There was a great deal of controversy as to the filament Exhibit H–1, the details of which may be found in the record. Finally, the court, in response to plaintiff's urgent demand, ordered a test, i. e., that a small piece of the filament H–1 should be removed and mounted so as to produce a longitudinal section. The result of this test was to show that the filament H–1 was hollow and not solid. Plaintiff's Exhibits 72 and 73; P. Ex. p. 178; Records, p. 662, Q. 171.

Dr. Scholl had testified that the filament H–1 was pure, homogeneous, and solid in the sense, inter alia, that it did not contain any carbon or carbide. This testimony was based on two tests: (1) The potassium nitrite test; and (2) the microscopic test. I am satisfied from Dr. Langmuir's testimony that the first test is inconclusive and the second negative. There were no life tests, and, in this art, that is Hamlet without the Dane. One of the exhibit lamps, known as lamp No. 10 of Exhibit V–1, was carefully examined by Dr. Langmuir, and microphotographs of a portion of the filament were made by Dr. Jeffries. Plaintiff's Exhibit No. 80, Figs. B and C. The result of the examination and of comparison with the tungsten filament of the patent in suit is thus summed up by Dr. Langmuir:

"I then compared the characteristics of the lamp before it was broken open with those of pure tungsten filaments of the same geometrical sizes—that is, length and diameter. I did this in two ways: First, by comparison of the characteristics with the published data of the characteristics, which was ob-

tained in our laboratory, as a result of several years' work, and also compared the characteristics of this lamp with a tungsten filament lamp, made up with drawn tungsten wire, having a filament of approximately the same dimensions as the lamp marked No. 10.

"As a result of all these measurements I found that the ratio of hot to cold resistance at approximately one watt per candle was 71 per cent. as great as that of a pure tungsten filament under the same conditions. The specific resistance of the filament at about one watt per candle was about 130 per cent. of that of a pure tungsten filament under the same conditions, and the total energy radiated in watts per square centimeter of surface from the filament at approximately one watt per candle was 111 per cent. of that of a pure tungsten filament under the same conditions. Finally, the cold specific resistance—that is, figured over to cubit centimeter basis—was 182 per cent. of that of a pure tungsten filament at the same temperature. This temperature was about 28 degrees Centigrade. These results showed that the filament was very far from being a tungsten filament or far from being a substantially pure tungsten filament. Differences in the characteristics between this filament and those of a pure tungsten filament were greater than those of any tungsten lamp that I had ever heard of before, and were such that it would be impossible to rate the lamp or class it as a tungsten filament lamp."

It is impossible, in view of the large amount of testimony and of the many exhibits, to do more than outline the controversy; but a careful reading of this branch of the case must lead to one of two conclusions, i. e.: (1) That the process of the German patent cannot, as matter of fact, produce the tungsten filament of the patent in suit; or (2) that defendant has failed to prove that it can.

But, even if it were concluded that what has just been stated is erroneous, there is still an insuperable barrier to the success of the defendant's case. The patent in suit discloses two different processes for the production of the tungsten filament. In each process a composite filament of tungsten and carbon is produced, and the carbon is removed by glowing the filament at a high temperature in an atmosphere of moist hydrogen. This is a step not disclosed in the German patent.

The first process described in the patent in suit involves forming a pasty mixture of carbonaceous material and tungsten, or carbonaceous material and a tungsten compound, into a thread or filament, drying and baking it, and decarbonizing it at high temperature by the use of moist hydrogen. The filament may then be equalized by the deposition process. This first process is the process by which most of the tungsten filaments were made prior to the Coolidge invention of drawn wire.

The second process of the patent in suit (lines 77–103) begins with the formation of a composite filament having a carbon core, just such a filament as results from the process of the German patent except that there appears in the patent in suit, and not in the German patent, the idea of using exceedingly small carbon filaments, filaments which are much smaller than those used in commercial work.

The German patent contemplates a replacement in situ followed by an equalization. No one knew at that time what the resistance of a tungsten filament would be. There was, therefore, no inducement to use a specially small carbon filament, particularly as the inventors thought that they had found a way of turning that carbon filament

into a tungsten filament. As is contended by plaintiff, it is therefore obvious that one skilled in the art, in practicing the process, would start with an ordinary carbon filament, would attempt to replace the carbon by tungsten, and, if he thought that he had succeeded in doing it, would deposit more tungsten, to strengthen the filament and equalize it, but only to the extent to which he thought it needed strengthening and equalization.

Defendant has started with a carbon filament about 1/1000 of an inch in diameter, smaller even than the .04 millimeter filament referred to in the patent in suit (.04 mm. equals .0016 inches—Rec. p. 859); "special filaments"; filaments so small that they cannot be procured in this country, but must be obtained from one Jean Planchon in Paris. "These filaments," said Dr. Scholl, "here were out of the ordinary as far as diameter was concerned." Rec. p. 402, X-Qs. 506, 507. They then proceeded, in accordance with the second process of the patent in suit, to build up around this almost microscopic thread a heavy coating of tungsten having a volume 20 times that of the carbon.

In addition to the foregoing, there was the use of a brilliant white heat, of wet hydrogen, and the raising of the temperature of the filament at the point at which the instruction of the German patent is to lower the heat—all departures from the German patent.

Plaintiff's counsel have concisely summarized the situation. I cannot do better than to adopt, in substance, their résumé:

(1) The process of the German patent is inoperative to produce the product of the American patent.

(a) The German patent, starting with a carbon filament, prescribes a tungsten replacement process, followed by a tungsten deposition process.

(b) The replacement does not occur, because the replacement process is entirely inoperative.

(c) Since the carbon is not replaced by tungsten, but remains unaltered, the final result is a carbon filament surrounded by a shell of tungsten.

(d) Such a composite filament is worthless.

(2) The process practiced by Dr. Scholl in producing the filaments which defendant put in evidence involved vital departures from the German patent, such as:

(a) The use of a brilliant white heat, though the German patent specifically directs the use of a "bright red" heat followed by a "red heat."

(b) The raising of the temperature of the filament at the very point at which the German patent directs that the temperature be lowered.

(c) The use of wet hydrogen introduced by the "indicating botttle," the use of a vacuum in the treating bottle, the use, as noted supra, of an abnormally fine carbon filament, covered with tungsten having 20 times the volume of the carbon, though the German patent obviously does not specify the use of any unusual carbon filament and prescribes the deposition process as a mere means of evening the filament, and the use of an abnormally rapid rate of vaporization of the oxychloride.

But again, if I am in error in being so fully convinced in plaintiff's favor in respect to conclusions where the subject-matter is so much a matter of expert controversy at every step and of examinations under the microscope, at least it is true that there are so many doubts which attach to defendant's case that it cannot be said that it has proved, as it must, the identity of the patents. That these doubts should exist is natural enough, because there is usually as much human nature in a patent case as in any other litigated cause. Plaintiff has made a great success with its lamps. The exploitation of these patents has vastly widened the commercial field, and the temptation to invade so lucrative a territory is not strange.

Many years have passed since Just and Hanaman made their great contribution in the invention disclosed in their American patent. During all that time no one practiced the process described in the German patent. It is idle not to recognize that after-acquired knowledge is a subtle and subconscious agent of inaccuracy and departure. The phrase "any one skilled in the art would have known" how to do then what is known how to do now is the danger signal which admonishes courts to be cautious, and, in a case under this statute, to insist that there must be undoubted compliance with the disclosure of the foreign patent before domestic rights may be destroyed.

In no case has fuller opportunity been accorded to a defendant and has more time been allowed to make experiments and prepare defenses; and, yet, notwithstanding the ingenuity and ability with which the Just and Hanaman American patent has been attacked, it remains where it was and where it should be—the embodiment of an impregnable invention of the highest order. The court having on other grounds dismissed the bill as to Fabian, plaintiff may have the usual decree, with costs against the remaining defendants.

Fabian individually is entitled to his costs against plaintiff.

Submit decree on five days' notice.

FEDERAL RESERVE BANK OF MINNEAPOLIS v. FIRST NAT. BANK OF EUREKA, S. D.

(District Court, D. South Dakota, N. D. September 2, 1921.)

No. 385.

1. Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Under Federal Reserve Act indorsement of member bank to Reserve Bank creates primary liability.

Under the Federal Reserve Act, providing that, in case of rediscounted notes "upon which suit is brought, the bank waives presentment, demand and protest," and that the indorsement of member bank shall "be deemed a waiver of demand notice and protest by such bank as to its own indorsement, exclusively," when a member bank deposits paper with the Reserve Bank, it is intended that there shall be a primary liability.

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

2. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Under Federal Reserve Act, Reserve Bank has same rights against receiver as against insolvent bank.**
In an action by Reserve Bank on notes discounted by a member bank, the appointment of a receiver for the member bank puts the receiver in the same position as the insolvent bank, and plaintiff had the right to make proof of the member's absolute liability on rediscounted paper, and upon proof acquired a vested interest in the trust fund in the hands of the receiver for the creditors.

3. **Bankruptcy ⇐314(1)—Receivers ⇐147—Debts provable though unmatured.**
Unmatured debts are provable both in bankruptcy and receiverships.

4. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—In proving claims on notes indorsed to Reserve Bank credits allowable to member bank as set-off.**
In an action by a Reserve Bank on an insolvent member's rediscounted notes, that plaintiff's claims matured after the receiver's appointment did not affect the right of set-off, and in proving the claims credits in favor of the insolvent are deducted.

5. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Member bank held chargeable with proceeds of checks forwarded for collection.**
In view of Federal Reserve Act, § 16, as to a Reserve Bank's exercising the function of a clearing house, and the Federal Reserve Board rule requiring that the member bank provide funds to cover at par all checks received from or for the account of the Reserve Bank, *held*, that a member bank is absolutely liable to a Reserve Bank for the proceeds of checks forwarded the member for collection and paid to the member bank.

At Law. Action by the Federal Reserve Bank of Minneapolis against the First National Bank of Eureka, S. D., Paul C. Keyes, receiver. Findings and judgment for plaintiff.

A. Ueland, of Minneapolis, Minn., for plaintiff.
J. N. Johnson, of Canby, Minn., for defendant.

ELLIOTT, District Judge. I have determined the issues of law presented in Re Federal Reserve Bank of Minneapolis v. First National Bank of Eureka, S. D., in favor of the plaintiff.

I find no material fact controverted in the record. The issues are issues of law. The rights of the plaintiff must necessarily be determined in the light of the provisions of the laws of the United States, and especially an act of Congress approved December 23, 1913, generally referred to as the Federal Reserve Act (38 Stat. 251), together with the rules and regulations established thereunder.

[1] It is the first contention of the defendant with reference to the 19 promissory notes in the first 19 causes of action of plaintiff's complaint that the liability is only a contingent liability, and that neither of the notes mentioned in the separate causes of action, with the defendant's indorsement thereon, can be made the basis of a claim against the receiver until the defendant's liability thereon has become absolute. He further contends that the defendant's liability does not become absolute until it is definitely ascertained that the makers or prior indorsers thereon are insolvent, so that the note cannot be collected from the maker or prior indorser.

If the purpose and intent of the statutes and rules and regulations above referred to are to be recognized, it is the evident intent and purpose to protect the bank in its service, and the advancement of funds to member banks, and upon the receipt of the notes of the bank and collateral notes with the indorsement of the bank. It seems clear that the intent and purpose of the act and rules and regulations is to throw every protection around the Reserve Bank, and to give it the advantage of a right to proceed against the bank that indorses the paper. Therefore, when the member bank deposits the paper with the Reserve Bank, it is intended that there shall be a primary liability. This is true because it is provided that in case of rediscounted notes "upon which suit is brought, the bank waives presentment, demand and protest." And this is true without the formality of indorsement upon the notes, because the Federal Reserve Act provides that the indorsement of a member bank shall "be deemed a waiver of demand, notice and protest by such bank as to its own indorsement, exclusively."

[2] What is the result of such an indorsement? What is the purpose of this provision? It is to relieve the obligation of the usual conditions, and, when relieved of these usual conditions, it becomes and is an absolute obligation on the part of the bank rediscounting and indorsing the paper to pay the same upon the date fixed. At maturity the Reserve Bank in this case had a right of action against the indorser without joining the maker. Certainly the fact of the insolvency of the indorser and the appointment of a receiver puts the receiver in no other or different or better position than the insolvent bank would have been. This plaintiff had a perfect right to make proof of this absolute liability of the insolvent bank upon each of the notes containing the indorsement of such bank, and upon proof of such claim the Reserve Bank thereby acquired a vested interest in the trust fund in the hands of the receiver for the benefit of the creditors of the insolvent bank.

[3] There is no contention here on the part of the defendant that, because the notes were not due at the date of insolvency or of making proof thereon, they were unmatured debts. That unmatured debts are provable both in bankruptcy and receivership needs no citation of authority.

[4] In this particular matter the instruction to the receiver from the Comptroller's office contained the following:

"It is recognized that ordinarily the holder of a negotiable note past due may proceed directly against the maker or any one of the indorsers, but in the case of a failed national bank no lien can be obtained against the assets of the bank by judgment or execution, and all collections made must be remitted to the Treasurer of the United States for deposit to the order of the Comptroller of the Currency, and by him distributed ratably in dividends to the creditors who have proved their claims or established them by order of a court of competent jurisdiction. Contingent claims are not recognized for proof until they become direct."

But in the view I have herein expressed the plaintiff's causes of action are not "contingent claims," and the proper practice in proving

these claims against this insolvent national bank is to first deduct credits in favor of the insolvent. The fact that the claims of the plaintiff mature after the receiver's appointment does not affect the right of set-off, and in my judgment the set-off should be made as hereinafter indicated. I am not unmindful of the opinion in Ex parte Howard National Bank, Fed. Cas. No. 6,764, in substance, that the indorsers' liability is no basis for claim until the maker is insolvent. Admitting that that was true under the law as it then stood, it does not follow that it is or can be true under the provisions of the recent statute and the rules and regulations made pursuant thereto.

[5] As to the causes of action upon the draft by the plaintiff, I gather from the record that just prior to the appointment of a receiver for the defendant the plaintiff received divers checks from its members, some of them drawn on the defendant and others drawn on other banks in the town of Eureka, S. D., in which defendant did business, amounting in the aggregate to $8,277.30. Those checks were received by plaintiff Reserve Bank from its member banks, as a clearing house under the provisions of the said Federal Reserve Act and the regulations thereunder. Immediately upon receiving these checks the plaintiff gave credit to the banks from whom they were received. The checks were at once forwarded to defendant—those upon defendant for payment and remittance, and those on the other banks for collection and remittance. The defendant bank thereupon collected the checks upon the other banks, received the money, and the assets of the defendant bank were enhanced thereby, and as to the checks drawn upon the defendant it became simply a matter of bookkeeping, and they were charged to the accounts of the respective parties and a draft for the amount above stated forwarded to the plaintiff covering the total of said checks. As I understand defendant's contention, it is that plaintiff is not entitled to have defendant's deposit account and its credit for canceled stock applied upon this draft, the same as on the rediscounts and the $100 check. The law, rules, and regulations cited by both counsel for plaintiff and defendant recognize the purpose and intent that the plaintiff should perform this service. The intent and purpose to protect the plaintiff is evident. Plaintiff very properly invokes the provisions of the law and the rules and regulations applying to clearing house functions. What is the situation with reference to the plaintiff and this large number of checks received from its member banks and forwarded in due course of the performance of its duties for clearance? These checks that were forwarded to the defendant bank which were drawn upon other banks, which constituted the major portion of this entire sum, were delivered to the banks upon which they were drawn, and by those banks charged to the accounts of the persons against whose accounts they were drawn, and have been canceled and delivered to the persons drawing them, the money paid by those banks to the defendant, and, I repeat, thus augmenting the assets of the defendant, the checks of the defendant bank being paid and canceled.

Having in mind this situation, I am not unmindful of the conten-

tion of counsel for defendant that the plaintiff had the right under the rules to charge the checks back to its members. This is true, but it cannot reasonably be said, in the light of the service to be rendered, which necessarily resulted in the checks going out of the possession of the Reserve Bank, going to the bank thereafter insolvent, and by it presented to the banks upon which they were drawn, surrendered, and canceled, that this right to charge the checks back is the only right of the Reserve Bank. It is self-evident that the right to charge a check back to its member bank is dependent upon its power to return the check to the member bank so that the member bank may in turn charge it back to the prior indorser, and that indorser back to the other, and so on until it reaches the maker. The clearing house rules respecting charging back these checks must be construed in harmony with the law merchant, so that, if the check is not paid, taken up, and returned to the member bank, at the time of its return it may be charged back; otherwise it cannot. Any other interpretation would put the loss upon the member bank that forwarded it to the Reserve Bank for clearing, or upon the Federal Reserve Bank, which has no interest in the check except in the performance of its duties as a clearing house. And, clearly, the same should be a claim in behalf of the Reserve Bank holding funds of the defaulting bank. I think this interpretation is justified in the consideration of that portion of section 16 of the act in question, "and may also require such bank to exercise the function of a clearing house for its member banks."

It must be presumed that Congress never intended that these Federal Reserve Banks should be required to become clearing houses for their members scattered throughout the different states of the Union, with the thought that the clearing house should operate as it does in a given city, where messengers are sent and at fixed hours, checks are exchanged, and balances paid. They must have understood that these checks upon banks at great distances, to be cleared by the Reserve Banks, would be days in the transmission and the receipt of information with reference to them. Having this in mind, the Federal Reserve Board provided by rule that—

"Member and clearing member banks will be required by the Federal Reserve Board to provide funds to cover at par all checks received from or for the account of Federal Reserve Banks."

From the time of the promulgation of this rule the credit of a member bank with its Federal Reserve Bank was rightfully treated by the Reserve Bank as a fund to cover all checks received from or for its account by a member bank. Indeed, if this Reserve Bank, as a clearing house, was to be made practical, if it were to be made possible for the banks to deal with it with any safety, the deposit account of this defendant bank must necessarily be treated as a fund to make good the balances in the clearing against defendant. Any other interpretation would impose the duty of clearing these checks with no provision for the safety of the banks using it, and no banker would be justified in assuming such a risk. That reasonable care imposed

upon the banker in handling checks and funds of its depositors demands an interpretation that will remove all question as to the safety of the transaction. The situation of the plaintiff and the defendant here would have been subject to the foregoing interpretation, even if the defendant bank had not, prior to its going into the hands of a receiver, forwarded its drafts upon the Minneapolis bank to the plaintiff to cover the entire amount of these collections. And if, upon receipt of these checks, the defendant had simply collected the checks and appropriated the proceeds without making remittance to the plaintiff, the liability of defendant would have been the same. The defendant having forwarded this draft to plaintiff, the same having been presented to the Minneapolis bank by plaintiff and dishonored, it at once became a primary obligation of the defendant and indebtedness of the defendant to the plaintiff, which constitutes a just and valid claim against the receiver.

The foregoing disposes of the last cause of action with reference to the $100 cashier's check.

I find in the record a stipulation by counsel for both plaintiff and defendant, in substance, that the seventh cause of action stated in the complaint has since argument and submission of the case been paid and is eliminated from the controversy, and therefore is not to be further considered in this action.

I am of the opinion that the judgment in this case should determine the amount of defendant's liability to plaintiff on August 13, 1920, on each of the separate causes of action, to the end that dividends on a rediscount may stop after it shall have been paid. To do this, it will be necessary, first, to credit on the 21 causes of action the $25,618.66 which it is conceded is to defendant's credit on its deposit account and for its canceled stock. There is no question but that plaintiff had and has the right to apply the credit as it chooses, but, construing the provisions of the collateral agreement in evidence, there having been no application in behalf of the defendant, it is my opinion that the same should be applied to the 21 causes of action (excluding the seventh cause of action) pro rata. Findings and judgment should be prepared and forwarded accordingly.

Under this determination the receiver and the Comptroller of the Currency should allow the plaintiff dividends on its claim as it stood at the date of the failure of the bank. Since execution cannot issue against the assets of the bank in the custody of the receiver, the judgment drawn in favor of the plaintiff should contain an order to the receiver that he certify the amount found owing on the claims as of the date of insolvency to the Comptroller, to be paid in due course of administration. This modification of the judgment should be in terms, and it is intended that the plaintiff shall be paid on a parity with other allowed creditors.

In drawing findings and judgment, allow defendant proper exceptions.

UNITED STATES v. PORT WASHINGTON BREWING CO. et al.

Petition of LA BAHN.

(District Court, E. D. Wisconsin. August 12, 1921.)

1. **Criminal law ⟸997—Writ of error coram nobis abolished in federal procedure.**
   The writ of error coram nobis has been abolished in federal procedure as a specific remedy, and motions in the case substituted.
2. **Criminal law ⟸1192—After affirmance by appellate court trial court has power only to execute mandate.**
   After a judgment entered on a plea of guilty has been affirmed by the appellate court and mandate issued for its enforcement, the trial court is without power to permit a withdrawal of the plea and a trial of the defendant.

Criminal prosecution by the United States against the Port Washington Brewing Company and others. On petition of defendant Herbert C. La Bahn for writ of error coram nobis. Denied.

H. A. Sawyer, U. S. Atty., of Milwaukee, Wis.
Henry A. Berger and Arthur C. Bachrach, both of Chicago, Ill., for defendant.

GEIGER, District Judge. An indictment was returned on May 2, 1921, charging the defendants, in 47 counts, with a violation of the National Prohibition Act, in that they manufactured and sold an intoxicating beer; and upon a consideration of the matter now before the court a chronology of the steps in the case as shown by the record may be preliminarily noted:

Pursuant to process, each of the four defendants, with counsel, appeared before the court on the 10th day of May, 1921, and upon arraignment pleaded not guilty; and the record contains the usual recitals respecting plea and joiner of issue. Immediately upon conclusion of arraignment, the court directed that the case be tried upon the ensuing 23d day of May, 1921, which date was accepted by both the government and the defendants as the date for trial; that is to say, no objection thereto was made.

The case retained this status until the 18th day of May, when the government and the defendants—undoubtedly, as will appear, by consent of respective counsel and parties—appeared in court; and the proceedings then taken are of record. At this point reference may be made to the parties. The defendant Port Washington Brewing Company is a corporation engaged in the business indicated by its name, and the defendants Ludwig La Bahn and his two sons, Herbert La Bahn and Charles La Bahn, were and are the stockholders, and bore relation respectively to the management and direction of the business substantially as follows: The father, Ludwig La Bahn, is of advanced age, 82 years, has participated little in the affairs of the business,

and for some time prior to the time laid in the indictment had lived principally in Chicago. The defendant Herbert C. La Bahn was in active management of the corporate business. He and his brother and codefendant, Charles La Bahn, had had serious differences, consequent upon which Charles, so the parties, including the government, agreed, had had little, practically no participation whatever, in the conduct of the business or in the commission of the acts charged in the indictment. In this situation, the parties appearing in court, and after exhaustive statement by the government and defendants' counsel of the facts relevant to the case, the proceedings on the 18th day of May, 1921, are exhibited upon the record in this court as follows:

"This day came the district attorney, Mr. H. A. Sawyer, and the defendants with their counsel. And the district attorney, by leave of court, entered a nolle prosequi of this indictment as to the defendant Ludwig La Bahn. And the defendant H. C. La Bahn, by leave of court, withdraws his plea of not guilty by him before pleaded and pleads guilty and submits in mercy. And the defendant Port Washington Brewing Company, by leave of court, withdraws its plea of not guilty by it before pleaded, and pleads guilty. And the defendant Charles La Bahn, by leave of court, withdraws his plea of not guilty by him before pleaded and tenders a plea of nolo contendere, which plea is accepted by the court."

Thereupon the court sentenced the defendant Herbert La Bahn upon the first, second, third, fourth, seventeenth, and eighteenth counts to six months in the House of Correction, and upon the forty-seventh count to ten months in the House of Correction, the sentences to run concurrently, and upon each of the remaining 40 counts a fine of $50, amounting in all to $2,000; the corporate defendant was fined in the aggregate $18,800; and the defendant Charles La Bahn upon his plea of nolo contendere $50 upon each count, in the aggregate $2,350.

Immediately upon pronouncement of judgment, the defendant Herbert C. La Bahn, by his counsel, appealed to the court for a stay of execution of sentence for ten days, which was granted, the defendant entering into a recognizance. Upon expiration of the stay, May 28th, such defendant made application to the court for allowance of a writ of error to the Circuit Court of Appeals for this circuit, which, having been denied, was presented to one of the judges of the Court of Appeals and allowed, with supersedeas. Thereafter, the United States attorney having moved for a vacation of supersedeas, such proceedings were had in the Court of Appeals that the writ of error was heard on its merits on the 13th day of June, 1921, and the judgment of conviction affirmed on that day, with direction that the mandate of said court "issue forthwith," concluding in the ordinary form:

"You therefore are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

Upon the reception of the mandate in this court, the defendant Herbert La Bahn, upon the same or following day, presented to this court a petition for a writ of error coram nobis, which this court refused to

receive or allow to be filed, whereupon, within the ensuing few days, application for a writ of error was made to the Circuit Court of Appeals, which application, so this court was advised by counsel interested in the matter, was withdrawn pending its presentation in open court.

Thereafter, and on or about the 22d day of June, 1921, the defendant Herbert La Bahn renewed his application in this court for leave to file a petition for a writ of error coram nobis, which petition, being filed, was heard by the court, the defendant desiring to introduce testimony in its support; and the testimony of the defendant and three attorneys who participated in the matter was given on behalf of the respective parties and is now before the court for consideration, whether the application be considered in a technical aspect for the issuance of a peculiar writ or for other relief as upon motion.

At the time, May 18th, when the court disposed of this case, three attorneys, Messrs. Fawcett, Kluwin, and Bowler, were present and appeared on behalf of the defendants. The first of these appeared on the original arraignment as counsel for all of the defendants. Mr. Kluwin had been retained on or shortly before May 18th. Mr. Bowler seems to have appeared in the case and in court for the first time on May 18th, and undoubtedly in the special interest of the defendant Charles La Bahn. He, so the testimony shows, from the start insisted that whatever the facts may show respecting knowledge on the part of Charles La Bahn of the culpable acts of the corporation and his brother, Herbert La Bahn, it would not and could not be shown that he was a culpable participant in any of the acts laid in the indictment. These matters are now referred to in view of the grounds asserted in the petition of the defendant Herbert La Bahn for a vacation of the judgment and recalling his plea of guilty. The petition recites:

(1) The retention of Kluwin and Fawcett on behalf of the petitioner, Kluwin having entered the case May 18th, and "represented to your petitioner that he was well acquainted with and personally friendly and intimate with H. A. Sawyer, United States attorney, * * * and that he would and could arrange to have your petitioner enter a plea of guilty in said cause, and that a fine would be imposed upon the entry of such plea."

(2) That the trial of this case had been set for May 23d, and that on May 18th petitioner did not know that there was to be or would be a hearing, or that any proceedings would take place in connection with the indictment against him; that with his attorneys he came to the office of the United States attorney for an interview with the latter; "that immediately following the interview between H. A. Sawyer, the United States attorney, and the said Fawcett and Kluwin your petitioner was told by the said Kluwin to come along and follow him, and your petitioner then found himself in the courtroom of this honorable court."

(3) That your petitioner was seated "in the rear of the courtroom and did not know and had not been informed that any proceedings were to be had with respect to the indictment pending against him; that at said time and place he heard the said John Kluwin inform the court that your petitioner, the defendant in said indictment, desired to enter a plea of guilty to the indictment."

(4) That Kluwin was "wholly unauthorized and had no authority to inform the court that your petitioner desired to enter a plea of guilty, and * * *

that the announcement of the said John Kluwin that your petitioner desired to enter a plea of guilty came with surprise and was wholly unexpected."

(5) That petitioner had "specially and directly and positively instructed and informed his counsel, both Kluwin and Fawcett, that under no circumstances would he consent to the entry of a plea of guilty if there was a possibility of the imposition of imprisonment of any kind, and your petitioner stated emphatically and expressly to both Kluwin and Fawcett that, if such possibility of imprisonment upon the entry of a plea of guilty existed, your petitioner desired to plead and would plead not guilty."

(6) That petitioner's first intimation that Kluwin would enter or intended to enter a plea of guilty was when the words were expressed by Kluwin in open court on the day mentioned, and "that immediately following the imposition by the court of the imprisonment and fine against this petitioner he remonstrated and criticized and condemned the action of the said John Kluwin in the entry of said plea of guilty, and then and there immediately informed the said Kluwin that the entry of said plea of guilty was made without any right or authority and in express violation of your petitioner's instructions, and your petitioner then and there requested the said John Kluwin to so inform the court, which the said John Kluwin refused to do, stating that your petitioner need not be alarmed or be concerned about the entry of the plea of guilty; that he, the said John Kluwin, would see that everything came out all right."

(7) "That at such time and place, viz. immediately following the entry of the plea of guilty, and immediately following his protest to the said John Kluwin that he was wholly unaware and ignorant of his right to then and there protest to the court, and your petitioner further avers that he remained wholly unaware and ignorant of his right to protest or of the legal effect of the entry of said plea by the said John Kluwin and of his right to move in said District Court to set aside the entry of said plea of guilty or to correct the said plea of guilty, and that he remained in ignorance of each and of all of these matters on said 18th day of May, 1921, and during all the time from said 18th day of May to the 14th day of June, 1921, at which time he was informed of his legal rights by counsel other than the said Fawcett and Kluwin."

The determination of the facts must rest upon the testimony taken upon this hearing, and upon such matters as are within the cognizance of the court as having taken place upon the hearing of the case; and I conceive that there are but two questions:

First. Is the plea of guilty which is of record in this case the voluntary plea of the defendant?

Second. Can this court, in view of the affirmance of the judgment of conviction by the Court of Appeals, and the remission of the case under a mandate directing enforcement of such judgment, now entertain an application to vacate, or reopen the judgment, or grant a trial?

The first of these questions is one of fact, which, if a negative answer be given to the second, need not be decided. But I have concluded, having taken the testimony, and also because of the extraordinary character of the defendant's charge, to consider the matter of fact, and to express my views thereon.

There is no doubt that between May 10th, when the case was set for trial, and May 18th, the defendant, through his counsel, had a number of conferences with the United States attorney, to the end of determining whether the case, as against any or all of the defendants, should be tried upon the merits as they became involved through the initial pleas of not guilty interposed by all of the defendants, or whether the defendants, or any of them, would withdraw or change the

then standing plea. It is unquestioned that the district attorney, realizing the necessity of preparing for trial and issuing subpœnas for the large number of witnesses to be called on behalf of the government, became very insistent that defendant's counsel should apprise him not later than May 18th of any conclusion reached with respect to the defendants in the matter of changing their pleas. It appears also that the defendants arranged to meet in Milwaukee with their counsel, in view of this insistence on the part of the United States attorney, and that Attorney Kluwin was called into the case, doubtless because of the urgency of making a reply to the district attorney's demand to be advised as noted.

It will serve no purpose merely to narrate the testimony given by the several witnesses upon this hearing, because the effect of such testimony can be best seen by its consideration in the light of matters uncontradicted. In short, as will be seen, the defendant, notwithstanding the allegations of his petition, has, at most, raised an issue of veracity between himself and every other witness upon the hearing which issue must be resolved, unhesitatingly, against him. Apparently, assuming that the petition filed is prima facie sufficient in its allegations of fact, for some purpose or other, the defendant and his counsel appeared to endeavor to substantiate it: First, by assertion of the defendant that he directed his counsel to plead not guilty in certain contingencies; secondly, that he never "authorized" his counsel to plead him guilty; or, third, that in court he never expressly said, "I consent to this plea of guilty."

Now, it is uncontroverted that the defendants and their counsel held extended conferences in Milwaukee on the 18th of May, solely for the purpose of considering the state of the case and what answer should be given to the district attorney in response to his demand that he be notified not later than on that day whether trial would be had upon the then standing pleas of not guilty. Nothing else was discussed. The defendant supports this by the strongest affirmative testimony. An original suggestion that defendant did not know of the possibility of a prison sentence upon conviction under the law is likewise eliminated from the case. There is an entire concurrence in the testimony upon the proposition that not only was the law well understood, but that in the conferences it was assumed that upon a conviction, either upon trial or upon a plea of guilty, a prison sentence was not only possible, but in the highest degree probable. It is unquestioned that in the conferences there was no skepticism on the part of anybody upon this phase of the case. It is equally true that much time was spent in discussing the means, if any could be suggested, for ascertaining in advance the probable action of the court. It is without controversy that, after the conference between defendants and their counsel, a further conference was held with the United States attorney; that the latter agreed to submit to the court an application for leave to enter a nolle prosequi against the defendant Ludwig La Bahn, and indicated that he would offer little or no opposition to an application to plead nolo contendere on behalf of the defendant Charles La

Bahn; that he was unalterably opposed to a consideration of the case against the defendant Herbert La Bahn, except as one exhibiting plain guilt, and that, unless a plea of guilty were entered on his behalf, the case must go to trial. It is likewise unquestioned that upon terminating the conference in the district attorney's office the entire party came at once to the courtroom, where the pleas now of record were entered, accepted, and acted upon, after formal application for the withdrawal of each of the previous recorded pleas of not guilty; that the plea of guilty on behalf of the defendant Herbert La Bahn was entered formally, categorically, within the presence and plain hearing, the perfect understanding and comprehension, of the defendant and every one else in the courtroom; that exhaustive statements of fact were made by the district attorney and the respective counsel for the defendants, all for the purpose of aiding or assisting the court, or the defendants, in the matter of the acceptance of the changed pleas and the penalties to be imposed thereon. Not a suggestion nor a syllable of dissent was or at any time had been voiced by the defendant respecting the truth of any of the foregoing.

The witnesses Kluwin and Bowler have given in great detail what transpired at the various conferences. The witness Fawcett, while declining, apparently, to accede to some of the matters of detail, unhesitatingly concurred in the ultimate inference to be drawn from the testimony in this case, namely, that what happened in court was precisely what he, as a lawyer for the defendant, contemplated should happen, in the light of the conferences which preceded the action of the court; as he puts it, any lawyer would certainly get that impression.

No one has suggested that as to the defendant Herbert La Bahn the conferences proceeded upon any other hypothesis than that of his and the corporation's undeniable guilt. True, he endeavors to say that he declined to plead guilty if there was to be a prison sentence, but that the conferences proceeded with a discussion of the matters of fact pertaining to the case upon the hypothesis either of innocence or a meritorious defense is not suggested anywhere in the case. The relation of the individual defendants to each other, their employment initially of the same counsel upon the original pleas of not guilty, the entrance of Mr. Bowler and Mr. Kluwin into the case after issue had been joined by pleas of not guilty, and the conferences held as noted, are circumstances throwing light upon the situation and afford most persuasive support to the testimony other than that of the defendant.

Now, it would be contrary to probabilities that, in the situation thus developing, either the parties or their counsel should be able to disclose conferences wherein the relations of the individual defendants as members of a family interested in a corporation should be discussed or conclusions should be reached, authority granted or received, according to set formulæ or precise terminology such as is suggested by questions put to the defendant when he was on the stand. It would be anomalous—it never happens—that in such situations a party will address his counsel in formal words endowing him with the requisite authority to take a step in litigation which has been the subject-matter

of exhaustive, though informal, conference. The question considered by the parties whether the pleas of not guilty should stand was answered in those conferences understandingly to the comprehension and apprehension of both parties and counsel, in the same manner and by the use of ordinary language as it usually is. Therefore, when we come to a consideration particularly of the testimony of Messrs. Kluwin and Bowler, we find that what they say is in entire accord, not only with much that the defendant himself admits, but with rather conclusively probable expectation, in view of the intention of the conferences, in the accession by parties and counsel in open court to the happening of the things which there happened, and the affirmance by the defendant himself of those facts after the termination of the case and for three weeks thereafter.

So, on the one hand, there is the clear, unequivocal testimony dealing with what happened in the various conferences and in open court, leaving no doubt in the mind of any one who will read the testimony or who heard the statements, or who had cognizance of the proceedings, that the things that were done were those to which the parties had agreed. The testimony given by Kluwin and Bowler stands upon the record without contradiction, except as hereinafter noted, and, when given, was, as to neither of them, sought to be tested out by cross-examination. Against this, as tendering the only possible issue, is the statement of the defendant that he had instructed Kluwin and Fawcett that he would not plead guilty. Both deny it. One would think from his testimony that, while he was present during the whole day, apparently in as close conference with his own counsel and as close to a conference at the district attorney's office as he could get, he yet heard but little of what was transpiring; that, although the purpose of going to the district attorney's office, of entering the court, was known to every one, he did not include himself and his part of the case as comprehended within the purpose; and that, although his guilt and his assumption of the consequences were fully discussed in all the conferences, likewise the consequences of his acknowledgment of guilt and the course to be pursued for the purpose of getting a short respite from imprisonment, yet he, in passing from the district attorney's office to the courtroom, expressly instructed Kluwin to interpose a a plea of not guilty, when the case already stood on such a plea. In this he is alone, not even getting support from any one in respect of his assertion that after imposition of sentence he protested or was surprised. It would seem quite without controversy that immediately upon the imposition of a sentence, which, except possibly as to the length of imprisonment, was fully expected by every one, every energy was at once bent toward steps for executive clemency. A stay of execution applied for and granted was in fact availed of for the purpose of a trip to Washington. According to Fawcett's testimony, he and the defendant discussed the result in court much of the time and "leisurely." Apparently at no time was there an intimation to Fawcett of the story told by the defendant on the stand respecting any conversation between the defendant and Kluwin. In a petition to the Presi-

dent for clemency, the defendant apparently asserted the interposition of his plea of guilty upon the advice of counsel, not once suggesting that it was not the plea authorized or assented to.

Without going into further detail, there is nothing in the case to suggest that Kluwin and Bowler, upon any promptings whatsoever, either equivocated or fabricated a syllable of the narrative given by them respectively of what transpired prior to the imposition of the sentence on the defendant. The story that the defendant, in a clandestine sort of a way, should communicate what he says he communicated to Kluwin, when nearly an entire day had been spent in reviewing the case and reaching a conclusion that that which was done should be done, is utterly beyond belief, and I unhesitatingly reject it as one made up, when, nearly a month after sentence, a frivolous writ of error had spent itself as a means of delaying or frustrating execution of the judgment.

But, even if the defendant's story could be either accepted or debatably entertained, the answer to the second question above propounded must dispose of this entire proceeding. Certainly our system of trial and reviewing courts contemplates that at some stage in litigation finality in results be attained. Certainly it is not contemplated that appeals from the final judgments of trial courts may be taken, and, if affirmed by a reviewing authority, the former should still retain power to reopen and again try lawsuits. This does not mean that in no case when there has been a review and an affirmance can there be a remedy. But it does mean that under our system of courts action by a reviewing tribunal must operate either as a limitation upon, or a complete deprivation of, power in trial courts for reopening litigation. This is familiar law, and no better statement of the doctrine can be found anywhere than in Re Potts, 166 U. S. 266, 17 Sup. Ct. 520, 41 L. Ed. 994. Obviously that the defendant calls his proceeding a petition for a writ of error coram nobis makes no difference in this case. That writ has become obsolete, and matters formerly cognizable through it as a medium must now be made the subject-matter of ordinary motion. But its analogy at law to bills of review in chancery and the analogy of any motion at law to bills of review in chancery, when the time for exerting any other remedy has expired, are perfect.

Therefore let us consider the present status of this case so far as this court is concerned. The judgment pronounced upon the defendant was certainly final and immediately executable. It ended the case. But he sued out a writ of error, thereby transferring the case to the Circuit Court of Appeals, and likewise, for the time being, suspending the power of this court to execute the judgment. That writ of error undeniably asserted the rendition of judgment by this court upon the defendant's plea of guilty. That plea, so far as it constituted the basis of record for the action of this court, was asserted by the writ of error to be his plea in the case, and he sought review of the proceedings in this court, and challenged the judgment, notwithstanding his plea. Without question record so transmitted to the Court of Appeals formed the basis for its action, and, when the judgment was affirm-

ed, it was affirmed upon a plea asserted by the defendant to be his plea in the case, and the affirmance of the judgment necessarily read that plea into the judgment of the Court of Appeals. The mandate of the Court of Appeals is absolute. It contains no reservation to this court of any power to retry the case. It contains no direction other than the direction in law to enforce the judgment; and, there being no reservation nor direction expressed, none is implied. The judgment has been remitted to this court, and by remission upon affirmance there has been withdrawn from this court all power to re-examine any question of fact or law, even jurisdiction, comprehended within appellate review and essential to the affirmed judgment, all power except that of enforcement; and that is imperative. It would be anomalous if in this situation this court by motion or by a proceeding otherwise styled, or by process or by writ, at its mere discretion, could now simply upset the affirmed judgment. It would be anomalous if a litigant, either in chancery, at common law, or in criminal case, could take his adversary to the reviewing tribunal and treat the proceeding as justified for speculative purposes only, as amounting to nothing in case of an adverse ruling, confident at all times of his right through innumerable proceedings upon return to the District Court to prevent such enforcement as should come upon finality; in other words, to stave off real finality indefinitely.

[1, 2] A somewhat careful examination of the adjudicated cases discloses clearly the abolition of the writ of error coram nobis in federal procedure as a specific remedy; the substitution of motions in the case; the universality of application of the principle as inherent in our system of trial and appellate procedure that trial courts, through determination upon appeal, are deprived of power of reopening, reexamining, retrying, altering, or changing determinations which have been read into appellate judgments. Without citation from cases, it will suffice to call attention to the following as sustaining the view that in the present case, unless and until the appellate tribunal "releases," as some of the authorities speak of it, this court, from its single obligation to enforce the affirmed judgment, there is no power residing here except the single power of enforcing that judgment: U. S. v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129; McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457; Scott v. U. S., 165 Fed. 172, 91 C. C. A. 206; Ex Parte Fuller, 182 U. S. 563, 21 Sup. Ct. 871, 45 L. Ed. 1230; Angle v. U. S., 162 Fed. 264, 89 C. C. A. 244; Morris v. U. S., 185 Fed. 74, 107 C. C. A. 293; Steam Dredge A, 229 Fed. 682, 144 C. C. A. 92; Sundh Electric Co. v. Cutler-Hammer Co., 244 Fed. 170, 156 C. C. A. 591; Durant v. Storrow, 101 U. S. 556, 25 L. Ed. 961; National Brake & Electric Co. v. Christensen, 258 Fed. 886, 169 C. C. A. 600. See, also, Nat. Brake & Elec. Co. v. Christensen, decided January 3, 1921, 254 U. S. 425, 41 Sup. Ct. 154, 65 L. Ed. ——; Sibbald v. U. S., 12 Pet. 492, 9 L. Ed. 1167; Suhor v. Gooch, 248 Fed. 870, 160 C. C. A. 628; Bronson v. Schulten, 104 U. S. 413, 26 L. Ed. 797; Phillips v. Negley, 117 U.

S. 672, 6 Sup. Ct. 901, 29 L. Ed. 1013; Pickett v. Ledgerwood, 7 Pet. 144, 8 L. Ed. 638.

The question is not whether defendant, if the facts are as he asserts them to be, is wholly without a remedy. It is simply whether, in view of the affirmed judgment and the obligation resting upon this court pursuant to it, the power rests here to entertain at this time any remedy. It does not seem possible that, consistently with the principle above discussed, and which seems of universal application to proceedings upon every side of the federal courts, there coexists, in defiance of it, power in trial courts to entertain such an application as is here made without previous grant or reservation obtained from the appellate tribunal.

Either ground herein discussed compels the conclusion that the proceeding be dismissed; and an order may be entered accordingly.

JOHNSON et al. v. BROWNING KING & CO.

(District Court, E. D. Wisconsin. February 26, 1917.)

1. **Patents ⟸168(2)—Record may be resorted to in determining presumptive validity of broad interpretation.**
   Though a suit for an infringement of a patent does not involve merely a review of the Patent Office proceedings on the record there made, such record, disclosing that patentee's insistence on a broad pioneer disclosure was not accepted by the Patent Office, may be most persuasive in determining whether recognition of presumptive validity, because of the issuance, shall be great, ordinary, or slight, and whether it may attach as well in support of a broad as of a narrow scope.

2. **Patents ⟸328—No. 973,200, claim 1, for union suit, held anticipated.**
   The Johnson patent, No. 973,200, claim 1, which covered broadly any union suit having a permanently closed crotch and an opening extending from the waist line down into one leg, *held* void for anticipation.

3. **Patents ⟸328—No. 973,200, claims 2 and 3, held not infringed.**
   The Johnson patent, No. 973,200, claims 2 and 3, covering a specific construction of a union suit having the posterior opening extend from one side of the waist line down into the opposite leg, *held* not infringed by defendants' garment, in which the opening was vertical.

In Equity. Suit by Horace G. Johnson and another against Browning King & Co. for infringement of a patent. Bill dismissed.

Offield, Towle, Graves & Offield, of Chicago, Ill., and Lines, Spooner & Quarles, of Milwaukee, Wis., for plaintiffs.

Duell, Warfield & Duell, of New York City, for defendant.

GEIGER, District Judge. Complainants sue, charging defendant with infringing letters patent 973,200, issued to plaintiff Johnson, October 18, 1910, upon an application filed September 25, 1909. The defenses are anticipation, lack of invention, and noninfringement.

The invention, the patent states—

"relates to that class of underwear known as union suits, and has for its chief object to provide an improved construction of such garments permitting the use of a permanently closed crotch, and dispensing with the use of double flaps, or a single wide drop-fall or flap, with their numerous fastenings, hitherto used to cover the posterior opening, while at the same time presenting a posterior opening of ample dimensions for the required purpose, covered by a single flap capable of being secured by a single button or other fastening. In other words, my present invention is designed to supply a garment combining in its construction the two most essential requisites for comfort and convenience in garments of this character, namely, a permanently closed crotch, and a posterior opening of ample dimensions and convenient location, that will not gap to expose the person, and closed by a single flap requiring but a single button or equivalent fastening."

A description of the invention, as given by the patentee, is addressed to the practice in the art of making this type of undergarment out of the "tubular blank," being the form in which the goods, at the initial stage of cutting and manufacture, are formed. Thus, of figures 3 and 4, which serve as well for description of the invention as for the manner of proceeding to cut a garment, it is said:

Fig. 3.

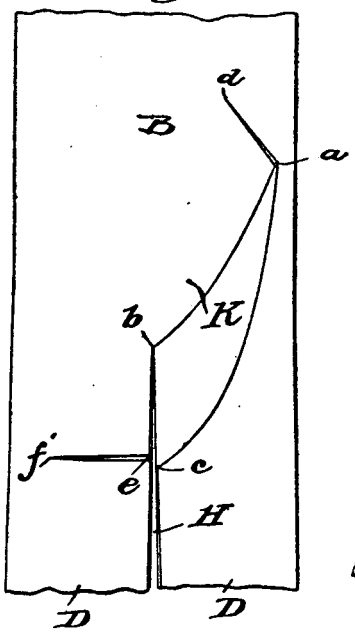
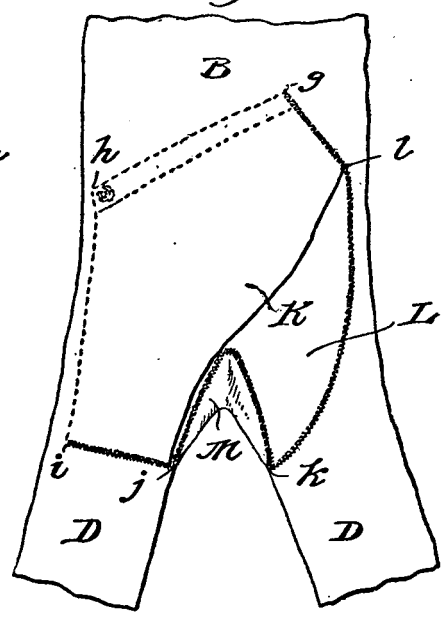
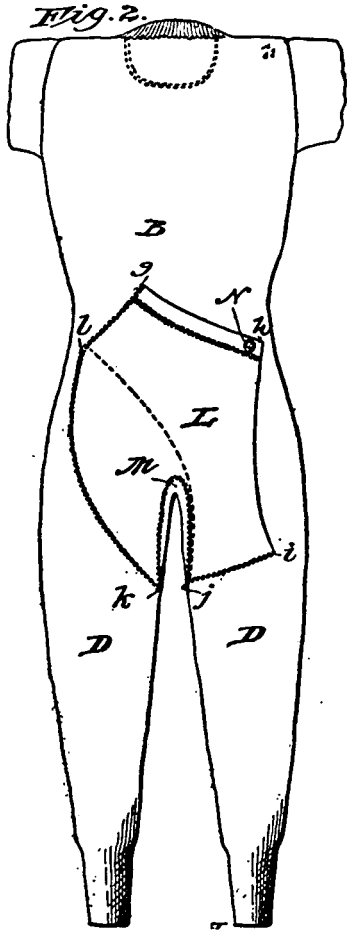


Fig. 4.



"Referring more particularly to Fig. 3, which shows the tubular blank turned inside out, a part of the rear body and leg portion is cut out, in the lines *a–b*, *b–c*, and *c–a*; and preferably oblique transfer cuts *a–d* and *e–b* are made in the rear body and leg portions opposite the extremities of the excised portions *a*, *b*, *c*, thereby forming a temporary inner flap member *K*, bounded by the lines *d–a*, *a–b*, *b–e*, *e–f*. I next form, from a separate piece of cloth, an external flap *L*, having the irregular form shown most plainly in Fig. 2 (below) and bounded by the lines *g–h*, *h–i*, *i–j*, *j–k*, *k–l* and *l–g*."



This reference to the figures and descriptive matter of the patent, therefore, shows the improvement to consist in an opening formed by a defined excision in the rear view of the garment, Fig. 2, indicated by the dotted lines *l–j* and *l–k*; The line *k–j* being the seam of the gusset *M* (Fig. 4). This excised opening, the patentee states, is covered by the flap *L* forming the seat or posterior of the garment.

The patentee's own description is then summarized as providing:

"* * * In the rear of the garment and extending from the line *l–g* in the back *obliquely* down to line *l–j* in one leg, below the crotch, a posterior opening defined by the line *l–j* and guarded by the inner wall member *K*, constituting a part of the body and leg of the garment itself, and the outer wall member comprising the flap *L*."

Again:

"From the above it will be seen that my invention provides a garment having a permanently closed crotch and a posterior opening extending from a point near the waist line to a point below the crotch in one leg only. By carrying this opening obliquely from a point substantially in the waist line down to a point on the inner side of the leg below the crotch I provide an opening of ample dimensions, not requiring twisting or lateral displacement of the intermediate portion of the garment when in service. This opening is fully protected by the single stiched-in flap *L*, requiring to be buttoned at but a single point to effect a perfect closure."

And the claims of the patent are:

"1. An undergarment having a permanently closed crotch and a posterior opening extending from a point near the waist line to a point below the crotch in one leg only, substantially as described.

"2. An undergarment having a permanently closed crotch and a posterior opening extending from substantially the waistline at one side of the center to a point in the opposite leg below the crotch, the inner wall of said opening being formed by a part of the body and leg portions of the garment and the outer wall being formed by a sewed-in flap having the free portion adapted to button over and close said opening on its outer side, substantially as described.

"3. An undergarment having a body and leg portions thereof cut to form an oblique posterior opening extending from substantially the waist line across the seat to a point in the opposite leg below the crotch and an inner flap coextensive with said opening, and an outer flap, said inner and outer flaps and body portion being sewed together at the top of the posterior opening, and said inner and outer flaps and leg portion being sewed together at the bottom of said posterior opening, and said outer flap having a free por-

tion adapted to button over and close said opening on its outer side, substantially as described."

It will be observed that these claims severally present as the elements of the improvement in an undergarment:

(1) In claim 1: (1) A permanently closed crotch; (2) a posterior opening extending (*a*) from a point *near* the waist line to a point (*b*) below the crotch (*c*) in one leg only.

(2) In claim 2: (1) A permanently closed crotch. (2) A posterior opening from (*a*) *substantially* the waist line at one side of the center to (*b*) a point in the *opposite* leg below the crotch. (3) An inner wall of the opening being formed (as described). (4) An outer wall (of the opening) being formed by a sewed-in flap. (5) The flap having a free portion adapted to be buttoned so as to close the opening on its outer side.

(3) In claim 3: (1) An *oblique* posterior opening (cut out of the body and leg portions) extending (*a*) from substantially the waist line *across* the seat to a point (*b*) in the opposite leg (*c*) below the crotch, and an inner flap, etc.

If the contention in this case were whether the patentee's object to supply a garment having (1) a permanently closed crotch, and (2) a posterior opening of ample dimensions and convenient location closed by a single flap, was attained through the constructions embodied in claims 2 and 3, the issue of infringement alone would probably determine the case in favor of defendant; for, as hereinafter indicated, not alone is defendant's garment, but also plaintiff's commercial garment, so essentially at variance from the limited form of construction disclosed in these two claims, as well as the specifications and drawings, that infringement cannot be said to be shown to the requisite degree of clearness. But the plaintiff's contentions respecting the validity, scope, and infringement of claim 1 are such that, if tenable, they give to the patent, as defendant contends, an importance equaled by the insignificance which must be given an apparently crowded paper and practical art.

The contentions of the parties upon this claim require an examination of the art and the history of the patent as disclosed in proceedings to obtain its allowance. It may be assumed permissible to refer to such history for the purpose of considering the application of language found in the present claims and specifications to the drawing—certainly when such language gives great scope to a claim and the drawings indicate a restricted idea. Upon the application as first presented the patentee, as at present, declared his chief object to be:

"An improved construction of such garments (union suits), permitting the use of a closed crotch and dispensing with the use of double flaps heretofore deemed necessary to effect closing of the posterior opening."

He proceeded:

"To this end, my invention is chiefly distinguished by the provision of a posterior opening, extending obliquely from substantially in the waist line down to a point on one leg of the garment below the crotch, with but a single flap covering said opening."

Upon this certain proposed claims were predicated, among them:

"Claim 1. An undergarment having a closed crotch and a single posterior opening, extending from substantially the waist line to a point in *one leg* below the crotch, substantially as described."

"Claim 2. An undergarment having a closed crotch and a posterior opening, extending *obliquely* from substantially the waist line to a point in the *opposite leg* below the crotch, substantially as described."

(The italicized words indicate the differences between these two claims.)

"Claim 6. An undergarment having the body and leg portion thereof cut to form an oblique posterior opening extending from substantially the waist line across the seat to a point in the opposite leg below the crotch, and an inner flap coextensive with said opening and an outer flap, said inner and outer flaps and body portions being sewed together at the top of the posterior opening and said inner and outer flaps and leg portion being sewed together at the bottom of said posterior opening, and said outer flap having a free portion adapted to button over and close said opening in its outer side, substantially as described."

A reading of these cannot but impress one with the idea that proposed claim 6 embodies the elements which are asserted to be the "chief distinction" of the invention and also subordinate elements; certainly it embodies the structure disclosed in the drawings and the then specifications. In claim 2 is found the asserted distinctive elements of an *oblique* opening extending into *one leg.* But claim 1, when finally allowed, had a breadth of language disclosing a construction without other limits than that the posterior opening *extend from substantially the waist* line to a *point in one leg below* the crotch—this, of course, if "substantially as described" be not given the limitation of the descriptive matter found in the drawings and specifications.

The Patent Office rejected all claims first presented. Three of these, 7, 8, and 9, were specific respecting the gusset insert, *M*, shown in Figs. 2 and 4. They were abandoned. The other six were rejected upon reference to the patents to Scott, 904,022, November 17, 1909, and Prue, 699,896, May 13, 1902, when considered with patent 705,070, July 22, 1902, to Graham.

It suffices for the present to say, of these references, that Prue disclosed the now conventional type of union suit having a posterior opening formed by what he calls a "vertical slit" upwardly from the crotch, covered by a single flap of quarter-oval shape, extending from such slit across the adjacent half of the seat portion of the garment. Scott discloses a construction "having an opening extending from the neck down the front and under the crotch and along the lower portion of the posterior." The opening at the posterior is closed by two sewed-in portions; the one a triangular gusset, the other likewise a gusset, but large enough to serve as a flap, so that, when sewed to the opposite side of the opening, the latter overlaps the former at the median line. Each of these is extended down into the inner leg portion of the garment, below the crotch. Graham's garment discloses an opening broadest at its base (near the lower part of the seat) and inclining upwardly and inwardly toward the median line at the top. The lower portion is a little above the crotch of the garment. The crotch is permanently closed.

This action of the Patent Office drew from applicant the criticism, respecting Prue and Scott, that—

"Neither of them discloses a garment having a closed crotch or a posterior opening extending down into the leg below the crotch. By a closed crotch, applicant intended a permanently closed crotch such as is made by sewing together or overlapping portions of a gusset or inset (as shown) or otherwise, in contradistinction to a crotch formed by overlapping portions buttoned together and intended to be opened in using the posterior opening."

Again:

"By utilizing the feature of extending the posterior opening *down into the leg of the garment below the crotch* to a point on the under side of the leg, applicant has been able to get a posterior opening large enough to be practical and at the same time to make a complete closure of the same opening by means of a flap requiring but a single fastening."

Amendments canceling the gusset claims, also adding the word "permanently" as descriptive of the closed crotch, adding a claim practically of the breadth of claim 1, another, describing the opening as "formed between a pair of lapped members," were thereupon proposed. Again, all claims were rejected, the examiner citing as a further reference the patent to Devoe, 562,287, June 16, 1896. The reference evidently was deemed pertinent as disclosing the notion—if it needed disclosure—of a posterior opening whose size, dimensions, and character depended upon extension into the leg portions of the garment below the crotch; for applicant at once proposed amendments which characterized the opening as extending into *one* leg only, adding:

"But applicant's real discovery lies in the fact that by extending the posterior opening into one leg only below the crotch, an opening of ample dimensions is provided, and one which may be practically closed by a narrow obliquely folding flap requiring but a single button. * * *"

Thereupon the examiner again rejected the claims, excepting, however, the then numbered claim 7—being the same as 6 above—which was allowed, as "it is considered to define whatever differences that exist between the construction disclosed by applicant and that shown by the art of record." Applicant then renewed his efforts, by presenting claim 1 without change; claim 2 (prior claim 4), which charterized the opening as extending "from a point in the back *above the crotch* to a point in the *inner portion of the leg below* the crotch; claim 3, describing the opening as extending from "substantially the waist line to a point in the opposite leg below the crotch," etc.; claim 4, for "an oblique posterior opening from substantially the waist line across the seat," etc. (identical in language with former claims 6 and 7); and claims 5 and 6, dealing with the "opening formed by a pair of lapped members," and the permanently closed crotch and the specific form of flap, respectively. All other claims were canceled. An extended argument on behalf of applicant reiterated the position taken upon the reference to Scott, Prue, Graham, and Devoe. Thus claim 1 is declared to represent the most "comprehensive statement of applicant's invention," and—

"Nowhere in the art cited or in the entire art can there be found any such an opening as this claim defines, wherein *part of the body* and part of *one leg only* of the garment is used for a posterior opening."

Again:

"The heart of applicant's invention is in the single opening or slit running from about the waist line to a point in one leg only well below the crotch. This feature is new. The best and preferred location of this opening, as herein shown and claimed, is from a point near the waist line above one leg, obliquely across the back, to a point in the inner side of the opposite leg below the crotch. This is also new."

It is worthy of notice that at this same time applicant refers to claim 4 (former claim 7, covering the "oblique posterior opening"), and which the examiner had on previous action declared allowable, as differing from the preceding claims "in a specific definition of the posterior opening," etc. All claims excepting the one noted were again rejected, the examiner observing that:

"Whatever differences exist between the construction covered by these claims (rejected claims 1, 2, 3, 5, and 6), in view of the prior art of record, and the allowed claim (4), are held to be mere colorable differences, and not such as would rise to the dignity of patentable invention."

An appeal resulted in the affirmance of the examiner's allowance of claim 4 and his rejection of claims 2, 5, and 6. A recommendation by the appeal board of the allowability of claim 3, if the extension of the opening be limited to substantially the waist line "at one side of the center," resulted in an amendment accordingly, and thereupon—except for a motion by applicant for rehearing—the patent issued with its three present claims.

Upon the appeal, the examiner's statement in substance is:

(1) That the language of claim 1 reads upon the Devoe construction, except that in the latter the opening was extended into both legs and not *one leg only*; but that the difference, in view of what the art disclosed respecting the use of flaps on one side only, was not patentable.

(2) That claim 2, in its breadth of language, read squarely on Devoe.

(3) That claims 3, 5, and 6 embodied mere colorable variations, and are either covered by the allowed claim or are fully anticipated by the references.

(4) That claim 4 (present claim 3) "allowed appellant ample protection for the very slight and simple change he made over said art."

That applicant, in meeting the position taken by the examiner, at the outset classified union suits in the art into "regulation open crotch," viz. Prue and Scott, and "regulation closed crotch," such as Devoe and Graham, and asserted—which is of importance in view of the testimony in the case—that:

"Prior to appellant's invention *all closed crotch union garments on the market* had *side placket openings* and a wide drop fall, which *required numerous fastenings at the waist line.*"

Without pursuing for the present the history of the patent, this position of the applicant on this important matter of fact, if accepted as true, might, and undoubtedly did, have a persuasive effect upon the appeal board. That it probably was accepted as the fact may not be surprising, in view of the ex parte character of the proceeding; for even in litigation involving this identical patent (Johnson v. Lambert, not reported) the truth of Johnson's assertion is thus accepted by District Judge Hough:

"When Johnson filed his application (September, 1909) there were, as revealed by patents and oral evidence, two distinct classes of union suits, the drop seat (Pennington, No. 816,880; Gould, 884,815; Graham, 705,070) and open crotch, the latter subdivisible into those with crotch incapable of closure (plaintiff's 5 and 6) and those with crotch closing with buttons or equivalent devices (Scott, 904,022)."

Undoubtedly this matter of fact was appreciated by applicant as of great importance in support of a claim of invention of great breadth. The primary examiner appears immovable in his purpose to take applicant's word, as found in his drawings and specifications, that the inventive concept embodied a *permanently closed crotch* union garment with a *posterior opening extending obliquely across the seat and extending to the leg.* Obviously, the fact, if it were such, that prior to the plaintiff's endeavors a *permanently* closed crotch, except the particular types disclosing the wide opening and drop fall flap, was unknown, or the further fact, if it be assumed, that no one had been able to devise an opening other than the Devoe or Graham types, which, in a closed crotch, was practical in respect of the degree of closure and the comfort and convenience demanded by users—either or both of these facts or assumptions may well have been persuasive in support of the view that a construction, disclosing a permanently closed crotch with an oblique opening from near the waist line at one side and extending across the seat into the opposite leg, was patentably novel; that it really was, as is claimed, a *permanently closed crotch garment,* with a new type of opening.

That is to say, granted that Scott and Prue did not disclose true permanently closed crotch garments, that Graham and Devoe are distinguishable as closed crotch with wide cut-out openings coverable by drop flaps, and that no other form of permanently closed crotch in connection with any other sort of opening was known, then the contention that a permanently closed crotch, with an oblique opening across the seat extending to the inner side of the leg, could be distinguished from Scott, who disclosed a vertical opening without a *permanently* closed crotch, from Prue, with a vertical slit convertibly open or closed at the crotch, from Graham, with its wide opening and drop fall covering, or from Devoe, with its triangular opening (which, however, was capable of considerable structural variation) formed by extending it into the leg portion of the garment at both sides, could well be accepted by the primary examiner. He evidently felt that the advance was sufficient to support the claim of invention, and his characterization of it as "slight" or "simple" makes no difference, now that this claim, which concededly discloses plaintiff's invention in specific language, has been allowed.

Recurring, now, to the proceedings for prosecution of the claims before the appeal board, this attitude is in substance taken by the applicant: That, although the allowed claim covered the precise disclosure of the drawings in almost the language of the specifications, it was "good as far as it goes," but that "in view of the distinctly novel character of the posterior opening of appellant's garment, and the unquestionable advantages secured thereby, * * * it is wholly unreasonable to force the appellant to accept a claim wholly inadequate

to protect his real invention," and the purpose is again disclosed of securing the allowance of claim 1 as a basic claim broad enough to cover, in a union garment, any *permanently closed crotch,* with *any* posterior opening, having only the characteristic, already noted, of extending from a point near the waist line to a point below the crotch, in one leg only. In other words, except for limitations imposed by "substantially as described," there are none, as (a) that the opening be oblique or extending across the seat; (b) that it extend below the crotch into the inner side of the leg opposite the point of beginning. In terms it is a claim subject to anticipation or infringement by any closed crotch garment showing a posterior opening, which extends from any point *near the waist line* to *any point* in *either leg, but in one leg only, below the crotch.* By way of illustration, it may be noted that the Devoe garment, with the flap sewed on one side, would infringe the plain terms of the claim. As observed by the Court of Appeals of the Second Circuit in Johnson v. Lambert, referred to, if the claim is valid, and the contentions concerning it are sound, the patentee justly "will either dominate the practical art or exercise a major control over it."

A most careful study of the file convinces me that the patentee, not only made no showing which was accepted by the appeal board as justifying his complaint that claim 4 (3) was "wholly inadequate," calling for the allowance of claim 1 to be as broad and comprehensive as its language, but that the action of the board upon the claims before it for allowance or rejection is repugnant thereto. Now, at this time, claim 1 stood as it had throughout the proceedings; the amendments being the specification of a *permanently* closed crotch and the extension of the opening into one leg only. Claim 4 (present claim 3) had been allowed. The then claims 2, 3, 5, and 6, rejected by the primary examiner, and which, with rejected claim 1, were the subject of appeal, read thus:

"(2) An undergarment having a *permanently* closed *crotch* and a *posterior opening extending from a point in the back above the crotch to a point in the inner portion of the leg below* the crotch, and a flap, adapted to button over and close," etc.

"(3) An undergarment having a permanently closed crotch and a *posterior opening extending from substantially the waist line to a point in the opposite leg below the crotch,* the inner wall of said opening being formed by a part of the body and leg portions of the garment, and the outer wall being formed by a sewed-in flap having a free portion adapted to fasten."

Claims 5 and 6 covered, as noted, "a posterior opening, a permanently closed crotch, a flap," etc., and a "permanently closed crotch, and a posterior opening formed between a pair of lapped members," respectively. Bearing in mind that the then allowed claim 4 covered, concededly, the applicant's exact disclosures, the feature of the situation is that the then claims 2 and 3, in so far as they attempt to embody and describe the "opening" of his construction—the italicized words above—do so in language of breadth and meaning almost identical with that found in rejected claim 1; and we find the appeal board, after citing the four references, Devoe et al., supra, in a brief opinion, disposing of the matter thus:

"The primary examiner has rejected the appealed claims on the ground that they do not involve invention over what he has allowed to the applicant in claim 4 (present claim 3), particularly in view of the references cited. We are of opinion that his action was right so far as claims 2, 3, 5, and 6 are concerned. Claims 2 and 5 are met, moreover, in either Devoe or Graham, and claim 6 involves nothing more than sewing up the fall piece A of Devoe along one side. This certainly is not invention. While claim 3 *suggests a distinction*, that distinction is not *clearly brought out*. This claim is therefore also considered met in *each of the Devoe and Graham patents*."

The "distinction" which claim 3 suggests, as the board doubtless conceived, is disclosed in this further language:

"It is also believed that claim 3 should be allowed, if amended by inserting after the word 'line' in the third line of the claim, as appearing in the examiner's statement, 'at one side of the center.' It is recommended that such a claim, if duly presented, be admitted and allowed; no new ground of rejection or objection appearing."

Obviously the suggestion was prompted by the board's conception of the character of applicant's opening as disclosed in his drawings, specifications, and claim allowed by the examiner, viz. the limitation respecting the *oblique opening extending across the seat*. And it is significant that this "suggestion" was disclosed by the board after it had agreed with the primary examiner in his rejection of the then claim 3, and after it had expressed these views *respecting claim 1*:

"Claim 1, however, in setting forth an opening which extends *below* the crotch *in one leg only* and from a point *near the waist line*, is believed to distinguish the applicant's particular kind of opening, and, with the other limitations of this claim, to avoid the references."

There were and are no *other* limitations, except that of a *permanently closed crotch*—the identical limitation appearing in the then rejected claim 2, and in the then rejected, and later modified and allowed, claim 3 (present claim 2). It is my judgment that this record, no matter how read, leads to the conclusion that the considerations which led both the primary and appellate examiners to reject claim 2, to suggest the amendment to claim 3 as a condition of its allowance, the reversal of the primary examiner on claim 1, and its allowance with *other limitations* (not in fact found in its language, unless the words "substantially as described" confine it to the exact disclosures of the drawings and specifications) condemn claim 1, and they forbid giving it any validity or breadth such as is now claimed for it.

[1] The record discloses that applicant's insistence upon a broad, pioneer, or revolutionary disclosure was at no time accepted by either the primary or appellate examiners. Of course, this suit does not involve merely a review of the Patent Office proceeding upon the record there made, to the end that the validity or construction of claims be determined thereon. But where, as here, the claim in controversy has a breadth of language bringing it far beyond the terms of an allowed claim which coincides with the disclosure of the drawings and specifications, the record may be most persuasive in determining whether recognition of presumptive validity, given to a patent because of its issue, shall be great, ordinary, or slight; whether such presumption may attach as well in support of broad as of narrow scope.

We therefore come to the consideration of the facts disclosed in evidence, other than the record we have reviewed, to determine their bearing upon the issue.

[2] It is established beyond the possibility of question that a permanently closed crotch union garment, not alone of the types with a wide posterior opening closed by a "drop fall" seat, but of the present conventional type, with the longitudinal opening between double or overlapping flaps, was made, sold, used, and well known in the commercial art. The testimony of the witnesses Lachner, McLaughlin, Cook, and O'Brien, in connection with exhibits, particularly Defendant's Nos. 1, 4, 5, and 7, leaves no doubt on the subject, and the testimony of one who purchased and used Defendant's Exhibit 1 as early as 1905, the testimony of a reputable dealer, of a designer, that this type of garment, the Holmes-Sterling type, was on the market from four to eight years prior to Cooper's application, and that it was known as a closed crotch garment, cannot be ignored. It establishes the fact, and overthrows the patentee's contention respecting it, before the Patent Office tribunals, and its importance rests in its showing, against the patentee, of a more crowded art, containing the very element—a permanently closed crotch—of a type upon whose *nonexistence* and previous *nondiscovery* applicant, in a considerable measure, *pressed his claim of invention.*

A second aspect of the case, and shown upon the larger art now disclosed in the evidence, is this: The use, in connection with the different types both of open and closed crotch, whether permanent or convertible, of various expedients or devices in connection with the opening, to promote adequacy in dimensions of the opening and comfort and security in the closure thereof. I think it fair to assume that the workers in the art, whether they proved to be inventors or not, all sought to attain the general object of adequacy of the opening and of the closure in respect of dimension, comfort, and convenience. But, whether the opening be longitudinal or horizontal, the *degree* of its extension up or down, from side to side, or obliquely, necessarily was a prime consideration, and the character of a union garment itself suggests, not only the approximate limits beyond which no opening can, but the limits *within* which it must, extend. For example, in a longitudinal median opening, the upper and lower limits must be approximately the waist line and the crotch vicinity.

Now, Devoe, no matter how different his type of opening or flap may be conceded to be, recognized this as a necessary recourse to obtain an adequate opening. He did not extend it (into both legs) for the sole purpose of "giving freedom to the thighs," as contended by plaintiff, but rather because the triangular inserts, depending from the waist line and attached to the side of the garment, would reduce the opening so that, except for the extension into the legs at the side (thereby including in the fall the lowering of the crotch portion of the garment when the flap was unbuttoned), the opening would be inadequate. It is true that such purpose was not declared in so many words; but it is obvious, and was so assumed in the specifications. The reference by defendant to the Mueller (British 8,766), Tichy (Austrian 2,783, 1907),

and Anderson (British 19,408, 1891), patents, no matter what distinctions in the general type of opening or garment may be pointed out, all persuasively point to the recourse in the art, to the extension, not merely to the physical limit of the crotch of the garment, but to such point in that vicinity as, in view of the upward or other extension of the opening, would give the opening such adequacy as comfort and convenience demanded.

Whether the idea of extending the opening beyond the crotch into the leg portion of the garment was "old" in the art, as stated by the primary examiner, it was not new with Johnson. It was known, and in so far as, standing alone, it involves the fundamental problem of making an opening, which must exist within certain limits, larger, by cutting it larger, or smaller, by not cutting it so large, it is quite likely that the inventive faculty need not be brought into active play for a solution. Considering, further, what appeared in the art as now shown in this record, respecting the different devices or expedients to contribute to adequacy and comfort in the openings of garments—of all types—the gusset insert appears to have been, not only known, but common. Johnson's original application included three claims covering such insert at the crotch, and, concerning its novelty and its functions, he said:

"A further feature of improvement consists in the employment of a gusset inserted at the crotch, which provides increased fullness at that point. The gusset insert, when used in connection with the other feature of the invention above referred to (the oblique opening into one leg, with a single flap, etc.), is stitched along its rear edge to the flap member and serves to increase the fullness of the latter in a desirable manner. However, the gusset insert at the crotch is capable of use advantageously with garments made to open *otherwise than* as herein shown and described, and consequently is not limited in its application and use to the particular garment herein described."

It would seem that broad novelty was claimed. But the claims were rejected on the patent to Howe, 117,885 (1871), disclosing, not a "diamond," but a "lozenge," shaped gusset—in drawers—at the crotch; its function being stated by Howe to insure "perfect freedom of movement of the legs, the fullness effected by it rendering it impossible, under any possible movement of the legs, that the cloth between them can be tightened or brought under strain," and the examiner, in rejecting claim 9, which covered the gusset, a "posterior opening extending from substantially the waist line to a point on one leg below the crotch," a flap, etc., cited Prue, "in view of the patent to Howe." The examiner's action resulted in withdrawal of the gusset claim. The specifications of the issued patent, while retaining the gusset feature, declaring that it is not indispensable, observe:

"The use of the crotch insert is, however, preferred, for the reason that it not only affords greater fullness and freedom at the crotch, but also affords greater fullness to the main flap *L*, effecting a freer gaping of the posterior opening when required."

Closely connected with the particular form of crotch insert or gusset just noted are the varied forms of seat pieces, and other types of gores, gussets, or insets. In some references and exhibits these are separate inserts, which alone are designed to give fullness to the crotch

or seat; in others, they form part of, or extensions into, the leg, of seat pieces, or flaps. Of the references before the examiner (disregarding the type of garment; i. e., whether it is a true closed crotch), Scott and Graham, as well as Howe, are striking illustrations.

That the patented art was not limited by these is abundantly shown by the additional references in the case, viz. Goldberger, Cook, Hill, Pennington, Hanks, Gould, and others, all issued prior to Johnson's application. That the true function of these devices or expedients was known cannot be doubted. That they were quite generally either assumed or declared to be means, not only to promote adequacy, comfort, and convenience of an opening, but necessarily determining factors in *the location* of an opening, is likewise plain; and the Holmes or Sterling garments, in evidence, regardless of their status as patented constructions, serve as excellent illustrations, because they are closed crotch types, with the longitudinal opening covered by opposing double flaps.

Johnson, in his argument before the appeal board respecting claim 1, recognized this very matter, in his attempted distinction between Devoe and Graham. After noting that the former extended the opening into both legs, and asserting that it was done to give "freedom to the thighs," he continues:

"Comparing Devoe and Graham, it will be noted that the latter employs a gusset inset, 8, Fig. 1, to widen the thigh parts of the legs, and consequently Graham does not need to extend his opening below the crotch."

To say that the gusset is inserted to widen the thigh parts of the leg, or that the extended opening into the legs gives freedom to the thighs, as already noted, neither negatives nor can it ignore the obvious result of thereby contributing to the adequacy and comfort, to say nothing of the particular *location* of the opening.

These considerations, when weighed in the light of the art thus disclosed, particularly the Holmes-Sterling garment, throw much light upon the soundness of Johnson's principal contention, repeatedly urged, in support of claim 1 for a broad invention. Thus, without asserting that the claim covered the oblique opening across the seat, and apparently ignoring the directions for excision of a part of the back, as contained in the drawings and specifications, he states the conceived idea to be:

"Running a narrow slit from a point in the back at about the waist line down to the inner portion of one leg well below the crotch. * * * The character and location of the posterior opening thus lies at the foundation of the present invention. By carrying the opening down into one leg below the crotch, an opening of sufficient length is obtained for practical service by simply drawing apart the longitudinal sides or edges of the opening, enabling the closed crotch feature to be preserved intact. On the other hand, when the wearer stands erect, *the longitudinal pull on the garment* draws these sides *closely together in overlapped relation*, making even the single oblique flap * * * practically unnecessary."

The soundness of this contention may be conceded in respect of an *oblique opening*, such as the drawings, specifications, and claim 3 embody. But with respect to a closed crotch garment of the Holmes type it is equally true, and its truth depends, not upon the fact that the

opening does or does not extend into the leg, but upon overlapping of the double flaps, whose edges at the upper ends are fastened at or beyond the median line of the back, and at their lower ends are likewise fastened in the overlapping or crossed relation at the crotch, or are fashioned with gusset or gore extending into the legs, that the longitudinal pull, so far as it is effective in any of these garments, draws the flaps together. The three prior art exhibits of the Holmes or Sterling garment, produced by defendant, afford striking proof of this, and equally, if not more so, does the "Mentor" garment, marked under plaintiff's patent and made by a licensee. It is not possible, in any of these garments having the conventional longitudinal opening, that the extension of the opening into one leg can contribute toward effecting a closure of the flaps through longitudinal pull; but it is due to the relations which the flaps bear to each other, and which their outer edges bear to the median line of the garment.

The defendant therefore established the two facts: (1) That at the date of Johnson's application a *permanently closed crotch* union garment of a type other than with the wide posterior opening covered by the drop fall flap was known and had been in use, as the testimony shows; and (2) that the extension of the posterior opening into the leg or legs of such a garment, for the purpose of promoting adequacy, comfort, and convenience in service, was likewise known.

In my judgment these give conclusive support to the view heretofore expressed that, upon the patent, its drawings, and specifications, read in the light of the proceedings for its allowance, it was impossible to grant to Johnson a broad claim for invention of a posterior opening in a permanently closed crotch garment characterized only by (a) its extension from a point near the waist line, (b) to a point below the crotch, (c) in one leg only; and when the art, as appears in this record, was not limited, but well crowded, and affords, as does every branch of the garment-making art, such wide range for the exercise of skill in designing, it is impossible to say that Johnson became an inventor by importing into garments of the Holmes type the known notion of enlarging an opening by extending it further downward, below the crotch, though in one leg only.

There is no showing in this case that the patent in suit brought about a marked change in the commercial art. The testimony, while showing that the garments put out by plaintiff's licensees have proven acceptable to the trade, does not show that a closed crotch garment, which is of the distinctive type disclosed in plaintiff's drawings and specifications, the oblique opening, has, because of that fact, tended to supersede other styles of true closed crotch garments. On the contrary, there is every reason to believe that the success of plaintiff's licensees has been but their share of the enormous development in the entire knit goods industry, and there is good reason to believe that some of it has been attributable to aggressive advertising of a monopoly right in respect of "closed crotch" union garments. Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 Fed. 347.

This, as well as considerations to be referred to in discussing infringement, preclude entertaining the success of plaintiff's licensees—

even if the validity of claim 1 were in doubt—because, in view of the state of the art, they add to, rather than tend to solve, doubt. I therefore conclude that claim 1 is invalid.

[3] With respect to claims 2 and 3, their validity need not be considered, because the determination of the issue of infringement will, in my judgment, fairly dispose of that branch of the case. In doing so, the assumed validity must be limited to what has been observed with respect to these claims, viz. that upon the face of the patent and the proceedings leading to their allowance they embody the particular disclosure shown, and neither can go beyond what can be said to be an *oblique opening,* capable of ready and substantial differentiation from the conventional longitudinal opening, and the specific method of closure. Now, on inspection of the garments in evidence, those which appear to be marked and made under the patent, and defendant's alleged infringing garment, it may be said with confidence that one only—specially made as in strict compliance with the specifications and drawings—can be recognized as embodying the specific construction; and, generally speaking, every one is of the double flap type, covering a longitudinal opening in the center line of the garment.

A careful examination fails to disclose a garment (excepting possibly the one noted) wherein the opening—and by that is meant the opening when it is open—is not, at its upper end, in the center of the garment near the waist line. True, a number of exhibits show that the upper end of the *initial incision* in the tubular blank is off center; but without exception, I believe, each of these shows that immediate compensation for this is made by overlapping double flaps of *unequal width,* so that the *width of the flaps and their unequal points of attachment at the waist line* practically obliterate the original incision at that point, and, when drawn apart, traverse each others' edges, exactly in the center line, and *that* forms the upper end of the opening. The result, therefore, is precisely identical with that found in defendant's and the Holmes and Sterling garments, where the incision is in the exact center, and the overlapping flaps at that point are of equal width.

Again, with the exception noted, not a commercial garment of the present or prior art shows Johnson's novel excision for an opening but they quite uniformly disclose a cutting similar to that employed in Scott and Holmes, if not Prue; and one is impressed with the fact that, given the permanently closed crotch and type of opening and flaps found in Holmes, these later commercial garments are all variations in design more closely derivative from Holmes and Scott than from Johnson's novel excised opening. Even if it be granted that garments such as Plaintiff's Exhibits 3, 9, and 13, are to be taken as showing an opening distinguishable from Holmes because of the wide flap or seat piece and an extension into one leg, that result is accomplished, in my judgment, not by following the teachings of the Johnson patent, but rather by resort to the expedients of the known art, discussed in connection with claim 1, for making an opening adequate and giving to it a desired location.

This is sharply brought out on comparison of defendant's garment with Plaintiff's Exhibit 9. If the latter be taken as distinctive from

Holmes, because it has a wide seat piece and a true extension of the opening into one leg, the defendant, by introducing the second flap of considerable width and attaching its lower end to the in-seam of the leg in the crotch vicinity, so that this flap serves to fix the lower limit of the opening substantially *at the crotch,* recurs to Holmes or Sterling in their use of overlapping flaps and gusset or thigh gore extensions, and not to the patent in suit. In other words, these matters pertain not so much to the character of the initial cutting or incision or excision, but rather to the kind of flap or closure and its upper and lower attachment (or extension by means of a gore or its equivalent) as will be most conducive to adequacy and comfort. Indeed, as it seems to me, Johnson attempted to obtain recognition of these considerations in claim 5 which was disallowed:

"An undergarment having a permanently closed crotch and a posterior opening *formed* between a pair of lapped members, the latter being permanently united to each other at both ends of said opening, substantially as described."

This, so the patentee asserts in the file, "was addressed to a distinct feature of novelty in the structure of the posterior opening, *irrespective* of the exact extent and location of said opening in the back of the garment. Scott and Prue are sought to be distinguished from this claim because the "lapped members" are not attached to each other, and because these references did not disclose "closed crotch garments." Obviously Holmes and Sterling forbade the allowance of such claim, even though not cited; and in any event, upon the issue of infringement, claims 2 and 3 should not, by construction, be given a breadth practically coincident with claim 1, or disallowed claims 2 or 5.

The record and exhibits in this case, showing, as they do, not only a large patented and a large commercial art—not merely closed crotch garments—but also such variations of style and design that the problem of assigning a particular garment to a particular patent, as covering its construction, has been found practically impossible of solution. If, for example, Johnson's patent justifies the variation to be found between the garment made in accordance therewith (Defendant's Exhibit 19), and the so-called "Mentor" garment, it is difficult to see how a like amount of variation in Prue or Holmes or Scott (if the closed crotch of Holmes be recognized) forbids defendant's garment.

The conclusion is that claims 2 and 3 are not infringed, and a decree dismissing the bill may be entered.

TWIN FALLS CANAL CO. v. DAMMAN et al.

(District Court, D. Idaho, S. D. August 20, 1920.)

Waters and water courses ⇐130—Waste water turned by irrigation company into natural coulee held subject to appropriation by others.

A natural coulee used by an irrigation company in part as a part of its distributing system and in part for carrying waste water into the river *held*, in so far as it was used to carry water from one part of the system to another for use on the segregated lands, to have the status of an artificial channel, and the water therein to belong exclusively to the company, but waste water turned therein *held* to become public water, subject to appropriation by others.

In Equity. Suit by the Twin Falls Canal Company against Frank B. Damman and others for injunctive relief. Granted in part.

Acting under the provisions of what is popularly known as the Carey Act (Comp. St. § 4685), the plaintiff's predecessor in interest constructed a large irrigation system diverting water from the Snake river for the reclamation of a segregated area of public lands of the United States aggregating more than 200,000 acres. Within this area were many coulees or draws through which naturally surface waters from melting snows in the spring drained into the Snake river, but which were dry during most of the year. Many of these were adopted by the construction company as a part of the irrigation system, and are being used by the plaintiff for distributing water to various portions of the tract and also for wasteways. The defendants acquired certain lands within the segregated area, and, having disposed of their rights to receive water from the system, have undertaken to make an original appropriation and to divert water from one of these coulees for the irrigation of such land. The plaintiff, claiming prior rights to the use of such water, has brought this suit to enjoin the defendants from making any diversion from the coulee.

James R. Bothwell, of Twin Falls, Idaho, for plaintiff.

S. T. Hamilton and T. K. Hackman, both of Twin Falls, Idaho, for defendants.

DIETRICH, District Judge. I shall hold that the water that flows in this coulee or tributary is water coming entirely from that which the plaintiff company diverts from Snake river and carries through its system, and that the company has possession of so much thereof as it can use upon lands within the segregation, but that it has not possession of, and must be deemed to have abandoned, such water as it cannot utilize. The only right which the defendants can or could acquire by virtue of their so-called appropriation is to utilize water flowing in this tributary which would otherwise waste into Snake river, and at any time the company can and does use the water its right is superior to that of the defendants. The plaintiff's right to use is confined to lands within the segregation. At times there may be considerable water going to waste, and at other times there may be none at all, but, generally speaking, the rights of the defendants are subject and subordinate to the right of the plaintiff, that is, its right to all the water flowing in the coulee that it can beneficially use upon lands within the segregation. Of course, the company is not bound to maintain for any length of

time the conditions giving rise to waste water in this coulee. I do not mean by that that it can willfully and maliciously divert the water from the coulee simply to keep the defendants from getting it, but so long as it may use the water in good faith it has the superior right. If this were an artificial channel, or if it were a coulee which had been adopted and used as a part of the distributing system of the plaintiff company, I would grant an injunction against interfering with it at all or going upon it; but it cannot be said to have quite that status. It is a natural depression, and it may be used in part for the wasting of water into Snake river and in part for carrying water from one portion of the system to another. In so far as it is utilized for the purpose of carrying water from one part of the system to another for use for beneficial purposes, it may be deemed to be a part of the system, but apparently it is also used merely as a part of the wasting system of the company; that is, water may run down through it merely for the purpose of discharging the water from the segregated land back into the river. To that extent it continues to be a public stream, and is a channel to which any one of the public may resort for the purpose of getting water which has in a sense become public water. The moment the company permits water to go into that natural channel for the purpose merely of letting it run into Snake river, such water becomes public property, subject to appropriation. I think I have said enough to make my view clear upon that point. If it were a channel used exclusively for the carrying of water from one part of the system to another, for use, it would then perhaps take the status of an artificial channel constructed by the plaintiff company, and no one could interfere with the exclusive control of it by the company, but in view of the dual purpose for which it is used and its dual character, I think I cannot go further than merely to enjoin the defendants from using any water which the plaintiff company is carrying through it for beneficial use upon land within the segregation.

PEAVEY v. PHILADELPHIA, B. & W. R. CO.

(Court of Appeals of District of Columbia. Submitted November 9, 1921. Decided December 5, 1921.)

No. 3500.

1. **Carriers ⇐157—Liability after arrival is controlled by bill of lading.**
   The conditions of a carrier's liability, while goods are retained after arrival, as stipulated in the bill of lading, are controlling.
2. **Carriers ⇐157—Notice of arrival, duly mailed, but not received, is "duly sent," within bill of lading, limiting liability to that of warehouseman.**
   Within the provision of a bill of lading limiting liability to that of a warehouseman after a notice of arrival had been duly sent or given, the expression "duly sent" means sent in a regular and approved manner, so that it is sufficient if notice of a letter stamped and addressed is deposited in the post office, though it was not received.
3. **Carriers ⇐157—Bill of lading held not to require receipt of notice of arrival.**
   A bill of lading requiring notice of arrival of the goods to be duly sent or given does not make actual notice necessary, since the words "or given" are qualified by the words "duly sent," and proof of either the due sending of the notice or actual notice is sufficient.

Appeal from the Supreme Court of the District of Columbia.

Action by S. Fillmore Peavey against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles V. Imlay, George W. Offutt, Jr., and Wm. A. Read, all of Washington, D. C., for appellant.

F. D. McKenney, J. S. Flannery, and G. B. Craighill, all of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the defendant, appellee here, in a suit for the recovery of the value of a box of books, etc., shipped by the plaintiff from Washington, D. C., to Brooklyn, N. Y., and later destroyed by fire in a warehouse in which the box had been stored by the receiving carrier.

From the agreed statement of facts it appears that the box was shipped by freight on October 3, 1916, to S. F. Peavey, Jr., whose mail address was given as 624 Eleventh street, Brooklyn. The box was received by the delivering carrier on or about November 4th following. It is agreed that a clerk employed by the delivering carrier "would testify that on November 6, 1916, a written notice of the arrival of said shipment was duly sent by him, by United States mail, postage prepaid, to the consignee, S. F. Peavey, Jr., 624 Eleventh street, Brooklyn, N. Y., and that said notice was not returned by the United States post office officials to said delivering carrier." It is further agreed that the consignee would testify that he did not receive the notice. The shipment was held by the delivering carrier until November 25, 1916, when it was delivered to a public warehouse, where it was destroyed

by fire on December 6th following. Under the view we have taken of the case it is unnecessary further to detail the facts.

Sections 1 and 5 of the bill of lading under which the shipment was sent provided in part as follows:

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

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

It must be assumed, from the agreed facts and the judgment of the trial court thereon, that notice of the arrival of this shipment was duly mailed, so that the question here is whether the conditions of the bill of lading as to notice were satisfied thereby.

[1, 2] It is settled law that the conditions of liability, while goods are retained after arrival as stipulated in the bill of lading, are controlling. Southern Ry. v. Prescott, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836. Here the bill of lading provides that the notice of arrival of the goods at destination may be "duly sent or given." To hold that the notice sent the consignee did not meet these terms would require us also to rule that a notice duly mailed is insufficient unless actually received. Such a ruling would be inconsistent with the provision that the notice may be "duly sent or given." "Duly sent" means sent in a regular and approved manner. It is familiar doctrine that unless actual notice is required, and no particular method is prescribed, it is sufficient if notice is deposited in the post office in a stamped and properly addressed envelope. Wheeler v. McStay, 160 Iowa, 745, 141 N. W. 404, L. R. A. 1915B, 181.

[3] We cannot ignore the words "duly sent," for they qualify the words "or given." Two methods of procedure are open to the carrier, either of which answers the prescribed conditions. Actual notice may be given in any manner, or constructive notice may be given in a regular and approved manner, as in this case. It may be that the Interstate Commerce Commission might require a change in bills of lading making actual notice necessary, but the conditions in the present bill of lading do not admit of such an interpretation.

Poythress v. Railway, 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427, cited by appellant, is not in point, for there no notice was sent or given, and in St. Louis B. & M. R. Co. v. Hicks (Tex. Civ. App.) 158 S. W. 192, the decision was made to turn upon the fact that the goods were destroyed within 48 hours after notice of their receipt by the carrier had been received by the consignee.

There being no charge of negligence against the carrier, the judgment must be affirmed, with costs.

Affirmed.

WATTS v. SPLAIN, United States Marshal.

(Court of Appeals of District of Columbia. Submitted November 7, 1921. Decided December 5, 1921.)

No. 3490.

1. **Habeas corpus ⟸92(2)—Regular papers in extradition proceedings preclude every question but presence within state.**
   If the requisition papers are regular on their face, the only question open for investigation on habeas corpus to procure discharge from the extradition warrant is whether the person sought was in the demanding state when the offense was committed.
2. **Extradition ⟸32—Affidavit positively sworn to is sufficient.**
   Under Rev. St. § 5278 (Comp. St. § 10126), requiring extradition on requisition, with which is produced a copy of an indictment found or an affidavit made before a magistrate, a requisition is regular on its face, where it is supported by an affidavit, positively sworn to, which embraces all the elements required by the statute.
3. **Habeas corpus ⟸85(2)—Testimony held not to imply affiant had no personal knowledge of offense.**
   Testimony by witness for the government that the police officer who made the affidavit on which the requisition was based requested the witness to go before a magistrate and make affidavit concerning what he knew of the trouble does not require an inference that the police officer had no personal knowledge of the facts.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus proceeding by Colly Watts against Maurice Splain, as United States Marshal in and for the District of Columbia. From a judgment denying the relief sought, petitioner appeals. Affirmed.

Thomas L. Jones, Royal A. Hughes, and George E. C. Hayes, all of Washington, D. C., for appellant.

John E. Laskey, Peyton Gordon, and L. H. Vandoren, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. On a requisition from the Governor of South Carolina the Chief Justice of the Supreme Court of the District, by virtue of the authority vested in him by the District Code, § 930, caused a warrant to be issued for the apprehension of Colly Watts, charged in an affidavit accompanying the requisition with the crime of assault and battery with intent to kill. He was arrested and brought before the Chief Justice, who, after a hearing, directed that he be surrendered to the agent of the state of South Carolina for the purpose of being returned to that state. While in the custody of the marshal he sued out a writ of habeas corpus to test the legality of his detention. From a decision against him he appeals.

[1] It is well settled in this court that, where the requisition papers are regular on their face, only one question is open for investigation, namely, whether or not the person sought was in the demanding state at or about the time the offense with which he is charged was committed. Ellison v. Splain, 261 Fed. 247, 49 App. D. C. 99. The testimony clearly establishes that Watts was in the state of South Caro-

lina at that time, and tends to show that he committed the offense with which he is charged. But he says that the requisition papers are not regular on their face.

[2] The Revised Statutes of the United States (section 5278; Comp. St. § 10126) provide:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate," etc.

—it shall be the duty of the executive authority of the state or territory to which the person has fled to cause his arrest and surrender him to the demanding state. In this case the charge was made against Watts, not by an indictment found, but by an affidavit positively sworn to by one Abrams, which embraces all the elements required by the statute. It is therefore regular on its face, and hence not open to attack. Even if it was open to attack, Watts has failed to show that it is insufficient.

[3] The government, erroneously assuming that the burden rested upon it of establishing, aliunde the extradition papers, that Watts was in the state at the time of the commission of the crime, called one witness. He testified that he saw the assault and that Watts made it. On cross-examination he said that at the instance of Abrams, a police officer, he appeared before a magistrate and made affidavit concerning what he knew of the trouble between Watts and the assaulted person. From this latter circumstance alone Watts asks us to infer that Abrams had no personal knowledge of the facts stated in his affidavit, and therefore that it is defective. But we cannot accede to the request. The testimony has no tendency to prove what Watts desires. This is manifest.

Much reliance is placed by Watts on Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801. It is not in point. In that case the affidavit was not, as here, positively sworn to. The person making it did not say that the statements therein contained were true, but that he believed them to be true. This the court said was not sufficient to satisfy the extradition statute. If the affidavit here was on belief only, the decision would be an authority for Watts' contention, but it is not.

There is no error in the record, and the judgment is affirmed, with costs.

Affirmed.

EAST HARLAN COAL CO. v. R. E. HAMILTON & SONS CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1922. On Motion to Modify Opinion, February 10, 1922.)

No 3564.

1. **Sales ⟸93—Orders to coal mining company in contemplation of contract abandoned by subsequent contract.**
   Orders by dealer to coal mining company stating terms given pending negotiations contemplating a contract by which the dealer was to take the mine output must be deemed abandoned by a subsequent contract for handling all the coal on stated commission unless such contract provide for the orders, or be reformed to provide therefor.

2. **Evidence ⟸450(6)—Contract held unambiguous, and oral evidence improperly admitted.**
   Where, pending negotiations between a coal dealer and a mining company contemplating a contract to handle the mine output, orders stating certain terms were given and accepted during the months of July and August, but negotiations on the proposed basis failed, a written proposal on September 11th consisting of plaintiff's proposal "to handle output of your mine for one year from July 1st" on an 8 per cent. commission basis, all former contracts declared canceled, and defendant's written acceptance thereof, created a plain and unambiguous contract, so that it was error to admit evidence of the dealer's claim that the former orders were not included.

3. **Appeal and error ⟸1050(1)—Parol evidence varying contract held not prejudicial as to construction of contract, but harmful as affecting damages.**
   Where a contract between dealer and mining company for handling the mine output on commission canceled the terms of orders theretofore given, but required the filling of such orders, error in admitting parol evidence of the dealer's claim that the orders were separate contracts from breach of which he was damaged *held* not prejudicial as affecting the construction of the contract as to the company's duty to deliver, but harmful as affecting the measure of damages for failure to fill the orders.

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

Action by the R. E. Hamilton & Sons Company against the East Harlan Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial, unless plaintiff enter remittitur.

On January 12, 1917, R. E. Hamilton & Sons Company, a Michigan corporation, brought an action in the United States District Court for the Eastern District of Kentucky against the East Harlan Coal Company, a Kentucky corporation, to recover damages for breach of contract for failure on the part of the defendant to ship and deliver coal upon a large number of contracts or orders given in July, August, and September of 1916 by the R. E. Hamilton & Sons Company, then a partnership, to the defendant corporation and accepted by it. It is further averred in the petition and in the amended petition that the plaintiff corporation was organized by and is the successor of the partnership doing business in 1916 under the firm name of R. E. Hamilton & Sons Company, and as such successor it has taken over all the business, property, and assets of that partnership and entitled to all its rights and benefits in and under these contracts or orders. Later the plaintiff

dismissed its action as to all of these orders, except nine, one of which was given in July, seven in August, and another on the 8th day of September, 1916. To this petition the defendant filed an answer and counterclaim. The counterclaim is based upon a balance of $1,397.86 due for coal sold and delivered to the plaintiff.

The answer further avers that whatever orders were given and accepted at prices named therein by this defendant, were given and accepted in pursuance of an oral contract for the entire output of its mine at Ages, Ky., for a period of one year from August 1, 1916, to August 1, 1917 except one car each day which the defendant was then obligated to furnish to the Louisville & Nashville Railroad Company; that on the 11th day of September, 1916, it entered into a new contract in writing by the terms of which all former contracts entered into between said parties were canceled and in place thereof a new agreement made by which the plaintiff was to handle the output of defendant's mine on a commission basis. The answer contained other defenses not now important to the disposition of this case.

To this answer the plaintiff filed a reply admitting indebtedness on the cause of action pleaded in defendant's cross-petition in the sum of $1,354.60, denying that any oral output contract was entered into between plaintiff and defendant, and averring that after some oral negotiations an output contract between said parties was reduced to writing and evidenced by the letter of plaintiff to defendant dated July 11, 1916, defendant's letter to plaintiff, dated July 13, 1916 and plaintiff's letter to defendant dated July 16, 1916. Plaintiff also admits the execution of the contract of September 11, 1916, but denies that this contract canceled or rescinded the orders theretofore given by plaintiff and accepted by defendant.

Evidence was offered tending to prove that negotiations for an output contract between these parties were initiated by plaintiff as early as June, 1916; that July 9th these negotiations resulted in an arrangement between the parties that the plaintiff would write a letter to the defendant embodying the terms of a proposed contract as discussed by them, for one year from August 1, 1916; that on July 11, 1916, the plaintiff submitted to defendant a proposition in writing based upon its understanding and interpretation of the oral negotiations. To this written proposition of the plaintiff the defendant replied that plaintiff's letter of the 11th inst. was satisfactory with certain exceptions relating to the division of the profits in excess of 10 per cent., and requesting that the plaintiff write another letter covering this part of the tentative agreement.

A number of letters and telegrams were exchanged between the parties in reference to this objection, and also in relation to a further objection later made by the defendant as to the time of payment, but this correspondence wholly failed to bring about any common understanding and agreement between the parties, at least as to the basis upon which the surplus profit would be divided, and thereupon the defendant notified plaintiff that, unless it met the defendant's terms as to division of surplus profits over 10 per cent. the defendant would refuse to do business on any other basis.

Mr. Hamilton, then representing the plaintiff went to Harlan, Ky., and, after full discussion of the differences between them, the contract as proposed in plaintiff's letter of July 11th was abandoned, and a wholly different contract was made. This contract is evidenced by two letters, both of which were written in the hotel at Harlan and delivered practically at the same time. These letters are as follows:

"[Letter Head New Harlan Hotel.]

"Harlan, Ky., Sept. 11, 1916.

"East Harlan Coal Co., Ages, Ky.—Gentlemen: We propose to handle the output of your mine at Ages, Ky., for the period of one year from July 1, 1916, on the following terms:

"We will secure for you prices equal to those secured by other mines in the Harlan field—that is to say, the highest market prices, and to you furnish enough tonnage to keep your mines running full time or at least as much as any other mines in the Harlan field.

"We will handle this coal on an 8% commission basis, payments for coal to be made as follows:

"One thousand dollars ($1,000.00) to be paid on account on the 5th of the month, and the remainder on the 20th of the month for all coal shipped the previous month. There is excluded from this contract one car per day which you are obligated to furnish to the L. & N. R. R. Co. on which we are to receive no commission.

"All former contracts or agreements entered into between us for the sale of your coal are herewith canceled.

"Yours truly, R. E. Hamilton & Sons Co."

"[Letter Head New Harlan Hotel.]

"Harlan, Ky., Sept. 11, 1916.

"R. E. Hamilton & Sons Co., Detroit, Mich.—Gentlemen: We beg to acknowledge receipt of yours of to-day containing proposal to handle the output of our mine at Ages, Ky., for a period of one year beginning July 1, 1916, on an 8% commission basis, and to advise that the terms and conditions incorporated therein are satisfactory to us.

"Yours truly, East Harlan Coal Co.,
"By W. W. Lewis, Pt."

On the trial of the case parol evidence was introduced over the objections and exceptions of the defendant tending to prove oral statements made by the parties prior to plaintiff's written proposition of July 11th and also oral statements made pending the negotiations resulting in the written contract of September 11th. At the close of all the evidence the defendant moved for an instructed verdict, which motion was overruled by the court. Defendant thereupon moved the court to withdraw from the jury all the testimony of the witness Sallee in regard to the verbal negotiations of July 9, 1916, and also the testimony of the witness Hamilton tending to contradict, vary, or extend the terms of the written contract of September 11th, which motions were both overruled. The jury found upon the issue joined for the plaintiff and returned a verdict in its favor for $14,437. A motion for new trial was filed and overruled, and judgment entered upon the verdict.

James H. Jeffries, of Pineville, Ky. (James H. Jeffries, of Pineville, Ky., on the brief), for plaintiff in error.

L. J. Crawford, Jr., of Newport, Ky. (Froome Morris, of Cincinnati, Ohio, and L. J. Crawford and L. J. Crawford, Jr., both of Newport, Ky., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). It is apparent from the evidence offered in the trial of this cause in the district court, both by the plaintiff and defendant, that no verbal contract was ever entered into between them on July 9, 1916, or any other date, and that neither ever had the intention or purpose of making a verbal contract.

It is equally clear that the numerous telegrams and letters exchanged between the parties, prior to September 11th, do not constitute a written contract between them. That fact fully appears by the letter written by defendant to the plaintiff on September 8th, and the testimony of Mr. Sallee explaining the plaintiff's reasons for sending Mr. Hamilton to Kentucky. His testimony in reference to this is as follows:

"We were not getting any place by correspondence, and they shut off the shipments on our orders, and our customers were demanding that we make

these shipments, and we sent him (Hamilton) down there to satisfy the East Harlan Coal Company regarding our arrangement and to make a satisfactory arrangement with them for the payment of our coal and the basis on which we should pay them. That is what he was sent down there to do."

[1] It also further appears from this evidence that the orders sued upon were accepted by defendant, pending negotiations for an output contract, and upon the assumption that such a contract would be consummated. Hamilton & Sons Co. v. Moss-Jellico Coal Co. (C. C. A.) 271 Fed. 237.

Therefore, unless the written contract of September 11th covers these prior orders or it is reformed in a proper action brought for that purpose so as to conform to the mutual intention and purpose of the parties to cover these orders, if that was their mutual purpose and intent, then these orders must fall with the abandonment of negotiations for the output contract contemplated in July and August. Hamilton Co. v. Moss-Jellico Co., supra.

It is the well-settled rule of evidence that, when persons put their contracts in writing, the written contract is, in the absence of fraud or mistake, conclusively presumed to contain all the terms and conditions agreed upon by the parties, and that the rights and the obligations of each must be determined from the contract as written. 1 Greenleaf on Evidence, § 275. This rule is well stated in Martin v. Berens, 67 Pa. 463, and quoted with approval by the Supreme Court of the United States in Bast v. Bank, 101 U. S. 93, 25 L. Ed. 794, in this language:

"Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule."

In Barnhart v. Riddle, 29 Pa. 96, it is said in support of the proposition that parol evidence will not be admitted to vary or contradict the terms of a written instrument.

"This rule of law is only a conclusion of reason, that that medium of proof is most trustworthy which is most precise, deliberate, and unchangeable."

This rule of evidence, so clearly and concisely stated in the cases above cited, has recently been approved, followed, and applied by this court in the case of Sudduth v. Coal Co. (C. C. A.) 268 Fed. 433–438.

Where, however, the language used in a written contract is ambiguous or uncertain, or where it becomes necessary to explain the exact meaning acquired by the use of a term in a particular art or business or the identity of a person, place, or thing, then parol evidence may be received to explain ambiguous language or trade terms or to make more definite and certain the place, person, or thing to which the contract relates, but never to vary or contradict the plain and unambiguous terms written therein.

If by mutual mistake of the parties the written contract does not state the terms of the contract agreed upon, then a court in a proper action will reform the written contract to conform to the actual agreement of the parties, but in the absence of such reformation, in an

action on the contract, the terms of the written contract must be enforced as therein written.

The contract of September 11, 1916, is plain, clear, and unambiguous in its terms. The provision in this contract, evidenced by the letter of September 11, 1916, copied into the statement of facts, specifically provides that—

"All former contracts or agreements entered into between us for the sale of your coal are herewith canceled."

That provision clearly refers to the oral negotiations and the attempt of the parties by letter and telegrams to reduce to writing the output contract along the lines contemplated in July and August of that year. However, this contract leaves nothing in doubt. It is dated September 11, 1916, but in express terms it includes and covers every transaction between the parties from July 1st of that year. The written proposition of the plaintiff dated September 11th and the written answer to that proposition by the defendant, of the same date, constitutes this written contract. The initial proposition in plaintiff's letter of September 11th is as follows:

"We propose to handle the output of your mine at Ages, Ky., for the period of one year from July 1, 1916, on the following terms."

To this letter containing this and other propositions, the defendant immediately replied:

"We beg to acknowledge receipt of yours of to-day containing proposal to handle the output of our mine at Ages, Ky., for a period of one year beginning July 1, 1916, on an 8% commission basis, and to advise that the terms and conditions incorporated therein are satisfactory to us."

The language in which the plaintiff stated this proposition and the language in which the defendant accepted the same is so clear, plain, and unequivocal that there can be no doubt as to the purpose, meaning, and effect thereof. Unless this provision was intended to include the prior orders, given between the 1st of July and the date of this contract, then the provision that the contract should cover the handling of defendant's output from July 1st of that year would be wholly meaningless, useless, and absurd.

It is clear from the evidence that the parties fully understood and appreciated the effect of this contract in relation to orders given after July 1st and prior to September 11th. The president of the defendant company testified that all deliveries made after this date were made under the contract of September 11th. This statement is fully corroborated by the fact that the shipments made on the J. & T. Hurley order were billed at 80 cents a ton, the price that Hurley was to pay to the plaintiff, instead of $1 a ton, the price the plaintiff was to pay the defendant for this coal under the proposed output contract of July 11th. That the plaintiff had the same understanding is evidenced by the letter written by Sallee, vice president and general manager of the plaintiff, to the defendant on September 18, 1916, a part of which letter is as follows:

"The last clause of our agreement does not state in any manner whatsoever that it cancels all former orders, only in so much as it pertains to the basis on which we sell your coal."

[2, 3] It necessarily follows that it was error to admit oral evidence to change, alter, or explain the plain and unequivocal terms of this written contract. However, in view of the fact that this contract is subject to no construction other than that the defendant by its terms was required to fill these prior orders, it does not necessarily follow that the introduction of oral evidence tending to prove that fact was prejudicial error for which this entire judgment must be reversed.

The plaintiff predicated this action upon the breach of these several order contracts, which were merely incident to the output contract of September 11, 1916, and which must fall or stand with that contract. On the other hand, it was the claim of the defendant that this output contract entirely abrogated these prior orders, so that it is now hardly in position to claim that the court erred in not submitting to the jury the question of whether it had or had not breached that output contract as a condition precedent to plaintiff's right to recover. The court submitted the issues to the jury just as the parties framed them by their pleadings and the evidence. It does not appear that any exceptions were taken to the charge of the court until after the jury retired, or, for that matter, not until the motion for a new trial was filed. In a letter dated September 15, 1916, the defendant admitted that it had agreed to fill the J. & T. Hurley order, notwithstanding its contention that this as well as all the other prior orders had been canceled by the contract of September 11th. On September 21st the defendant wrote the plaintiff another letter in which it positively stated that it would not fill the prior orders, and in reply to that letter the plaintiff wrote to the defendant on September 29th that, after the writer (Mr. Sallee) had taken up the matter with Mr. Hamilton and Mr. Craven, it had decided to continue to send orders at the current market price until the expiration of the agreement. This positive statement on the part of the defendant that it was not required to fill and would not fill prior orders under the September agreement and the reply of plaintiff to that letter are susceptible, at least, of the interpretation that defendant's letter of September 21st applied only to prior orders other than the Hurley order, which it had already positively stated in its letter of September 15th it had agreed to fill.

This written admission of the defendant that it had agreed and obligated itself to fill the Hurley order, regardless of its construction of the September output contract, is sufficient to justify a recovery of damages by the plaintiff for the defendant's failure to fill that particular order as a separate and distinct contract, but no such admissions were made by the defendant in reference to any of the other orders. Therefore the plaintiff's right to recover, if at all, for failure of the defendant to fill these other prior orders, must be based upon a breach by defendant of the September output contract. While failure to fill these orders would be some evidence tending to prove such a breach, nevertheless no breach of that contract was averred by the

plaintiff, and no such question was submitted to the jury. It further appears from the evidence that plaintiff notified the defendant to discontinue shipments upon two of these orders, and never thereafter requested it to recommence shipments thereon. That, perhaps would not be important if a breach of the September contract had been averred and proven, but would be fatal to a recovery upon them as separate contracts. The introduction of oral evidence tending to establish these prior orders other than the Hurley order, as separate and independent contracts, unmodified or unaffected by the September output contract, was error prejudicial to the defendant, for which the entire judgment must be reversed unless a remittitur be entered for the highest amount of damages that the jury, under the evidence in this case, might have included upon these orders, in its general verdict.

In view of the contention of the defendant as it appears in its answer, and the evidence offered by it on the trial of this cause, its admission as to the Hurley order must be accepted as an admission on its part that that order was separate and apart from the September agreement; nevertheless it does not necessarily follow that the damages sustained by plaintiff should be ascertained by the same rule of evidence as to the measure of damages that would apply if it were in fact a separate and distinct order, having no reference whatever to any output contract.

There seems to be no conflict in the evidence upon the proposition that both parties understood that the September output contract did affect the Hurley order in so far as it pertained to the basis upon which plaintiff was to sell defendant's coal. Reference has heretofore been made in this opinion to the letter of Mr. Sallee and the evidence of the president of the defendant company upon this subject, also to the fact that the coal shipped upon the Hurley order was billed to the plaintiff at 80 cents per ton instead of $1 a ton as contemplated by the original Hurley order. Therefore, to this extent at least, even under the issues as joined by the pleadings and submitted to the jury, for which the trial court was in no wise responsible, the damages of the plaintiff for failure to fill the Hurley order were properly subject to ascertainment with reference to this later output contract.

While the admission of oral evidence tending to vary, extend, or explain the written contract was not prejudicial to the defendant in so far as that evidence tended to establish its obligation to fill the Hurley order, for it had voluntarily admitted that fact in its letter of September 15th; nevertheless, in so far as that evidence would affect the measure of damages, it was prejudicial.

Under the terms of this output contract of September 11th, the plaintiff would ordinarily be entitled to recover as damages but 8 per cent. commission upon that order. In this particular case, however, the plaintiff had sold this coal to the Hurley Company long prior to the making of this September contract, and, even though by the terms of that contract the defendant had as between plaintiff and defendant accepted that order as its own, that fact alone would not release the plaintiff from liability to Hurley for failure to fill that order. This, of course, the parties to this contract must have fully known and

understood at the time the contract was made. The plaintiff therefore was entitled to plead and prove as special damages whatever loss it had sustained by reason of its liability to the Hurley company. While the plaintiff's petition contains no such averment as to special damages, nevertheless the case was tried upon substantially the same theory as it would have been tried had the petition contained such averment. The evidence offered by the plaintiff tended to prove that it had sustained special damages by reason of its legal liability for its breach of the Hurley order of not less than $7,658, and not more than $23,202. It necessarily follows that, if this judgment is reduced to the least sum which, under the evidence, the jury could have found the plaintiff suffered as special damages by reason of the failure of the defendant to fill the Hurley order, then the admission of this oral evidence cannot be prejudicial to the defendant. Further than this, under the peculiar state of this record, the defendant ought not to be heard to complain.

The lowest damages that the jury could have found upon the Hurley order in favor of the plaintiff under the evidence in this case would be $7,658. This must be reduced by the amount claimed by defendant in its cross-petition, to wit, $1,397.80, which, deducted from $7,658, would leave a balance of $6,260.20.

If the defendant in error is willing to accept this amount with interest, and within 30 days from the filing of this opinion enter in the district court a remittitur for the balance of this judgment over and above $6,260.20, and cause a certificate to be issued out of that court and filed in this court showing that such remittitur has been entered, this judgment to the extent of $6,260.20, with interest, will be affirmed; otherwise, for the reasons above stated, the entire judgment will be reversed, and cause remanded for a new trial.

On Motion of Defendant in Error to Modify Opinion and for an Extension of Time.

PER CURIAM. This motion is based upon the assumption that the highest amount that under the evidence could have been awarded by the jury as damages for the failure of the Harlan Company to fill the orders, other than the Hurley order, constitutes the full amount of the remittitur ordered. On the contrary, the court included, as a part of the amount ordered to be remitted, not only the entire amount of damages that might possibly have been allowed for breach of these orders as separate contracts, but also all that part of the verdict and judgment in excess of the least sum, which, under the issue as framed and the evidence, the jury could have found the plaintiff suffered as special damages by reason of the failure of the defendant to fill the Hurley order.

This conclusion, of course, is based solely upon the state of this record, and, if a retrial of this cause is to be had, the pleadings must be amended to conform with this court's construction of the output contract of September 11, 1916, and plaintiff's right to recover upon any

of these orders, including the Hurley order, must be based upon a breach by the defendant of this output contract.

The motion of the defendant in error to modify the original opinion filed in this case is overruled, and the time in which defendant in error must enter the remittitur ordered, if it does elect to enter such remittitur, is extended for 15 days from the entry of the order of this court overruling this motion.

VANDENBURGH v. TRUSCON STEEL CO. *

(Circuit Court of Appeals, Sixth Circuit. January 9, 1922.)

No. 3587.

1. **Patents ⟸328—Reissue 14,182, for reinforced concrete construction, held invalid as too broad as to one claim and not infringed as to another.**
   The Vandenburgh reissue patent, No. 14,182 (original No. 841,741), for reinforced concrete construction, claim 1, *held* invalid, as too broad. Claim 3, if conceded validity, as limited by the prior art, *held* not infringed.
2. **Patents ⟸324(5)—Finding by trial court as to prior date of invention presumptively correct.**
   The burden rests on a complainant to establish an asserted earlier date of invention to the satisfaction of the court, and the conclusion of the trial court on such question of fact must be accepted by the appellate court, unless the evidence decidedly preponderates against it.

Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by George E. Vandenburgh against the Truscon Steel Company. Decree for defendant, and complainant appeals. Affirmed.

Carlos P. Griffin, of San Francisco, Cal., for appellant.

W. F. Guthrie, of Youngstown, Ohio (E. N. Pagelsen, of Detroit, Mich., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of claims 1 and 3 of reissued patent No. 14,182 (August 15, 1916), to Vandenburgh. The original patent, No. 841,741, was issued January 22, 1907. The application for reissue was filed July 1, 1916. The invention relates generally to reinforced concrete construction. Its prominently stated specific object is to "provide a reinforcing bar with one or more spirally disposed coils secured to the bar, so as to provide an extended area of contact adapted to resist strain longitudinally and laterally on the bar, and to form a truss within the body of concrete," etc. As a preferred means of securing the coils to the bar the specification discloses "a series of kerfs in one face of the bar inclined away from the center of the bar toward the opposite ends thereof," the coils being "seated within these kerfs and held therein by means of the integral spurs,

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

*Certiorari granted 256 U. S. —, 42 Sup. Ct. 314, 66 L. Ed. —.

which are forced downward upon the coils when inserted and permanently retain them in position." The specifications, considered in connection with the drawings, plainly show an integral spur overlapping the kerf, which when forced downward upon the coils holds them rigidly in position. Claims 1 and 3 read as follows:

"1. A concrete reinforcing consisting of a bar having a plurality of integral spurs and a spiral coil permanently secured thereto, by having the spurs bent down on the several coils, the coils extending beyond and free of the bar at the opposite side therefrom to the securing point."

"3. A reinforcing bar provided upon one edge with a series of kerfs each having an integral overlapping spur, and a coil disposed in said kerfs, each convolution thereof being retained beneath one of said spurs."

The defenses are invalidity of the reissue, lack of invention, and noninfringement. The District Court held claim 1 invalid as too broad, and claim 3 void for lack of patentable novelty, if construed broadly enough to embrace defendant's structure. The appeal is from a decree dismissing the bill.

[1] The District Court was plainly right in holding claim 1 invalid. As will later appear, the only novelty in plaintiff's conception is in the specific method of attaching the coils to the bar by kerfs therein and integral spurs rigidly securing the coils within the kerfs. The claims of the original patent, which were replaced by claims 1 and 2 of the reissue, in terms call for a rigid fastening. The omission of the requirement of rigidity in claims 1 and 2 was apparently intended to cover the feature of collapsibility found in later devices. Claim 1 of the reissue is thus unwarrantably broad. The same conclusion has been reached by the Circuit Courts of Appeals of both the Second [1] and Third [2] Circuits. Claim 3 of the reissue differs from the third claim of the original patent only in the substitution in the reissue of the word "edge" for the word "end" in the original. This is plainly merely a correction of a clerical error. It thus becomes unnecessary to give further consideration to the question of the validity of the reissue.

[2] The real date of plaintiff's invention is more or less material in determining what is prior art as related to invention. Plaintiff's original application was filed May 9, 1906. He attempted to carry the actual date of his invention back to 1903, and offered some testimony tending to show such earlier invention date. The trial judge held the testimony not sufficient to establish such earlier date. We cannot disturb this conclusion. The evidence consisted solely of the oral testimony of plaintiff and another witness, taken in open court. Under well-settled rules, the burden rested heavily upon plaintiff to establish the fact of the asserted earlier date of invention to the satisfaction of the court—whether or not such satisfaction is required to be beyond a reasonable doubt. St. Paul Plow Works v. Starling, 140 U. S., 184, 198, 11 Sup. Ct. 803, 35 L. Ed. 404; Clark Co. v. Willimantic Co., 140 U. S. 481, 492, 11 Sup. Ct. 846, 35 L. Ed. 521; Moline v. Rock

[1] Vandenburgh v. Concrete Steel Co., 258 Fed. 143, 169 C. C. A. 138.

[2] Vandenburgh v. Electric Welding Co. (C. C. A.) 263 Fed. 95.

Island (C. C. A. 7) 212 Fed. 727, 732, 129 C. C. A. 337; Barber v. Otis (C. C. A. 2) 271 Fed. 171, 180. The question presented was one of fact only, depending upon the weight to be given this oral testimony, and the trial court's conclusion thereon must be accepted here, unless the evidence decidedly preponderates against it. Pugh v. Snodgrass (C. C. A. 6) 209 Fed. 325. Assuming that we are at liberty, upon this record,[3] to consider this testimony, it is enough to say that the evidence does not preponderate against the conclusion of the trial judge.

Turning to claim 3: The art of steel-reinforced concrete construction generally was highly developed before Vandenburgh entered the field. It had been applied, not only to the construction of bridges, spandrel walls, dock walls, retaining walls, and fireproof floor construction, but specifically to beam, girder, and column construction in manufacturing and other buildings.[4] The art, generally speaking, was already old and crowded, although the more extensive and rapid use of metal-reinforced concrete came a little later. Truss reinforcement of concrete beams was also old, through the use of radially disposed projections from the tension member (either perpendicularly or obliquely thereto), as well as otherwise. See Trussed Concrete Steel Co. v. Goldberg (C. C. A. 6) 222 Fed. 506, 509 et seq. 138 C. C. A. 106. The art with which we are here concerned relates to that form of column construction called "column hooping." While Vandenburgh's invention seems more specially adapted to beam and girder construction, it is declared by the specification to be applicable to column construction as well; and we shall treat the disclosure, not only as so applicable, but as intended to cover a plurality of vertical reinforcing or spacing members around and upon which steel reinforcement is wound in spiral form. Vandenburgh was not a pioneer in this field. Hyatt (by British patent, 1874) and Lee (also by British patent, in 1885) had disclosed iron bands looped spirally to reinforcing members, the spirals being riveted to each other or to the vertical reinforcement. Kiesserling (German patent, 1894) had disclosed columnar reinforcement by way of a series of loops attached to vertical members by square notches therein. Column hooping seems to have become active abroad about the year 1902, and in the United States about a year later, and in articles published in 1902 and 1904 column hooping was described and illustrated; the 1902 publication disclosing notches on the exterior faces of the supporting members to contain and hold the spirals. Considere (United States patent, 1904) disclosed a reinforcement consisting of longitudinal rods and "independent helicoidal coils of metal * * * surrounding the core and rods," the

[3] The testimony is not certified as settled and approved by the trial judge, as required by general equity rule 75 (b), 198 Fed. xl, 115 C. C. A. xl. It appears to have been merely stipulated by counsel.

[4] We may refer in this connection to the following decisions of this court: Ferro Concrete Steel Co. v. Concrete Steel Co., 206 Fed. 666, 124 C. C. A. 466; City of Akron v. Bone, 221 Fed. 944, 137 C. C. A. 514; Detroit Iron & Steel Co. v. Carey, 236 Fed. 924, 150 C. C. A. 186; Luten v. Whittier, 251 Fed. 590, 163 C. C. A. 584.

coils apparently not being attached to the longitudinal members, and the next year published his researches in connection with the use of "continuous helicoidal spirals." In March 1906, the Engineering News published an illustrated description of metal reinforcement for columns, showing spiral reinforcement retained in place upon the vertical members between projections from the surface thereof.

It is thus apparent that Vandenburgh's invention, at the best, consisted only in the method of attaching the spiral loop to the vertical or spacing member. As already said, his method of attachment was by means of a kerf cut at an angle inclined to the edge of the vertical or spacing member, which thereby created an overhanging spur integral with the upright; the hammering down of this kerf and spur making a rigid connection between the spiral and the upright. It is true that this particular method of attaching the loop to the upright was new as applied to the art of metal-reinforced concrete. But as already shown, continuous spirals in connection with spacer bars were old in that art. It was old in metal construction generally to use that method of fastening wires to uprights, as shown by Norwood (patent, 1896) in the connection of longitudinal parallel wires with the crossbars of sand screens, where "diagonal slots forming acute angle hooks" receive the wires; the hooks being "bent down to hold such wires in place." The same method had been disclosed for the fastening of fence wires to posts of cement construction; the attachment, of course, not being directly to the cement. We recognize that the use of diagonal kerf and overhanging spur method of connection in a nonanalogous art did not anticipate the combination claim in question; but we are not considering anticipation, but invention, and the prior art in question is thus not irrelevant. Day v. Mountain City Mill Co. (C. C. A. 6) 264 Fed. 963, 964, 965. The adaption of an inclined kerf and overhanging spur connection to the reinforced concrete art amounted only to a common mechanical expedient. Berger Mfg. Co. v. Trussed Steel Concrete Co. (C. C. A. 6) 257 Fed. 741, 169 C. C. A. 29.

The defendant does not use the diagonal kerf and overhanging spur. Its coil is located in a rectangular cut in the edge of the upright, there being thus no overhanging spur, and the coil is held in position by hammering or "peening" down the metal at the edges of the rectangular cut sufficiently to hold the coil in position, not rigidly but loosely enough to permit the collapsing of the structure for purposes of shipment. Defendant's method of fastening was also old in the metal construction art, being shown in Prescott & Bennett's 1891 sand screen patent. The patent in suit has been considered by the Circuit Courts of Appeals of the Second and Third Circuits. In the former (Vandenburgh v. Concrete Steel Co., supra) claim 3 was held to disclose invention and to be infringed by a construction which seems to be substantially similar to that involved here. In the Third Circuit (Vandenburgh v. Electric Welding Co., supra) claim 3 was held limited by the prior art to a bar with kerfs in which the attached coil is placed and a tongue or spur overlapping the kerf and holding the coil in place, and, as so limited, not infringed by a fastening consisting of a lip or clip struck up from the face of the spacing member.

We are not impressed that the advance in reinforced concrete construction is due in any substantial measure to Vandenburgh's contribution. Our conclusion is that, assuming for the purposes of this opinion that the claim in question involves some measure of invention, it is so narrow as to be practically limited to the specific method of fastening disclosed, and that it cannot be extended to cover defendant's method.

The decree of the District Court is accordingly affirmed.

SACO-LOWELL SHOPS v. CLINTON MILLS CO.

(Circuit Court of Appeals, First Circuit. December 29, 1921.)

No. 1506.

1. **Sales ⟸22(4)—Return of offer marked accepted but with changed terms is rejection.**

   Where an offer to sell machinery was returned to the seller marked by the buyer as accepted, but containing material modifications of the terms interlined by the buyer, the offer was rejected, and no contract was consummated.

2. **Frauds, statute of ⟸113(3)—Memorandum of sale omitting time of delivery which was an essential element held insufficient.**

   Where the seller of machinery submitted a written proposal, which called for delivery on a stated date, but the parties negotiated as to terms, until long after the stated date of delivery, and then, as the buyer claimed, orally agreed on the contract as stated in the proposal, except for a future date of delivery, and evidence showed the date of delivery was an essential element, the proposal of the seller was not a sufficient memorandum to comply with Acts Mass. 1908, c. 237, pt. 1, § 4, since it did not contain the essential element, so that the contract was partly written and partly oral.

3. **Frauds, statute of ⟸82—Contract of sale of machinery of standard type required to be in writing by statute, though excepting goods "specially manufactured."**

   Though Acts Mass. 1908, c. 237, pt. 1, § 4, requiring written contracts of sale of goods, provides that it shall not apply to goods "specially manufactured" by the seller for the buyer, and not suitable for sale to others in the ordinary course of the seller's business, it applies to a sale of machinery of a standard type manufactured by the seller of less value to others than the buyer, and the contract must be in writing.

In Error to the District Court of the United States for the District of Massachusetts; Edgar Aldrich, Judge.

Action by the Clinton Mills Company against the Saco-Lowell Shops. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to set aside the verdict.

Thomas Hunt and Rupert L. Mapplebeck, both of Boston, Mass. (Gaston, Snow, Saltonstall & Hunt, of Boston, Mass., on the brief), for plaintiff in error.

Stuart C. Rand. of Boston, Mass. (John L. Hall, of Boston, Mass., and Thomas A. McKennell, of New York City, on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. This is a writ of error from a judgment of the District Court of Massachusetts, in which the Clinton Mills Company was plaintiff and the Saco-Lowell Shops defendant, and for convenience they will be so designated herein.

The plaintiff was a corporation engaged in the manufacture of cotton cloth at Hoboken, N. J. Part of its product was used by another corporation known as the Ayvad Manufacturing Company in the manufacture of water wings, an article protected by a patent, and the balance was sold to others. Some time in the year 1913 Mr. H. A. Ayvad, who seems to have controlled both corporations, desiring to increase their business, partly upon information furnished him by the defendant, purchased a cotton mill plant at Emporia, Va., with the intention of moving there the machinery which he had been using at Hoboken and by the addition of new machinery forming a larger plant than that previously conducted at Hoboken.

Mr. Ayvad applied to the defendant to furnish additional machinery needed at the new plant and to furnish specifications for the proper equipment of a 5,000-spindle cotton mill which the plaintiff proposed to establish, using, as far as the same was suitable, the old machinery which was in the plaintiff's plant at Hoboken.

On October 14, 1914, the defendant submitted to H. A. Ayvad its written proposal for furnishing machinery covered in a schedule annexed thereto. This machinery was of the standard type built by the defendant at its shops in Massachusetts and Maine and was to be delivered before January 1, 1915.

This proposal was retained by Mr. Ayvad until the first part of January, 1915, when it was returned to the defendant with certain changes in the specifications and in the time of the first payment, but without changing the time of delivery. These changes were made by Mr. Ayvad and his superintendent by interlineations and notations upon the printed and typewritten sheets constituting the original proposal, which was in duplicate. One of the parts was retained by the plaintiff, and the other sent to the defendant. Upon both parts, before the return of one of them to the defendant, the plaintiff had entered the following indorsement: "Accepted: Clinton Mills Company, H. A. Ayvad, Pres."

January 6, 1915, the defendant wrote the plaintiff in regard to the interlineations and notations which the latter had made upon the original proposal and discussed them in detail, pointing out why it wished to adhere to the original specifications.

[1] Although the plaintiff had written its acceptance upon the original proposal, yet the return of it with the changes which it had made was a rejection by it of the defendant's offer. Bank v. Hall, 101 U. S. 43, 50, 25 L. Ed. 822; Minneapolis, etc., Ry. v. Columbus Rolling Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; Denver v. New York Trust Co., 229 U. S. 123, 140, 33 Sup. Ct. 657, 57 L. Ed. 1101.

The defendant did not withdraw its offer, but by its letter of January 6, 1915, renewed it; and, as the time of delivery fixed therein had

become impossible, it called the attention of the plaintiff to the fact that a new time of delivery must be agreed upon and urged the plaintiff to advise in regard to it.

On January 20, 1915, not having received a reply to its letter of January 6th, the defendant again wrote, asking for a reply at an early date, and stating that it was unable to proceed with the building of the roving and spinning machinery until all the details covered by its letter of January 6th were closed up.

On January 25, 1915, the plaintiff wrote the defendant, stating that because of other work its Mr. Ayvad and its superintendent, Mr. Fadden, had not had time to consider the matters discussed in the defendant's letter of January 6th, but promised attention within a week and that information needed should be sent.

March 15, 1915, the defendant wrote the plaintiff:

"We would be very glad indeed to hear from you as to how matters are progressing and if we may have your final approval of the specifications and date of delivery of the machinery."

On May 6, 1915, the defendant again wrote Mr. Ayvad, stating that it must know something definite with regard to the plaintiff's requirements for delivery in order to protect it upon the same, as it was rapidly filling up with orders for deliveries during the balance of the year.

To this letter the plaintiff replied, stating that it had not been able to arrive at a definite decision in regard to the machinery; that its Mr. Ayvad and Mr. Fadden went over the proposal that had been submitted and found that the machinery designated in it would not match its present machinery, and that it was very particular not to have various kinds of machinery in its mills; that it would therefore be necessary to go over the whole situation once more and have this point clearly understood, stating that Mr. Ayvad would be at Hoboken about the 1st of June and would like to have a talk with Mr. Havey, selling agent of the defendant company, before going too far.

To this letter the defendant replied that it would be glad to go over the matter again when Mr. Ayvad came to Hoboken.

Up to this point it is apparent that no contract had been made. The defendant had submitted a proposal which had been changed by the plaintiff in material features. The defendant had not agreed to these changes, and no time of delivery had been agreed upon in place of that which had become impossible. The whole contract, involving specifications, times of payment, and delivery, was allowed to stand open awaiting an interview between the parties.

An interview was had about the 1st of June, 1915, between Mr. Ayvad and Mr. Havey, selling agent for the defendant; but the parties disagree as to what actually took place. Mr. Ayvad testified that, after the suggested changes in the original proposal had been gone over by Mr. Havey and explained to him, he finally agreed to waive the changes which he had asked for, and that the machinery might be furnished in accordance with the proposal submitted by the defendant; that it was agreed that the delivery should be made in the fall

and that the first payment of $5,000 should be made one year after the average date of shipment.

Mr. Havey testified that at this interview Mr. Ayvad told him that he could not decide upon the matters covered by the notations which had been made by him upon the original proposal, and discussed by the defendant in its letter of January 6th, until he had conferred with his superintendent, Mr. Fadden, and therefore that the whole matter was left unsettled.

Whatever occurred at this meeting in June depended for its proof entirely upon oral testimony and was not shown by any written memorandum or correspondence.

Nothing further occurred between the parties until October 2, 1915, when the plaintiff wrote the defendant asking if it would not be possible to deliver the machinery which it had ordered last year and erect the same, together with the old machinery which it had transported from Hoboken to Emporia, and have its plant at Emporia running about the middle of November; that the time was very important, as it had been offered a contract under which deliveries would have to be made commencing December 1, 1915; and that its acceptance was conditioned upon the defendant making its delivery as requested. It asked that the defendant reply by telegram, which it did upon October 4th, stating that it was impossible to make delivery before the last of December; and upon the same day it wrote the plaintiff confirming its telegram and stated that the time of delivery stated in it was the very best it could do if it had the plaintiff's instructions to go ahead at once. It also stated:

"We would like very much to build this machinery now and hope you can arrange to let us go ahead."

On February 21, 1916, the plaintiff wrote the defendant that its Mr. Ayvad had just returned from the South and was at the Hoboken office and would like to go over the mill proposition and give instructions when and how to ship machinery to Emporia, as the buildings there were completed and ready to receive the same, and asking that the defendant forward by return mail a copy of the latest layout plans, also specifications for belting, motors, etc., so that, while Mr. Ayvad was in Hoboken he could have this matter disposed of, and also inquiring when the whole order could be shipped.

To this the defendant replied February 23, 1916, stating in substance that it noted Mr. Ayvad wished to reopen the mill proposition; that they had assumed that the matter had lapsed and had not been carrying any memo of the same for some time past; that they would be glad to quote present prices and terms; that the question of delivery was a very serious one, as they were completely filled up for the balance of the year, but might be able to move some of the machinery in December; that the present cost materials and labor had caused an advance in machinery of 25 or 30 per cent., and it would be impossible to close any final contract at the prices mentioned in 1914. At a meeting between the parties after the date of this letter the defendant refused to furnish machinery according to the original proposal.

The plaintiff's declaration contains six counts, in each of which it alleges a contract of sale of machinery by the defendant to it, which, after protracted negotiations, was closed in June, 1915, when an offer of the defendant was accepted and the time of delivery agreed upon, which was the fall of 1915; that, at large expense and with the knowledge of the defendant, it had moved machinery from Hoboken, N. J., to Emporia, Va., for use in connection with the machinery which was to be furnished by the defendant; that by failure of the defendant to furnish the machinery which was necessary to be used in equipping its mill at Emporia it lost the use of said mill and the resulting profits which might have been made from its operation; that it was unable to obtain other machinery in place of that to be furnished by the defendant.

The defendant in its answer admitted that in the year 1914 it attempted to enter into an agreement with the plaintiff, but claimed that it failed to do so, and that there was never any contract consummated between the parties. It also alleged that there was no memorandum in writing of the sale alleged by the plaintiff sufficient to satisfy section 4 of part 1 of chapter 237 of the Acts of the General Court of the Commonwealth of Massachusetts for the year 1908, which is the statute of frauds, covering the sale of goods and choses in action of the value of $500 or more and containing the usual provision in regard to a memorandum of a sale.

The jury accepted the plaintiff's version of what occurred at the interview in June, and the court instructed them that the contract between the parties could be shown by the written proposal which had been submitted by the defendant, supplemented by oral testimony of the agreement in June, 1915; that the contract was partly written and partly oral, and left the determination of what the contract really was to them.

There are 101 assignments of error; but we find it necessary to consider only those which embody the refusal of the court to give the instructions requested by the defendant upon the Massachusetts statute, which appear in the following assignments:

"The court erred in refusing to rule that a memorandum sufficient to satisfy the requirements of section 4 of part 1 of chapter 237 of the Acts of the General Court of the Commonwealth of Massachusetts for the year 1908 must contain the parties, the price, the property to which the contract relates, and any material terms agreed upon, such as the warranty terms of credit, security, or time of delivery."

"The court erred in refusing to rule that there is no evidence of a memorandum sufficient to satisfy the requirements of the statute above referred to."

The same question was raised by assignments of error directed to the following instructions of the court, to which the defendant excepted:

"So far as it is a question of fact, I find, and so far as it is a question of law, I rule, that this proposal signed by the Saco-Lowell Machine Shops in October, 1914, in connection with the correspondence which followed amounts to a 'note or memorandum in writing signed by the party to be charged,' sufficient to take it out of the provisions of the statute of frauds and to put the transaction in a situation for you to find whether or not, accepting this as a basis on which to apply the undertaking of the parties, whether or not it

was completed at the interview in June in Hoboken, completed by the parties getting together and saying, 'These details which we have talked about, which we have discussed in writing and orally, are accepted on the part of Mr. Ayvad as the lines on which the Massachusetts corporation is to go forward and perfect and deliver the machinery.' If you find that it was accepted, then it is a binding contract."

[2] Under the plaintiff's version of what took place at the interview in June, 1915, and upon which the verdict of the jury must have been based, the contract of sale upon which the plaintiff sought to recover was partly written and partly oral.

It is elementary that the memorandum in writing, to satisfy the statute of frauds, must contain all the essential elements of the contract, and no substantive element can be supplied by oral testimony.

In the contract upon which the plaintiff has declared, the time of delivery was an essential element, as conclusively appears from the correspondence. There was no memorandum stating the time the delivery should take place, which the jury must have found was provided for in the oral contract of June, 1915.

In Rosenfeld v. Standard Bottling & Extracts Co., 232 Mass. 239, it is said at page 245, 122 N. E. 299, 300:

"It is contended, however, that the case at bar, as was said by Mr. Justice Hoar in Whittier v. Dana, 10 Allen, 326, at page 327, 'is governed by the decisions of this court in Cummings v. Arnold, 3 Met. 486, and Stearns v. Hall, 9 Cush. 31, in both of which the doctrine was recognized and affirmed that, where a written contract within the statute of frauds has been varied by a subsequent parol agreement, affecting the mode of performance only, the action can be maintained only upon the written contract, because to allow a party to sue partly on a written and partly on an oral agreement would be in direct contravention of the statute.'"

The present case is not within Cummings v. Arnold and Stearns v. Hall, supra, and Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462, because it does not present the question considered and decided by them of the enlargement of the time of performance of a written contract within the statute of frauds by a subsequent oral agreement; but it presents the question of whether a substantive part of a contract never reduced to writing, but, if ever agreed upon, agreed upon orally, may be omitted from the memorandum.

The contract here, if there was one, was not made until June, 1915, and an essential element in it was the time of delivery which was then, if ever, agreed upon, but which does not appear as a substitute for the date that it contained when submitted by the defendant and which had become impossible; nor does it appear in any of the correspondence between the parties. If it was agreed upon orally there is no memorandum in writing which contains it.

The plaintiff in all the counts of its declaration has declared upon a contract of sale of machinery to be delivered in the fall of 1915; but the only evidence to support this allegation was the testimony of the plaintiff in regard to the oral agreement that was made in June, 1915.

Under the instructions of the court the jury must have found that the contract was partly written and partly oral, the oral part being that which fixed the date of delivery, and for a breach or failure to deliver in accordance with the oral contract damages must have been

assessed, because, upon this branch of the case, they received the following instructions:

"But if you should find that this proposal which was signed by both parties, some suggestion of changes, and the correspondence which followed, carried the transaction along with a view of perfecting certain details, and that those details were finally agreed upon in June and accepted by Mr. Ayvad with instructions to go ahead, * * * then your verdict would be for the plaintiff, because there would be a contract, although partly in writing, the writing being the basis of the June summation if there was a summation, the relations being partly established by writing and partly by parol, it would be a contract which would be enforceable and a contract which would create rights on which Mr. Ayvad would be entitled to rely."

[3] It was suggested in argument that the machinery specified in the defendant's proposal was to be manufactured by it especially for the plaintiff, and was not suitable for sale to others in the ordinary course of the defendant's business, and therefore the Massachusetts statute, by its express provision, would not apply.

There was some evidence that the machinery specified would be of less value to other than to the plaintiff, but the testimony discloses that it was of a standard type manufactured by the defendant, and that it was not to be built of any special type for the plaintiff.

The plaintiff in its declaration declared upon a sale of machinery, and not upon a contract for its manufacture. The court in its instructions treated the contract as one of sale. No exceptions were taken to these instructions, and no error assigned which raises this question.

The time of delivery, an essential part of the contract, having been agreed upon orally, and not evidenced by the written proposal or any of the correspondence or by any written memorandum, there was no sufficient memorandum to satisfy the Massachusetts statute. The instructions requested by the defendant upon this branch of the case should have been given, and there was error in the instruction which was given.

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

COLUMBIAN INS. CO. OF INDIANA v. MODERN LAUNDRY, Inc.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1921.)
No. 5838.

1. Insurance ⇐553(1)—False statement of loss held "attempt" to defraud insurer under fire policy.

Where a fire policy provided that it should be void "if the insured has made any attempt to defraud the company, either before or after the loss," service by insured of a verified false statement and excessive overvaluation of loss after a fire constituted an attempt to defraud, notwithstanding the insurer had knowledge of the actual amount of the loss and

that no actual fraud was consummated; an "attempt" being an endeavor to do an act, carried beyond mere preparation, but short of execution.

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

2. Insurance ⇐553(1)—Intent to deceive insurer implied by willful false statement in proof of loss.

Where insured knowingly and willfully makes a false statement as to a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss thereto by fire, the intention to deceive insurer is necessarily implied as the natural consequence of such act, under a policy void if the insured attempts to defraud the insurer.

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

Action by the Modern Laundry, Incorporated, against the Columbian Insurance Company of Indiana. Judgment for plaintiff, and defendant brings error. Reversed and remanded, wih directions to grant a new trial.

Nathan H. Chase, of Minneapolis, Minn., for plaintiff in error.

Le Roy Bowen, of Minneapolis, Minn. (M. H. Boutelle and A. H. David, both of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The plaintiff in error questions the correctness of a portion of the charge of the court to the jury in a trial of an action by the plaintiff, Modern Laundry, Incorporated, against the Columbian Insurance Company of Indiana, a corporation, to recover $10,000 on a policy of insurance against fire for that amount issued to the plaintiff by the defendant on December 16, 1919. The property insured consisted of motors, belts, pulleys, and shafting, tables, chairs, typewriters, stationery, books of account, soaps, cleaning compounds, tools, and implements, and other articles customarily used in the conduct of a laundry. On January 29, 1920, a fire occurred, which destroyed a part and injured other parts of the articles insured. On March 23, 1920, the president and secretary of the laundry company made oath to the correctness and truth of schedules of the value of the articles insured, and of the loss and damage on account of the fire thereto, and served these schedules and their affidavit to the correctness thereof upon the insurance company as a preliminary proof of loss. This verified notice of loss stated the value of the articles insured at the time of the fire to have been $20,131.20, and the damage and loss by the fire thereto to have been $12,100. Upon this verified notice the plaintiff demanded the payment by the insurance company of $10,000. The company refused to pay this amount. Thereupon the laundry company sued upon the policy; the insurance company in its answer denied that the property insured was of any such value as that stated in the verified statement of loss, denied that there had been any such loss or damage thereto caused by the fire as was stated

therein, alleged that the policy of insurance provided that it should be void if the insured should make any attempt to defraud the insurer either before or after the loss, and that the laundry company, after the fire, had made such an attempt, in that it had knowingly and willfully greatly overvalued the property insured, and the amount of the loss and damage in its sworn notice of loss. These issues were tried to a jury, which found the loss to the laundry company, plus the interest on the amount of that loss from June 3, 1920, to December 6, 1920, to have been $7,210, while the laundry company's verified notice made that loss $12,100.

There was substantial evidence at the trial that the defendant in error, in its verified notice of the value of the insured property and of the loss and damage, knowingly and willfully greatly overvalued that property, and greatly overstated the damage and loss thereto from the fire, although there was also evidence to the contrary. Evidence was introduced at the trial that before the verified statement was made the insurance company had sent men to the scene of the fire from time to time, and that they had been through a portion, but not all, of the laundry building, and that the adjuster of the insurance company had been through the entire building and had examined every piece of machinery.

In this state of the proof the court charged the jury that if they believed from the evidence that the laundry company, by its officers in the verified statement of loss, knowingly and intentionally made oath to substantial overvaluations of the insured property, or to substantial overstatements of the amount of the loss or damage by the fire, with intent to deceive the insurance company, that would constitute an attempt to defraud the company, and they should return a verdict for the defendant, unless they further found from the evidence that, before the verified notice was served on the insurance company, the latter had investigated and learned the actual value of and the real loss and damage to the insured property, or had had full opportunity so to do, so that the verified statement could not deceive it, but that in case they should find that, before the verified notice was delivered to the insurer, it had investigated and learned the true value of the property and the actual amount of the loss and damage to it from the fire, or had had full opportunity so to do, so that the verified notice could not deceive it, the facts that the laundry company, in that notice had, by its officers, with intent to deceive and defraud the insurance company, knowingly and willfully falsely sworn that substantial overvaluations of the property were the actual values thereof, and that greatly excessive statements of the loss and damage to the property from the fire were the actual loss and damage, did not constitute an attempt to defraud or any defense to this action under the contract in the policy that "the policy shall be void if the insured has made any attempt to defraud the company either before or after the loss."

To this charge the insurance company excepted, and it insists that it was erroneous, because the service of the verified intentionally false statement of overvaluation and of the excessive amount of the loss

and damage as clearly constituted, under the terms of this contract just quoted, an attempt to defraud, if it did not and could not deceive the insurance company, as if it could have done so and had done so, and that it as clearly constituted an attempt to defraud if that attempt failed to defraud, as it would have done if it had succeeded.

Counsel for the assured met this contention with this argument: Proof of the avoidance of an insurance policy, under a contract therein that it shall be void if the insured attempts to defraud the insurance company, consists of the same indispensable elements as does proof of the avoidance of a policy under a contract that it shall be void if the insured is guilty of fraud or false swearing in his proof of loss or other evidence relating to the value of the insured property, or the loss of or damage thereto by the fire; proof of the deceit of the insurer and substantial injury to it by the fraud or false swearing is indispensable to an avoidance of the policy, under the contract that it shall be void for such fraud or false swearing, and the impossibility of such deceit is fatal to the attempt to avoid such a policy for fraud and false swearing; therefore the impossibility of the deceit of the insurer in this case by the knowingly and intentionally false overvaluations of the insured property, and the knowingly false statements of greatly excessive loss and damage by the fire, was fatal to the defense that this policy was avoided in this case by the laundry company's attempt to defraud the insurer.

To sustain this argument and its conclusions counsel for the assured have cited some authorities which fairly support them: Shaw v. Scottish Commercial Insurance Co. (C. C.) 1 Fed. 761, 763; Rohrbach v. Ætna Ins. Co., 62 N. Y. 613; Farmers' Mutual Fire Ins. Co. v. Gargett et al., 42 Mich. 289, 3 N. W. 954; German Ins. Co. v. Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173—although the three cases last cited rest on the fact that the agent of the insurer knew the facts misrepresented when he took the policy. They have also cited many authorities which do not directly rule the questions of law here presented, but which they claim tend to sustain their argument. On the other hand, counsel for the insurer have cited authorities which directly sustain a conclusion diametrically opposite to that which counsel for the assured deduce from their argument, and other authorities which do not directly rule the questions here under consideration, but which they claim tend to sustain the position they take. The authorities thus cited are too numerous to review in detail. The opinions of the courts to which counsel have referred and the briefs of counsel have been read, and these and the arguments at the hearing have received deliberate consideration, with the result that the more persuasive reasons and the weight of authority in the opinion of the court sustain, and it has reached, these conclusions:

[1] The provision of the policy "that the policy shall be void if the insured has made any attempt to defraud the company, either before or after the loss" was a plain, unambiguous contract, binding upon each of the parties to it. That agreement was not that if the insured, before or after the loss, made any attempt to defraud the company, except in instances in which such an attempt could not and did not

deceive the insurer, and except in instances in which such attempt was unsuccessful, the policy should be void. No such exception is expressed or indicated by the clear and comprehensive terms of the agreement, or by the situation or circumstances of the parties when they made it. In such a state of the facts courts may not lawfully conceive and ingraft upon the contract such exceptions. The fact that the parties did not set them out in their written contract is conclusive that their minds never met upon them and they never intended to make them.

Proof of the avoidance of a policy, under a contract that it shall be void if the insured attempts to defraud the insurer, does not consist of the same indispensable elements as does proof of its avoidance under a contract that the policy shall be void if the insured is guilty of fraud or false swearing in its proof of loss or other testimony as to the value of or damage or loss to the insured property.

Neither the deceit of the insurer nor the possibility of such deceit by the attempt to defraud is indispensable to plenary proof of avoidance of a policy by such an attempt under the contract here under consideration. An attempt is "an endeavor to do an act carried beyond mere preparation, but * * * short of execution." People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732. And an attempt to defraud is not necessarily a fraud. The attempt may fail, and then the fraud is not perpetrated; it never exists, and the real object and purpose of the contract here under consideration was to protect the insurer against such futile attempts. Deceit and injury to the person deceived thereby are in some cases indispensable to proof of actionable fraud, but neither of them is indispensable to proof of an attempt to defraud. Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 83, 84, 3 Sup. Ct. 507, 28 L. Ed. 76; Follett v. Standard Fire Ins. Co., 77 N. H. 457, 92 Atl. 956, 957; Sleeper v. New Hampshire Ins. Co., 56 N. H. 401, 407, 408; Dolloff v. Phœnix Ins. Co., 82 Me. 267, 19 Atl. 396, 17 Am. St. Rep. 482; Oskosh Packing & Prov. Co. v. Mercantile Ins. Co. of Mobile (C. C.) 31 Fed. 200, 206; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754; Vaughan & Co. v. Virginia Fire & Marine Ins. Co., 102 Va. 541, 46 S. E. 692.

In Claflin v. Commonwealth Ins. Co., just cited, the contract was:

"All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under this policy."

The insurance company, pursuant to a provision of the policy, required the insured to submit to an examination under oath. In that examination he testified falsely as to the manner in which he paid his vendor for the insured property which he purchased. He did this without any intention to deceive or defraud the insurance company, for the purpose of making his testimony consistent with a statement he had made to R. G. Dun & Co. in order to enable him to obtain credit. The Supreme Court, in delivering the opinion in the case, said, among other things:

"A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent.

If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. * * * No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and willfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. * * *" 110 U. S. 95, 3 Sup. Ct. 515, 28 L. Ed. 76.

It is further declared, speaking of the contract of avoidance of the policy:

"By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, willfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance." 110 U. S. 97, 3 Sup. Ct. 516, 28 L. Ed. 76.

In Follett v. Standard Fire Ins. Co., 77 N. H. 457, 92 Atl. 956, the Supreme Court of New Hampshire held that "false swearing to a statement of loss furnished to the insurer was plainly an attempt to defraud; it was an act done in part execution of what, if carried to a successful issue, would be a completed fraud," and that false swearing by the insured to an overvaluation at the trial, when the insurer presumably was informed of the truth and could not be deceived by the false oath, was an "attempt to defraud the company * * * after the loss."

In Virginia Fire Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754, the actual loss was $2,000, and the policy only $1,500; but the Supreme Court of Virginia held that willfully false statements of a greater loss than the actual loss constituted an attempt to defraud, which avoided the policy, although they could not have deceived the insurance company to its injury.

In view of the conclusions at which we have arrived, there is no logical way of escape from the result that the court below was in error in charging the jury that, if the insurer knew the actual value of the insured property, and the amount of the loss and damage thereto by the fire, or had had full opportunity to know it, so that it could not be deceived by the verified overvaluations and statements of excessive amounts of loss made by the insured, the service of that notice did not constitute an attempt to defraud, although it contained knowingly and willfully false excessive statements of the value of the property and of the loss and damage caused by the fire.

[2] As this case must be tried again, attention is called to the rule that, where the insured knowingly and willfully makes a false statement of or regarding a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as the natural consequence of such act. Claflin v. Commonwealth Insurance Co., 110 U. S. 81, 95, 3 Sup. Ct. 507, 28 L. Ed. 76; Fidelity & Casualty Co. v. Bank of Timmonsville, 139 Fed. 101, 103,

71 C. C. A. 299; Mutual Life Ins. Co. v. Hurni Packing Co., 260 Fed. 641, 646, 171 C. C. A. 405.

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

THRONATEESKA PECAN CO. et al. v. MATTHEWS et al.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1921.)

No. 3679.

1. **Courts ⟸323—Averments of jurisdictional facts in bill taken as true prima facie.**
   Where a bill alleges the requisite citizenship to give a federal court jurisdiction, the duty of pleading and burden of proof is on the defendant, and unless the answer or plea denies such allegations, they need not be proved, but are prima facie true.

2. **Mortgages ⟸401(2)—Matured interest constitutes principal "debt" for nonpayment of which foreclosure is authorized.**
   In a mortgage authorizing foreclosure "on default of payment of said debt" continuing for 60 days, "debt" may be construed as embracing a matured installment of interest, which then becomes a part of the principal debt.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

3. **Mortgages ⟸401(2)—Construction placed on ambiguous provision by parties will be adopted by court.**
   Where a mortgage is not clear as to the right to accelerate maturity of the principal debt, because of default in payment of interest, the construction placed upon it by the parties will be adopted by the court.

4. **Mortgages ⟸401(2)—Right to accelerate maturity of principal debt for nonpayment of interest inures to assignee.**
   The right given to a mortgagee to accelerate maturity of the principal debt for default in payment of interest is not personal to him, but inures to the benefit of his assignee.

5. **Mortgages ⟸401(4)—Foreclosure suit sufficient acceleration.**
   A foreclosure suit by mortgagee is sufficient exercise of option for acceleration on default in payment of interest.

6. **Mortgages ⟸235—Power of attorney, though not under seal, held to authorize indorsement of notes and transfer of mortgage secured thereby.**
   A power of attorney, though not under seal, *held* sufficient to authorize indorsement of notes and transfer of a mortgage, which would follow as a legal consequence of the indorsement and transfer of the notes secured under Code Ga. 1910, § 4276.

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

Suit in equity by J. P. Matthews and others against the Thronateeska Pecan Company and another. Decree for complainants, and defendants appeal. Affirmed.

D. H. Redfearn, of Albany, Ga., Arthur G. Powell, of Atlanta, Ga., R. J. Bacon, of Baconton, Ga., and Sam S. Bennet, of Albany, Ga., for appellants.

J. R. Pottle, I. J. Hofmayer, and H. A. Peacock, all of Albany, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On June 12, 1917, Thronateeska Pecan Company, a corporation created under the laws of Georgia, executed to C. M. Barnwell four notes, aggregating $121,540 principal, secured by a mortgage of even date covering a tract of land of about 700 acres, known as the Barnwell pecan groves, situated in Mitchell county, Ga. The first two of these notes were paid. The last two, to wit, one for $35,000, due June 12, 1920, and one for $75,000, due June 12, 1922, remain unpaid. Interest on these last two notes at the rate of 7 per cent. per annum is payable quarterly on the 1st days of July, October, January, and April of each year after date. On July 1, 1919, a default was made in the payment of the quarterly installment of interest then due, amounting to $1,950. The mortgage contained a provision that the mortgagor, its successors and assigns should have the right at any time or times to anticipate the payment, before maturity of any or all of said notes, upon payment to the mortgagee of 60 days' interest in advance, and also provided:

"Upon default of payment of said debt according to the terms hereof after said (debt) default has continued for 60 days, then the Thronateeska Pecan Company hereby authorizes and empowers said C. M. Barnwell to foreclose this mortgage, in his discretion, in the usual form, or to sell the same, or so much thereof as may be necessary to pay said debt and also expenses of sale at public outcry, for cash, on any lawful sale day for sheriff sales at the time and place of sheriff's sales of like property under mortgage executions from the superior courts of the state of Georgia, first giving notice of such sale and the time, terms and place thereof, in the public gazette in which sheriff's sales for the county where such sale is to be made are advertised, and as often and for such period as is required for such sheriff's sales, and from the proceeds of such sale or sales to pay said debt, with interest due thereon and expenses of said sale or sales, including 10 per cent. attorney's fees, and account to said Thronateeska Pecan Company for the surplus, if any."

On said June 12, 1917, the Thronateeska Pecan Company also executed a deed of trust, subject to said mortgage above described, to the Georgia Trust & Savings Company, now Georgia Bank & Trust Company, as trustee, to secure an issue of $240,000 second mortgage bonds. These bonds were issued and delivered to various persons as bondholders. The deed of trust provided that a default in the payment of interest on said bonds for 90 days would mature the entire debt due thereon.

On September 14, 1917, the Thronateeska Pecan Company conveyed said Barnwell pecan groves to the Barnwell Pecan Company, subject to said mortgage and deed of trust. Upon default in payment of interest on the notes secured by the Barnwell mortgage on July 1, 1919, they were placed in the hands of E. E. Cox, an attorney, for collection. Negotiations were had between said Cox and the manager of the Barn-

well Pecan Company and others representing said companies by which it was understood and agreed that the said Barnwell should declare a default after the expiration of 60 days from July 1, 1919, and declare the entire indebtedness due; it being made to clearly appear in the testimony in said case that the mortgagor and mortgagee understood such default of interest for 60 days in any payment of interest entitled the mortgagee to declare the principal of said debt due. It appears from the pleadings and evidence in the case that a large portion of the second mortgage bonds were held by the Bank of Columbia, a banking corporation in the state of South Carolina, to secure an indebtedness existing between said bank and said Thronateeska Company, and that said company desired the foreclosure of said Barnwell mortgage as a means of procuring a litigation in the state of Georgia in which the Bank of Columbia, as largely interested in said second mortgage bonds and deed of trust, might become a party defendant, so that an accounting might be had between them in the courts in Georgia.

Said Cox thereupon, after the happening of said default for 60 days, as attorney for Barnwell, declared said entire debt, principal and interest, due on said notes and brought suit thereon on September 18, 1919, in the city court of Albany, Ga., the residence of said Thronateeska Company. The holders of said second mortgage bonds, becoming aware of said suit, requested one J. P. Matthews to purchase the notes and mortgage owned by said Barnwell, and on October 7, 1919, Barnwell acting by and through his attorney in fact, Charles M. Barnwell, Jr., transferred, without recourse, the two notes above described, together with the mortgage securing the same, to said Matthews. Matthews does not appear to have become a party to said suit in said city court of Albany, but undertook to exercise the power of sale contained in said mortgage by advertising the property for sale before the courthouse door of Mitchell county, Ga.

Said sale was restrained by legal proceedings instituted by the two pecan companies, but on December 6, 1919, an agreement was entered into between counsel for Matthews and for the pecan companies, in which it was expressly agreed that Matthews should proceed to advertise the property for sale under said power of sale for the first Tuesday in January, 1920.

Said sale was delayed by litigation, which was removed into the United States District Court for the Southern District of Georgia, and on April 22, 1920, J. P. Matthews, as the owner of said mortgage and notes, transferred to him by said Barnwell, together with a large number of persons, the holders of said second mortgage bonds of said Thronateeska Company, filed a bill in said United States District Court, seeking to foreclose said first mortgage and said deed of trust, praying the appointment of a receiver to hold said property pendente lite, also seeking the removal of the Georgia Bank & Trust Company as trustee under said deed of trust, and for further relief.

On the hearing for injunction and receiver, the court entertained jurisdiction for the purpose of foreclosing said first mortgage assigned to said Matthews and appointed a receiver. It held that the Georgia Bank & Trust Company should not be removed as trustee, and that

said bondholders were not, under the evidence then submitted, entitled to foreclose said deed of trust.

The said Georgia Bank & Trust Company thereafter was permitted to file an intervention in said cause, in which it prayed the foreclosure of said deed of trust. The defendant pecan companies defended said litigation on several grounds.

The court below, after hearing the evidence in said case, held that under the provisions of the first mortgage and notes secured thereby, and the conduct of the parties, the said principal could be accelerated for default in payment of interest for as much as 60 days, and that the same had been accelerated by Barnwell by the filing of the suit in the city court of Albany, and that the same had been fully recognized and acted upon by both complainants and the defendant pecan companies. He ascertained the amount due on said first mortgage, and decreed a foreclosure and sale to satisfy the same. He also ascertained the amount due upon the bonds secured by said deed of trust, and directed that after payment of the first mortgage they should be satisfied, and that said deed of trust be foreclosed.

The questions raised on this appeal are:

First. That the pleadings and evidence did not show that C. M. Barnwell was not a citizen of Georgia at the time when said suit was filed, and therefore Matthews as his assignee is not entitled to maintain the same.

Second. That no right to accelerate the principal existed under the mortgage and notes so held by said Matthews; that no principal sum was due at the time the bill was filed, and therefore the amount in controversy, exclusive of interest and costs, necessary to give this court jurisdiction, did not exist.

Third. That, if the right to declare said principal due existed, it was personal to C. M. Barnwell, Sr., and that maturity of the principal could not be accelerated by Matthews as assignee.

Fourth. That the transfer of the mortgage in question was the transfer of a sealed instrument; that the power of attorney executed by Barnwell to his nephew was not under seal, and therefore did not confer power to execute a transfer, and the notes secured by said mortgage were also under seal, and that the power of attorney did not authorize the indorsement thereof by said attorney.

Fifth. That, as the bill filed by J. P. Matthews to foreclose the first mortgage should not have been sustained, the intervention of the Georgia Bank & Trust Company should of necessity have been dismissed, and no foreclosure of said deed of trust decreed.

[1] The first question raised is as to the averments of the citizenship of C. M. Barnwell, Sr., at the time of the filing of this suit by Matthews in the District Court. The court below considered the question as though raised by the pleadings, and held that under the evidence Barnwell possessed the citizenship which would have sustained a suit by him in said court. There was abundant evidence to sustain this ruling, and this court agrees with the finding of the court below on this question.

But it is claimed that the pleadings do not aver Barnwell's citizenship, and that this was essential. On appellees' motion an amendment of the bill was allowed to be filed in this court, as permitted by Act March 3, 1915 (38 Stat. 956; U. S. Comp. St. § 1251c), asserting his citizenship, with leave to the appellants to file an answer positively verified on this subject. An amendment, averring Barnwell to be a citizen of South Carolina at the time of the transfer of said notes and mortgage, and of the filing of said bill, was filed, and an answer has been presented, stating that appellants cannot verify the same positively.

Permitting this answer to stand, and taking its averments for what they state, they do not deny the essential averment of the amendment. They aver the belief of appellants that at the time the assignor, Barnwell, executed the power of attorney, under which his nephew made the transfer, he was not a citizen and resident of South Carolina, but was a citizen and resident of Georgia. His residence at that time (February 14, 1919) is wholly immaterial. It is positively averred in the amendment that he was a citizen and resident of South Carolina on April 22, 1920, when this suit was filed. As to this, the only averment of the answer is:

"Appellants are unwilling to admit that he has since [date of power of attorney] legally moved his residence prior to the time of the filing of said suit."

This does not deny the positive averments of citizenship of the amendment, even on information and belief; it only expresses unwillingness to admit them. Where the answer or plea does not deny the averments of citizenship of the bill, they need not be proven, but are prima facie true. Where the bill alleges the requisite citizenship, the duty of pleading and burden of proof is on the defendant. Sheppard et al. v. Graves, 14 How. 505, 510, 14 L. Ed. 518; Livingston v. Story, 11 Pet. 351, 393, 9 L. Ed. 746; Hartog v. Memory, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725; Simkins, Fed. Suit in Eq. (2d Ed.) 121, 125, 126. On the whole record, we think it is sufficiently alleged and proved that the assignor was a citizen of South Carolina when the suit was brought.

[2] We think the court was correct in holding that the mortgage gives to the mortgagee the right to accelerate the maturity of the principal for a default for 60 days in payment of the interest on the dates when contracted to be paid. The court below held that the mortgage was ambiguous, and under the evidence of the conduct of the parties construed the provisions thereof to provide for an acceleration of the entire debt on default of the interest.

Where interest is payable at a fixed date, and is not paid, it becomes due and collectible, and itself bears interest. It becomes in fact a principal debt, for which suit can be brought, and to collect which a foreclosure of a mortgage given to secure the obligation can be had. Cumberland Island Co. et al. v. Bunkley, 108 Ga. 756, 33 S. E. 183; Ray v. Pease, 97 Ga. 618, 25 S. E. 360; Calhoun et al. v. Marshall, 61 Ga. 275, 34 Am. Rep. 99; City of Lexington v. Butler, 14 Wall. 282, 297, 20 L. Ed. 809; Edwards v. Bates County, 163 U. S. 269, 272,

16 Sup. Ct. 967, 41 L. Ed. 155. Hence it is permissible to construe the word "debt" as embracing such overdue installment of interest. Park, Treas'r, v. Candler, Governor, 114 Ga. 466, 40 S. E. 523; Neal, Ex'r, v. Reams, Adm'r, 88 Ga. 298, 14 S. E. 617.

The first provision of this agreement as to the effect of a default is that, if it lasts for 60 days, the mortgagee may proceed to foreclose, with an alternative that he may sell, as at a sheriff's sale, without legal proceedings. It is quite evident that one purpose of this stipulation was to agree to a foreclosure for the entire debt by legal proceedings, after 60 days' default.

Had the stipulation contemplated that the entire debt must be then due, the stipulation would have deferred the right, then existing under the law, to proceed immediately on the default in payment of the entire debt at maturity, which is hardly probable. The stipulation also immediately follows one giving to the mortgagor the right to anticipate the maturity of the debt and to discharge it before maturity. It is therefore most likely that the succeeding stipulation was providing for an acceleration of the maturity of the debt on a default of 60 days in the payment of interest.

[3] The contract, evidenced by the notes and mortgage securing the same, were made in Georgia and to be performed in Georgia. Code of Georgia 1910, § 4267, provides that, even when the intention of the parties may differ, "the meaning placed on a contract by one party, and known to be thus understood by the other party, at the time, shall be held as the true meaning." While this section will not permit the court to receive evidence of intention to defeat a contract entirely unambiguous, where the meaning is in no way doubtful, yet it plainly allows proof of the understanding of the parties, as placed thereon by one party with the knowledge and apparent acquiescence of the other party, to be received and to determine the meaning of the contract. Reeves v. Daniel, 143 Ga. 569, 85 S. E. 756.

The rule is also well settled that, where the contract is doubtful or ambiguous, "the interpretation given by the parties themselves to the contract will be adopted by the court." 1 Williston on Contracts, § 623, and notes; Barber Asphalt Co. v. City of St. Paul, 224 Fed. 842, 846, 138 C. C. A. 558. Here there is no doubt, not only as to the meaning placed on this stipulation by Barnwell and acquiesced in by the two pecan companies, but action on this construction was procured by these defendant companies to be taken by Barnwell, and an acceleration of the principal of the entire debt declared, and a suit procured to be brought thereon. Because of this conduct and suit, Matthews was induced to purchase from Barnwell this first mortgage debt, which had been thus declared due at the solicitation of the mortgage debtor.

[4] We also think that the acceleration was made by Barnwell, and that it was recognized by the defendant companies in the agreement made with Matthews on December 6, 1919. We do not think that these defendant companies can be permitted now to deny that the entire indebtedness was properly declared to be due. We also think that Matthews, as transferee, had the same right to accelerate the maturity of the debt. Pomeroy, Eq. Jur. (2d Ed.) §§ 1209, 1210. His

foreclosure suit was a sufficient acceleration. Harris v. Powers, 129 Ga. 75 (6), 58 S. E. 1038, 12 Ann. Cas. 475.

[5] That the power of attorney executed by the mortgagee Barnwell to his nephew, whether under seal or not, was sufficient to authorize the indorsement of the notes to Matthews and a transfer of the mortgage, which would in fact have resulted from a transfer of the notes, is quite clear under the authorities, including the decisions of the Supreme Court of Georgia. Pomeroy, Eq. Jur. (2d Ed.) § 1209; Code of Georgia (1910) § 4276; Berry v. Van Hise, 148 Ga. 27, 95 S. E. 690.

We find no error in the decree rendered by the District Court, and it is affirmed.

LOONEY v. THORPE BROS.

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

No. 5867.

1. **Equity ⟸204—Parties may not be brought in by counterclaim.**
Parties may not be brought into a suit in equity by counterclaim.

2. **Courts ⟸347—Counterclaim must be cause of action against complainant.**
Under equity rule 30 (201 Fed. v, 118 C. C. A. v), a counterclaim which may be set up in the answer must be one which might be the subject of a suit against the complainant, and a counterclaim alleging causes of action against others, who were not parties, and asking that they be made parties, *held* properly stricken out.

3. **Corporations ⟸506—Identity of corporations not to be determined in suit to which all are not parties.**
An allegation that complainant, a corporation, and other corporations named, are one and the same, and are owned, officered, and controlled by the same person, raises no issue that can be determined, where the other corporations are not parties to the suit.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Suit in equity by Thorpe Bros., a corporation, against John Looney. Decree for complainant, and defendant appeals. Affirmed.

C. C. Catron, of Santa Fé, N. M., for appellant.

John H. Fry, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. This action was commenced by appellee, hereafter plaintiff, a corporation of Minnesota, against appellant, hereafter defendant, to foreclose a mortgage given by the latter to the Arlington Land Company, a corporation of Colorado, and of which mortgage and the debt secured thereby plaintiff claimed to be the owner. Defendant pleaded "for counterclaim and for affirmative relief" substantially as follows:

That the Arlington Land Company is a corporation organized under the laws of the state of Colorado, with its principal place of business in Minneapolis, Minn.; that Samuel S. Thorpe is the president, Thomas Peebles the secretary, and James H. Pershing its vice president, and that the said three officers are the only three directors; that the objects for which the Arlington Land Company is incorporated are, generally, to deal in real estate, personal property, commercial paper, acquire water rights, operate waterworks and irrigation systems, to mine, operate for oil and hydrocarbon products, conduct refineries, and enter into all necessary contracts advantageous for carrying out the objects for which this company is created.

That the Mosota Land Company is a corporation organized under the laws of the state of Colorado, with its principal place of business in Minneapolis, Minn.; that Samuel S. Thorpe is its president, James H. Pershing vice president, and Thomas Peebles secretary and treasurer, and that the said three officers constitute its board of directors; that the object for which it is created is to take, hold, lease, mortgage, and convey personal property, to give and take conveyances, leases, mortgages, deeds of trust, negotiable instruments, and pledges, to take, hold, manage, and develop its properties and to acquire water rights and operate waterworks and irrigation systems.

That the Arlington Land Company, the Mosota Land Company, and the complainant, Thorpe Bros., are in fact one and the same, except in name, and are owned, officered, and controlled by Samuel S. Thorpe and Thomas Peebles, and that ever since 1914, and prior thereto, have been directed and controlled by Samuel S. Thorpe and Thomas Peebles as instruments and for the purpose of defrauding the defendant as hereinafter set forth.

That in 1914 Thomas Peebles and Samuel S. Thorpe represented unto this defendant that they were the real owners in fee simple of the 9,537 acres of land described in the mortgage in plaintiff's bill of complaint mentioned, that for their convenience the title was vested in a corporation known as the Arlington Land Company, and that the said Thorpe and Peebles sold to the said defendant the aforesaid land, reserving however, the coal thereon, the said land to be paid for by defendant, $3,293 in cash and four notes, aggregating $16,777.70. That the said defendant immediately went into possession of said lands under said agreement of sale and on April 24, 1914, paid unto the said Thorpe and Peebles the sum of $3,293 in cash, and executed what the defendant then supposed to be the notes and mortgages drawn according to the terms of the said sale, it being understood that the said Thorpe and Peebles were to have the deed to the said land so sold the defendant executed, conveying the said land, excepting the coal therein, in fee simple absolute, with full covenants of warranty, and would cause the same to be recorded, and, when recorded, would deliver same to the defendant; but the said Thorpe and Peebles, combining and confederating with the Arlington Land Company and the Mosota Land Company, for the purpose of cheating and defrauding this defendant, fraudulently and without the knowledge of this defendant caused the Arlington Land Company on the 23d day of March, 1914,

to convey unto the Mosota Land Company certain interests in the said lands, to wit, all ores, coal, petroleum, oil, gas, metals, carbons or hydrocarbons, mines, and valuable mineral deposits, lodes and veins found or hereafter to be found, together with their dips in or beneath the surface of the lands described in Plaintiff's Exhibit C, attached to plaintiff's complaint, and which said lands so described are identical with the lands described in Plaintiff's Exhibit B, attached to plaintiff's complaint, the same being the deed of the Arlington Land Company to John Looney, and that for a like fraudulent purpose they inserted in the deed conveying the lands to this defendant the statement in substance that the land deeded is subject to the terms of that certain deed executed and delivered by the Arlington Land Company to the Mosota Land Company, and for a like fraudulent purpose caused to be written into the said mortgage of the said John Looney to the Arlington Land Company, the same being Plaintiff's Exhibit A, attached to plaintiff's complaint, the statement that the description contained in the mortgage was subject only to certain exceptions and reservations created by and appearing in that certain deed from the Arlington Land Company to John Looney, the same being Plaintiff's Exhibit B, above referred to. (The said deed from the Arlington Land Company to John Looney and the mortgage from John Looney to the Arlington Land Company being respectively drawn and dated January 2, 1914, and the deed or the pretended deed to the Mosota Land Company being dated March 23, 1914.)

That the said Peebles and Thorpe for a like fraudulent purpose caused the deed for the said lands to this defendant, and the said notes and the said mortgage to be antedated for the fraudulent purpose of extorting unearned interest, and for a further purpose of cheating and defrauding this defendant the said Thorpe and Peebles represented that the said tract of land contained 9,537 acres, whereas in truth and in fact the said tract contained only 9,272 acres, or a shortage of 265 acres, whereby, on account of said shortage, defendant has lost the said lands of the value of $26,500; that the deed of the Arlington Land Company to the Mosota Land Company is a cloud upon the title of this defendant, and should in equity and good conscience be removed, and that the deed from the Arlington Land Company to this defendant should in equity and good conscience be reformed and corrected to conform with the agreement of sale; that similar representations were made by the said Thorpe and Peebles as to another tract of land containing 3,133 acres, which were contracted to be sold by them unto the said defendant John Looney under the same conditions as the tract hereinabove referred to, which said deed, however, fraudulently contained similar exceptions to those hereinabove set forth, and that the said Thorpe and Peebles, at such time of sale, for the purpose of cheating and defrauding this defendant, purposely suppressed from this defendant, at the time he purchased the said tract of land containing 3,133 acres, the fact that the Arlington Land Company had previously conveyed to the Mosota Land Company certain interests in said lands, and that this defendant had no knowledge of the conveyance of such interests to the Mosota Land

Company, or of the placing of record of such conveyance, at the time of his purchase from the Arlington Land Company, and that the said deed to the Mosota Land Company should in equity and good conscience be set aside as a fraud upon this defendant; that on account of the false representations and fraud perpetrated upon this defendant by the said Thorpe and Peebles, and the shortage in land and the damages resulting therefrom, and the payments made, the defendant has fully paid up the said purchase price of said lands.

The prayer based upon the counterclaim was substantially as follows:

The defendant prays for the following relief: That the said Samuel S. Thorpe, Thomas Peebles, Arlington Land Company, and Mosota Land Company be made parties to this suit by the plaintiff; that they be compelled to answer this counterclaim; that an accounting be had of the full amount of money the defendant has paid on the said mortgaged indebtedness, the number of acres that the said tract falls short, the damage sustained by the defendant by reason of said shortage, and that the same be allowed as a counterclaim against the said complainants, Samuel S. Thorpe, Thomas Peebles, or the Arlington Land Company; that the deed from the Arlington Land Company to the Mosota Land Company and the record thereof may be set aside and canceled; that the exceptions and reservations in the mortgage deed from John Looney to the Arlington Land Company be ordered to be stricken; that the exceptions and exclusions contained in the deed from the Arlington Land Company to John Looney, and other recitals therein specified, be stricken out of said deed and record thereof as being inserted therein unlawfully and fraudulently, and as a cloud upon the title of the defendant, and that the said deed be reformed to speak the truth; that the deeds of the Arlington Land Company to the Mosota Land Company in this pleading referred to be declared void as to this defendant, not only as a fraud upon the defendant, but for want of power in the Mosota Land Company to deal in real estate.

Plaintiff moved the trial court for an order striking out the counterclaim. The order asked for was granted, subject to the right of defendant to file an amended answer within 15 days if he should be so advised. This ruling is the first error assigned. Defendant denominated the pleading upon which he asked affirmative relief a counterclaim and made no effort to have it called anything else. Federal equity rule 30 (201 Fed. v, 118 C. C. A. v), so far as material reads as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him."

[1] In order to present the question of whether the matter pleaded was a counterclaim within the rule above quoted, it is necessary to put to one side all parties except the defendant and plaintiff, as there are no other parties to the cause, or any proper pleading which would authorize any one else to be made a party thereto. Parties may not be

brought into a cause by a counterclaim, and there is no allegation in the answer that there is a defect of parties plaintiff or defendant in the present case. U. S. v. Woods, 223 Fed. 316, 138 C. C. A. 578; Patten v. Marshall, 173 Fed. 350; Williams v. Adler-Goldman Commission Co., 227 Fed. 374, 142 C. C. A. 70. Looking, then, at the parties to the cause, we find as plaintiff a corporation of Minnesota and as defendant Mr. Looney. Plaintiff is a separate legal entity from Samuel S. Thorpe and Thomas Peebles, even if it be conceded that they own all the stock and control the affairs of the corporation. 14 C. J. p. 53, and cases cited.

[2] The question now arises as to what affirmative cause of action the defendant has pleaded against the plaintiff, either arising out of the transaction which is the subject-matter of the suit, or which might be the subject of an independent suit in equity against it, and which, if maintained, would authorize a judgment in favor of defendant against the plaintiff. The only relief prayed for is: (1) That the plaintiff be compelled to make Thorpe, Peebles, Arlington Land Company, and Mosota Land Company parties to the suit. This relief, of course, could not be granted by way of counterclaim, and therefore it does not constitute a counterclaim against the plaintiff. (2) That an accounting be had of the full amount paid by defendant on the mortgage indebtedness. Of course, if defendant has paid anything on the mortgage, he would be entitled to show such fact as a matter of defense under his answer, but it would not constitute a counterclaim. (3) That the number of acres the tract conveyed to defendant was short be ascertained, and the damages for the shortage be allowed as a counterclaim against Thorpe, Peebles, or the Arlington Land Company. Defendant did not pray that the amount be allowed as a counterclaim against plaintiff, but if the prayer could be so construed the claim could not be established without Thorpe, Peebles, and the Arlington Land Company were parties to the action; they are not parties, and could not be made so in the situation in which the case stood. It would not in any event be a cause of action in favor of defendant against the plaintiff. (4) That the deed from the Arlington Land Company to the Mosota Land Company and the record thereof may be set aside and canceled. This would constitute no counterclaim against plaintiff. (5) That the exceptions and reservations in the mortgage deed from defendant to the Arlington Land Company be ordered stricken. This would be no counterclaim against plaintiff. (6) That the exceptions and exclusions contained in the deed from the Arlington Land Company to defendant and other recitals therein specified be stricken out of said deed and record thereof and that said deed be reformed to speak the truth. This would be no counterclaim against plaintiff. (7) That the deeds of the Arlington Land Company to the Mosota Land Company be declared void as to defendant. This would not constitute any counterclaim against plaintiff. Defendant was given the opportunity to plead any matters of defense that he had against the plaintiff but did not amend his answer.

[3] Defendant seeks to avoid the apparent difficulties attending his attempt to plead a counterclaim by alleging that the Arlington Land

Company, the Mosota Land Company and Thorpe Bros., are one legal entity, and are owned, officered, and controlled by Samuel S. Thorpe and Thomas Peebles. This court not only must take notice that these three corporations are not one legal entity, but the corporations themselves have a right to contest the allegation that they are one, and they cannot do so in this suit, as they are not parties thereto, and no proper attempt has been made to make them so. There was no error in striking the counterclaim. After the counterclaim had been stricken the case came on for trial. The plaintiff introduced its evidence and recovered a judgment of foreclosure. It is now claimed by defendant that the court erred in denying his motion to dismiss made at the close of plaintiff's case, on the ground that the evidence offered by it was insufficient to sustain a judgment in his favor. In considering this assignment of error, the state of the pleadings and the evidence when the motion was made must be considered. The counterclaim had been stricken from the answer, leaving only the matters of defense set up in the answer. The plaintiff was not required to file a reply to this matter under equity rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii). The defendant offered no evidence whatever. The answer admitted the execution and delivery of the notes secured by the mortgage. The same admissions were made as to the mortgage. There was evidence that the plaintiff was the owner of the notes. Whether the plaintiff was a bona fide holder or not was immaterial, as the defendant did not attempt to prove any defense against it. The status of a bona fide holder is a protection from attack. If one is not attacked, the status need not be claimed.

The decree appealed from is affirmed.

LOONEY v. THORPE BROS.

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

No. 5868.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Suit in equity by Thorpe Bros., a corporation, against John Looney. Decree for complainant, and defendant appeals. Affirmed.

C. C. Catron, of Santa Fé, N. M., for appellant.

John H. Fry, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. This case is ruled by the opinion in No. 5867, John Looney, Appellant, Thorpe Brothers, a Corporation, Appellee, 277 Fed. 367, this day decided. The mortgage covers different lands than those mentioned in No. 5867.

For the reasons stated in our opinion in No. 5867, the decree below is affirmed.

UNITED STATES v. IDE et al.

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

No. 5704.

1. **Waters and water courses ⟸38—Facts held to show wash was not a natural stream.**
   The fact that, before irrigation of lands under a government reclamation project commenced, a wash or channel within the lands covered by the project carried water only as the run-off from rain or melting snow, and was generally dry during all the irrigating season, except the first 10 days, showed that the wash was not a natural stream, within Const. Wyo. art. 8, § 1, declaring the water of such streams to be the property of the state.
2. **Waters and water courses ⟸38—Natural stream should have permanent flow.**
   No definition of a natural stream or water course can be given that will apply to all cases, but the law requires, speaking generally, that a natural stream have a channel, boundary, permanent source of supply, and a permanent flow, and even if a water course in an arid region can be claimed as a natural stream, though it would not be in another region, a dry run or wash, which was worthless as a stream from which adjacent lands can be irrigated, cannot be classed as a natural stream.
3. **Waters and water courses ⟸38—State water permit does not make wash a natural stream.**
   That the state issued a permit for the appropriation of water from a water course does not make that water course a natural stream, if in fact it was not.
4. **Waters and water courses ⟸222—Reservation of right of way applies to future ditches.**
   Act Aug. 30, 1890 (Comp. St. § 4933), reserving from patents to public lands thereafter issued a right of way for ditches and canals constructed by the authority of the United States, did not limit the reserved right to ditches constructed when the patent was issued, but authorized a reservation in the patent for ditches thereafter to be constructed.
5. **Waters and water courses ⟸222—Patentee from state cannot object to reserved reclamation of right of way.**
   A patentee of lands from the state, who knowingly took his patent subject to a reservation, pursuant to Comp. St. Wyo. 1920, § 4954, of a right of way for ditches constructed by the United States, cannot contend as against the United States that the statute authorizing the reservation only applied to land while owned by the state.
6. **Waters and water courses ⟸222—Government liable for negligence in constructing ditches under reserved right of way.**
   The right of way reserved in a patent to lands for ditches constructed under the authority of the United States authorizes the construction of such ditches only in the exercise of due care, and the landowner can recover any damages resulting from negligent construction.
7. **Waters and water courses ⟸222—Drainage may be part of reclamation system.**
   The United States may construct drainage works as a part of its irrigation system for a reclamation project.
8. **Waters and water courses ⟸222—Necessity for drainage and method are within discretion of Secretary of the Interior.**
   Necessity for drainage in connection with a reclamation project and the method of conducting the work are in the sound discretion of the

Secretary of Interior, and his discretion cannot be reviewed by the courts.

9. **Waters and water courses ⟸222—Seepage and waste from reclamation project may be saved by United States, unless abandoned.**

The United States can save and continue to use the drainage seepage and waste waters from its reclamation project, even after such waters had been allowed to escape, so long as they could be identified and had not been abandoned.

10. **Waters and water courses ⟸222—Abandoned waste water can be reclaimed, without prejudice to third party.**

Even if waste water from a government reclamation project had once been abandoned, the government could thereafter reclaim such water and apply it to beneficial use, if no right of third parties had intervened.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit by the United States against Arthur W. Ide and others to enjoin interference with the construction of a ditch, in which Christopher Althoff and others were allowed to intervene as parties defendant. From a decree dismissing the complaint, awarding damages to defendants, and enjoining the United States from interfering with defendants' appropriation and use of certain waters, the United States appeals. Reversed and remanded, with direction to enter a decree for the United States.

This is an action commenced July 3, 1918, by the appellant against appellees for the purpose of enjoining them from interfering with the construction of a ditch in connection with appellant's Shoshone reclamation project, located in the state of Wyoming. The parties hereafter will be referred to as they were in the trial court. The original defendants were Arthur W. Ide, Charles Grant Caldwell, and H. B. Loomis. On motion Christopher Althoff, Arthur R. Thornberg, Earl Kysar, D. E. Townsley, and Agnes H. Caldwell were allowed to intervene as parties defendant. The defendants filed separate answers to the complaint of the plaintiff, and by way of counterclaim prayed that the plaintiff be enjoined from constructing the ditch above mentioned, and from performing any acts that would injure defendants' lands and water rights located along said proposed ditch. Judgment for damages for trespasses already committed was also asked. On final hearing upon pleadings and proofs the trial court granted the defendants damages in the aggregate sum of $3,150, dismissed plaintiff's complaint, and enjoined plaintiff and its officers, agents, employees, and representatives from interfering in any way with defendants' appropriation and use of the waters of Bitter creek, so called, for the purpose of irrigating their lands, and from constructing or maintaining any ditches or other works which would destroy or interfere with the maintenance and use by defendants of diversion drains, ditches, and other means of conveying water from Bitter creek to defendants' lands for irrigation purposes. It was further adjudged and decreed that if the plaintiff should, within 30 days from the date of the decree, file in the cause its election to furnish each of the defendants, other than A. W. Ide, a perpetual water right for the irrigation of their lands, and at the same time file a proper instrument in writing conveying without cost to each of said defendants, other than defendant A. W. Ide, perpetual water rights for the irrigation of their respective holdings of land in an amount equal to their respective appropriations of water from Bitter creek as evidenced by their water permits granted by the state of Wyoming, then the defendants should be enjoined from interfering with the plaintiff's construction of said ditch and the diversion and use of water therefrom. The plaintiff filed no election within the time allowed there-

for, and a decree was entered as above stated. From this decree plaintiff appealed.

A proper understanding of the case requires a statement, as brief as may be, of the facts as they appear from the record. Plaintiff on the 17th day of June (date of the approval of the Reclamation Act, 32 Stat. 388 [Comp. St. §§ 4700–4708]), was the owner of 1,000,000 acres of land situated in Big Horn county, Wyo.; a part of said county now being embraced in the county of Park. Through these lands flowed the Shoshone river. On and before the date aforesaid these lands were vacant lands, arid in character, and incapable of producing agricultural crops without artificial irrigation. The only source from which water could be obtained to irrigate these lands was the above-named river, the natural flow of which during the crop-growing season varied from a few hundred second feet to several thousand second feet in time of flood. April 21, 1903, March 11, 1904, and April 15, 1904, the Secretary of the Interior, under the authority of the Reclamation Act, above mentioned, withdrew from all forms of entry and sale, except under the homestead laws the public lands in said county of Big Horn. On February 10, 1904, said Secretary, acting under the authority of the same act, authorized and immediately began the carrying out of a reclamation project to be known as the Shoshone project, and which should embrace the lands so withdrawn from entry. The work upon the construction of said project has continued from the date last mentioned till the present time.

A sum in excess of $5,328,000 has so far been expended in the construction of reservoirs, dams, ditches, laterals, and in necessary surveys, and it is estimated that an expenditure of $5,000,000 will be required to complete said project. The principal engineering features of said reclamation project thus far constructed consist of the Shoshone storage reservoir situated in the county of Park above mentioned, with a storage capacity of 456,000 acre feet, completed at an expenditure of $1,364,000. The storage water coming from the Shoshone river into said reservoir is carried down said river as a carrying channel, and diverted at or near Corbett, in said county of Park, and will be diverted at other points along the river. The diversion dam at Corbett is a substantial concrete structure across the Shoshone river, constructed at an expenditure of $97,000. Its purpose is to divert water into the Corbett tunnel, and thence into the Garland Canal. The tunnel diverts about 1,000 cubic feet of water per second of time from the Shoshone river. The canal is 50 miles in length, has 286 miles of lateral ditches, and a capacity of irrigating 82,000 acres of land on the north side of the Shoshone river. Water was applied to the irrigation of the lands of the project in the summer of 1908, and has been applied to more and more lands, until at the commencement of this litigation 55,380 acres of lands under the Garland Canal were being irrigated. The total amount of land which will be irrigated when the project is completed will be 150,000 acres.

In 1899, there was segregated to the state of Wyoming by plaintiff, under the provisions of Act Aug. 18, 1894 (28 Stat. 422 [Comp. St. § 4685]), known as the "Carey Act," a tract of land of about 60,000 acres. This segregation was approved by the Interior Department June 9, 1901. May 22, 1899, the state engineer of Wyoming issued a permit to Cody and Salisbury for the diverting of water from the Shoshone river in an amount sufficient to irrigate this tract of 60,000 acres of arid land, with a limitation of one cubic foot per second of time for each 70 acres of land reclaimed. January 26, 1903, the Governor of Wyoming requested the plaintiff to take a relinquishment from the state of said tract of segregated land and an assignment of said water permit, so that plaintiff could irrigate and reclaim said land. The plaintiff accepted a transfer of said land and an assignment of the water permit. The tract of 60,000 acres so segregated by plaintiff to the state of Wyoming, and received back as above stated, embraced and included the lands of defendants.

March 5, 1904, plaintiff filed in the office of the state engineer of Wyoming an application in due form for a permit in conformity to the laws of said state for the construction of the Shoshone reservoir, which application was

duly granted. March 28, 1904, plaintiff filed in the same office an application in due form for a permit in conformity with the laws of said state to construct the Garland Canal, which application was duly allowed. On January 3, 1910, plaintiff filed in conformity with the laws of said state an application for a permit in due form for the construction and operation, among others of the Garland Canal and distribution system, and a notice of the withdrawal, reservation, and utilization by the plaintiff of its surplus and unappropriated waters for the reclamation purposes of the Shoshone project. This application was duly allowed by the proper officials of the state of Wyoming with a priority dating back to May 22, 1899, the date of the permit to Cody and Salisbury. The various permits granted by the state of Wyoming to the plaintiff cover the lands of defendants here in controversy.

Prior to the year 1908, plaintiff constructed as a part of its said project the Garland Canal and several laterals above and around the Garland division of the Shoshone project. Beginning with the year 1908, the water of the plaintiff was run through the Garland Canal and the laterals around and above said area, and the lands therein were supplied with water for irrigation. Immediately upon the carrying of water into plaintiff's Garland Canal around and above the drainage line called Bitter creek, and the application of irrigation water from said canal and laterals to the lands situated in the vicinity thereof, waste, return, percolating, and seep water began to appear in portions of said Bitter creek to such an extent that an increasing and continuous stream was created. Adjacent areas of land in the vicinity became saturated and required drainage in order to retain their productivity and to secure the highest agricultural returns.

Beginning in the year of 1910, in furtherance of said project and for carrying out the express purposes thereof, and in contemplation of the condition heretofore described, and to develop and collect water on said project and to drain waterlogged land, and to utilize said waste, percolated, and seepage water, and in accordance with notices theretofore given as above stated, plaintiff found it necessary to construct in the vicinity of Bitter creek a large and deep drainage ditch for developing and collecting waste, percolating, and seepage waters resulting from the irrigation with plaintiff's water of lands under said project. The natural lines of drainage for said project included and involved the use of Bitter creek as a drainage line, and the plans of the proposed drainage system contemplated such use. Construction work was begun and continued, with Bitter creek as a main trunk drain, and the plans for construction of drains and the actual construction thereof have not been changed or interrupted, except by state officials of Wyoming acting at the instance of defendants.

Since 1910 the plaintiff has constructed additional drains for the reclamation of seeped lands, and to utilize the waste and drainage water for the irrigation and reclamation of the lands of the project, and to put said drainage waters to beneficial use. By the construction of additional drains the amount of water in Bitter creek has increased, and at the commencement of this litigation more than 22 second feet of water was being applied to beneficial use. Plaintiff plans to divert and use, to irrigate the project lands, about 110 second feet at the time of final drainage development.

Defendant Ide owns a homestead, consisting of lot 41 in township 56, range 98, through which Bitter creek flows. The other defendants are owners of separate portions of section 36 or lot 37, in township 56, range 99, through the south half of which Bitter creek also flows. This section was purchased from the state of Wyoming in 1910. Eighty acres of it, belonging to defendant Charles Grant Caldwell, is and since 1911 has been irrigated with water taken from Bitter creek through Caldwell Ditches No. 1 and No. 2, by virtue of appropriation permits from the state of Wyoming, dated October 6, 1910. Approximately all of the remainder of this section is irrigated with water from the same source, taken through enlargements of said ditches by virtue of permits from the state of Wyoming dated April 22, 1915. Defendant Charles Grant Caldwell also owns a homestead of 80 acres, consisting of the east half

of the southeast quarter of section 38, township 59, range 99, through which Bitter creek flows, and which is irrigated with water purchased from the government reclamation project.

Pursuant to the drainage plans of plaintiff as above stated, it was found necessary to deepen Bitter creek, and in doing so plaintiff committed the trespass and caused the injuries which defendants claim they have suffered. The homesteads of Ide and Caldwell were patented under Act June 17, 1902 (Reclamation Act, 32 Stat. 388), and Act Aug. 30, 1890 (26 Stat. 391 [Comp. St. § 4933). The last-named act contains the following proviso: "That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

The act of the Legislature of Wyoming approved February 21, 1905 (C. S. Wyo. 1910, § 3890), provides: "There is hereby granted over all the lands now owned by the state of Wyoming, which may hereafter be owned by the state of Wyoming, a right of way for ditches, tunnels, telephone and transmission lines constructed by and under the authority of the United States; Provided, * * * That all conveyances by the state of any of its lands, which may hereafter be made, shall contain a reservation for rights of way provided for in this act."

The homestead patents to Ide and Caldwell contained this reservation: "But excepting, nevertheless, and reserving unto the United States, rights of way over, across, and through said lands for canals and ditches constructed, or to be constructed by its authority, all in the manner prescribed and directed by the act of Congress approved August 30, 1890 (26 Stat. 391)."

The patents of the state of Wyoming, conveying section 36, supra, contained this exception: "Subject to all legally established or granted rights of way under the laws of the state of Wyoming or reserved to the United States."

The length of the irrigation season in the locality in question is 180 days, extending from April 20th to October 20th. In regard to whether or not the depression in the earth's surface, called in the record Bitter creek wash, dry wash, drainage line, and Bitter creek, is a natural stream, there was much testimony introduced by both parties. Such testimony has been carefully read and considered, and we are of the opinion that, giving to the testimony of the defendants' witnesses all that can be claimed for it, the following facts are established without material dispute:

What is called Bitter creek, when viewed separate and apart from the waters which are now flowing in it, from the reclamation project of the plaintiff, has no natural source of water supply other than rainfall or melting snow. The water from the territory which drains into Bitter creek from rain and melting snow does so during the months of March and April of each year, and that subsequently to the 1st of May no water is found in Bitter creek, other than produced by the Shoshone project. The water from rain and melting snow varies from year to year proportionately to the amount of rainfall including snow. The official records of this rainfall, including snow, kept by the agents and officers of the plaintiff at Powell, in the vicinity of the watershed to Bitter creek, shows that the rainfall, including snow, averages less than 6 inches per year. The same records show for the watershed an evaporation of 30 inches during the irrigation season. The drainage basin contains only 33 square miles.

Prior to the construction of the Shoshone project, although there were settlers in the vicinity of Bitter creek, near the town of Byron, as early as 1900, there is no evidence that any one ever applied during that time to the state of Wyoming for a water permit on Bitter creek, although land along the so-called creek is admittedly, according to all the testimony, worthless without water, but with water is worth $250 per acre. The water rights under which defendants, or some of them, claim were granted in 1910 or subsequent thereto. From 1900 until 1908 there was no grass, bushes, or trees,

such as grow along natural streams in Wyoming, growing along the banks of this alleged creek above Garland. All the engineers engaged on the reclamation project testified that from their own observation there was no natural flow or source of water in Bitter creek, except from rainfall or melting snow and that this was of short duration.

Byron Sessions, a witness for the plaintiff, testified: "When you talk about water in that draw, it is all nonsense." The witness Caldwell, whom the trial court mentions, was directly interested as a party defendant, and his testimony does not conflict with what we have stated.

Ethelbert Ward, Sp. Asst. Atty. Gen., and Albert D. Walton, U. S. Atty., of Cheyenne, Wyo. (Willis J. Egleston, Dist. Counsel, U. S. Reclamation Service, of Helena, Mont., and Clyde M. Watts, Asst. U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

Avery Haggard, of Cheyenne, Wyo. (William B. Ross, of Cheyenne, Wyo., on the brief), for appellees.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge (after stating the facts as above). The attempt of the plaintiff to deepen what is called in the evidence Bitter creek, in accordance with its plans for draining the Garland division of its Shoshone project, together with the attempts of the defendants to make worthless lands worth $250 per acre at the expense of the plaintiff, are the chief causes of this litigation. The Reclamation Act provides that all proceedings thereunder on the part of the plaintiff shall be in accordance with the laws of the state in which the proceedings are had, and so far as we have been able to learn from the record the plaintiff has complied with the laws of Wyoming in the construction of its reclamation project, including reservoirs, diversion dams, canals, and laterals. We are of the opinion that, in the consideration of a case such as the one before us, a broad view of the situation is necessary, in order to carry out, if lawfully permissible, the great object which the plaintiff had in view in enacting legislation which permits it, with its great resources, to reclaim arid and semi-arid lands for cultivation. It is a work that could not be done, or at least would not be done, by private effort.

On the face of the record it would seem that the defendants, whose lands have been increased in value from nothing to $250 per acre by the construction of the Shoshone project, were willing to receive this benefit without contributing anything therefor. They claim, however, that they are acting clearly within their legal rights. If so, they must prevail as against the claims of the plaintiff. There are two large questions to be considered in the determination of the rights of the parties:

(1) Is or was Bitter creek ever a natural stream within the meaning of those words as used in article 8, § 1, Constitution of Wyoming, which reads:

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

(2) Had the United States a right of way through or across the lands of defendants to construct a ditch as a part of its drainage system in the Garland division of its Shoshone project, for the purpose of draining seeped lands, collecting waste and percolating water arising from its project, and diverting the same for beneficial use in connection with its reclamation project?

[1] Upon the first proposition we are of the opinion that the evidence falls far short of showing Bitter creek ever to have been a natural stream. No one, prior to the time that water first commenced to run in the creek as the result of the construction of the Shoshone project, ever applied for a permit to use any of the water of the creek, and there is no substantial conflict in the testimony to the effect that there was no water in the creek after the 1st of May, and that the irrigation season did not commence until April 20th of each year. The substance of what the evidence shows has been set forth in the statement of facts, and we are of the opinion that it would be a clear mistake, in considering the evidence, to hold that Bitter creek is or ever was a natural stream. The trial court found that it was a natural stream. We think the presumption attending such finding is clearly overthrown by the evidence, and we must hold that there was a serious mistake made in the consideration of the evidence by the trial court upon this point. We have examined the authorities cited by counsel for defendants upon the question at issue, and we are unable to find an authority which under the facts as they appear in the record holds such a stream as Bitter creek is shown to be is a natural stream.

[2] It is claimed that the question of whether Bitter creek is a stream or not must be judged with reference to the country or locality in which it is found, and that there are natural streams in arid countries that would not be called such in a country not arid. But certainly any such distinction should not be carried so far as to make a natural stream out of a dry run or wash. In determining whether a natural stream exists or not, it is permissible to inquire whether the alleged stream flows for such a length of time that its existence will furnish the advantages usually attendant on streams of water. Chicago, etc., R. Co. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802; Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727. The stream in question, when subjected to this test, wholly fails. It certainly was worthless as a stream from which adjacent lands could be irrigated. It is believed that no definition of a natural stream or water course can be given that will apply to all cases, as each case has its own facts which must influence the judgment of the court. Speaking generally, it seems to be the law that a natural stream must have a channel, boundary, permanent source of supply, and a permanent flow. R. C. L. vol. 27, pp. 1063, 1065, 1066; 40 Cyc. 554, 555, 556; 29 Cyc. 283; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Pyle v. Richards, 17 Neb. 180; 22 N. W. 370; 27 Am. & Eng. Encl. of Law, 1; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; Hutchinson v. Watson Slough Ditch Co., 16 Idaho, 484, 101 Pac. 1095, 133 Am. St. Rep. 125; Rait v. Furrow, 74 Kan. 101, 85 Pac.

934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044; Thorpe et ux v. City of Spokane, 78 Wash. 488, 139 Pac. 221; C., R. I. & P. v. Morton, 57 Okl. 711, 157 Pac. 917; Town of Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Ashley v. Wolcott, 11 Cush. 192; Hoyt v. City of Hudson, 27 Wis. 664, 9 Am. Rep. 473; Ang. Water Courses (5th Ed.) § 4; Barnes v. Sabron, 10 Nev. 218; 1 Kinney on Irrigation (2d Ed.) pp. 495, 496, 498, 499. We find nothing to the contrary in Simons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727, Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 Pac. 994, and Oregon-Washington R. & Nav. Co. v. Royer, 255 Fed. 881, 167 C. C. A. 201, because the facts in those cases are different from those in the case at bar. We therefore decide that Bitter creek is not a natural stream.

[3] The state of Wyoming could not make the creek a natural stream by issuing a permit to take water therefrom. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258–269, 50 L. R. A. 747, 87 Am. St. Rep. 918; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661; U. S. v. Rams horn Ditch Co. (D. C.) 254 Fed. 842; Id. (C. C. A.) 269 Fed. 80; Wattson v. U. S., 260 Fed. 506, 171 C. C. A. 308; Hagerman Irr. Dist. v. East Grand Plains Drainage Dist., 25 N. M. 649, 187 Pac. 555; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. 567; Basinger v. Taylor, 30 Idaho, 289, 164 Pac. 522.

Coming, now, to the question as to whether the plaintiff had a right of way over and through the lands of defendants for the purpose of constructing a ditch, in order to carry out its drainage plan and the collection and diversion of its waste, seepage, and percolating water escaping from its Shoshone project, we are of the opinion that the reservations in the patents from the United States and in the conveyances executed by the state of Wyoming to the defendants for lands in section 36, supra, were valid reservations of a right of way for the purpose mentioned and that the plaintiff was not a trespasser in entering upon defendants' lands for the purpose of deepening Bitter creek. The act of Congress of August 30, 1890, and the act of the Legislature of Wyoming approved February 21, 1905, so far as material, are set forth in the statement of facts; also the reservations in the patents and deeds of conveyance. We are satisfied that the legislation on the part of Congress and the state of Wyoming was enacted in order to assist the plaintiff in carrying out the Reclamation Act, although the latter act was passed after August 30, 1890. The Legislatures of other states having arid lands passed acts similar to the one passed by the state of Wyoming. Such statutes were enacted in 1905 in Idaho, Montana, Nebraska, Nevada, Oregon, Utah, Washington, and in 1907 by California, New Mexico, and South Dakota, and in 1909 by Colorado.

[4] Counsel for defendant calls attention to the fact that the act of Congress of August 30, 1890, supra, reserves a right of way for ditches and canals "constructed" by the authority of the United States, while the reservation in the homestead patents contains the additional words "or to be constructed," and the claim is made that the reserva-

tions in the patents are broader than the statute, and that no authority can be found in the statute for reserving a right of way for canals and ditches "to be constructed" by authority of the United States. Such a construction of the statute would make the reservation therein apply only to ditches that had already been constructed. We do not think that such an absurd result was ever intended by Congress, but that the reservations in the patents were in accordance with the evident intention of Congress, and that, such interpretation being given by the department of the government having charge of the execution of the statute, great weight must be given to it. We think the statute as well as the patents referred to ditches "to be constructed" in the future. The statute in question has been construed by the courts in the following cases: Green v. Willhite (C. C.) 160 Fed. 755 (1906); Green v. Willhite, 14 Idaho, 238, 93 Pac. 971 (1908); U. S. v. Van Horn (D. C.) 197 Fed. 611 (Colo. 1912). In those cases the courts have placed the same construction upon the statute as we have indicated. In Green v. Willhite, 14 Idaho, 238, 93 Pac. 971, a detailed history of the act and the discussions in Congress relative to its purpose and interpretation are given. It appears clearly from said history, as stated by the Supreme Court of Idaho, that the members of Congress, both those favoring and those opposing the act, believed and understood that it would have the effect of reserving a perpetual easement and right of way to the government for ditches and canals that might thereafter be constructed by authority of the government over lands that should be entered and patented subsequent to the passage of the act. We have no doubt that the reservation in the homestead patents contained the proper interpretation of the act of Congress of August 30, 1890.

[5] It is further contended by counsel for defendants that there is no justification in the language of the statute enacted by the Legislature of Wyoming for the purpose of reserving a right of way for ditches, tunnels, telephone, and transmission lines constructed by and under the authority of the United States for extending said right of easement to lands not owned by the state. We do not think it is open to the defendants, who purchased their lands from the state of Wyoming and received and accepted the deed of conveyance containing the reservation heretofore mentioned, to now complain as against the plaintiff that the reservation is void. The reservation and the deed of conveyance was made pursuant to the last proviso of section 4954, C. S. Wyo. 1920, heretofore quoted, and became operative at the time the deed was executed and delivered. The defendants took their title subject to this burden and with full knowledge thereof. No injustice results, for the reason that the lands purchased by defendants were admittedly worthless without irrigation, and they were not purchased until the plaintiff had proceeded far enough with its Shoshone project so as to show that these lands would be irrigated thereunder.

[6] Counsel for defendants complains of the great injustice done the defendants by the manner in which Bitter creek was deepened across defendants' lands. We have no intention of deciding that the plain-

tiff could go on the lands of defendants and in a reckless and careless way construct a ditch that would unnecessarily damage the lands of defendants, and the decision in this case will be without prejudice to the right of the defendants, or any of them, to recover from the plaintiff any damages resulting from the want of ordinary care in constructing the ditch or the deepening of Bitter creek. We think the plaintiff was fully authorized, by the statutes that have been mentioned and the reservations in the patents and deeds of conveyance, to construct a ditch across defendants' lands using ordinary care.

[7, 8] It is well settled that the plaintiff may construct drainage works as a part of its irrigation system. Bissett v. Pioneer Irr. Dist., 21 Idaho, 98, 120 Pac. 461; Pioneer Irr. Dist. v. Stone, 23 Idaho, 344, 130 Pac. 382; Nampa & Meridian Dist. v. Petrie, 28 Idaho, 227, 153 Pac. 425; G. G. Burt et al. Drainage Dist. v. Farmer's Co-operative Co., 30 Idaho, 752, 168 Pac. 1078. The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts. Ness v. Fisher, 223 U. S. 691, 32 Sup. Ct. 356, 56 L. Ed. 610; Knight v. U. S. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Noble v. Union River Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123 (1893); U. S. v. Minidoka & W. R. Co., 190 Fed. 491, 111 C. C. A. 323 (1911); Stalker v. O. S. L. Ry. Co., 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027 (1912); U. S. v. O'Neill (D. C.) 198 Fed. 680; U. S. v. Burley (C. C.) 172 Fed. 617; State ex rel. Megler v. Forrest, Commissioner of Public Lands, 13 Wash. 268, 43 Pac. 51 (1895); U. S. v. Doherty (D. C.) 27 Fed. 730; U. S. v. Schurz, 102 U. S. 375, 26 L. Ed. 167; Cosmos Exploration Co. v. Gray Eagle Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; Riverside Oil Co. v. Hitchcock, 190 U. S. 317, 23 Sup. Ct. 698, 47 L. Ed. 1074; U. S. v. Speed, 8 Wall. 77, 83, 19 L. Ed. 449; Earnshaw v. U. S., 146 U. S. 60, 13 Sup. Ct. 14, 36 L. Ed. 887; Bates v. Payne, 194 U. S. 107, 24 Sup. Ct. 595, 48 L. Ed. 894.

[9] The right of the plaintiff to save and continue to use the drainage, seepage, and waste waters of its project is established by the following cases: Ramshorn Ditch Co. v. U. S. (C. C. A.) 269 Fed. 80, 83 (8th Cir. 1920); Griffiths v. Cole (D. C.) 264 Fed. 369, 372 (Idaho, 1919); McKelvey v. North Sterling Irr. Dist., 66 Colo. 11, 179 Pac. 872, 874 (1919); Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N. M. 649, 187 Pac. 555, 557, 558 (1920); Lambeye v. Garcia, 18 Ariz. 178, 157 Pac. 977, 979, 980 (1916); United States v. Oliver O. Haga et ux. (D. C.) 276 Fed. 41 (August 10, 1921).

The permits granted by the state of Wyoming to the defendants could not authorize the defendants to take the waters of the plaintiff, and, as Bitter creek was not a natural stream, said permits gave no authority to take water from Bitter creek. No one ever applied for such permits until the plaintiff had at a great expense brought water from the Shoshone reservoir to the vicinity of the lands in question, and it is fair to presume that no permits would have been asked for, if the irrigation project had not been developed by the plaintiff. The law is clear, in our opinion, that the plaintiff had the right to save and

continue to use the drainage, seepage, and waste waters of its project as long as such water could be identified and had not been abandoned.

[10] So far as abandonment is concerned, it was neither pleaded nor proven by the defendants. There may have been some of the plaintiff's water which during the construction of the Shoshone project may have flowed into the Shoshone river, but the acts and declarations of the plaintiff show that as soon as it could reasonably do so it commenced to construct ditches and diversion works to save and divert drainage, seepage, and waste water arising from its project, for the purpose of applying it to the beneficial use of irrigating lands in the Garland division. The evidence shows that at all times plaintiff had in mind the saving of its waste water. Even if it had been shown that the plaintiff had abandoned some of this waste water, it would not preclude it from subsequently attempting to save it for beneficial use, where the rights of third parties had not intervened, and the defendants are no such parties, as they have no lawful right to take water from Bitter creek, except under the terms of the Reclamation Act. In U. S. v. Haga, supra, Dietrich, District Judge, used the following language in regard to the question now under consideration:

"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, it 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 suffer 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. D., 25 N. M. 649, 187 Pac. 555; Griffith 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.

"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."

We conclude that the facts as stated and the law applicable thereto require a reversal of the decree below, and that the case be remanded to that court, with directions to enter a decree in favor of the plaintiff as prayed; and it is so ordered.

WEYMOUTH et al. v. LINCOLN LAND CO. et al.

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

No. 5703.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by the Lincoln Land Company and others against Frank E. Weymouth and others. Decree for complainants, and defendants appeal. Reversed and remanded.

Ethelbert Ward, Sp. Asst. Atty. Gen., and Albert D. Walton, U. S. Atty., of Cheyenne, Wyo. (Willis J. Egleston, Dist. Counsel, U. S. Reclamation Service, of Helena, Mont., and Clyde M. Watts, Asst. U. S. Atty., of Cheyenne, Wyo., on the brief), for appellants.

Avery Haggard, of Cheyenne, Wyo. (William B. Ross, of Cheyenne, Wyo., on the brief), for appellees.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. This case is ruled by the decision in No. 5704, United States of America, Appellant, v. Arthur W. Ide et al., Appellees, 277 Fed. 373, this day decided. It is an action brought by appellees for the purpose of restraining appellants who are officers of the United States in charge of the Shoshone reclamation project, Wyoming, from performing any acts which will divert the waters of Bitter creek in such a manner as would prevent appellees from receiving at all times through headgates on Bitter creek the amount of water necessary to properly irrigate their lands for agricultural purposes. Appellees are the owners of lot 56, townships 55 and 56 north, range 98 west of the sixth principal meridian, containing 320 acres, Park county, Wyo. On August 5, 1912, the Lincoln Land Company obtained from the state of Wyoming a permit to appropriate water from Bitter creek sufficient to irrigate for agricultural purposes the land owned by it as above described and to construct a diversion dam in said Bitter creek for that purpose. It is claimed that by reason of these facts appellees have a right to use the waters of Bitter creek to the extent necessary to properly irrigate the said lands of appellees. On or about May 8, 1918, appellants in carrying out the work incident to the construction of the Shoshone reclamation project caused a trench to be dug from a point on Bitter creek above appellees' diversion dam to a point on said creek below said dam, which trench diverted all the waters away from said diversion dam.

For the reasons stated in our opinion in No. 5704, the appellees have no right to the water in Bitter creek by virtue of their permit granted in 1912, and therefore the decree must be reversed, and the case remanded, with directions to dismiss the complaint of appellees, with costs.

And it is so ordered.

BANK OF BUCHANAN COUNTY v. CONTINENTAL NAT. BANK OF LOS ANGELES.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1921.)

No. 5551.

1. **Guaranty ⟸30—Limited to person to whom addressed.**
   A guaranty addressed to a particular person is a contract limited to the person addressed.
2. **Guaranty ⟸30—Guarantor held not bound by a guaranty transferred by the addressee to another.**
   Defendant bank telegraphed to another bank a guaranty of drafts drawn on a commission house covering cars of produce to be shipped under certain conditions. The addressee, having no business relations with the shipper, turned the telegram over to plaintiff bank, which had, and which cashed the drafts, though they did not comply in all respects with the conditions. *Held* that, the guaranty not having been accepted and acted on by the addressee, defendant was not liable thereon.
3. **Guaranty ⟸6—Guarantor not bound to accept or reject proposed modification.**
   Notice by the addressee of a telegram of guaranty to the guarantor that it would not act thereon, but had turned the telegram over to another, *held* in effect a new offer which the guarantor was not called on to either accept or reject, and its failure to answer *held* not an acceptance of the substitution.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by the Continental National Bank of Los Angeles against the Bank of Buchanan County. Judgment for plaintiff, and defendant brings error. Reversed.

Charles H. Mayer, of St. Joseph, Mo. (Charles F. Strop, of St. Joseph, Mo., on the brief), for plaintiff in error.

R. E. Culver and Benjamin Phillip, both of St. Joseph, Mo., for defendant in error.

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

MUNGER, District Judge. This was an action upon a written guaranty. At the close of the evidence both parties requested a directed verdict. The court directed a verdict in favor of the plaintiff, and from the judgment this error proceeding is prosecuted. The J. L. Price Brokerage Company were engaged in business at St. Joseph, Mo., as commission merchants. Hicks, Sutherland & Co. were engaged in a similar business at Los Angeles, Cal. The St. Joseph company had made some prior purchases from the Los Angeles company, but, contemplating further purchases, it procured the defendant, hereafter called St. Joseph Bank, to send to the Los Angeles Trust & Savings Bank a telegram reading as follows:

"St. Joseph, Mo. 9 31 A June 8, 1917.

"Los Angeles Trust and Savings Bank, Los Angeles, Calif. We guarantee J. L. Price Brokerage Co. will pay draft drawn by Hicks Sutherland Co.

when accompanied with certificate of weights and original bill of lading covering five cars new potatoes sacked draft to be drawn on basis three twenty five cwt. for what the car contains and decking charge ten dollars per car.
Bank of Buchanan Co."

Upon receipt of the telegram the addressee ascertained that Hicks, Sutherland & Co. were not among its regular customers, but transacted their business with the plaintiff, the Continental National Bank of Los Angeles. The addressee advised the plaintiff of the contents of the telegram, and on the same day, June 8th, the Los Angeles Trust & Savings Bank mailed a letter to the St. Joseph Bank acknowledging receipt of the telegram and advising that the Hicks-Sutherland Company was not a client of that bank, but had given the writer the name of their Los Angeles bankers. The letter then continued:

"We called up the Continental National Bank and explained the situation and they stated it would be agreeable to them to negotiate drafts as outlined in your telegram, and requested that we send them your telegram, which request we are pleased to grant. Trusting there will be no objection to the manner in which we have disposed of the matter, and that you appreciate our position, we are,
"Yours truly,
Ralph Day, Assistant Cashier."

About four days are ordinarily required for a letter mailed at Los Angeles to reach a St. Joseph addressee. The St. Joseph Bank received this letter, but made no reply. Between June 14th and June 19th Hicks, Sutherland & Co. loaded and shipped five carloads of new potatoes, consigned to the J. L. Price Brokerage Company on straight bills of lading. At the same dates Hicks, Sutherland & Co. drew five drafts, each addressed to J. L. Price Brokerage Company and signed by Hicks, Sutherland & Co. and payable on demand to the order of the Continental National Bank of Los Angeles for amounts stated. The originals of the bills of lading were attached to these drafts with invoices showing the car, the date of shipment, the consignor, the weight and value of the potatoes, and the charge for decking. These drafts were delivered to the Continental National Bank, which paid Hicks, Sutherland & Co. the amount of the face of the drafts and then sent them with the attached papers to the St. Joseph Bank. No certificates of weights were attached or sent with the drafts. On June 25th or 26th an attorney for the Continental National Bank was informed at a meeting with officers of the St. Joseph Bank and of the J. L. Price Brokerage Company that payment of the drafts was refused, because the guaranty was not addressed to the Continental National Bank, and because no certificates of weights were attached to the drafts and bills of lading. The cars had arrived at St. Joseph at dates between June 21st and 25th, and the potatoes had been sold by the railway company on dates from June 22d to June 27th, for freight and demurrage charges and as perishable goods. The attorney for the Continental National Bank on June 26th requested his client to procure the certificates of weight and upon obtaining them he exhibited them to the St. Joseph Bank on July 9th and again demanded payment of the drafts which was refused.

[1] "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the

right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' " Arkansas Smelting Co. v. Belden Co., 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246. Was this telegram a special guaranty intended only for the addressee or was it a general guaranty which could be accepted by other banks? The rule has often been stated that a guaranty which is addressed to a particular person is a contract limited to the person addressed. Myers v. Edge, 7 Term 254, 256; Strange v. Lee, 3 East 484, 490; Dry v. Davy, 10 A. & E. 30, 31; Grant v. Naylor, 4 Cranch (U. S.) 224, 235, 2 L. Ed. 603; Robbins v. Bingham, 4 Johns. (N. Y.) 476, 477; Walsh v. Bailie, 10 Johns. (N. Y.) 180, 182; Penoyer v. Watson, 16 Johns. (N. Y.) 100, 101; Evansville Bank v. Kaufmann, 93 N. Y. 273, 288, 45 Am. Rep. 204; Birckhead v. Brown, 5 Hill (N. Y.) 634, 643, Id., 2 Denio, 375; Smith v. Montgomery, 3 Tex. 199, 208; Allison v. Rutledge, 5 Yerg. (Tenn.) 193, 194; Johnson v. Brown, 51 Ga. 498, 500; King v. Batterson, 13 R. I. 117, 119, 43 Am. Rep. 13; Holmes v. Small, 157 Mass. 221, 224, 32 N. E. 3; Jordan-Marsh Co. v. Beals, 201 Mass. 163, 164, 87 N. E. 471; Lyon v. Van Raden, 126 Mich. 259, 262, 85 N. W. 727; Morris & Co. v. Lucker, 158 Mich. 518, 520, 123 N. W. 21; Schoonover v. Osborne, 108 Iowa, 453, 458, 79 N. W. 263; Black v. Albery, 89 Ohio St. 240, 245, 106 N. E. 38; Lyon & Co. v. Plum, 75 N. J. Law, 883, 884, 69 Atl. 209, 14 L. R. A. (N. S.) 1231, 15 Ann. Cas. 1019, 127 Am. St. Rep. 858; Saunders v. Ducker, 116 Md. 474, 479, 82 Atl. 154, Ann. Cas. 1913C, 817; 2 Dan. Neg. Inst. § 1774.

The most common application of the principle in the cases cited is to guaranties addressed to one individual and acted upon by another and to guaranties addressed to one firm which has been succeeded by another organization, or in which some change has occurred by addition or withdrawal from the membership and the claim was made that the guaranty extended to the later firm or company. In the case of Grant v. Naylor, supra, the Supreme Court of the United States by Chief Justice Marshall held that a letter of credit carried by the writer's son to England and addressed by mistake of the writer to "Messrs. John & Joseph Naylor & Co.," guarantying the engagements of a firm in which the writer's son was a partner, did not bind the writer to pay for goods sold by a firm engaged in business at Wakefield, England, under the name of John & Jeremiah Naylor & Co., although the sale was made upon the faith of the letter of credit, and there was no commercial house at Wakefield of the name of John & Joseph Naylor & Co., and the letter was really designed for John and Jeremiah Naylor, because the letter was not ambiguous and was not addressed to the firm that acted upon it. It is to be observed that in most of the cases cited the intention of the guarantor to confine his engagement to the person named is shown not only by the formal address or superscription at the beginning of the writing, but is also shown by the use of some pronoun in the body of the guaranty in phrases such as "if you will furnish" or "which you may supply." While such definiteness affords a facile means of interpretation of the contract, it is not lightly to be inferred that a guaranty is to be taken as general because it is

addressed to one person in the superscription only. The guarantor may have selected the particular addressee as the only person whom he would trust to deal with his principal, for the reasons stated by Lord Kenyon in Meyers v. Edge, supra, that the guarantor thought that that dealer would use due diligence in enforcing payment from the principal regularly, as goods were sold him, and that at least, the courts cannot say that the guarantor would have given the same credit to some other person than the one he did select. Others of the cases cited say that the guarantor has the right to select the person whom he trusts to supply his principal with funds or goods, because he may have confidence in his prudence in dealing with his principal or in his lenience with the guarantor if the principal makes default and so the character of the addressee selected is a material ingredient in the engagement. There are many obvious reasons why a bank may select a particular bank correspondent as one whom it will guaranty in a case like this. There may be such a relation of credits between them that, if called upon to pay the guaranty, the guarantor may offset the claim by mere entry of credit; there may be such common business interests between the banks that there is a mutual advantage anticipated from the transaction; the guarantor may have confidence in the bank which it guaranteed, derived from previous dealings, from personal friendships between the banks' officers, or from knowledge of the reputation and standing of the correspondent so that it believes the correspondent will take unusual care not to purchase the drafts unless it is satisfied with the solvency and willingness to pay of the drawee, and that it will take unusual care to first exact payment from the drawee before it calls upon the guarantor to pay.

[2] In this case, although the guaranty was that the Price Brokerage Company would pay the drafts when they were accompanied by certificates of weights and the bills of lading, the drafts were presented to the St. Joseph Bank without any such certificates, and before the certificates were obtained the produce had been sold by the railway company, as a perishable product and to pay the charges of carriage. The St. Joseph Bank was threatened with possible suit, when it might have been willing to have paid the drafts had the certificates accompanied the drafts. It may have selected the other Los Angeles bank as its addressee, because it believed it would attend to such details in a proper business manner. When the St. Joseph Bank sent the telegram of guaranty, it was making an obligation which was only collateral to the obligation of the J. L. Price Brokerage Company, the drawee of the drafts, and which bound it to pay only in case the drawee should fail to pay. Before such a guarantor can be held, the holder of the drafts must use reasonable diligence to make demand upon the drawee and to give notice of the nonpayment to the guarantor. Douglass v. Reynolds, 7 Pet. 113, 126, 127, 8 L. Ed. 626; Davis v. Wells, 104 U. S. 159, 160, 170, 26 L. Ed. 686; Johnson v. Charles D. Norton Co., 159 Fed. 361, 364, 86 C. C. A. 361; 2 Dan. Neg. Inst. § 1787.

The St. Joseph Bank may have selected the addressee in its telegram, because it believed that that correspondent would use greater diligence to have the holder present the drafts to the J. L. Price Brokerage

Company and in notifying the guarantor of default than another bank would exert and thereby would give the guarantor an earlier opportunity to save itself from loss, before the markets for produce should materially change, before the produce should deteriorate, and before the drawee's financial condition should change for the worse. The reasons for maintaining the right of selection of the person with whom one will contract are illustrated by those suppositions, but the right of selection in any case does not depend upon proof of the existence of a good reason therefor, for one may refuse to contract with another for a good reason or for no reason. Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 641, 28 C. C. A. 365; Boston Ice Co. v. Potter, 123 Mass. 28, 31, 25 Am. Rep. 9.

From these considerations it is manifest that the court cannot say that the bank which the guarantor selected is not the only one which it intended to select. The meaning of the guaranty is apparent and limited by its terms to the addressee. If it had been the intention to guaranty the drawer's drafts to any indorsee, a telegram to the drawer and addressed to no particular indorsee would have been the usual method of granting such credit. There were no words in the guaranty indicating that it was intended for any other bank's protection. The few cases which bear upon this exact question support the view which has been announced. In Taylor v. Wetmore, 10 Ohio, 491, 494, the guaranty was addressed at the beginning to "Messrs. A. D. McBride & Co.," and the argument was made that because the body of the guaranty did not say that the guarantors "will be responsible to you" it was therefore a letter of credit to any one who would advance the goods. The court said:

"It seems to us this reasoning is more ingenious than sound. The guaranty being addressed to A. D. McBride & Co., it is to them the defendants speak when they say, 'We will be responsible to the amount of $2,000;' and it contains no general terms by which either Farrar or the house of McBride had the authority to transfer it to the plaintiffs, and they to make the defendants their guarantors, without their assent, express or implied."

In Fletcher v. Burnside, 142 Ga. 803, 83 S. E. 935, a guarantor was held not liable to F. for goods sold to C. because he had written a letter to K. asking him to furnish goods to C. and promising to pay for them, although in pursuance of the letter K. induced F. to sell the goods to C., and the guarantor knew that F. had sold C. the goods in pursuance of his letter to K.

[3] The defendant in error asserts that the failure of the St. Joseph Bank to reply to the letter of the Los Angeles Trust & Savings Bank, wherein it advised that it had explained the situation to the Continental National Bank and the latter bank had stated that it would be agreeable to them to negotiate drafts as outlined in the telegram, was an acceptance of the Continental National Bank as the one guaranteed, by acquiescence of the St. Joseph Bank, and a practical construction placed on the guaranty, as if it had been addressed to the Continental National Bank. There is no doubt that parties by their acts and conduct may give a practical interpretation to doubtful portions of a contract of guaranty. In Bleeker v. Hyde, 3 McLean, 279, 280, Fed. Cas. No.

1,537, a letter was addressed to C. & Co. authorizing a firm to purchase goods in the name and on the account of the guarantor. Goods were sold by another than C. & Co. In the invoices the goods were charged to the guarantor, and he saw and approved of these invoices and also took the remaining goods into his possession, on the ground that he was bound to pay for them. This was held sufficient to show that he approved of the purchases and was bound to pay for them. In Edmonston v. Drake, 5 Pet. 624, 635, 8 L. Ed. 251, E. wrote a letter of credit to C. & B. guarantying contracts of R. C. & B. were unable to undertake the business and introduced R. to D. & M., showing the letter of credit. D. & M. dealt with R. on the faith of the letter. D. & M. then informed the guarantor that by virtue of his letter of credit to C. & B. they had dealt with R., and asked repayment for funds advanced. To this E. replied by letter sanctioning the advances D. & M. had made to R., and this was held to make E. responsible. But in the present case there was no affirmation by word or acts of acceptance by the St. Joseph Bank of the Continental National Bank as the one guaranteed. There was mere delay and silence when the letter of notification was received from the Los Angeles Trust & Savings Bank. The effect of the telegram by the St. Joseph Bank was an offer of guaranty to the Los Angeles Trust & Savings Bank. If the letter of the addressee in reply can be treated as the act of the Continental National Bank by its agent, it was a counter proposal by which it, instead of the original addressee, offered to cash the drafts. This proposal of new conditions, not in the original offer, was a rejection and refusal of the St. Joseph Bank's offer (National Bank v. Hall, 101 U. S. 43, 50, 25 L. Ed. 822; Sloan v. Wolf Co., 124 Fed. 196, 198, 59 C. C. A. 612; Rushing v. Manhattan Life Ins. Co. of New York, 224 Fed. 74, 78, 139 C. C. A. 520; Doyle v. Hamilton Fish Corp., 234 Fed. 47, 50, 148 C. C. A. 63; 13 Corp. Jur. 281) and the making of a new offer to the St. Joseph Bank. Delay and failure to answer a proposal does not make a contract. No notice of acceptance of this counter proposal was ever given and an acceptance of such an offer, if not communicated to the proposer, does not make a contract. National Bank v. Hall, 101 U. S. 43, 48, 25 L. Ed. 822; Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 642, 28 C. C. A. 365; Paine v. Pac. Mut. Life Ins. Co., 51 Fed. 689, 693, 2 C. C. A. 459. Nor was the silence of the St. Joseph Bank an acceptance of the counter offer, for silence cannot be taken as assent to an offer unless there was both the opportunity and the duty to speak. One to whom an offer is made is under no obligation to do or say anything concerning an offer which he does not accept. More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 547, 29 N. E. 757; Titcomb v. United States, 14 Ct. Cl. 263, 267; Prescott v. Jones, 69 N. H. 305, 306, 41 Atl. 352; Felthouse v. Bindley, 11 C. B. N. S. 869, 875; Baltimore & L. Ry. Co. v. Steel Rail Supply Co., 123 Fed. 655, 659, 59 C. C. A. 419; 13 Corp. Jur. 276; Anson on Contracts, p. 15; 1 Williston on Cont. § 91.

It was not the duty of the St. Joseph Bank to warn the Continental National Bank not to purchase drafts relying on its telegram, but it was the duty of the Continental Bank to await an acceptance of the

offer it had made before relying upon the guaranty as made for its benefit. It is unnecessary to consider other questions presented. The court should have instructed the jury to return a verdict in favor of the defendant.

The judgment will be reversed, and a new trial ordered.

THE KALFARLI.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 37.

1. **Maritime liens ⟸26—Are stricti juris.**
   A maritime lien, being a jus in re, which goes with the thing into the hands of purchasers, and so is embarrassing to commerce, is stricti juris.

2. **Maritime liens ⟸60—Right to proceed in rem must be pursued in admiralty.**
   The right of one making repairs or furnishing supplies to a vessel to proceed in rem against the vessel must be pursued in the admiralty courts, but the right to proceed in personam against the shipowner for money damages alone is within the concurrent jurisdiction of the common-law courts.

3. **Admiralty ⟸26—Not courts of equity, but proceed according to principles of equity.**
   Courts of admiralty are not courts of equity, but in respect to certain matters within their jurisdiction proceed according to the principles of equity.

4. **Maritime liens ⟸59—Admiralty cannot deny relief in rem for fraudulent conduct not defeating right at law.**
   A court of admiralty, though administering justice on equitable principles, cannot refuse to enforce a maritime lien for repairs or supplies because the lienor has fraudulently claimed to have done more work than he did, or fraudulently charged for the labor or supplies in fact furnished; such fraudulent conduct not extinguishing his right to proceed in a common-law court in personam.

5. **Admiralty ⟸118—Appellate court may examine testimony and reach its own conclusions on the facts.**
   While the decision of a trial court in admiralty on a question of fact based on conflicting testimony, or the credibility of witnesses examined before the judge, is entitled to great respect, and will not be lightly reversed on appeal, unless there is a decided preponderance of evidence against it, or a mistake is clearly shown, the whole case is open for trial de novo, and where the judge did not see and hear all of the witnesses, the appellate court may examine the testimony and reach its own conclusions.

6. **Shipping ⟸76—Duty of person contracting to make repairs to disclose that he was acting for himself, and not for another.**
   Where the master of a steamship, in employing libelant to make repairs, supposed he was dealing with a third person, for whom libelant had previously been foreman and solicitor, and the libelant knew the master thought so, it was his duty to disclose that he was no longer associated with such third person, but was acting for himself, and his omission to do so amounted to fraudulent deception.

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7. Fraud ⊜16—May consist of silence.

Fraud may consist of silence as well as actual outspoken misrepresentation, and under some circumstances silence may be as reprehensible as false representations.

8. Maritime liens ⊜65—Evidence held to show charges grossly inflated, and to require reduction of amount recovered.

In a suit to enforce a maritime lien for repairs on a vessel, evidence as to the prevailing rate of wages and the number of hours worked *held* to show that the libelant's charges were grossly inflated, and to require a reduction from $2,494.35, allowed by a commissioner and the trial judge, to $1,700.

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

Libel by Anton Andersen against the steamship Kalfarli, her engines, etc., claimed by Daniel Steen. From a decree for libelant (263 Fed. 958), claimant appeals. Modified and affirmed.

Bullowa & Bullowa, of New York City (Lawrence E. Brown, of New York City, of counsel), for appellant.

Thomas J. Cuff, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in admiralty, in which the libelant has filed his libel against the steamship Kalfarli to recover the sum of $3,626, which he alleges is the reasonable value of work, labor, and services which were necessary for equipping the vessel, and which he avers that he performed at the special instance and request of the master and owner of the vessel, between December 26, 1917, and January 5, 1918.

The answer denies the allegations of the libel, except the nonpayment of the amount demanded and the jurisdiction of the court, and alleges that the work was performed pursuant to a contract made between the respondent, as master of the vessel, and one Andrew Olsen, and that the contract was solicited by the libelant for and on behalf of Olsen, and further alleges that the reasonable value of the work, labor, and services rendered was but a fraction of the sum alleged in the libel.

Testimony for the libelant was taken in open court, and testimony for the claimant was taken out of court; the last of such testimony having been taken on November 8, 1918. The District Judge rendered an opinion on February 3, 1920. He found in favor of the libelant, but directed that the case be sent to a commissioner, "if further hearing is desired as to the amount." On February 18, 1920, an interlocutory decree and order of reference was filed and entered, and on April 20, 1920, the commissioner began to take testimony, and continued thereafter to do so from time to time until May 28, 1920, when it was declared that the testimony was closed.

On August 16, 1920, the commissioner filed his report. He reported in favor of the libelant in the sum of $2,160.05, having disallowed a number of items in his claim. The amount allowed, with interest thereon from January 5, 1918, which amounted to $334.30, made in all the

sum of $2,494.35. On August 19, 1920, the claimant filed his exceptions to the commissioner's report, and on September 9, 1920, the District Judge entered a decree, in which it was ordered that the report of the commissioner be in all things confirmed, and that the libelant recover the amount recommended by the commissioner, together with his costs, which amounted together to the sum of $2,690.85. In his opinion the District Judge said:

"There may have been some lack of understanding on the part of the master of the ship as to the capacity in which Andersen was undertaking to do the work, and perhaps Olsen was rightfully displeased with Andersen for obtaining work from his old customers, without making plain to them the change in relation and that the work would not be done by Olsen's men or at his shop. But neither of these propositions is a defense to an action for work actually performed by Andersen as principal, on the orders of the master, even though the master mistakenly closed his eyes, disregarded the statements and facts, and thought he was an agent.

"The claimant invokes the rule that the libelant must have clean hands and be guilty of no deception before he may come into equity for relief. But the present action is not in equity, but at law. Unless there was an absolute absence of contract, or of consent and acquiescence in the performance of the work on the ship, the ground of objection on the part of the third party as to business methods used in obtaining the work is not a defense to a charge for the work done. Even in equity the relation of third parties would not affect the equities between the libelant and the claimant, in an action on a lien for work and materials. The testimony produced upon the trial seemed to show in general that the work was well performed and that the amount of the bill, while large, due to increased wages and other causes, was not exorbitant or incorrect."

The statement that "the present action is not in equity, but at law," must have been made inadvertently. The District Judge very well knew that the suit was neither at law nor in equity, but in admiralty, and an admiralty court administers maritime law by a procedure peculiar to itself and different from that followed by either courts of common law or of equity. The admiralty courts owe their origin largely to the civil law, and the process and methods of procedure in such courts, as was pointed out in Richmond v. New Bedford Copper Co., 2 Lowell, 315, Fed. Cas. No. 11,800, are even more free from technical rules than is the case with the equity courts.

But before entering upon a particular consideration of the claims made by this libelant, and the character of those claims and the evidence in this record concerning them, it seems desirable, for reasons which will more fully appear in a later portion of this opinion, that we should call attention to certain fundamental propositions which underlie the jurisdiction and powers of this court respecting the questions which arise in connection with the libel now before us.

We may observe that one who makes repairs or furnishes supplies to a vessel may have an action in personam to recover therefor, or he may have a right in rem against the ship, which enables him to cause the ship to be sold so that he may be repaid out of the proceeds. Under the maritime law, when unchanged by statute, his right to a lien against the ship depended upon the character of the ship. Thus in The General Smith, 4 Wheat. 438, 4 L. Ed. 609, decided by the Supreme Court in 1819, in an opinion written by Justice Story, it was decided

that by the common law materialmen, furnishing repairs to a domestic ship, have no lien upon the ship for their demand, although a lien exists for repairs made or necessities furnished to a foreign ship, or to a ship in a port of a state to which she does not belong. It appears that a strenuous attempt was made to bring about a reconsideration of the question in Rodd v. Heartt, 21 Wall. 558, 22 L. Ed. 654, but the court held it to be a settled principle of American jurisprudence. Where supplies are ordered in the home port, or repairs are made in such a port, they are thought to be furnished on the personal credit of the owner, as ordinary goods are furnished. But in a foreign port, in the absence of the owner, the presumption is that the supplies are furnished or the repairs made on the credit of the ship.

Congress, however, by the Act of June 23, 1910, 36 Stat. p. 604, c. 373 (Comp. St. §§ 7783–7787), enacted that any person furnishing repairs, supplies, or other necessaries 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 section 2 provides:

"That 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."

[1] In the case now under consideration libelant is seeking to recover the value of the labor and materials furnished, not by a proceeding in personam, but by one in rem, claiming that he has a lien on the vessel. A lien is an exception to the general rule, which entitled all creditors to participate equally in all the property of their debtor, and a maritime lien, as Mr. Justice Curtis pointed out in The Larch, 2 Curt. 427, 14 Fed. Cas. 1139, No. 8,085, being also a jus in re, which goes with the thing into the hands of purchasers, and so is embarrassing to commerce, is stricti juris; and in Astor Trust Co. v. E. V. White & Co., 241 Fed. 57, 60, 154 C. C. A. 57, 60 (L. R. A. 1917E, 526), the court declares that a maritime lien is "an equitable right, springing from the necessities of commerce."

[2] The right to proceed in rem is one which must be pursued in the admiralty courts; the right to proceed against the vessel in rem being distinctly an admiralty remedy, and as such exclusively within the jurisdiction of the admiralty courts of the United States. But the right to proceed in personam against the shipowner on his contracts money damages alone being demanded has always been within the common-law courts which have a concurrent jurisdiction with the courts of admiralty in such cases. Benedict's Admiralty, § 127.

[3] We observe also that while the courts of admiralty are not courts of equity, they proceed, as this court declared in Higgins v. Anglo-Algerian S. S. Co., Ltd., 248 Fed. 386, 160 C. C. A. 396, upon equitable principles. In Benedict's Admiralty (4th Ed.) § 261, it is said that the court of admiralty has "in certain respects the capacity of a court of equity," although it "is not a court of general equity,

nor has it the characteristic powers of a court of equity." The author adds that—

"It is bound, by its nature and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice. It cannot, in a technical sense, be called a court of equity. It is rather a court of justice."

In Brown v. Lull, 2 Sumn. 443, 4 Fed. Cas. 407, No. 2,018, Mr. Justice Story said:

"Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity, and, in short, so far as their powers extend, they act as courts of equity."

In The Kate, 164 U. S. 458, 469, 17 Sup. Ct. 135, 41 L. Ed. 512, the court declared that "good faith is undoubtedly required of a party seeking to enforce a lien against a vessel" for repairs or supplies furnished at the master's request, and it was said:

"Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts."

Mr. Justice Story, in The Virgin, 8 Pet. 538, 549 (8 L. Ed. 1036), speaking of the considerations which control courts sitting in admiralty, says:

"Such courts in the exercise of their jurisdiction are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

In Kellum v. Emerson, 2 Curt. 79, 14 Fed. Cas. 263, No. 7,669, Mr. Justice Curtis said:

"It is often said that a court of admiralty is a court of equity, acting on maritime affairs. This is true when properly understood. A court of admiralty applies the principles of equity to the subjects within its jurisdiction."

In The Julianna, 2 Dods. Ad. 503, 521, it is said:

"A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This court certainly does not claim the character of a court of general equity, but it is bound, by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice."

It is said in The Harriett, 1 W. Rob. Ad. 183, 192, by Lushington, Judge of the High Court of Admiralty:

"If a court of equity would relieve, and a court of law could not, I consider that it would be my duty to afford that relief under the circumstances of the present case. The jurisdiction which I exercise is an equitable as well as a legal jurisdiction, and I must relieve the parties in this suit, if they are entitled to be relieved in law or in equity. It is therefore unnecessary for me to enter into a distinction whether the relief is at law or in equity."

When it is said that a court of admiralty proceeds according to principles of equity, it is necessary to understand exactly what is meant.

It certainly does not mean that a court of admiralty proceeds in all respects as a court of equity might do. For example, it does not mean that a court of admiralty can reform a maritime contract under the same circumstances that a court of equity would reform a contract within its cognizance. Williams v. Insurance Co. (D. C.) 56 Fed. 159; Meyer v. Pacific Mail Steamship Co. (D. C.) 58 Fed. 923. And it does not mean that a court of admiralty can decree specific performance. Benedict's Admiralty (4th Ed.) § 261. But it means that in respect to certain matters which are within its jurisdiction it proceeds according to the principles of equity.

In Pope v. Nickerson, 3 Story, 486, Fed. Cas. No. 11,274, it was said that a court of admiralty, in cases within its jurisdiction, acts as a court of equity, and construes instruments as a court of equity does, with a large and liberal indulgence. And in O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469, Mr. Justice White (Chief Justice White) speaking of bottomry bonds, said:

"In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

In Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 399, 106 C. C. A. 501, 509, the Circuit Court of Appeals for the Sixth Circuit, speaking of a revocation of an agreement of submission to arbitration and the attitude of courts of law and of equity respecting it, said:

"But this suit is in admiralty, a branch of the law not hampered by the rigid rules of the common law, and which deals with causes upon considerations even more elastic than pertain to the broad jurisdiction of courts of chancery."

[4] In Carmen v. Fox Film Corporation, 269 Fed. 928, this court, sitting as a court of equity, refused affirmative relief to one coming into court with unclean hands respecting the transaction involved. Can a court of admiralty, administering justice upon equitable principles, dismiss this libelant because of fraudulent conduct in respect of the transactions involved herein? We think not.

In Hansen v. Barnard (C. C. A.) 270 Fed. 163, the master of a ship sought to recover compensation for his services. It appeared that he had rendered fraudulent accounts to the owner. We dismissed the suit in that case. But our decision in it went upon the theory that an agent forfeits his right to compensation, if he is guilty of fraud on his principal in the transaction of the agency. We did not find it necessary to consider, under the circumstances existing in that case, whether a court of admiralty would deny relief to one guilty of fraud and standing in no fiduciary relation.

There seems no analogy between the misconduct of a seaman, which leads a court of admiralty to deny the seaman a lien on the ship for his wages, and the misconduct of one who, like the libelant, furnishes labor or supplies to the ship, but is guilty of misconduct respecting the transaction. In the case of the seaman, his misconduct under the maritime law extinguishes his right to recover wages, and he can no more proceed in personam that he can in rem. In denying him his lien, therefore, the court is not proceeding upon equitable principles and

denying him relief because his hands are unclean. Relief is denied because his right is extinguished, both in rem and in personam. But the fraudulent conduct of a materialman does not extinguish his right to proceed in a common-law court in personam, and we are cited to no authority which shows that he loses his right to proceed in admiralty in personam or in rem to enforce his lien for work actually done or for supplies actually furnished. We are not aware that courts of admiralty in maritime cases remitted libelants to courts of law to obtain their rights, as courts of equity so frequently did in matters within the concurrent jurisdiction of both courts. The fact is that courts of admiralty exercise both a legal and an equitable jurisdiction, and there is no reason why it should send a suitor to a court of law in respect to maritime matters. In The Harriett, supra, as we have before remarked, Lushington, judge of the High Court of Admiralty, declared that the jurisdiction which he exercised was an equitable as well as a legal jurisdiction, and there is no doubt that courts of admiralty afforded legal as well as equitable relief.

What was said by the Supreme Court in The Lulu, 10 Wall. 192, 19 L. Ed. 906, as to the necessity of good faith, must be considered in the light of the circumstances of that case. The court certainly did not intend to lay down the broad proposition that a court of admiralty, like a court of equity, would deny relief in all cases to one guilty of bad faith. The Lulu was a New York vessel, and the repairs on her were made in Baltimore, and prior to the Act of June 23, 1910, to which reference has already been made. Under the law as it then existed, the right of a materialman to a lien on a foreign vessel depended upon whether or not he had knowledge or reasonable means of knowledge that the master had available funds or sources of credit, or that the vessel owner had made independent arrangements to supply necessary funds for the vessel's purposes. If he had such knowledge, he acquired no lien. If he had the actual or constructive knowledge above referred to, the implied lien did not arise. What was said as to good faith is to be understood as relating to the circumstances referred to.

That the libelant actually performed work for the ship and furnished her with certain materials cannot be denied. For such work and for such supplies the maritime law gives a lien. We do not think that a court of admiralty can deprive him of that right on the ground that he claimed fraudulently to have done more work than he did, or charged fraudulently for the labor or supplies he in fact furnished.

[5] This brings us to inquire whether we can examine the testimony in the record to determine for ourselves what labor the libelant performed, and what services he rendered, and what he is entitled to recover therefor. Are we concluded, as to the amount, by the findings of the commissioner, confirmed as they have been in all respects by the District Judge. In Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360, this court held that on an appeal in admiralty the whole case is open for trial de novo, and this is well-established law. Reid v. American Express Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156; The Louisville v. Halliday, 154 U. S. 657, Append., 14 Sup.

Ct. 1190, 25 L. Ed. 771; Irvine v. The Hesper, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175; Merchants' Mutual Insurance Co. v. Allen, 121 U. S. 67, 7 Sup. Ct. 821, 30 L. Ed. 858; The Charles Morgan, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. Ed. 316; Chicago D. & G. B. Transit Co. v. Moore, 259 Fed. 490, 170 C. C. A. 466; Western Transit Co. v. Davidson, 212 Fed. 696, 701, 129 C. C. A. 232.

We are not unmindful of the cases which assert that the decision of a trial court in admiralty upon a question of fact, based upon conflicting testimony or the credibility of witnesses examined before the judge, is entitled to great respect, and will not be lightly reversed on appeal, unless there is a decided preponderance of evidence against it, or a mistake is clearly shown. The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; The Lady Pike, 21 Wall. 1, 22 L. Ed. 499; Walsh v. Rogers, 13 How. 283, 14 L. Ed. 147; The City of New York, 54 Fed. 181, 4 C. C. A. 268; The Jersey City, 51 Fed. 527, 2 C. C. A. 365; The Buffalo, 55 Fed. 1019, 5 C. C. A. 388. And if testimony has been taken before a commissioner, and not before the judge below, and it is all before the appellate court, the decision of a trial judge on questions of fact is not entitled to the same controlling weight as where he saw and heard the witnesses testify. The Sappho, 94 Fed. 545, 36 C. C. A. 395; The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; The Glendale, 81 Fed. 633; The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

The appellate court is not, however, concluded by the fact that the witnesses were seen and heard by the District Judge. In The Ariadne, 13 Wall. 475, 20 L. Ed. 542, the Supreme Court used the following language:

"We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer. Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a presumption, prima facie, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect."

In The Columbian, 100 Fed. 991, 41 C. C. A. 150, which was a case in the Circuit Court of Appeals for the First Circuit, counsel urged that, as the question was one of weighing conflicting evidence, the finding of the court below should be accepted as unassailable. The court, speaking through Judge Putnam, said, in the opinion which it rendered, that the practice in that circuit had been "to secure what the statute establishing this court intended to secure, not only a prompt hearing but a retrial of the case in accordance with the convictions formed from the record by the judges sitting on appeal."

This court in The Gypsum Prince, 67 Fed. 612, 14 C. C. A. 573—a case heard before Judges Wallace, Lacombe, and Shipman—considered it proper to disregard a finding of fact by the district judge under the circumstances there stated. The court, in a case heard before the same judges, in The Albany, 81 Fed. 966, 27 C. C. A. 28, declared

again that under the circumstances there stated there was no reason why the appellate court should not review the testimony for itself, unembarrassed by the findings below.

In Hughes, Admiralty Law (2d Ed.) § 203, the authority states that the intent of Congress to give an appeal on questions both of law and fact is clear, but that appellate courts have gone very far in practically refusing to review questions of fact where the District Judge has had the witnesses before him. He declares that this doctrine is largely an abdication of the trust confided in the courts of appeal, and for an admiralty court, smacks too much of the old common-law fiction as to the sacredness of a jury's verdict. He adds that this theory about the trial judge being endowed with clairvoyance because he saw the witnesses has degenerated into a mere makeweight for that filius nullius, the per curiam opinion. He then says:

"If the trial judge could decide cases at their close, as juries render verdicts, there would be more force in the idea. But in districts of crowded dockets, where numerous cases, each with numerous witnesses, are tried in rapid succession, and then taken under advisement for months, nothing short of a moving picture screen, with a photographic-phonographic attachment, could bring it back to the judicial mind. To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give. That seeing the witnesses is an advantage cannot be denied; but its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to overbalance it."

In the case now under consideration, the judge did not see and hear all the witnesses. He saw and heard only the libelant, his wife, and two other witnesses and their testimony constituted relatively a small part of the testimony in the record. Under the circumstances, we do not feel ourselves concluded by the findings, and we shall examine the testimony and reach our own conclusions. See La Bourgogne, 210 U. S. 95, 114, 28 Sup. Ct. 664, 52 L. Ed. 973; The Wildcroft, 201 U. S. 378, 387, 26 Sup. Ct. 467, 50 L. Ed. 794; The Carib Prince, 170 U. S. 655, 658, 18 Sup. Ct. 753, 42 L. Ed. 1181.

We come, now, to consider the facts of this case and the action of the court below. The question litigated on the trial was whether the master of the ship employed the libelant to do certain work on the ship as principal or as the representative or solicitor of one Olsen, who did an extensive business in repairing ships at Brooklyn; it being admitted that the libelant had been the solicitor for Olsen for some time, and that the master knew him because of that employment. The judge held that this was no defense to the action, and that the amount of the bills was "not exorbitant or incorrect," and directed that an interlocutory decree be entered and sent the case to a commissioner. Thereafter testimony was taken before the commissioner, who made a report that libelant was entitled to recover for the number of hours charged, viz. 3,460 hours, but at 45 cents per hour, instead of 80 cents; he also allowed for some of the supplies for which libelant charged; he also allowed the charges for 60 hours for one man in one night on the winches, and for 60 hours for each of five men in one night on the engine, but at 45 cents per hour, instead of 80 cents per hour; he also

allowed the charge of $50 for sweeping down the stack, holding that, even though there was a fire under the boiler at the time, conditions inside the stack were probably not very uncomfortable, as the weather was very cold; he also cut down the charge for launch hire and compensation insurance, and recommended a recovery by the libelant of $2,160.05, instead of $3,626, claimed in the libel, which, with interest, of $334.30, made a total of $2,494.35. The claimant filed exceptions to the report, which the judge overruled, and confirmed the report, and entered the usual decree in favor of the libelant for $2,690.85. From that decree this appeal has been taken.

[6] The testimony convinces us that the master of the steamship supposed that the libelant represented Olsen who had a place of business in Brooklyn and had always done the master's repair work. The master knew the libelant as Olsen's representative, and when he met him at Norfolk he told him to tell Olsen to have men meet him when the ship arrived in New York and clean the ship's tanks. It appears that on the arrival in New York the steamship was met by the libelant, who came in Olsen's launch, and was instructed by the master to go ahead with the work. The master testified that he understood Olsen was doing the work until he got the bill. The libelant had been in Olsen's employ for nine years, and for the last two years of his employment had been his foreman and solicitor, and held himself out as Olsen's representative, but had been discharged by Olsen a few weeks before the transactions herein involved. The master knew him simply as Olsen's employee. The libelant testified that he informed the master at Norfolk that he had been discharged by Olsen, but in view of the master's testimony we do not believe him. Good faith and honest dealing made it the libelant's duty to make the disclosure that he was no longer associated with Olsen and was acting for himself only. This he did not do, but, on the contrary, contrived to come to the pier in Olsen's launch when the Kalfarli reached New York, intending, no doubt, to strengthen the impression that he was still Olsen's representative. If a party conceals a fact that is material to a transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment may be as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated. Thomas v. Murphy, 87 Minn. 358, 91 N. W. 1097; Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151; Biggs v. Perkins, 75 N. C. 397; McKindly v. Drew, 71 Vt. 138, 41 Atl. 1039; March v. Mobile First National Bank, 4 Hun. (N. Y.) 466, affirmed in 64 N. Y. 645. Actionable fraud, it has been held, may be perpetrated by encouraging and taking advantage of a delusion known to exist in the mind of the other party. Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940; Maynard v. Maynard, 49 Vt. 297.

[7] Fraud may consist in silence as well as in actual outspoken misrepresentation, and there are circumstances when the suppressio veri may be reprehensible as the suggestio falsi. The master of the ship supposed he was dealing with Olsen through Olsen's representative, and the libelant knew the master thought so, and, making no disclosure of the truth, took advantage of the situation to do the work with his

own men. Having been introduced to the master, according to his own story, as "Olsen's man," he should have informed the master that he no longer represented Olsen. This in our opinion he did not do, and the omission to do it under the circumstances amounted to a fraudulent deception. It was dolus malus, and not dolus bonus.

[8] Not only did the contract originate in a fraudulent deception, but the bill rendered was also fraudulent. When one puts in a bill in which he charges double the amount for work done that he is entitled to charge, and includes in it charges for work he did not perform, and does it deliberately and with knowledge the bill must be considered fraudulent. The bill which is the subject-matter of this libel is outrageously inflated, and the inflation is not due to inadvertence or carelessness; for as soon as the libel was filed the claimant filed elaborate interrogations, asking minutely as to the work, labor, and services alleged to have been rendered, and the time consumed in the performance of the services, and the amount charged for each item of work, labor, and services performed. This was filed on July 31, 1918, and the answer to the interrogations was not filed until October 16, 1918.

The libelant, in his statement of charges, as heretofore stated, gave the total number of hours of work, labor, and services performed as 3,460, for which he charged at the rate of 80 cents an hour. The commissioner found that this was excessive, and that 45 cents an hour should be allowed. The claimant called a disinterested witness, who at the time the libelant performed the work was a superintendent of shipyard and repair work and had been such for seven years prior to the time when this work was done. The following is an excerpt from his testimony:

"Q. Do you recall the prevailing rate of wages paid to boiler scalers in December, 1917, and January, 1918? A. At that time I was employed by James Shewan & Sons over there, and he paid, in 1917, 34 cents an hour for boiler scalers and tank scalers."

The claimant also called a boiler foreman at Olsen's, where the libelant had been employed prior to his discharge, previously referred to. He testified that at the time when this work was done boiler scalers were paid at Olsen's yard $2.75 a day, and that foreman received $3.50. He also called a consulting engineer, by whom scaling bills had to be approved before they were paid, and who testified that scalers were paid $2.75 a day. He put on the stand, too, one of libelant's own workmen, who was engaged on the work for which libelant seeks to recover. He testified that when he began the work the libelant paid him $3 a day, but before the work was concluded he was paid $3.50 a day, and that that was the highest amount he received. It thus appears that libelant was charging nearly twice what he was entitled in good faith to charge for wages paid, even assuming his statement as to the number of hours was correct.

We have examined the reductions with care, and the fault we find is not that they were made, but that they were insufficiently made. The commissioner allowed pay at the rate of $4.50 a day of 10 hours, or 45 cents an hour. This was based on an allowance of $3.50 to each man and an overhead charge of $1 a day for each. The evidence al-

ready cited shows that at the time this work was done the prevailing rate of wages was from $2.75 to $3 a day. The amount due should be fixed at the rate of $4 a day, or 40 cents an hour.

The commissioner did not reduce the number of hours the libelant claims his men worked. We believe that the statement is inaccurate and more or less inflated. An illustration of its inaccuracy is afforded by the fact that the libelant charges for the time of 12 men working 10 hours each on December 26th. We are satisfied that the work did not begin until December 27th, as the engineers in charge of the Kalfarli testify, and as the vouchers for the wire and zinc brushes which the men used show. This error alone involves 120 hours.

The total number of hours of work is determined by ascertaining the number of men employed and the number of hours each man worked. The testimony as to the number of men who were employed on the job is very contradictory. The libelant's attempt to support his claim as to the number of hours the men worked by the testimony of his foreman does not help his case. How satisfactory and reliable that testimony was may be judged by the following excerpt from his testimony:

"Q. It appears here that on Thursday, the 27th, and Friday, the 28th, you worked 46 hours on each day? A. Yes.

"Q. Does that mean that you went on board the ship Thursday morning at 7:30 and worked through until 7:30 Friday morning without a rest? A. Yes.

"Q. Without any sleep? A. Yes.

"Q. You worked through 48 hours, right from 7 o'clock on Thursday morning till 7 o'clock on Friday morning; then on Saturday you worked 10 hours more? A. Yes.

"Q. So that you worked 58 hours consecutively without sleep? A. Yes.

"Q. You didn't sleep a wink during that time? A. No—that is up to me.

"Q. Mr. Lundstrom, you are under oath; you are swearing to this, now? A. I know it; but, when you ask me such a question, I must answer that way. You know a man working like that will take any chance he can, without asking or telling anybody.

"Q. As a matter of fact, you did not work through from Thursday morning at 7 o'clock until Saturday night at 4 o'clock without taking any rest? A. I did not.

"Q. It would be impossible for you to do that, wouldn't it? A. Yes.

"Q. And the same thing applies to these other men; is that not so? A. Yes.

"Q. That whenever they got a chance to take a nap they took a nap? A. If I was working, and the chief engineer came along and said to me, 'Mr. Lundstrom, go into my room and take a nap,' am I supposed to tell anybody that and cut it out of my pay? No."

The libelant claimed that on a certain day each of his men had worked and was paid for 46 hours. Asked to explain he did as follows:

"Q. How many hours? A. 10 hours. They only work 8 hours; from 4 to 8 in the afternoon is 4 hours again, which makes 10 hours for the men. And from 8 to 12 is another 4 hours, which makes another 10 hours, there is 30, and from 12 to 4 o'clock in the morning is 4 hours, and that makes 40 hours; and from 4 to 7 o'clock in the morning is 3 hours, double time, 6 hours, makes 46 hours. That is what I had to agree with the men to get them to work, and what I had to pay for it."

On New Year's Day he claimed each man worked 56 hours. This is an excerpt from his testimony in reply to an inquiry as to how he figured it:

"A. We worked from the 31st and the night of the day before.
"The Court: They had been at work all day on the 31st, and up to midnight—
"The Witness: And to the New Year's Eve.
"The Court: Start at 12 o'clock and then to 4. How many hours?
"The Witness: From midnight that would be 30 hours, to 4'oclock is 40 hours, and from 4 to 8, that is 50—well, my foreman can explain it; he did not get paid for nor more than 56 hours.
"Q. In other words, you cannot tell how a man can work 56 hours? A. He has paid for 56 hours.
"Q. I am asking you how these men could work for 56 hours during a 24-hour period on New Year's day? A. That is the time I took off the foreman—
"Q. You do not know? A. I would not say that for sure, because I don't know. I know we were paying it."

The claimant was under the impression that, in estimating the total number of hours charged for, the libelant had included the hours his men had worked on the boat in doing certain work under a special contract for which a separate charge had been made. The foreman was asked as to this, and the following is an excerpt from his testimony:

"Q. Do you think it would be proper for Mr. Andersen to charge 80 cents per hour for doing that work, and still charge for those men's time for just the general work? A. That is up to him.
"Q. That would be doubling up, wouldn't it? A. No.
"Q. Why wouldn't it, if a charge was made for 16 men doing a special contract during December 26 and December 27, and then in addition a charge was made for their time in those 3,460 hours, which you say were actually put in on the job, wouldn't that be doubling up on the job?
"Mr. Cuff: I object to that as being argumentative.
"A. That is between the boss and the chief engineer."

The commissioner has allowed for sweeping down the smokestacks, which in our opinion the libelant's men did not do. The item rests upon the testimony of libelant's foreman, above referred to, and which was accepted by the commissioner, but which we believe was utterly untrustworthy. The two engineers on the vessel testified in the most positive terms that it had not been done. The following is an excerpt from the testimony of one of them:

"Q. Do you know whether the smokestack was swept down? A. It was not.
"Q. It was not done? A. No.
"Q. Did you have a fire all the time you were in port? A. Yes; in one of the main boilers.
"Q. All the time? A. Yes; all the time.
"Q. Was it possible to sweep the smokestack down when there was a fire? A. No.
"Q. It could not be done? A. No."

And the following excerpt is from the testimony of the other:

"Q. Did you clean the smokestack? A. No.
"Q. Did you have a fire in the boiler all the time you were in New York? A. Yes; all the time.
"Q. Could they sweep the smokestack when there was a fire in the boiler? A. No."

The foreman's testimony was that they went inside the smokestack, and cleaned it, but that the steam was on, but low down, and the fire was banked. But the testimony is that the vessel was an oil burner,

and that it is impossible to bank the fires of an oil burner. One of the employees testified as follows:

"Q. What kind of a vessel was the Kalfarli? Was she a coal or oil burner? A. Oil burner.
"Q. Is it possible to bank the fires in an oil burner? A. No."

The boilers must have had considerable steam, on as they operated the winches, and it is inconceivable that workmen would go down inside the stack of a steamer to sweep it out when the fires were going, and had been going all day to make steam for the winches.

Included in the charges for which the libelant seeks payment are two items, aggregating $84.55, for the use of launches in transporting his men to and from the ship while she was lying in the stream and before she was brought to the pier, between December 26th and January 5th. The commissioner cut this item down to $6. He was asked on cross-examination how many days the boat lay at the pier, and how many days out in the stream, but was unable to say, although he admitted she came up to the pier on December 26th, and we have stated our opinion that the work on her did not commence until December 27th. The claimant put on the stand one of the men employed on the work. As he testified that he worked on the boat 8 or 10 days, he must have been on the boat during almost the entire time, if not the whole of the time, the libelant's work upon her was under way, as that work commenced on December 27th and ended on January 5th. He stated that, when he began his work, the vessel was at the pier, and that she remained there while he was at work on her, and that he never used a launch in order to get to the boat. We believe him to have been a disinterested and truthful witness.

We are satisfied that there are numerous other errors which we do not deem it necessary to point out in detail. As the libelant has rendered labor and services to the ship, it is clear that the law gives him a lien on the ship, of which he cannot be deprived, even though the contract originated in deception, and the bill rendered is in some respects grossly inaccurate, and extortionate, if not actually in some respects fraudulent. We think, in view of all the circumstances, that justice will be done if a decree is entered in favor of the libelant in the amount of $1,700, without interest, and without costs in the District Court, and that he should be charged with the costs of this court.

As so modified, the decree is affirmed.

KELLY v. UNITED STATES.

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

No. 1864.

1. **Receiving stolen goods ⟸9(1)—Whether defendant bought and transported stolen car with knowledge of theft held a jury question.**
   Evidence *held* sufficient to make a case for the jury as to whether defendant bought and transported an automobile knowing the same to have been stolen, in violation of Act Cong. Oct. 29, 1919, known as the National Motor Vehicle Theft Act.
2. **Commerce ⟸33—Stolen car, driven across state line, held transported in "interstate commerce."**
   One who purchased an automobile with knowledge that it had been stolen, and drove it across a state line under its own power for his own purposes, or for the purpose of an ultimate future sale of it, was guilty of transporting such automobile in interstate commerce, within Act Cong. Oct. 29, 1919, known as the National Motor Vehicle Theft Act.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]
3. **Commerce ⟸3—Congress may prohibit interstate transportation of stolen motor vehicles.**
   Congress may prohibit the interstate transportation of motor vehicles known to have been stolen.
4. **Criminal law ⟸822(1)—Charge to be judged as a whole.**
   The charge in a criminal case is to be judged as a whole, and not by some incidental statement which, taken by itself, might be misleading.
5. **Criminal law ⟸829(12)—Erroneous refusal to charge as to possession of stolen goods held cured by given charge.**
   If it was error, in a prosecution for transporting in interstate commerce a stolen automobile, knowing the same to have been stolen, in violation of Act Cong. Oct. 29, 1919, to refuse to charge that "the mere possession of stolen goods, without proof that the accused received them knowing them to have been stolen, raises no presumption that the goods were stolen property, and is insufficient to establish guilty knowledge," it was harmless, where the fact that the car had been stolen was not in dispute, and the court instructed that the real question for the jury to determine was whether, under all those circumstances, testified to by defendant and others, the defendant must have known that the automobile was stolen.
6. **Criminal law ⟸829(12)—Refusal of instruction as to proof of guilty knowledge held harmless, in view of charge given.**
   In a prosecution for transporting in interstate commerce an automobile known to have been stolen, in violation of Act Cong. Oct. 29, 1919, if it was error to refuse to charge "that mere inadequacy of price is insufficient proof of guilty knowledge," it was harmless, where the refusal was coupled with the statement, "I charge you, however, that inadequacy of price may be one of the circumstances from which the jury may infer guilty knowledge," which properly defined the bearing and limited the testimony relating to the price paid by accused for the car.
7. **Criminal law ⟸1170(1)—Exclusion of testimony as to hostility of witness to accused held harmless.**
   Accused cannot complain of exclusion of testimony offered to show that witness was influenced by personal hostility to the defendant, where such witness testified to nothing which was the subject of dispute.

8. Criminal law ⇐1170(3)—Exclusion of evidence cured by subsequent admission.

Improper exclusion of testimony is cured by its subsequent admission.

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

C. L. Kelly was convicted of transporting in interstate commerce a stolen automobile, knowing it to have been stolen, and brings error. Affirmed.

Frank A. Miller, of Hartsville, S. C., for plaintiff in error.

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

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

KNAPP, Circuit Judge. Plaintiff in error, herein referred to as defendant, was convicted of transporting in interstate commerce a certain automobile, knowing the same to have been stolen, in violation of the Act of October 29, 1919 (41 Stat. 325), known as the National Motor Vehicle Theft Act, the third section of which reads as follows:

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than five years, or both."

Not denying that the automobile described in the indictment was stolen from its owner, and admitting that he got possession of it soon afterwards at Columbia, S. C., and took it at once into the state of Georgia, defendant here urges as grounds for reversal, among other things: (1) That there is no evidence that he knew the car had been stolen; and (2) no evidence that it was transported in interstate commerce. Bearing upon these contentions the following facts appear, as the jury were warranted in finding:

The car in question, a Buick, 1919 model, said by the owner to be worth about $1,600, was stolen from him at Hartsville, S. C., where he lived, and near which defendant also resided, on the evening of Monday, March 29, 1920. The loss was promptly reported to the chief of police, who telephoned a description of the car to surrounding towns and made other efforts to trace it. The next day advertisements sent by wire were inserted in several daily papers. On the following Friday the car was located in Canton, Ga., to which place it had been taken by defendant and a relative of his, named Skinner. Two or three days later the owner went to Canton with the chief of police and recovered it. He found that the old tag had been removed and a new tag put on, which, as he afterwards learned, had been issued to defendant at Columbia on the 30th of March. On his return home he swore out a warrant for defendant and Skinner, who in the meantime had been arrested at Knoxville, Tenn., and they were brought back to

Hartsville by the sheriff. For some reason their prosecution under the state law was abandoned, and instead defendant was indicted and tried under the federal statute. Further testimony for the government was to the effect that on their way to Canton, at the little station of Lebanon, Ga., where they spent a night, they gave the names of Smith and Jones, and that defendant there tried to sell the car for $1,300, but refused a check for $1,000 to be dated 10 days ahead, to allow him to furnish a reference.

The defendant testified in substance, as did Skinner, that they came to Columbia in the forenoon of Wednesday, March 31st, intending to go on that day by rail to Louisville, Ky., where defendant owned or had an interest in a traveling show business, in which Skinner was to be employed; that while walking around, waiting for the train, they came to a garage which stood back some 20 or 30 feet from the street and on which was the sign, "We buy and sell second-hand cars;" that defendant thereupon proposed to buy a second-hand car and motor across the country to Louisville; that on or near the street in front of the garage was a negro working on a car, which he said he had come there to sell; that he asked $700 for it, but after some bargaining let defendant have it for $550; that the car was very muddy, the top badly torn, one or more tires flat, and other parts needing adjustment; that they proceeded to put it in running condition and started out with it that afternoon. It was the stolen car.

The negro, who called himself Charles Brown, was a sranger to both defendant and Skinner. Neither had seen him before. According to their own admissions he was not asked, and did not tell, when or where or from whom he obtained the car, whether it was new or used when he got it, what he had been doing with it, how it came to be in such a condition, why he wanted to sell it, or how he happened to be in Columbia at the time. No inquiry was made at the garage, and no other effort made to ascertain whether this unknown negro was the owner of the car which he was so anxious to sell. In explanation of the tag number, defendant said that some days before he had lost the tag on a Hudson car which he owned, and had obtained a duplicate, which was at the hotel with his baggage, and that he put this duplicate on the Buick in place of the tag which the negro removed when he bought it.

[1] Without reference to other incidents of the purchase and trip to Canton, it seems that on arrival there they took the car to a garage to be washed, and went on foot to a boarding house to arrange for accommodations; that while away for this purpose they were told by a boy that the car had been seized as a stolen car, and that they would be arrested if they went back; that thereupon they got the boy to take them in a Ford car to a railroad station some 12 miles out in the country, where they spent the night; and that next morning they boarded the train for Knoxville, at which place they were arrested and put in jail. The reason given by them for leaving Canton in that way was that they desired to avoid arrest in a town where they were strangers and could not get bail. They also said they intended to return home at once to meet any charge that might be brought against them, and that they took the Knoxville train to do so, although, as the govern-

ment points out, the much shorter route was in the opposite direction. We need not comment upon this evidence. In our judgment it was clearly sufficient to make a case for the jury to determine whether defendant bought and transported the car in question, "knowing the same to have been stolen," and the trial court, therefore, did not err in refusing to direct a verdict in his favor for lack of proof of guilty knowledge.

[2] Was the car transported "in interstate commerce"? That the act under review was intended to cover such a case as is here disclosed seems to us not doubtful, and the learned judge below charged the jury as follows:

"I charge you further, gentlemen, that the term 'interstate commerce,' as used in the act of Congress mentioned, includes transportation from one state to another. It may be otherwise said that interstate commerce, in the signification intended by Congress in the act under which the defendant is indicted, is that the motor vehicle must have been moved or transported from one state into another for the purpose either of sale or for the purpose of transporting persons or articles of personal property from one state to another; and I charge you, under the facts in this case, that if you find Kelly and his companion took this vehicle, and by driving it, moving it through the use of its own power, caused themselves to be transported by this vehicle from South Carolina to Georgia, either for the purpose of an ultimate future sale of it, or for the purpose of using the vehicle to be transported through Georgia, to Louisville, in the state of Kentucky, for the purposes of their own business, using it as a means of transportation for themselves for the performance of business, as they testified, that that would be a transportation in interstate commerce, as intended by that statute."

[3] We are of opinion that this instruction is sanctioned by repeated decisions of the Supreme Court construing and upholding analogous statutes. To penalize the transportation of a given article is in effect to prohibit its transportation. And if the Congress may prohibit the interstate transportation of lottery tickets, Champion v. Ames, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; of impure foods and drugs, Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; of intoxicating liquors into a prohibition state, even for personal use, Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; and of women and girls for an immoral, though noncommercial purpose, Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168—we perceive no reason, constitutional or other, why it may not in like manner prohibit the interstate transportation of motor vehicles known to have been stolen. As is said in Hammer v. Dagenhart, 247 U. S. 251, 271, 38 Sup. Ct. 529, 531 (62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724), reviewing the cases cited:

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

So in this case. The "harmful results," obvious and frequently occurring, of transporting stolen motor vehicles from one state to an-

other, can be prevented only by prohibiting altogether their interstate transportation, and such prohibition is therefore a valid exercise of the power invested in the Congress. And it follows that if the defendant had guilty knowledge that the car in question had been stolen, as the jury must have found, he had no right to transport it at all, either within or without the state in which it was purchased, and for the wrongful act of taking it into another state, using it for the transportation thereto of himself and Skinner, he incurred the penalties of the federal statute, irrespective of what he intended to do with it in that state or elsewhere.

[4] The remaining assignments of error, based upon exceptions to other instructions and the refusal of requested instructions, require but brief discussion. It is argued that the jury were told in substance that the test of guilty knowledge was what the "average man" might have believed in the circumstances disclosed, and not what the defendant in fact believed; but it seems clear to us that the instructions cannot reasonably be so construed and could not have been so understood. The charge is to be judged as a whole, and not by some incidental statement which, taken by itself, might be misleading. "Whether the instructions could have produced misconception in the minds of the jury," says the Supreme Court in Seaboard Air Line v. Padgett, 236 U. S. 668, 672, 35 Sup. Ct. 481, 482 (59 L. Ed. 777), "is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

In this case, not only was the unmistakable import of the entire charge to the effect that the defendant could not be convicted unless he knew that the car had been stolen, but the jury were repeatedly and explicitly so instructed. For example, at the conclusion of his general charge, in which he had recited the principal incidents connected with the purchase of the car, the learned judge said:

"I charge you as a matter of law that it is for you to say whether, under all the circumstances, all the testimony in the case, it indicates to your mind to the exclusion of any other reasonable inference that there was guilty knowledge on defendant's part; that he knew the car must have been stolen. If you come to the conclusion, beyond a reasonable doubt, that he knew it was stolen, you will find him guilty; otherwise, not guilty."

And in refusing a requested instruction, "in manner and form as asked," he again said:

"As to the rest of this request, I charge the jury here that the prosecution must show beyond a reasonable doubt that the defendant at that time, in their opinion, under all the circumstances of the case, knew that the automobile had been stolen."

Without further quotation or comment, it is enough to say that in our judgment the contention here considered is wholly refuted "by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

[5] To the request to charge that "the mere possession of stolen goods, without proof that the accused received them knowing them to

have been stolen, raises no presumption that the goods were stolen property and is insufficient to establish guilty knowledge," the court said:

"I refuse that as not applicable to the case. If the prosecution had simply proved the possession and then stopped, and asked for a verdict based simply upon the presumption arising from mere proof of possession, the question of its propriety would have arisen. In this case, I charge you, gentlemen, that there have been proven, both in the testimony for the prosecution and for the defense, the circumstances under which he acquired possession; and it is for you to say whether under all those circumstances he must have known that it must have been stolen."

Even if it be conceded that defendant was entitled to the instruction asked for, the error of refusing it was rendered harmless by the reason assigned therefor and the accompanying statement of the real question for the jury to determine. The fact that the car had been stolen was not in dispute.

[6] So, too, of the request to charge "that mere inadequacy of price is insufficient proof of guilty knowledge." Granted the correctness of the proposition, and even the technical error of refusing it in the form presented, we are nevertheless of opinion that no misleading inference was possible, because the refusal was coupled with and modified by the statement, "I charge you, however, that inadequacy of price may be one of the circumstances from which the jury may infer guilty knowledge," which properly defined the bearing and limited the application of the testimony relating to the price paid for the car. State v. Houston, 29 S. C. 108, 6 S. E. 943.

[7, 8] Something is sought to be made of the exclusion, when first offered, of testimony designed to show that Redfern, the chief of police, was influenced by personal hostility to the defendant; but the sufficient answer to the contention is that Redfern testified to nothing which was the subject of dispute, and therefore his attitude of mind, assuming it to have been biased, was a wholly irrelevant matter. Aside from this, however, if in any view of the case this testimony was improperly rejected, at the time it was first offered, the error was fully cured by its subsequent admission.

The other assignments of error raise no question which calls for discussion.

Affirmed.

UNITED STATES v. 2,000 CASES OF WHISKY, 25 BARRELS OF WHISKY, AND 253 BARRELS OF WINE (GIOVANNI AQUINO, Inc., Claimant).

(Circuit Court of Appeals, Second Circuit. Decided October 20, 1921. Opinion Filed November 16, 1921.)

No. 153.

1. Internal revenue ⇐11—Prohibition Act does not tax liquors intended for beverage purposes.

National Prohibition Act, tit. 2, § 35, providing that the regulations therein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws, and that it shall not relieve any one from paying any taxes or charges imposed on the manu-

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

facture or traffic in "such liquor," refers to intoxicating liquor for nonbeverage purposes, as to which regulations are provided for its manufacture and sale, and the act is not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, in view of title 2, §§ 3, 25, 29.

2. **Internal revenue ⟸2—Statute providing for seizure and forfeiture held repealed.**

Rev. St. § 3453 (Comp. St. § 6355), providing for the seizure and forfeiture of goods, merchandise, etc., found in any person's possession or control for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of taxes, is repealed as applied to intoxicating liquors for beverage purposes by the National Prohibition Act, which in title 2, §§ 25, 29, provides its own machinery for preventing the manufacture and sale of such liquors.

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

Libel by the United States against 2,000 cases of whisky, 25 barrels of whisky and 253 barrels of wine claimed by Giovanni Aquino, Inc. From a decree dismissing the libel, and ordering the United States marshal to return the goods libeled to claimant, the United States appeals. Affirmed.

William Hayward, U. S. Atty., of New York City (John Holley Clark, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States.

George L. Donnellan, of New York City, for appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge. The libel was filed under section 3453 of the Revised Statutes of the United States (Comp. St. § 6355). It alleged that the whisky and wine seized from appellee on March 2, 1921, were property on which taxes are imposed under the revenue laws of the United States, and that the goods on the date of seizures "were found in the possession and within the control of" the appellee "for the purpose of being sold by it in fraud of the internal revenue laws, and with design to avoid payment of said taxes, in that said personal property consisted of whisky and wine upon which taxes had been paid for nonbeverage purposes only, and which were held" by appellee on the date of the seizure "for the purpose of selling the same for beverage purposes and with the design that the United States be thereby defrauded of the tax due upon the said whisky and wine when sold for beverage purposes."

Section 3453, under which this libel was filed, reads as follows:

"All goods, wares, merchandise, articles, or objects on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or

with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the Circuit Court or District Court of the United States for the district where such seizure is made."

The act of February 24, 1919 (40 Stat. 1105, c. 18, §§ 600–627), was passed subsequent to the War Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), but prior to the National Prohibition Act (41 Stat. 305), at a time when the sale of intoxicating liquor for beverage purposes was still lawful. In so far as it levied or imposed taxes, it was concerned solely with revenue purposes. In other words, manufacture and sale for beverage purposes was then lawful, but, as a condition thereof, such manufacture or sale paid money tribute for the benefit of the revenues of the United States. Failure to comply with the tax requirements could be redressed in the manner set forth in section 3453, supra.

The Eighteenth Amendment and the National Prohibition Act, however, completely changed the policy of the United States. As said in United States v. Boze Yuginovich et al., 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided June 1, 1921, when referring to various revenue statutes:

"These statutes have long been part of the federal internal revenue legislation, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the federal government was concerned, to manufacture and sell ardent spirits for beverage purposes. The government derived large revenues from taxing the business, which is sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the Eighteenth Amendment to the federal Constitution, and the enactment of legislation to make the amendment effective. The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the amendment by appropriate legislation. To this end, Congress passed a national prohibition law, known as the Volstead Act. 41 Stat. 305. It is a comprehensive statute, intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes."

The repeal provisions of the National Prohibition Act are found in title 2, § 35, thereof as follows:

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

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

[1] It will be noted that the taxes not relieved under section 35 refer to "such" liquor, and "such" liquor refers to intoxicating liquor in regard to which there are "regulations herein provided" for the manufacture and sale thereof; i. e., regulations in respect of intoxicating liquor for nonbeverage purposes, as provided in title 2, section 3 et seq., of the act. The Congress, if it had so desired, could have taxed prohibited liquor and the Supreme Court has so stated in the Yuginovich Case as follows:

"That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished we have no question."

The question here, therefore, is not one of the power but of legislative intent. That legislative intent is manifested throughout the act in provisions which, carrying out the policy of the Eighteenth Amendment, completely prohibit manufacture and traffic in intoxicating liquors for beverage purposes, and provide, not merely for forfeiture, but for destruction, of the liquor. Title 2, §§ 3 and 25. Thus, under section 25, it is provided:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of public law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

While repeals by implication are not favored:

"It is equally well settled that a later statute repeals former ones, when clearly inconsistent with the earlier enactments."

[2] We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes; but "being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes," it has erected its own machinery (as illustrated in section 25, supra, and title 2, § 29) to accomplish the desired result.

We are therefore of opinion that section 3453 has been repealed, and hence that the decree below should be affirmed.

COX v. PHILLIPS.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1921.)

No. 3776.

Navigable waters ⇐46(2)—Description held to include island accretion.

A trust deed covering a plantation situated on the east bank of the Mississippi river, "also all accretions or made land pertaining to said plantation," *held* to include a large island of unknown acreage, which had been forming in the river, and which under the law of the state was an appurtenance to the shore land, and a statement in the deed of the acreage, "more or less," *held* not a limitation, but intended to apply to the mainland only.

In Error to the District Court of the United States for the Jackson Division of the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action at law by Mary E. Cox against Mary A. Phillips. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Hirsh, of Vicksburg, Miss. (Wm. H. Watkins, of Jackson, Miss., Hirsh, Dent & Landau, of Vicksburg, Miss., and Watkins, Watwins & Eager, of Jackson, Miss., on the brief), for plaintiff in error.

William C. Martin, of Natchez, Miss., and T. G. Birchett, of Vicksburg, Miss. (R. L. McLaurin, of Vicksburg, Miss., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error brought an action of ejectment against defendant in error to recover certain land, described in the declaration as:

"Buena Vista Island, adjoining and lying immediately in front of the Buena Vista plantation, containing 2122 acres."

The declaration also alleges:

"Said Buena Vista plantation comprises all of section 7, except a strip 8.55 chains wide, containing 100 acres, off the north end; all of section 8, 9, 10, 11, and 12, and lots 1 and 2, section 15; and 22.40 acres in section 13, known as the Zachary Taylor place—all in township 10, range 2 west; the said Buena Vista plantation containing 1,960 acres."

It was stipulated that one A. A. Cox died seized and possessed of the plantation, and—

"as riparian owner became the owner of all that part of Buena Vista Island lying in front of the Buena Vista plantation, the said Buena Vista Island being east of the center of the stream of the Mississippi river; such portion of Buena Vista Island being the land sued for by the plaintiff in this cause."

The said A. A. Cox died intestate in 1886, leaving as his heirs at law his widow, Anna L. Cox, his son, W. S. Louis Cox, and his daughter, Mary E. Cox, plaintiff in error. November 3, 1892, plaintiff in error and her brother conveyed their undivided two-thirds interest in the

plantation to their mother, describing it as being in sections 7, 8, 9, 10, 11, and 12, and as containing 1,716 acres, and conveyed also:

"All the island and accretions adjacent to and pertaining to the same, consisting of about 1,000 acres, making all together 2,716 acres."

February 13, 1893, plaintiff in error and her brother executed to their mother another deed, in which they added to the description in their first deed lot 2 of section 15, and represented the land conveyed as—

"containing by estimation 1,875 acres, more or less; also all batture and accretion known as the 'Island' thereunto belonging."

February 14, 1893, Anna L. Cox executed a deed of trust to secure a loan from the American Freehold Land Mortgage Company of London, Limited., of the lands last mentioned, and in addition of lot 1 in section 15, and 22.40 acres in section 13. The description in the deed of trust also contains the following:

"Also all accretions or made land pertaining to said plantation—all in township ten (10) north, range two (2) west, containing in all nineteen hundred and sixty-five (1,965) acres, more or less."

After executing the deed of trust, and on March 17, 1893, Anna L. Cox conveyed the plantation and island to plaintiff in error and W. S. Louis Cox. The plantation was described as containing 1,716 acres, and otherwise as it had been in the deed of November 3, 1892. The island was described simply as "Buena Vista Island," and without mention of acreage. Plaintiff in error inherited the interest, if any, of W. S. Louis Cox, who subsequently died. The deed of trust was foreclosed in the year 1895, the description being the same as in the deed of trust. Defendant in error claims title to both the plantation and island under the foreclosure sale.

Buena Vista plantation comprised several irregularly shaped and fractional sections of land bordering on the east bank of the Mississippi river. A plat of the surveys of these sections was filed in evidence. It fails to give the acreage of section 7, but represents the other sections and parts of sections within the plantation as containing 1,437 acres. In the deed to defendant in error the part of section 7 conveyed is represented as containing 435 acres. Buena Vista Island began to form in the Mississippi river some time prior to the year 1870. There was testimony that the island contained about 300 acres as early as 1869. It was variously estimated to contain 800, 1,000, and even 1,700 acres prior to 1893, at about which time it became solid ground adjoining the mainland, and only during extremely high stages of water is it now separated from the mainland. At the close of the evidence the court directed a verdict for the defendant in error.

It is the contention of plaintiff in error that the description in the deed of trust only included the mainland lying within the surveyed sections of the Buena Vista plantation, and did not include the accretions which form the island and connect it with the plantation. That clause in the deed of trust which grants, "also all accretions or made land pertaining to said plantation," is claimed to be ineffective and insufficient to include the accretions, according to the natural import of the words used, and the reason assigned is that the acreage named in the deed of

trust is considerably less than the combined actual acreage of the plantation and the land formed by accretion.

It will be observed that in the deed of November 3, 1892, the plantation is described as containing 1,716 acres, and that in the deed dated February 13, 1893, the plantation is described as containing 1,875 acres, more or less, and that in the deed of trust the acreage is given as 1,965 acres, more or less; but it should be borne in mind that lot 2 of section 15 was added in the deed of 1893, and that not only this lot, but also lot 1 in section 15, and 22.40 acres in section 13, were included in the deed of trust. The declaration alleges that the mainland included in the plantation contains 1,960 acres, or only 5 acres less than that described as being contained in the deed of trust.

It is to be inferred that the deeds from plaintiff in error and her brother to their mother were executed in contemplation of the deed of trust, because of the reconveyance to them shortly thereafter. It is significant that title to the accretions, as well as to the mainland, was conveyed to the mother. There would have been no object in doing that, if it had not been the intention to include the accretions in the deed of trust.

It appears to be the settled law of Mississippi that the owner of land bounded by the Mississippi river takes title to the middle thread of the river. Morgan v. Reading, 3 Smedes & M. 366; The Steamboat Magnolia v. Marshall, 39 Miss. 109; Archer v. Greenville Sand & Gravel Co., 233 U. S. 60, 34 Sup. Ct. 567, 5 L. Ed. 850. In Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872, it is said:

"Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to a fixed side line."

To the same effect is Smith v. Leavenworth, 101 Miss. 238, 57 South. 803.

If, therefore, there had been no reference to accretions or made land, the title thereto would nevertheless have passed by the deed of trust and the foreclosure thereof, to the island and to all the alluvial lands lying between the Buena Vista plantation and the middle thread of the Mississippi river. But the fact that the alluvial lands are specifically mentioned would appear to show beyond dispute that title thereto passed, by foreclosure of the deed of trust, to the predecessor in title of defendant in error.

The only circumstance urged against this rather obvious conclusion is that the acreage in the deed of trust is stated to be less than it actually was as a matter of fact. If it be once conceded that the acreage refers only to the mainland, and not to the accretions, it is quite apparent that there is no error in the decree of the court below. We are of opinion that it was the intention of the parties to give the acreage contained in the mainland only. This construction disposes of all contentions made by plaintiff in error, while the construction contended for by her would render useless and pointless the reference made in the deed of trust to the accretions. The conclusion that it was the intention

to convey the accretions, including the island, is every where apparent and is consistent with the contemporaneous acts of the parties, and cannot be explained away by the mere circumstance that the unknown, uncertain, and variable acreage of the accretions was not also stated.

The judgment is affirmed.

REIFF v. NEBRASKA-CALIFORNIA COLONY CO.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1921.)

No. 5604.

1. **Evidence ⟸441(1)—Evidence of prior negotiations not admissible to alter written contract.**
   In the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract can be permitted to prevail, either in law or in equity over the plain provisions and proper interpretation of the written contract.
2. **Corporations ⟸448(1)—Not bound by representations or agreements of promoters.**
   A corporation is not bound by the representations, promises, or agreements of its promoters.
3. **Corporations ⟸82—Agreement by promoters intended to deceive subscribers to stock of corporation void for fraud.**
   An agreement by promoters of a corporation that, if defendant would subscribe for stock to influence others to do so, they would later return his notes *held* void as a fraud on other subscribers.
4. **Corporations ⟸432(6)—Evidence held not competent to establish agency for corporation.**
   Evidence that an oral agreement with defendant that, if he would assign certificates of stock of a corporation issued in defendant's name, but not delivered, his notes given therefor would be returned, was made by a director, who had the certificates in his possession *held* not competent to prove his authority from the corporation to make such agreement.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by the Nebraska-California Colony Company against John B. Reiff. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry H. Wilson, of Lincoln, Neb. (Elmer J. Burkett, Elmer W. Brown, and Ralph P. Wilson, all of Lincoln, Neb., and Sackett & Brewster, of Beatrice, Neb., on the brief), for plaintiff in error.

J. S. McCarty and G. W. Berge, both of Lincoln, Neb., for defendant in error.

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

PER CURIAM. Defendant in error brought suit in the court below upon two promissory notes executed by plaintiff in error. The defendant, plaintiff in error, in his answer admitted the execution of the notes. As a defense he alleged, in substance, that in July, 1913, one

H. B. Smith and one C. W. Glough represented to him that they and others were about to organize a corporation under the laws of the state of California for the purpose of buying lands located in that state; that they wanted him to subscribe for stock in the proposed company, because he was influential in the neighborhood where he lived in Gage county, Neb., and stated that if he would sign notes and ostensibly become a stockholder in the proposed company it would aid them in obtaining other subscriptions in his neighborhood; that if thereafter at any time he was not perfectly satisfied with his investment they would cancel his notes and sell to others the stock subscribed for by him, assuring him that they would take the stock off his hands and surrender his notes to him at any time he was not perfectly satisfied; that in reliance upon the representations thus made to him he signed and delivered certain notes to said Smith. He then alleges, in substance and so far as material here, that in the month of November following the same parties came to his home and represented to him that if he would execute notes payable to one Anderson as trustee, in lieu of the notes theretofore signed by him and payable to said Smith, and that if at any time in the future he should not be perfectly satisfied with his investment, the corporation would surrender the new notes, and he would be released from all liability thereon and cease to be a stockholder in the company; that, relying upon said representations, he executed said new notes. The notes sued upon in this action are the notes last above mentioned.

As a further defense the defendant alleged, in substance, that in November, 1914, the said Smith above named, as the agent of the plaintiff and authorized by the plaintiff in that behalf, entered into an oral agreement with him at the city of Beatrice, in Nebraska, by the terms of which it was agreed that if he, the defendant, would assign to plaintiff the certificates theretofore issued in the name of the defendant, but never delivered to him, and which represented his subscription to the capital stock of the plaintiff corporation, plaintiff would cancel and deliver up to him the notes sued upon in this action; that the said Smith produced said certificates of stock, and he, the defendant, signed the blank assignments on the back thereof; that said certificates of stock so assigned were retained and taken away by said Smith, acting for and in behalf of the plaintiff; that plaintiff has neglected and failed to surrender said notes, as it agreed to do.

The plaintiff company was incorporated under the laws of California in December, 1913. At the trial the defendant made offers of proof in respect to the several matters alleged in his answer. Upon objection the testimony was excluded. The defendant excepted, and has assigned the rulings of the court as error.

[1] The testimony offered to prove the oral agreements alleged to have been made between the defendant and Smith and Glough in July and November, 1913, was not admissible because:

"'In the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract.' N. Y. Life Ins. Co. v. McMaster, 87 Fed. 63, 71,

30 C. C. A. 532, 540; Conn. Fire Ins. Co. v. Buchanan, 141 Fed. 877, 897, 73 C. C. A. 111, 131, 4 L. R. A. (N. S.) 758; Omaha Cooperage Co. v. Armour & Co., 170 Fed. 292, 297, 95 C. C. A. 488, 493." Sioux Falls Nat. Bank v. Klaveness, (C. C. A.) 264 Fed. 40.

[2] A corporation is not bound by the representations, promises, or agreements of its promoters. Penn Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; Miser Gold M. & M. Co. v. Moody, 37 Colo. 310, 86 Pac. 335; Jones v. Smith (Tex. Civ. App.) 87 S. W. 210; Fletcher, Cyclopedia Corporations, vol. 1, § 150.

[3] The alleged agreements entered into between the defendant and said Smith and Glough constituted a fraud upon the other subscribers to the capital stock of the corporation and were void. Huster v. Newkirk Creamery Co., 42 Okl. 790, 141 Pac. 790, L. R. A. 1915A, 390; Quartz Glass & Mfg. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648; Fletcher, Cyclopedia Corporations, vol. 2, § 606.

[4] It appears that H. B. Smith was a director of the plaintiff corporation at the time the alleged agreement of November, 1914, was entered into between him and the defendant. But the fact that he was a director of the plaintiff corporation, though supplemented by the fact that he had the certificates of stock issued to defendant in his possession, does not tend to prove that he had authority in behalf of the plaintiff to enter into the agreement alleged in the answer. Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Chandler v. Robinett, 21 Cal. App. 333, 131 Pac. 891; Dox v. R. E. Lomax Co., 29 Cal. App. 718, 156 Pac. 874.

As the offer of proof of the transaction of November, 1914, was properly excluded on the ground above indicated, it becomes unnecessary to discuss or decide whether the plaintiff would have been bound by the agreement, had said Smith been authorized by plaintiff to enter into it. We find no error in the record.

Judgment affirmed.

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

UNITED STATES v. BOTHWELL et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1921.)

No. 5636.

Public lands ⊂=19—Suit for unlawful inclosure and occupancy dismissed without prejudice.

In a suit brought by the United States under Act Feb. 25, 1885 (Comp. St. § 4998), for unlawful inclosure and occupancy of public lands, where the evidence shows that none of the defendants were at the time of suit maintaining such inclosure, so as to warrant an injunction, but that it may have been built and maintained by some of them in the past, a dismissal of the bill should be without prejudice to the right to sue at law for damages for use and occupation.

⊂=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 District of Wyoming; John A. Riner, Judge.

Suit in equity by the United States against Albert J. Bothwell and others. Decree for defendants, and the United States appeals. Modified and affirmed.

Albert D. Walton, U. S. Atty., of Cheyenne, Wyo. (Clyde M. Watts, Asst. U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

William R. Kelly, of Greeley, Colo., for appellees Sanford.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. The United States filed a bill in the court below against Albert J. Bothwell, the Bothwell Company, a corporation, Stewart Sanford, and Archie Sanford, in which it was alleged that the United States was the owner in fee simple, as a part of the public domain, of certain lands in Natrona county, Wyo., particularly described in the bill in paragraph II. The bill also alleged:

"That said defendants, prior to the 1st day of January, 1895, but the exact date this plaintiff is not advised, have continuously up to and until the present time maintained and controlled and do now maintain and control, and threaten to continue to maintain and control, an enclosure of the lands hereinbefore described in paragraph II of this bill of complaint, by means of strong fences, which together with certain natural barriers with which they are connected, form a complete and continuous inclosure of said lands, and that said defendants wrongfully and unlawfully and by reason of the use of said fence assert the right to the exclusive use and occupancy of said described lands.

"That said fences are so constructed as to prevent stock, such as cattle, horses, sheep, and other live stock, from passing over, under, or through the same, and that said fences and all parts thereof, so as aforesaid constructed and maintained thereby prevent the free and uninterrupted access to and passage on, over, and across said described lands, or any part thereof, and thereby, by maintaining said fences, said defendants have obstructed and prevented any and all persons from peacefully entering upon and establishing settlement and residence on said described lands, or any part thereof, as might be their right to do under the laws of the United States. * * *

"That during all said last-mentioned period of time said defendants have so maintained and controlled said fences they neither had, nor now have, any claim or color of title made or acquired in good faith, nor any asserted right thereto by or under any claim made in good faith with a view to entry thereof, at the proper United States land office under the general land laws of the United States, to said lands or any part or portion thereof.

"That during all the times defendants have maintained and controlled said fences and inclosure aforesaid they have used the said lands described in paragraph II in this bill of complaint so inclosed as aforesaid for their own exclusive use and benefit, by way of pasturing thereon many head of horses, cattle, sheep, and other stock, to the damage of the plaintiff in the sum of $41,750.

"Wherefore plaintiff prays that said defendants, their agents, servants, and employees, of every name and nature, may be restrained from further maintaining said fences and inclosures, and that said defendants be decreed to remove and destroy said fences and inclosures immediately; that, should said defendants refuse or neglect to comply with said order within the time fixed by the court herein, it be further ordered and decreed that the United States marshal, or other proper officer of the court, do proceed summarily to destroy

said fences and inclosures at the expense of the defendants, as provided in the act of February 25, 1885 (Comp. St. § 4998), under which these proceedings are brought; that plaintiff have judgment against defendants for the sum of $41,750 as damages for the use and occupancy of said lands by defendants, and that the plaintiff have such other and further relief in the premises as may be meet and proper, and in accordance with equity and good conscience."

At the conclusion of the testimony the court rendered the following decree:

"This cause came on to be heard at this term upon the pleadings, the evidence taken in open court and was argued by counsel. Thereupon, upon consideration thereof, the court finds: First, that the inclosure complained of in the bill of complaint does not come within the provisions of the statute prohibiting the inclosure of the public domain.

"Second. The court finds that the defendants, nor either of them, at the time the suit was brought or at any time prior thereto, ever exercised, or assumed to exercise, exclusive control and occupancy of the lands described in the bill.

"It is therefore ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed, to which ruling plaintiff by its counsel excepts."

We have read the testimony carefully. It appears therefrom that at the time of the bringing of the suit the inclosure complained of in the bill was not being maintained by any one of the defendants. It also appears from the evidence that such inclosure never had been maintained by the defendants Stewart Sanford and Archie Sanford. A part of the relief asked for is an injunction. The Sanfords having never maintained the inclosure, and Albert J. Bothwell and the Bothwell Company having ceased to maintain the inclosure prior to the bringing of the suit, there was nothing for an injunction to operate on, even if it be assumed that the inclosure theretofore maintained by Albert J. Bothwell and the Bothwell Company was unlawful. We think that the trial court was right in dismissing the bill against Stewart Sanford and Archie Sanford. We think, however, upon the record before us, that as against Albert J. Bothwell and the Bothwell Company the bill should have been dismissed without prejudice to the right of the government to bring a suit or suits at law against them for damages for the use and occupancy of the lands mentioned in the bill. In so holding we do not at this time intend to prejudge the cause or to express an opinion as to the liability of said defendants or either of them in such a suit or suits.

The decree will be modified here dismissing the bill against Albert J. Bothwell and the Bothwell Company without prejudice to the right of the United States to bring a suit at law against them for damages for use and occupation of the lands, and, as thus modified, the decree will be affirmed.

WESTERN UNION TELEGRAPH CO. v. HALE et al.*

(Circuit Court of Appeals, Fifth Circuit. December 17, 1921.)

No. 3687.

Master and servant ⇐330(3)—Evidence held to show negligent telegraph messenger acted within scope of employment.

Uncontradicted evidence that it was the custom of defendant telegraph company to deliver and collect messages by the use of messengers on bicycles, and that such a messenger, in defendant's uniform, was going on his bicycle in the direction of defendant's office and was only a block distant therefrom when he negligently ran against and injured plaintiff, *held* sufficient, prima facie to sustain an allegation that he was engaged on defendant's business and acting within the scope of his employment.

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

Action at law by Laura Hale and William F. Hale, her husband, against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John E. Hartridge, of Jacksonville, Fla. (Francis R. Stark, of New York City, and Julian Hartridge, of Jacksonville, Fla., on the brief), for plaintiff in error.

R. E. Stillman, of Jacksonville, Fla. (A. G. Hartridge, of Jacksonville, Fla., on the brief), for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff, defendant in error here, joined by her husband, sued the defendant, Western Union Telegraph Company, and alleged in her declaration that one of defendant's messengers, employed to receive and deliver telegrams, so negligently managed a bicycle he was riding while engaged in defendant's business as to run into and injure her.

It was the custom of defendant to have its messengers deliver telegrams to addressees in the city of Jacksonville, and to collect for transmission telegrams intended to be sent elsewhere; and it was also the custom for defendant's messengers to use bicycles for these purposes. The injury occurred at a street corner only a block away from defendant's place of business, and resulted from a collision between plaintiff and one of defendant's messengers. The messenger was in uniform and was riding a bicycle in the direction of the building used by defendant.

At the conclusion of plaintiff's evidence the court denied defendant's motion to direct a verdict of not guilty. The defendant offered no evidence, and the trial resulted in a verdict and judgment for plaintiff.

It is unnecessary to state the evidence offered to sustain the allegation of the messenger's negligence. It was not denied, and therefore it may be taken as conceded, that the evidence of negligence was sufficient to authorize the submission of that question to the jury.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 273, 66 L. Ed. —.

There is but one assignment of error. It raises the single and narrow question whether defendant's messenger was proven to be acting within the scope of his employment at the time of the injury. This question was treated by the parties and by the trial court as within the issues raised by the pleadings.

We are of opinion that the evidence submitted by the plaintiff showing defendant's custom in delivering and receiving telegrams by the use of messengers on bicycles, and that the particular messenger who injured plaintiff was at the time of the injury within a block of defendant's offices, in his uniform and riding his bicycle in that direction, was sufficient, if necessary, to make out a prima facie case that the messenger was at that time engaged in the master's business, and to throw the burden of proof upon the defendant. If the facts were not as indicated by plaintiff's evidence, they were peculiarly within defendant's knowledge and could have been produced by it without difficulty or inconvenience. The defendant could not have been taken by surprise, in view of the essential allegation that the messenger was acting within the scope of his employment, and it doubtless would have shown that the messenger was not so acting if that had been the fact. Its silence and failure to offer any evidence under the circumstances warrants the conclusion that it was deprived of no right and suffered no injury by reason of the court's refusal to grant its motion for a directed verdict. Benn v. Forrest, 213 Fed. 763, 130 C. C. A. 277; Foundation Co. v. Henderson (C. C. A.) 264 Fed. 483.

The defendant cites authorities which hold that messengers who collect telegrams to be forwarded are the agents of the senders of the telegrams, and not of the telegraph companies These cases arose out of delays in delivery or failure to deliver telegrams intrusted to messengers, and are governed by contracts between the senders and telegraph companies; and are therefore not considered in point in this case.

The judgment is affirmed.

A. B. DICK CO. v. BARNETT.

(Circuit Court of Appeals, Second Circuit. November 16, 1921.)

No. 100.

1. **Patents ⇐312(3)—Similarity of results may justify conclusion of infringement of process.**

   While complainant must demonstrate infringement of patents for a process or product, similarity of result may justify a conclusion of infringement, in the absence of proof that in some respects the secret process used by defendant (though it need not be disclosed) or the resulting product differs from the patented process or product.

2. **Patents ⇐298—To justify preliminary injunction, prima facie case, free from reasonable doubt, must be established.**

   To justify a preliminary injunction in a patent case, complainant has not merely the burden of proof, but must establish a prima facie case, free from reasonable doubt.

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

Suit in equity by the A. B. Dick Company against Louis A. Barnett. From an order granting a preliminary injunction, defendant appeals. Reversed.

E. Clarkson Seward, of New York City, for appellant.

Samuel Owen Edmonds, of New York City (J. Edgar Bull, of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from an order of the District Court granting a preliminary injunction against the defendant, a distributor selling "Hesco" stencil paper, which is alleged to be an infringement upon the plaintiff's Fuller patent, No. 1,101,268. This and the other Fuller patent, No. 1,101,269, in suit covered the process and the product of plaintiff's so-called indestructible mimeograph stencil paper "Dermatype." In A. B. Dick Co. v. Underwood Typewriter Co., Inc. (D. C.) 246 Fed. 309 (affirmed by this court without opinion), the validity of these patents was sustained. For the purposes of the motion for preliminary injunction, the validity of patents in suit was properly assumed; the contest was as to infringement.

It is unnecessary for us here to review in detail the nature of the plaintiff's patent and its position in the art, as these were fully considered in the Underwood Case, supra. As the District Judge pointed out, the controversy as to infringement turns on the construction of the claims in suit. Defendant contends that they are limited to a fully and permanently coagulated (insoluble) gelatin, and that the defendant's coating was almost entirely soluble. The affidavits of the experts are in conflict as to the true scope of the claims, as well as to the nature of the plaintiff's process and its resultant product. The District Judge expressly recognized that whether the defendant used "a fully coagulated substance" or "a coagulated collodial substance" or their equivalents, within the meaning of the claims in suit, was a debatable question.

[1, 2] While plaintiff must demonstrate infringement, similarity of result may justify a conclusion of infringement, in the absence of proof that in some respects the secret process (which need not, however, be disclosed) or the resulting product differs from the patented process or product. Philadelphia Rubber W. Co. v. U. S. R. R. Works, 229 Fed. 153, 143 C. C. A. 426; Id. (D. C.) 225 Fed. 789; Badische Anilin v. Klipstein (C. C.) 125 Fed. 559. Here, however, the affidavits of the expert and of the "Hesco" manufacturer (who, though not a formal party, defended the suit), while guarding the secret process, purport to show important differences. Without passing upon their sufficiency, they raise at least a reasonable doubt as to infringement. The District Judge stressed too strongly the failure to disclose the secret process, and thereby, we believe, failed to apply the rule again announced by this court in Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158, June 23, 1921, that, to justify a pre-

liminary injunction in a patent case, plaintiff has not merely the burden of proof, but must "establish a prima facie case free from reasonable doubt." For, while ordinarily a preliminary injunction aims to preserve the status quo pending suit, in a patent case like this it may be said to destroy it.

The order of the District Court will be reversed.

ACME HARVESTING MACH. CO. v. BENNETT.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1921.)

No. 5625.

Bankruptcy ⟸414(3)—Evidence of obtaining property on false statements held insufficient to bar discharge.

Evidence in support of objections to a bankrupt's discharge on the ground that he obtained goods on materially false statements in writing *held* insufficient to bar his discharge under Bankruptcy Act, § 14b (3 [Comp. St. § 9598]), where bankrupt was the only witness, and testified that the statements were written by the creditor's salesman and signed by him without reading, and that the statements made by him as to amounts and values were according to his best information, and that some of his answers were not correctly entered.

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

In the matter of Eugenus H. Bennett, bankrupt. The Acme Harvesting Machine Company appeals from order granting the discharge. Affirmed.

See, also, In re Bennett, 264 Fed. 533.

Lee Montgomery, of Sedalia, Mo. (John Montgomery, Jr., and Roy W. Rucker, both of Sedalia, Mo., on the brief), for appellant.

G. W. Barnett, of Sedalia, Mo., for appellee.

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

COTTERAL, District Judge. This appeal is from an order granting a discharge to the appellee. There was a reference to a master of the issues arising upon appellant's objections, which were eventually confined to the ground that the appellee had obtained goods upon materially false statements in writing.

The appellee was the only witness at the hearing. Material discrepancies appear in the statements, as compared with his testimony, deeds, other instruments, and the schedules—two in the first statement as to incumbrances and three in the second as to real estate values, which counsel have pointed out and emphasized. Appellee testified that he verbally informed appellant's agents as to his property and debts for insertion by them in the statements, and that he signed them without reading the contents. The master declined to accept his explanation to the effect that he honestly thought the items furnished

by him were correct and were according to his best information, and that the statements were not prepared as he intended, and from the documents and the admissions of the appellee held the objection to be well taken, and recommended that the discharge be refused.

The District Judge, conceding that appellee's assets were overstated and his liabilities understated, commented on the need in such cases of the testimony of the salesmen in support of the statements written up by them when purchasers do not read or understand them, and do not have the data to be exact, and considered that in this case such testimony was not produced, and its omission was not satisfactorily explained. The finding was that appellant had not met the burden of establishing the falsity of the representations. Accordingly the exceptions to the master's report were sustained, and the discharge was granted. There were later proceedings wherein the discharge was formally ordered, and still later the order was vacated on motion of appellant and then re-entered.

In substance, appellee attributed the errors in the statements to honest mistakes and incorrect entries by appellant's agents. There was no denial of his testimony, and no showing that the statements were not obtained as he claimed, or that the items were inserted as he gave them. From a consideration of the evidence, including the concessions on his part, we are persuaded that there was a failure in this case, under its circumstances, to establish that appellee intended to misrepresent the facts by means of the statements signed by him, and that they were for that reason false in the sense required by section 14 b (3) of the Bankruptcy Act (Comp. St. § 9598). Only a question of fact is presented, and in our opinion it was rightly determined by the District Judge.

The order appealed from is therefore affirmed.

Judge HOOK participated at the hearing of this case, but died before a conclusion was reached and the opinion was prepared.

GEITGEY v. HENDERSON et al.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1922.)

No. 3714.

Frauds, statute of ⟸108(4)—Title bond, not mentioning price, is insufficient memorandum of contract to sell realty.

A title bond executed by the vendor, conditioned on conveyance by the vendor if the purchaser should pay the purchase-money notes issued by him, but not otherwise stating the consideration, is insufficient as a memorandum of the contract for the sale of land, as required by Gen. St. Fla. 1906, § 2517.

Appeal from the District Court of the United States for the Southern District of Florida; William I. Grubb, Judge.

Suit for specific performance by Daniel R. Henderson against A. A. Geitgey and another. Decree for plaintiff, and the named defendant appeals. Reversed.

Wm. H. Baker, of Jacksonville, Fla., for appellant.

William M. Toomer, of Jacksonville, Fla., and H. J. Quincey, of Ocilla, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This suit was brought by the appellee Daniel R. Henderson to enforce the specific performance by the appellant, A. A. Geitgey, of an alleged contract whereby Geitgey agreed to sell to Henderson described land in Baker county, Fla., for the sum of $29,810, $3,000 whereof was to be paid in cash, and the balance in stated installments. The granting of the relief prayed for was resisted on the ground that the provision of the Florida statute of frauds as to actions on contracts for the sale of lands was not complied with. The following is the pertinent provision of that statute:

"No action shall be brought * * * upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them * * * unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith or some other person * * * thereunto lawfully authorized." General Statutes of Florida 1906, § 2517.

Oral testimony tending to support allegations of the bill as to the making of a contract was adduced. What was successfully relied on as a note or memorandum in writing of that contract, sufficient to comply with the requirements of the statute, was a bond for title signed and acknowledged by Geitgey and his wife, but not made effective by delivery. That bond was in the sum of $30,000, payable to Henderson, recited the sale of the land in question by Geitgey and wife to Henderson, and the execution by Henderson of 11 described notes for principal sums, with interest thereon from date, payable at different dates, aggregating $26,810, and the following was the condition thereof:

"Now, if the said D. R. Henderson shall well and truly pay the said promissory notes, with interest as stated therein, and shall pay all taxes and insurance upon the within described property together with 75 per cent. of all timber removed from said land into the possession of which from the date hereof, it is hereby agreed he shall enter and continue, then the said A. A. Geitgey and his wife, Lucy M. Geitgey, shall execute a deed in fee simple to the said D. R. Henderson for the aforesaid property, when this obligation is to be void; else to remain in full force and virtue."

Nothing contained in that instrument indicated the price at which the land was agreed to be sold, or that any sum in addition to the amounts called for by the described notes was paid or to be paid. There was nothing in writing to show the price agreed on by the parties, or to support an inference as to what that price was.

The price to be paid is an essential term of an executory contract for the sale of land. The above-mentioned bond for title was not

a compliance with the requirement of the statute of frauds, as it in no way disclosed the price agreed on. Williams v. Morris, 95 U. S. 444, 455, 24 L. Ed. 360; 25 Ruling Case Law, 661. The following was said in the opinion in the case of Williams v. Morris, supra:

"Decided cases everywhere require that the memorandum should mention the price. * * * Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent."

The conclusion is that the alleged contract is not specifically enforceable, because of the failure to prove compliance with the requirement of the Florida statute of frauds, and that the decree appealed from was erroneous.

That decree is reversed.

BUTTARS et al. v. ETCHEVERRY et ux.

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

No. 5876.

Brokers ⊜88(4)—Right to commission held question for jury under the evidence as to defendant's default.

In an action to recover an agreed commission for negotiating a contract for the sale of land, under which the purchaser went into possession where defendant denied liability on the ground that the first payment called for by the contract was not made, but there was uncontradicted evidence that the default was due to the failure of defendant to clear his title and make a mortgage, the proceeds of which were under the contract to be applied on such payment, direction of a verdict for defendant *held* error.

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

Action at law by D. W. Buttars and E. S. Merrill, partners as Buttars & Merrill, against Dominique Etcheverry and Claudia Etcheverry. Judgment for defendants, and plaintiffs bring error. Reversed.

William A. Riner, of Cheyenne, Wyo., and J. H. Peterson and T. C. Coffin, both of Pocatello, Idaho, for plaintiffs in error.

Roderick N. Matson and T. Blake Kennedy, both of Cheyenne, Wyo., and M. S. Reynolds, of Kemmerer, Wyo., for defendants in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. The parties will be designated as in the trial court. Plaintiffs brought this action to recover of defendants the sum of $6,000, claimed to be due on a commission contract for the sale of real estate. At the close of all the evidence the trial court on its own motion directed a verdict for the defendants. This

action of the court is assigned as error. The material facts as they appear in the record are as follows: The defendant, Dominique Etcheverry, employed plaintiffs, who were real estate dealers, to sell 1,140 acres of land located in Franklin county, Idaho, together with all crops, cattle, sheep, and hogs belonging to the land, which was called a ranch. The selling price was to be $74,000, $55,000 cash and the proceeds of three cars of cattle as first payment, balance in six equal payments with interest at 8 per cent. Buttars & Merrill found a purchaser for the ranch, and a contract of sale in writing was executed by the defendant Dominique Etcheverry and his wife, as vendors, and C. A. Robbins as vendee, whereby the defendants agreed to sell and Robbins agreed to buy the ranch in question together with the personal property connected therewith on the terms above specified. The contract contained the following language:

"Party of the first part agrees to pay for commission $6,000, $4,000 from first payment, and $2,000 December, 1920. The party of the first part agrees to place a mortgage on ranch and cattle, this money to be paid as part of first payment."

Buttars & Merrill were not parties to the contract, but they both testified that, before the contract between the defendants and Robbins was executed, they had an oral agreement with the defendant Dominique Etcheverry that they should receive as their commission on the sale the sum of $6,000. Robbins went into possession of the ranch under the contract of sale. E. S. Merrill testified that the reason the $55,000 was not paid in cash was because the defendant could not clear his title to the land, and his testimony was undisputed. Viewing the case without reference to the contract of sale, the plaintiffs were clearly entitled to have the case submitted to the jury. Viewing the case on the theory that plaintiffs were bound in some way by the language above quoted from the contract because one of the plaintiffs drew the contract, we find the defendant Dominique Etcheverry seeking to evade the payment of the commission because Robbins did not make the first payment of $55,000, but E. S. Merrill testified why Robbins could not pay. Etcheverry had promised Robbins that he would place a mortgage on the land, but he could not clear the title so that the loan could be made. In any view of the case it was error to direct a verdict against plaintiffs.

Reversed, and new trial ordered.

UNITED STATES FIDELITY & GUARANTY CO. v. CITY OF PENSACOLA.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1922.)

No. 3705.

Appeal and error ⇐501(4)—Record showing exception is essential to refusal of the charge.

A judgment cannot be reversed because of rulings in the court's charge to the jury, or its refusal to give requested charges, where the record does not show that any exception was reserved to the charge or to the refusal.

⇐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 Northern District of Florida; Wm. B. Sheppard, Judge.

Action between the United States Fidelity & Guaranty Company and the City of Pensacola. Judgment for the city, and the company brings error. Affirmed.

J. J. Sullivan and J. J. Sullivan, Jr., both of Pensacola, Fla., for plaintiff in error.

John B. Jones, of Pensacola, Fla., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The record does not show that any exception was reserved to the court's charge to the jury, or to its refusal to give requested charges. This being so, the judgment is not subject to be reversed because of any of those rulings. The assignment of errors based upon rulings of the court on objections to evidence does not conform to the requirement of rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) that such assignment "shall quote the full substance of the evidence admitted or rejected." However, those rulings have been considered. In our opinion, none of them involved reversible error.

The judgment is affirmed.

BROOKINGS STATE BANK v. FEDERAL RESERVE BANK OF SAN FRANCISCO.

(District Court, D. Oregon. December 19, 1921.)

No. E-8577.

Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Federal Reserve Bank held without authority to require nonmember bank to remit without charging exchange.

A state bank, not a member of the Federal Reserve Bank, *held* entitled to charge its customary exchange on remittances to the reserve bank of the district, and a practice of the reserve bank to send checks on the state bank received by it for collection to the drawee bank indorsed "for collection only and remittance in full without deduction for exchange," and on their return unpaid to return them to its correspondents, advising them in effect that the checks were dishonored, *held* unauthorized, and enjoined, where it appeared that such practice was adopted for the purpose of coercing the state bank.

In Equity. Suit by the Brookings State Bank against the Federal Reserve Bank of San Francisco. On motion for preliminary injunction. Granted.

T. T. Bennett and B. Swanton, both of Marshfield, Or., for plaintiff.

Gavin McNab, of San Francisco, Cal., Wood, Montague & Matthiessen, of Portland, Or., and Albert C. Agnew, of San Francisco, Cal., for defendant.

WOLVERTON, District Judge. This is a suit for an injunction to restrain defendant from indulging in certain alleged practices supposedly injurious to plaintiff's business.

The Brookings State Bank is a banking institution organized under the laws of the state of Oregon, with a capital stock of $15,000, having its principal place of business at Brookings, a small town in the southwestern part of Curry county, in the state. The Federal Reserve Bank is a corporation organized under the laws of the United States, and a branch of the Federal Reserve system. The State Bank has correspondents at Portland, Or., and San Francisco, Cal., where it maintains funds subject to being drawn upon by it by check or draft, to meet remittances by exchange. In making remittances, the Brookings Bank has heretofore exacted a charge of one-tenth of 1 per cent. rate of exchange.

It is alleged that the defendant has heretofore demanded of plaintiff that it remit at par in all cases where defendant is acting as a collection agency, and, the plaintiff having refused so to remit at par, that defendant has resorted to the supposed expedient of maintaining an agent at Brookings for the purpose of presenting and demanding the payment of checks and drafts drawn on the bank over the counter and shipping the money to the defendant bank, which was done at great expense to the defendant bank, but for the purpose of harassing and annoying plaintiff and coercing it to subscribe to defendant's policy of remitting at par.

It appears from the affidavits of persons, filed in the cause on hearing for preliminary injunction, that on October 1, 1921, the agent was withdrawn from Brookings, and the State Bank was notified by defendant bank that thereafter checks received by the defendant bank for collection against the Brookings State Bank would be forwarded to it by mail, with request that the check be paid at par and the proceeds remitted by exchange on Portland or San Francisco. Checks were so forwarded, but were returned without payment as requested, upon the ground that plaintiff was not called upon to act as agent for the Reserve Bank for the collection of the checks under the terms imposed. On the return of the checks, the defendant bank has returned them to its correspondents, advising them in effect that the State Bank refused to pay, and had not protested the same, and that they must look to the State Bank for their protection. In sending the checks to the Brookings Bank, the defendant bank caused them to be indorsed as follows:

"Pay to Brookings State Bank for collection only and remittance in full without deduction for exchange or collection charges. Portland Branch, Federal Reserve Bank of San Francisco, Frederick Greenwood, Manager."

It can hardly be disputed that the Brookings State Bank has the right, if it so desires, to charge a reasonable rate of exchange for its remittances. Although there may exist a custom by which banks make remittances without the exaction of exchange, it is not universal, for the record shows that a number of small banks in Oregon and Washington are still charging exchange on remittances. See affidavit of Charles F. Adams. The custom does not affect the right of the banks to adhere to their practice of charging exchange on remittances.

A custom prevails, which is practically universal in the state of Oregon, whereby checks upon out of town banks are received by Portland banks and paid or credited to the account of the person presenting

the same to transmit such checks by mail to the drawee bank for payment (where there is no other bank in the same town with the drawee bank), and it is universally regarded and treated by banks that such presentment by mail is a regular, customary, and proper method of presentment for payment, and refusal of payment is generally treated as dishonor. The sending bank, in such cases, customarily and regularly notifies the prior parties that the check is dishonored. And I might say that it is further averred that it is the prevailing custom at the present time in the state of Oregon for checks so presented to be paid by the drawee bank without deducting any charge for making payment. See affidavits of Charles F. Adams and others.

Such a custom, as we are persuaded and again assert, does not affect the right of the drawee bank to charge an exchange for making remittances. Now, the conditions are these: The Federal Reserve Banks are inhibited from making any charge for exchange against other Federal Reserve Banks. Section 13 as amended, Act June 21, 1917 (40 Stat. 232, 234; Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796).

The opinion of Attorney General Gregory clarifies the clause alluded to. by language following:

"'No such charges shall be made against the Federal Reserve Banks' may be construed not as directed against state banks which are not depositors but merely as specifying a condition upon which checks may clear through the Federal Reserve Banks—in effect a prohibition against the payment of such charges by the Federal Reserve Banks." Vol. 31, Opinions of Attorneys General, 245, 248, 249.

The act, however, does not inhibit Federal Reserve Banks from expending money in making collections by other methods from banks not members of the Federal Reserve system. American Bank & Trust Co. v. Federal Reserve Bank (C. C. A.) 269 Fed. 4.

The defendant, therefore, was acting within its authority in maintaining an agent at Brookings, for making collections over the counter of plaintiff's bank and paying the expenses entailed thereby.

While, under the prevailing custom, the defendant bank could rightfully remit checks and drafts drawn against the plaintiff bank direct to the latter for collection, and could thereby exact payment of them, it could not impose conditions upon which such payment should be made; much less could it make the plaintiff bank its agent for causing protest to be made for nonpayment. The idea of requiring that a maker or drawee shall have protested his own paper is so inconsistent with the functions of an agent that it can hardly receive the sanction of law. No man can serve two masters, especially himself and another, in inconsistent capacities. I am persuaded, therefore, that the defendant was at fault in two particulars: First, in attempting to impose the condition that the plaintiff bank pay without its charge for exchange; and, second, in attempting to hold the plaintiff bank responsible for not having its own paper protested for nonpayment.

The question remains for determination as it respects the motive that induced the defendant bank to pursue the course it did in attempting to make collection from the plaintiff bank. It appears by defendant's answer that it expended $1,915.32 in making collections, over the coun-

ter of plaintiff's bank, of $102,850.33, during the year from October 1, 1920, to October 1, 1921. The method employed, considering the occasion for it, or rather the lack of reasonable necessity, was, to say the least, extraordinary, extravagant, and unbusinesslike.

In view of the fact that the defendant bank demanded payment of the Brookings Bank on condition that it remit at par, the refusal so to remit was not an act of dishonor as affecting the paper. Nor was the defendant authorized to advise its clients that they must look to the plaintiff bank for their protection through failure to protest. The defendant has sent out many letters to its clients containing advice of the kind. It does not appear that it has wholly desisted from the practice, although it has written to some of its clients that:

"The attitude taken by the Brookings State Bank makes it impossible for us to accept for collection further items drawn upon that bank."

I am persuaded, however, that the action of the defendant bank in adopting the methods pursued by it toward the plaintiff bank, and in persistently adhering to them, indicates most convincingly that it was for the purpose of coercing the latter bank into adopting the policy of the Reserve Bank to remit at par. Although the policy may be commercially sound, the plaintiff was entitled to pursue its own method, without being harassed and annoyed because it persisted in so doing.

A preliminary injunction will issue restraining defendant from sending letters to its clients, advising them that they must look to the plaintiff bank for their protection through failure to protest such paper, as demand for payment of may be made upon it on condition that it remit at par.

SHELTON ELECTRIC CO. v. VICTOR TALKING MACH. CO.

(District Court, D. New Jersey. January 4, 1922.)

Limitation of actions ⇐35(1)—Two-year limitation against forfeiture does not bar recovery under anti-trust laws.

The New Jersey statute of limitations (3 Comp. St. 1910, p. 3170, § 21), barring actions for penalty or forfeiture upon any statute in two years, does not bar an action under the federal anti-trust laws (Comp. St. § 8820 et seq.) to recover treble damages for an alleged unlawful restraint of trade, since such recovery is not a forfeiture or penalty but is to recover damages for an injury inflicted.

At Law. Action by the Shelton Electric Company against the Victor Talking Machine Company to recover treble damages by reason of an alleged unlawful restraint of trade. Defense interposing the bar of limitations overruled.

Frank E. Williamson, of Jersey City, N. J. (Arthur C. Fraser, of New York City, and Edgar W. Hunt, of Trenton, N. J., of counsel), for plaintiff.

Louis B. Le Duc, of Camden, N. J. (George W. Schurman, of New York City, John D. Myers, of Camden, N. J., and Allen S. Hubbard, of New York City, of counsel), for defendant.

BODINE, District Judge. The present action is brought to recover damages by reason of an alleged unlawful restraint of trade. The complaint contains two counts. The first charges that certain specific acts have been done "contrary to and in contravention of the anti-trust laws of the United States," and the concluding clause demands treble damages in addition to the attorneys' fees and costs, "as authorized by law in such case made and provided."

The second count contains no reference to the anti-trust laws of the United States or to the provisions of the laws of the United States. As to the first count, the defendant has interposed the bar of the statute of limitations as contained in section 21 of the Compiled Statutes of New Jersey 1910, pp. 3170, 3171, which, so far as pertinent, is as follows:

"* * * All actions on informations which shall be brought or exhibited for any forfeiture or cause upon any statute made or to be made, the benefit and suit whereof is or shall be limited or given to the party aggrieved, shall be brought or exhibited within the space of two years, next after the offense committed or to be committed, or cause of action accrued and not after"

—the contention being that this statute operates so as to bar actions, both penal and nonpenal, for any cause upon any statute.

The statute in question in its present form is to be found in section 15 of the Engrossed Statutes of 1799. The title of the act was "An act for the limitation of actions." The act is first printed in the Session Laws for the year 1798–99, pp. 456 and 459. Opposite the portion of the statute in question appears this marginal note, "Actions for forfeiture to the party aggrieved limited to two years." In the Patterson Compilation of 1800 (page 354) the act appears with marginal notes merely at the side of the first part of the section as follows, "Within what time actions or information on penal statutes shall be brought or exhibited."

The marginal notes add nothing to the construction of the act because not contained in the act, as engrossed, and undoubtedly, added as is the present practice, by the person preparing the laws for printing as an aid to the bar and in the preparation of the index.

The portion of the statute cited seems not to have met with judicial construction, although in Boswell v. Robinson, 33 N. J. Law, 273, and in McLaren v. McVicar, 41 N. J. Law, 271, the earlier portions of the section were considered by the courts.

Mr. Chief Justice Beasley, in Cowenhoven v. Board of Freeholders, 44 N. J. Law, 232, held that a common pleas judge, seeking to recover fees allowed him by statute, was not barred by the six years' limitation. In Jersey City v. Sackett, 44 N. J. Law, 428, the same justice, sitting in the Court of Errors and Appeals, affirmed the same doctrine with a unanimous court, holding that a suit for damages awarded under a statute for the laying out of a public street was not barred by the six-year statute of limitations. The action was on a statute, and would certainly have been barred by the two-year statute of limitations, if the construction contended for by the defendant in this case had been interposed at that time. See, also, McFarlan v. Morris Canal & Bank-

ing Co., 44 N. J. Law, 471; Outwater v. City of Passaic, 51 N. J. Law, 345, 18 Atl. 164. From these decisions, it is more than apparent that neither the bench, nor the eminent lawyers of this state engaged in these cases, recognized the two years' limitation as barring possible recovery on a statutory action, where the damages to be recovered were conferred upon a private individual as compensation for the injury which he had sustained.

Prior to the act of 1799, the Provinces of New Jersey had enacted the then existing English statutes of limitation (Session Laws 1727–28, p. 25). The entire act (Session Laws 1798–99, p. 456) shows its comprehensive extent. Actions of every kind and nature are subjected to periods of limitation—actions of debt, actions on the case, actions on bonds, and every other form of action are dealt with. In section 15, now section 21, the Legislature limited, first, actions for forfeiture on penal statutes where the recovery was limited to the state and then those limited to the state and an informer, and lastly those actions for a forfeiture or cause upon any statute limited to the person aggrieved. The later part of the section is controlled by the earlier portions and is no more than a bar to actions for a forfeiture or in the nature of a forfeiture where the action is instituted by the party aggrieved.

The course of decisions in this state, the history of the Legislature, and the language of the act, indicate that an action such as the present is not subject to the two-year limitation. At common law, the person injured by an illegal restraint in trade had a right of action. Standard Oil Co. v. United States, 221 U. S. 1, 49 to 64, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, and it is upon such unreasonable restraint that the second count of the complaint is predicated. The treble damages, which the complaint seeks to recover, are neither a penalty or a forfeiture, but merely treble damages allowed by the law for the redress of a private injury. Chattanooga Foundry Co. v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241.

The case is, however, I think, controlled by Thomson v. Clanmorris (1900) 1 Chancery, 718. In that case, a shareholder brought a suit to recover damages by reason of untrue statements contained in a company prospectus. A right of action for such misstatements was given by section 3 of the Directors' Liability Act of 1890. The pertinent portion of the statute of limitations invoked provided a bar for "all actions for penalties, damages or sums of money given to the party grieved by any statute," and the court held that the limitation did not apply, for the reason that the statute merely gave a new action on the case to those persons who had been injured by the neglect of a statutory duty.

The pertinent reasoning of Master of the Rolls Lindley is as follows:

"In construing s. 3 of the act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided. and when we look at the state of the law before the act of 1833 we can see

pretty plainly what was the mischief at which it was aimed. There were certain causes of action as to which there was no defined time of limitation. Some of them are enumerated in the earlier part of s. 3; for instances, 'actions of debt upon any bond or other specialty,' and others which are there mentioned. They were not provided for by the then existing statutes of limitations, and they are brought in. That was the first defect. There was another class of actions as to which there was no definite limitation of time, namely, 'actions for penalties, damages or sums of money given to the party grieved' by various acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where * * * punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was contemplated by the latter part of s. 3. In other words, they were what are popularly called 'penal actions.' We arrived at this from the history of the act, and from a knowledge of the then state of the law and the defect which was to be cured."

The defense is overruled.

HILDEBRANDT v. FLOWER LIGHTERAGE CO.

(District Court, S. D. New York. June 19, 1919.)

Shipping ⟸58(2)—Burden of proof stated, where demised vessel is returned injured.

The burden of proof of the owner to establish negligence of lessee, in case of return of demised boat injured, is met by showing failure to return in good condition, subject to ordinary wear and tear, and this puts on defendant the burden of going forward with evidence to show lack of diligence; but when the respondent gives proof of just what was done, though the cause of the particular damage is not shown, the burden of showing negligence remains on libelant.

In Admiralty. Libel by John Hildebrandt against Flower Lighterage Company. Libel dismissed.

Macklin, Brown & Purdy, of New York City, for libelant.

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

Burlingham, Veeder, Masten & Fearey, of New York City, for claimant.

MACK, Circuit Judge (orally). In order to give you a full opportunity for review, I state my conclusions of fact and my views on the law. So far as the tug is concerned, this is an action in rem against the tug. The tug must be shown to have been guilty of some negligence. There is no proof of that whatsoever. The evidence is that the tug took her, and took her properly, tied her up in a proper place, as appears from the evidence. I do not see how, under the circumstances, any case has been established by the libelant or the respondent as against the tug, so that the libel against the tug will have to be dismissed.

Now, as between the libelant and the respondent, the bailee is liable for the exercise of ordinary care; it responds in damages, if it fails to exercise ordinary care in the protection of the property. It is held

that in a bailment of this kind the fact that the accident happens, that the damage is done while the boat is in the bailee's possession, that the bailee is not able to return it in good condition subject to ordinary wear and tear, establishes a prima facie case of fault. In other words, it is up to the bailee to rebut the prima facie case; that is, to explain the situation. I cannot agree with counsel that the prima facie case can be met only by showing how the accident happened. In my judgment, the true principle of law is that the burden of proof is on the libelant to establish negligence; that that burden is prima facie met in the case of a demise by showing a failure to return in good condition, subject to ordinary wear and tear. That puts upon the defendant the burden of going forward with evidence to show a lack of negligence on its part. But, when all the evidence is in, the court must weigh the situation and say: Was the respondent guilty of negligence or not? Now, what is shown in this case? It is shown that the defendant acted properly, so far as it is concerned, in the handling of the boat, in the loading of the cargo on the boat. It did nothing, so far as the evidence shows, that can be called negligence, and everything that it did do is shown. It is immaterial whether, if the master had been present, the accident would not have happened, because the respondent is not liable for the master's being absent. In so far as that would have any bearing on the case, it would be a responsibility of the libelant. I am assuming, because I believe that the evidence sustains it, that the boat was in seaworthy condition when it was handed over to the respondent. It follows, therefore, that the damage occurred after it was handed over to the respondent. That reduces the inquiry to this: Was the respondent guilty of negligence, by which that damage occurred? As I say, if there were no proof at all, except the handing over, for the failure to return they would be liable; when there is proof of just what was done, even though the cause of the particular damage is not shown, the burden of showing negligence remains on the libelant.

In my judgment, that burden has not been met; there has been no showing of negligence. It may be that the boat was badly shifted by the tug. It may be that the damage was done in the shifting; but there is no proof of that, and while, of course, the tug is not liable, in the absence of proof that the damage occurred because of faulty shifting, in my judgment the respondent is not liable for the fault of shifting, if there was fault of shifting, on the part of the tug. The tug was not the agent of the respondent, so as to make the respondent absolutely liable for its acts, and therefore the respondent is not bound to show affirmatively that the tug shifted properly, and that the damage did not occur while the tug was shifting, or as a result of the shifting, or as the result of the tying up.

But, even if I am wrong in this, even if the respondent would be liable for the acts and neglects of the tug, and even if, in the absence of any evidence whatsoever bearing on the subject, except the mere fact that the tug moved the boat, it should be assumed that there was a negligent moving, a negligent shifting, because of some burden of going forward on the part of the respondent which had not been met, even then, in my judgment, that is not the situation here, because the

captain of the tug has testified, and his testimony would rebut any prima facie case as against the respondent and not merely as against the tug, that there was a negligent shifting and that the damage arose from that.

It follows, therefore, that while it cannot be positively said how the damage arose, the probability, under all the evidence, is that it arose after the boat was shifted. Whether some passing vessel knocked a hole in it, or in what other way the thing happened, is merely guesswork. It is my judgment, however, that the evidence affirmatively shows, if that were necessary, the exercise of ordinary care on the part of the respondent and it therefore meets the prima facie case.

The libel will be dismissed.

THE PRESIDENT.

HILDEBRANDT v. FLOWER LIGHTERAGE CO.

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

No. 22.

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

Libel by John Hildebrandt against the Flower Lighterage Company, and the steam tug President, her engines, etc.; the Clyde Steamship Company, claimant. From an adverse decision, libelant appeals. Affirmed.

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

Foley & Martin, of New York City (George V. A. McCloskey, of New York City, of counsel), for respondent appellee.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for claimant appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed.

THE JUNIATA.

(District Court, D. Maryland. January 14, 1922.)

No. 917.

1. Maritime liens ⇐24—Not in issue if subcontractor gave credit to contractor and not to ship.

Where a subcontractor gave credit to the contractor and looked to it, and not to the ship, it is unnecessary to inquire whether a subcontractor can acquire a lien upon a ship.

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

2. Maritime liens ⇐17, 29—Subcontractor held not entitled to maritime lien, the contractor not representing the owner.

Act June 23, 1910, § 5 (Comp. St. § 7787), re-enacted by Merchant Marine Act June 5, 1920, supersedes all provisions of the state statutes so far as they purport to create rights of action enforceable in rem against vessels for repairs, supplies, and other necessaries, and, if a subcontractor ever had a right to a lien therefor on a vessel, it was based upon the contractor's agency for the owner, and cannot now exist, in view of Act June 23, 1910, § 2 (section 7784), which enumerates the persons presumed to have authority from the owner to procure repairs, supplies, and other necessaries, but does not mention the contractor.

In Admiralty. Libel by the S O S Welding Corporation against the steamship Juniata, in which plaintiff claimed a lien which he sought to enforce as a subcontractor; the contractor having gone into bankruptcy. Libel dismissed.

Keech, Deming, Kemp & Carman, of Baltimore, Md., for libelant.
Thaddeus H. Swank, of Baltimore, Md., for respondent.

ROSE, District Judge. The Globe Ship Building & Dry Dock Company, hereinafter called the "contractor," about the 1st of October, 1921, contracted with the claimant, the Merchants' & Miners' Transportation Company, hereinafter called the "owner," to make certain repairs to the latter's steamship, the Juniata, for a price of something less than $1,900. Among them was a certain rather small amount of welding, of the value of less than $100. The contract, however, contained a provision that, if additional welding was found to be needed and ordered, it should be paid for in some circumstances at so much an hour, and under other circumstances at so much per square foot. The contractor had no welding plant of its own, and that fact was known to some of the officials of the owner, although not to others. The contractor invited proposals for welding from two concerns, and the libelant, the S O S Welding Corporation, being the lowest bidder, received the order.

In the course of making the repairs, it was found that very much more welding was needed than was at first supposed, and the contractor was directed to do it. It had the work done by the subcontractor, and the subcontractor rendered a bill therefor to the contractor for $2,379.51. There is no question as to the correctness of this bill, and that the contractor owes it.

The contractor operated a large shipyard, recently constructed at a cost of some millions. After the work on the ship was finished, it assigned to the Commercial Credit Company, for cash, its account against the ship and owner, including therein its charge for the welding done by the subcontractor, which charge was naturally appreciably larger than that made by the subcontractor to it. Shortly thereafter, upon an involuntary petition in bankruptcy, the contractor was adjudicated a bankrupt. The subcontractor thereupon gave notice to the owner that it would claim a lien in rem for the amount of its bill against the ship, and filed its libel to enforce such a claim. The

owner had not at the time it received such notice, and has not now, paid the contractor's bill.

[1] At the hearing some attempt was made to show that, in ordering the welding from the subcontractor, the contractor was acting, not for itself, but as agent for the owner, and that, as the owner had its inspector of welding on the job to see that it was done in a workmanlike manner, and that no excess time was charged for, there was a direct contract between the owner and the subcontractor, as was held in The James H. Prentice (D. C.) 36 Fed. 777. The facts stated do not justify the conclusion sought to be drawn from them, and in short, after seeing and hearing the witnesses, I have no question that the owner made its bargain with the contractor and looked to it, and to no one else, to do the work. The subcontractor extended credit to the contractor, and never thought of seeking to hold any one else liable until bankruptcy intervened. The finding that the subcontractor gave credit to the contractor, and looked to it, and not to the ship, doubtless renders it unnecessary to inquire whether under other circumstances a subcontractor can acquire a lien upon a ship. The Supreme Court, in The Roanoke, 189 U. S. at page 195, 23 Sup. Ct. 491, 47 L. Ed. 770, while noting that it never had occasion to decide the question, recognized that the general consensus of opinion in the state courts and in the inferior federal courts was that labor and materials furnished to a contractor do not constitute a lien upon the vessel, unless at least notice be given to the owner of such claim before the contractor has received the sum stipulated by his contract. It would seem that, if such subcontractor really acquired a maritime lien, such notice could scarcely be necessary to protect it. Ordinarily maritime liens, until they become stale, having once attached to a ship, are unaffected by subsequent transactions of other parties concerning it. I shall not stop to inquire whether the purchase of the contractor's account by the Commercial Credit Company before the latter had any notice of the subcontractor's claim left the subcontractor in the same position as if the owner had paid the claim without notice; for, independently of whether it did or not, the decision will necessarily have to be against the subcontractor.

[2] The cases in which a so-called subcontractor has been held entitled to a lien or to a right in the nature of a lien against the ship appear all to have been cases in which, upon the facts, it was possible reasonably to hold that he was not a subcontractor at all, but had an agreement with the owner, made through the contractor as the owner's agent, and as has been pointed out, that was not the case here, or else where state laws gave such a right to a subcontractor. Since the passage of the fifth section of the act of 1910 (36 Stat. 605; Comp. St. § 7787), re-enacted by the Merchant Marine Act of 1920 (41 Stat. 1006, § 30, subsec. "x"), all the provisions of state statutes are superseded in so far as they purport to create rights of action enforceable in rem against vessels for repairs, supplies, and other necessaries. Moreover, if the right contended for ever existed at all, it was, as Justice Brown in The Roanoke pointed out, upon the theory that the contractor was to be presumed to be the agent of the vessel in the

purchase of such labor and materials, and since the act of 1910 that presumption can hardly be held admissible, for Congress was at pains in section 2 of the act (section 7784) to enumerate the persons who shall be presumed to have authority from the owner to procure repairs, supplies, and other necessaries, and, among persons so enumerated, contractors for ship repairs are not mentioned.

It follows that the libel must be dismissed.

THE JUNIATA.

(District Court, D. Maryland. January 14, 1922.)

No. 919.

Maritime liens ⇐24—Subcontractor giving credit solely to contractor cannot claim lien on vessel.

Where at the time a contractor gave a subcontractor specifications for material, there was present a foreman of carpenters in the employ of the owners of the vessel who had for years at intervals ordered materials for the owner's ship from the subcontractor, and who assisted in making up the specifications, but where, as a matter of fact, the subcontractor contracted solely with the contractor and extended credit solely to it, the subcontractor could not maintain a lien.

In Admiralty. Libel by the American Woodworking Corporation against the steamship Juniata, claiming and seeking to enforce a lien. Libel dismissed.

Niles, Wolff, Barton & Morrow, of Baltimore, Md., for libelant.
Thaddeus H. Swank, of Baltimore, Md., for respondent.

ROSE, District Judge. The only difference between this case and that of the S O S Welding Corporation, decided this day, is that the original contract between the owner and the contractor did not include the construction of six additional staterooms. There was subsequently made an additional contract, covering the construction of such staterooms, providing, however, that the contractor should only do so much of the work as could be done while the repairs mentioned in the opinion in the S O S Welding Corporation were still uncompleted. When these more important repairs were finished, the ship was to be taken away by the owner, the contractor to be paid for what had been done up to that time, and the rest of the work to be finished by the owner. Among many other things needed for the construction of these staterooms were doors, blinds, grills, and other millwork, and this the contractor obtained from the libelant, hereinafter called the subcontractor. The contractor, finding that the subcontractor had often done work in the past for the owner, and it being uncertain whether the material ordered by the contractor from the subcontractor would be finished before or after the contractor had completed the part of the work it was to do, agreed with the owner that such material would be charged to it at cost to contractor. That which is here in con-

troversy was furnished by the subcontractor to the contractor, and received by the contractor, and billed by the subcontractor to the contractor, and the amount of the subcontractor's claim, $1,086.67, was among the items of an account sold as mentioned in the preceding opinion by the contractor to the Commercial Credit Company.

At the time the contractor gave the subcontractor the specifications for the material, there was present a foreman of carpenters in the employ of the owners. This man had, for years, at intervals, ordered materials for the owner's ships from the subcontractor. He assisted in making up the specifications, but I find, as a matter of fact, that the subcontractor contracted solely with the contractor and extended credit solely to it.

Therefore the ruling in this case must necessarily be the same as in the S O S Welding Corporation, and here, as there, the libel must be dismissed.

THE KIYO MARU.

THE WEST JESTER.

(District Court, W. D. Washington, N. D. July 19, 1921.)

No. 6149.

Salvage ⇐38—Distribution of award between ship, master, and crew.

A salvage award, fixed by amicable agreement, for saving a burning steamship by another steamship, the service rendered being of a high order of merit and involving danger to the salving vessel and her crew, distributed between the ship, master, and crew; the master and chief engineer being given increased compensation for responsibility assumed and efficiency shown.

In Admiralty. In the matter of the salvage of the steamship Kiyo Maru by the steamship West Jester. Decree distributing salvage award.

Robert C. Saunders, U. S. Atty., and F. C. Reagan, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Peterson & Macbride, of Seattle, Wash., for Patrick J. Woods.

NETERER, District Judge. On the 16th day of June, 1920, in the harbor of Yokohama, Japan, the Japanese steamship Kiyo Maru was on fire, and called for help. The steamship West Jester went to her assistance. When it approached the Kiyo Maru, "from a little fore side of the funnel leading aft to the stern, was encompassed by flame." Another vessel of the same nationality was lying by a short distance away. There were upon the Kiyo Maru at the time 238 people, including a crew of 93. These people were on the forward part of the ship, many of them jumping overboard and were rescued by the lifeboats from the other steamship lying by, but no assistance was rendered to the Kiyo Maru. The West Jester went to the port side of the burning steamer and turned on its hose at about 5 o'clock in the afternoon.

About 6 o'clock an oil tank exploded in the Kiyo Maru. The wind having shifted, the heat was intense. The West Jester cut loose and and shifted to the starboard side, and the crew again boarded the burning ship and turned on six fire hose of the West Jester. The officers and crew worked diligently and continuously, except for refreshment, until 8 o'clock on the following morning, when they succeeded in extinguishing the flames.

The Kiyo Maru had a cargo of between 4,000 and 5,000 tons of nitrate of soda from Chile. The ship was worth approximately $1,000,000. There is no testimony as to the value of the nitrate. The damage to the Kiyo Maru by the fire was approximately $250,000. The damage to the West Jester was nominal, about $1,200. The West Jester is a large steel steamship of modern type, belonging to the Shipping Board, operated by Waterhouse & Co. The Shipping Board suggested an amicable settlement of the salvage claim, and concluded an adjustment for 200,000 yen, or $96,000. Out of this sum, items for commissions, attorney's fees, survey, and miscellaneous expenses were taken, which left net $79,705.24. The petition herein is filed by the United States attorney, and with it he has deposited the money realized from this settlement, and prays that the money be paid to the master and crew, and to the ship in accordance with the Japanese law, which provides two-thirds to the ship and one-third to the master and crew.

A show cause order was issued, directing all parties to appear before the court and show cause why the distribution should not be made. At the time of the settlement the master objected to the settlement as being not sufficient payment, and has not at any time consented thereto. Nineteen seamen appeared in court in response to the show cause order, and in open court signified their willingness to accept the settlement; twelve have not responded to the show cause order. The master appeared by counsel, and he and all of the men who appeared agreed in open court that the court should distribute the funds in accordance with equity and justice to the parties entitled thereto; the master insisting that he be awarded, in view of the responsibility resting upon him, extra compensation in accordance with the usual rule.

The service rendered is of very high order. Rarely have men exhibited greater bravery and gallantry than the master and crew on this ship, and undoubtedly saved the ship, and no doubt many human lives, at the risk of their own lives, as well as the ship under the master's command. The commander of the steamship Kiyo Maru issued this certificate:

"Yokohama, Japan, June 17, 1920.

"This is to certify that the American steamship West Jester, 5,866 gross tons, Capt. Patrick J. Woods, came alongside the Japanese steamship Kiyo Maru, anchored about two miles outside Honmuku Buoy, at about 5:40 p. m., the 16th inst., when the Kiyo Maru was in great peril from fire in the engine room, which encompassed the whole of the aft part of the Kiyo Maru, from a little fore side of the funnel leading aft to the stern. At the time no other assistance was being given, and on board the Kiyo Maru fire had cut off all methods by which the fire could be extinguished. That the steamship West Jester, with six fire hose going, attacked the fire. At 10 p. m. the flames were considerably reduced. Fire hose were kept going and played in seat of fire, and from then on the fire was kept in abeyance and smoldered. The credit of

subjugating the fire is hereby given by me to the master of the steamship West Jester."

The Marine Surveyor, Rennie Tipple, at Yokohama, made a report to the owner's agent of the American steamship West Jester, in which he says:

"The master of the West Jester performed a brave and skillful act in going alongside the Kiyo Maru, under adverse weather conditions, when the Kiyo Maru was raging with a fierce and rapidly increasing fire, and, by remaining alongside and playing water onto the fire until the said fire was subdued and extinguished, in my opinion, saved the Kiyo Maru and her cargo from destruction. Further, in my opinion, when the West Jester's crew boarded the Kiyo Maru, they imperiled their lives. The whole crew of the West Jester behaved most pluckily, but the chief engineer, Mr. R. K. Willis, deserves especial credit, as he pluckily led and by his knowledge of the interior of the engine room and stokehold of an oil steamer was able to more efficiently direct movements and more quickly quell the fire. In conclusion it may fairly be said the whole credit of extinguishing the Kiyo Maru fire is wholly and solely due to the master, chief engineer, and crew of the West Jester."

In harmony with the sentiment of the officers and crew of the West Jester, the settlement is approved, and out of the fund $26,125 shall be paid to the master and crew in proportion to the wages which they receive, and that in addition there be paid to the master the sum of $5,000, and to the first engineer the sum of $1,500, and the balance, less the clerk's costs and commissions, to be paid to the claimant. The Kiyo Maru was fortunate in having the matter amicably settled.

NEW YORK CANAL CO., Limited, v. UNITED STATES.

(District Court, D. Idaho, S. D. December 31, 1913.)

Waters and water courses ⇐222—Contract between Government and irrigation company construed.

A contract between the United States and an irrigation company by which the latter turned over its canal to become part of a larger government project, which was to include storage reservoirs for the flood waters of the river, but "reserving" to its stockholders and contract holders a designated quantity of water which the company claimed the right to appropriate from the river, and which the government agreed to carry and distribute, "provided that delivery * * * shall be made exclusively from the unregulated flow of the Boise river and shall be limited by the amount thereof," *held* to require the government to deliver thereunder only so much water as the company was actually entitled to take from the river under its appropriation, though, as later to be determined in a then pending suit, the quantity might be less than that named in the contract.

At Law. Action by the New York Canal Company, Limited, against the United States. Judgment for defendant.

Cavanah, Blake & MacLane, of Boise, Idaho, for plaintiff.

C. H. Lingenfelter and B. E. Stoutemyer, both of Boise, Idaho, for the United States.

DIETRICH, District Judge. This suit is brought by the New York Canal Company against the United States to recover $500 as damages for the alleged breach of a written contract, dated March 3, 1906, a copy of which is attached to the complaint. Jurisdiction rests upon section 24, subd. 20, of the Judicial Code (Comp. St. § 991, subd. 20). The controversy primarily involves the construction of the contract, and grows out of the administration of what is commonly known as the Reclamation Act (32 Stat. 388 [Comp. St. §§ 4700–4708]), by which certain of the proceeds arising from the sale of public lands are appropriated for the reclamation of arid lands.

It appears that prior to the execution of the contract the plaintiff company was the owner of a canal diverting water from the Boise river, upon the left bank thereof, a short distance above the city of Boise, by means of which it was distributing to its stockholders and to others possessing rights under permanent contracts water for the irrigation of their farms. In the same vicinity there were large bodies of arid public lands, and these the Secretary of the interior, in the exercise of the discretion and authority vested in him by the Reclamation Act, decided to reclaim; and accordingly they were withdrawn from entry, and the project came to be known as the Payette-Boise project.

Upon investigation it was found that the right of way occupied by the plaintiff's main canal was highly desirable for the government project, and negotiations were opened for taking over the system for such use. It is also shown that the plaintiff had no permanent diversion dam in the river, and that, on account of the difficulties in keeping in repair the upper portion of the canal, the cost of its maintenance was great, and the delivery of water was at times either wholly interrupted or insufficient in quantity. It further appears that while negotiations leading to the execution of the contract were in progress, and at the time the terms and form thereof were finally agreed upon by the plaintiff's board of directors and stockholders, a suit was pending in the district court of the Seventh judicial district of Idaho in and for Canyon county, wherein the Farmers' Co-operative Ditch Company was plaintiff, and the Riverside Irrigation District and others, including the plaintiff here, were defendants, for the settlement and adjudication of the rights of most of the claimants of water in the Boise river. Decree was rendered therein upon January 18, 1906, but thereafter an appeal was taken to the Supreme Court of the state, resulting in an affirmance in so far as the decree established the dates of the several appropriations, but in a reversal as to the duty of water, and hence as to the amount of each appropriation, with instructions that this issue be retried by the court below. At this time and subsequently the government claimed, as an original appropriator, the right to divert from the Boise river water to the amount of 1,647 second feet, dating from December 4, 1903. This right, it was known, would be available generally only during the early spring; it being the purpose of the government to supplement the natural supply during the summer season by the creation of storage reservoirs for the conservation of the flood waters.

Now turning to the contract itself: It refers to the adoption of the project by the Secretary of the Interior; recites that the line of the plaintiff's canal is the most advantageous location for the canal proposed to be constructed by the government; also that the plaintiff "is unable to deliver all the water to which the holders of its certificates of stock and of its water right contracts are entitled," and that, "by reason of the improved facilities furnished by the construction proposed by the United States Reclamation Service, the entire water supply for holders of said certificates and contracts can be delivered more uniformly and at less cost." Thereupon it is stated that the plaintiff "grants to the United States the right to occupy, use, and control perpetually and exclusively the right of way" of the plaintiff's main canal, "together with the right to enlarge the said canal and to construct, operate, and maintain upon said right of way such canal, structures, and other works or appurtenances as may be necessary or convenient," and there is also a grant and transfer to the United States of all the plaintiff's right, title, and interest in and to its water rights and power rights and privileges, all free from any obligations, charges, terms, or conditions at any time assumed by it, except as specifically provided for. Thereupon follow paragraphs from 4 to 8, inclusive, which literally are:

"(4) It is agreed that there shall be reserved to the holders of certificates of stock for not more than fifteen thousand shares, an amount of water equivalent to four-fifths of an inch for each share, not exceeding in total twelve thousand inches, or two hundred and forty cubic feet of water per second of time.

"(5) It is further agreed that there shall be reserved to the owners thereof certain water rights represented by contracts heretofore made by the party of the first part, the amount of eighteen hundred ninety-three (1,893) inches of water, or thirty-seven and eighty-six hundredths (37.86) cubic feet per second of time.

"(6) The said total of thirteen thousand eight hundred ninety-three (13,893) inches of water being 277.86 cubic feet per second of time, the vested water right claimed by the company and its stockholders shall be regarded as of the priority determined by the courts.

"(7) The delivery of such water reserved to the holders of said certificates of stock and contracts, and the payments for maintaining and operating the system as hereinafter provided, shall be made in accordance with the provisions of the existing by-laws of the said company and the terms of the contracts, from any existing lateral on the main canal between the point of diversion at Boise river and a point not more than five miles southwest of the crossing of such main canal by the Oregon Short Line Railroad near Mora, and shall be given precedence over any other rights to water in said canal which may be subsequently acquired, provided that delivery of water represented by said certificates of stock and contracts shall be made exclusively from the unregulated flow of the Boise river and shall be limited by the amount thereof. Copies of the said by-laws and contracts are hereto attached and made a part hereof. And provided further that it is expressly agreed and understood that no part of the expense for the enlargement of said canal shall be assessed against or borne by or charged to the stock of the stockholders of the said New York Canal Company, Limited.

"(8) It is further agreed that an equitable proportion of the cost of maintaining and operating the system of irrigation works which may be constructed by the United States on the south side of the Boise Valley, as may be determined by the Secretary of the Interior, shall be paid to the United States by the holders of said certificates of stock. The holders of rights under said contracts with the company shall pay to the United States the cost

of maintaining and operating such system of irrigation works in accordance with the terms of their said contract."

It will be noted that it was agreed that there should be "reserved" for the use of the holders of plaintiff's certificates of stock an amount of water "equivalent to four-fifths of an inch for each share," for not to exceed 1,500 shares, or 240 second feet, and for the contract holders the additional amount of 37.86 second feet, or a total of 277.86 second feet. By the decree in the water suit in the state court, however, plaintiff was awarded as the full measure of the rights it possessed when the contract was entered into, and as of date March 23, 1900, only 219.1 second feet, a much smaller amount than it had claimed. And in the amount of this award lies the source of the controversy, the plaintiff asserting that under the contract it is entitled to receive the full amount of $277.86 second feet of water, while the defendant contends that its obligation in this respect does not extend beyond the rights of the plaintiff as an appropriator, namely, 219.1 feet.

It is set forth in the complaint and admitted in the answer that the aggregate of all rights, including that of the plaintiff, awarded by the original decree in the water suit, of dates prior to the government appropriation, is 2,698.5 second feet, and that three rights, aggregating 85.5 feet, intervene between the plaintiff's appropriation and that of the government. It is further averred that during the season of 1912, while there was flowing in the river more than enough water to supply all rights prior to the defendant's appropriation, it declined to deliver, for the use of the plaintiff's stockholders or contract holders, any amount in excess of 219.1 second feet. Does, then, the plaintiff's appropriation constitute the maximum measure of the defendant's obligation, or, for the purpose of supplying the full amount of 277.86 second feet, must it draw upon its own appropriation?

If it be assumed that the present contingency was anticipated by the parties, and that both considered that the plaintiff's water right might be held to be less than 277.86 feet, it is impossible to adopt either view without greatly straining some of the language of the contract. Words may be selected by the plaintiff, which, when isolated, tend strongly to support its contention; and in like manner the defendant may fortify its position. Indeed, upon such an assumption the phraseology is in some respects not only inapt, but incongruous, and upon the whole the conclusion seems unavoidable that the agreement was made upon the understanding by both parties that the defendant's appropriation exceeded the 277.86 feet. Against this view is the simple fact that the decree in the state district court was entered before the contract was signed, but admittedly at a time long prior to the rendition of the decree the plaintiff's board of directors had agreed with the defendant not only upon the terms and conditions, but upon the very form of the contract, and their action had, as early as October 11, 1905, been ratified by the stockholders. No decree had then been rendered, and the plaintiff was claiming a right greatly in excess of 277.86 feet. Moreover, at the time the contract was actually signed the decree was not final, for the suit was in course of appeal to the Supreme Court. If, as is not improbable, the plaintiff was, at the time the instrument

was drafted and its form agreed upon, confidently asserting a much larger right, it might not have occurred to any one to provide for the present contingency; nor would the rendition of the decree necessarily have suggested to any of the agents of the government the desirability of making express provision in the draft which had long been fully agreed upon, and the conditions of which had long been regarded as definitely settled, especially when such decree was not regarded as final.

If now we assume that at the time the form of the contract was agreed upon neither party anticipated an award to the plaintiff of less than 277.86 feet, we have no serious difficulty in harmonizing the phraseology of the entire instrument, and there is left little room for doubt as to its true intent and meaning. Upon such assumption, it becomes unnecessary to put a strain upon the word "reserved" as the same is used in paragraphs 4 and 5, or to argue that it was employed in the exceptional and unusual sense of conveying to or vesting in the plaintiff, as grantor, a title or right greater or other than that of which it was already possessed. In the sixth paragraph the clause which refers to the 277.86 second feet as "the vested water right claimed by the (plaintiff) company and its stockholders" may be given its natural significance; and so with the further clause in the same paragraph, "shall be regarded as of the priority (that is, of the date in relation to other rights) determined by the courts." In paragraph 7 the proviso to the effect that the water for the use of the plaintiff and its stockholders should be delivered "exclusively from the unregulated flow of the Boise river," and should be limited by the amount thereof, loses the significance which the plaintiff attaches to it. It may be assumed that "unregulated flow" means the natural flow of the river, as distinguished from the water which the defendant planned to conserve in reservoirs and release from time to time for use during the low-water season. Applying the maxim, "Expressio unius exclusio alterius," the plaintiff has argued, why, if the government understood that its obligation to furnish water under the contract was restricted to the plaintiff's appropriation, it caused to be inserted in the agreement a clause expressly negativing the idea that it was to furnish water from one of its independent resources, namely, its reservoirs, but was silent as to its other resource, namely, its original appropriation of the natural flow of the stream. But, if we are right in our conclusion as to the conditions under which the contract was drawn, the argument loses its force; for, if it never occurred or was suggested to the government agents that the plaintiff's appropriation was less than 277.86, their failure to make express provision against such a contingency is without significance. No presumption arises from a man's failure to mention a fact of which he is ignorant or to provide against a future event of which he had no thought. Upon the other hand, it is to be inferred from the record that at the time the agreement was reached there was, to say the least, a prevalent doubt whether the natural flow of the river was, during the low-water season, sufficient to cover the plaintiff's appropriation, after supplying all prior rights; and to avoid future controversy as to the meaning of the con-

tract it was the natural and sensible thing to insert language expressly negativing any possible claim that such deficiency as might thus arise should be supplied by the defendant from its storage reservoirs. But, if it was considered that the plaintiff's appropriation exceeded the 277.86 feet, no such provision would be necessary in respect to the defendant's rights as an appropriator, for, its appropriation being subsequent to that of the plaintiff, its right to divert water from the river on account thereof would wholly cease before there could justly be any reduction of the delivery under the plaintiff's appropriation.

Similar considerations are applicable to certain clauses in the preamble which are put forward by the plaintiff as signifying that it was to receive a supplemental supply from an independent source. The recitals are to the effect that the plaintiff was "unable to deliver all the water to which the holders of its certificates of stock and of its water right contracts" were entitled, and that by reason of the execution of the plans of the government "the entire water supply for holders of such certificates and contracts (could) be delivered more uniformly and at less cost." When we remember that because of the necessity of occasionally reconstructing or adding to the plaintiff's diversion dam after the same was washed out or injured by the flood waters in the spring, and of repairing breaks in the upper portion of its main canal, it was unable at times to deliver any water at all, and at other times to deliver up to its normal capacity, these recitals signify nothing more than a recognition of the plaintiff's inability continuously to deliver its maximum appropriation, or at least such part thereof as its patrons required, and the expression of a belief, not that, with the improved system proposed by the government, more water than plaintiff had appropriated would be delivered, but that the water to which it was entitled and which was sufficient for its maximum needs would "be delivered more uniformly and at less cost."

Mention has been made of the strain which plaintiff's construction puts upon certain expressions in the contract, such as the reference to the 277.86 feet as "the vested water right" claimed by the plaintiff and the provision that this amount is "reserved" for the use of its stockholders. But under its view the silence of the instrument in certain respects is equally difficult of explanation. It is conceded that the right upon which the plaintiff must depend for its supply is in point of date or priority subject to judicial determination. The duty of the defendant is not absolute, but is conditioned upon the sufficiency of the flow in the river to supply some appropriation or appropriations, which the contract does not identify, and the dignity of which it does not establish. The theory outlined in the complaint and assumed in the argument is that the defendant is to supply 219.1 feet from the plaintiff's appropriation, which dates from May 23, 1900; that is, deliver the whole of this appropriation, and supplement it with an additional amount of 58.76 feet from its own appropriation of December 4, 1903. But the contract is wholly silent as to the government's appropriation; it is not referred to directly or indirectly. Upon what basis, then, can we rest the conclusion that the defendant agreed to apply 58.76 feet of this appropriation to the plaintiff's use, or that the "priority" of this

particular appropriation was to be determined by the courts? Why not some other right or appropriation? Moreover, if we adopt the plaintiff's view of the meaning of the word "reserved," and therefore hold that it is equivalent to "granted" or "conveyed," and is not restricted in its operation to the original estate or right of the grantor, the plaintiff here, upon what theory can it be held that the water right which is "reserved" to any extent or at all covers the plaintiff's original appropriation? If "reserved" operates to convey 58.76 feet of the defendant's appropriation, why could and should it not be held to transfer 277.86 feet thereof, leaving the defendant to do as it pleases with the plaintiff's appropriation? And if the word "priority" as used in the sixth paragraph of the contract is to have the effect of establishing the date for 58.76 feet as of December 4, 1903, why should it not be held that it establishes a like date for the whole 277.86 feet? There is nothing in the agreement to tie the right which plaintiff possesses by virtue of the agreement to its original appropriation, excepting only the phrase "vested right" and the word "reserved." But manifestly these terms serve no such purpose if we attribute to them the exceptional meaning for which plaintiff contends. Other practical difficulties with the plaintiff's construction might be suggested, but perhaps the discussion has already exceeded reasonable bounds.

There is thought to be no escape from the view that in entering into the contract both parties unquestioningly assumed that the plaintiff had a vested right to the waters of Boise river in an amount exceeding the 277.86 feet reserved by the contract. Two conclusions necessarily follow: (1) The plaintiff possesses the right to have carried through the defendant's system and distributed to the holders of its stock and contracts 277.86 second feet of water. This is the canal capacity which both parties understood would be required for the plaintiff's needs, and it was upon this basis that they entered into the agreement. But (2) the defendant is bound to divert into and carry through its canal for plaintiff's use only so much water, not exceeding 277.86 feet, as the plaintiff at any time has in the river available for that purpose. The defendant is not bound to resort to its own appropriations to supply the amount. Did the plaintiff have such an available right during the irrigation season of 1912? We have seen that by the decision of the Supreme Court of the state the decree of the trial court limiting the plaintiff's appropriation to 219.1 feet was reversed, and thereupon the decree, of course, became wholly ineffective. In the absence of some judicial determination, it is thought the presumption should be indulged that the plaintiff possessed a right of at least 277.86 feet, in accordance with the assumption of the parties when they entered into the agreement. However, it seems that the action in the state court is still pending, and that the issue touching the duty of water has never been retried pursuant to the directions of the Supreme Court. In the meantime, upon hearings had for that purpose, orders have been entered establishing a basis for the temporary distribution of water; the order for 1912 having been made upon the application of the plaintiff here. No question is made of the validity of these orders, nor is there either allegation or proof that the defendant failed

to deliver the full amount permissible thereunder. That being the case, it follows that the proofs fail to establish a breach of the contract, and the action must be dismissed.

In the discussion it has been assumed that the Secretary of the Interior is not without authority, at his discretion, to make a contract such as this would be if construed in accordance with the plaintiff's views. Nor has place been given to the familiar canon of construction under which grants by the public are to be construed strictly against the grantee; it seems doubtful whether such a rule should be applied in a case like this, where an agency, public though it may be, is engaged in a business enterprise, the burden of which is ultimately borne by private individuals, who in turn receive all the direct benefits therefrom. It has also been recognized that the words "reserved" and "priority" may be used in the sense in which the plaintiff contends they were here employed. It may be added that little has been found in the dealings of the parties with each other subsequently to the execution of the contract or in their practical construction of it which throws any certain light upon the point at issue.

A judgment will be entered dismissing the action.

UNITED STATES v. DOUGHERTY.

(District Court, D. Montana. December 28, 1921.)

No. 86.

1. **Public lands ⇐120—Homestead patent for land in fact nonmineral held not subject to cancellation because of some known mineral thereon.**

Defendant filed a homestead entry, performed all required conditions made final proof, and received a patent for land of value for agricultural purposes. The land had been prospected for minerals during 50 years, and an ore vein therein had been worked at intervals, but without sufficient production to justify further development. Defendant had resided on the land for 6 years prior to his entry, had filed mineral claims thereon, and at times had taken out and sold some ore. He also produced garden and hay crops and conducted a small dairy business. *Held*, that the land was nonmineral in a legal sense at the time of entry and final proof, and that defendant's patent was not subject to cancellation for fraud, because of the existence of mineral thereon to the extent described.

2. **Public lands ⇐120—Homestead patent not subject to cancellation because of immaterial false representations as to minerals.**

Where, at the time of a homestead entry and final proof, the land was in fact nonmineral and subject to agricultural entry, the patent issued is not subject to cancellation because the entryman made false oath that there was no known mineral thereon, since he secured nothing to which he was not otherwise entitled.

3. **Public lands ⇐29—Homestead entryman held not estopped by holding mineral claims on the land.**

The fact that a homestead entryman was maintaining mineral claims on the land at the time of his entry and final proof *held* not to estop him from exercising his homestead right, if otherwise entitled thereto.

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

In Equity. Suit by the United States against Patrick Dougherty. Decree for defendant.

John L. Slattery, U. S. Atty., W. H. Meigs, Asst. U. S. Atty., and Benj. F. L. Heron, all of Helena, Mont., for the United States.

Wheeler & Baldwin, of Butte, Mont., for defendant.

BOURQUIN, District Judge. In this suit to cancel a patent for 120 acres of land (issued to defendant in 1917 upon final proof in 1916 in respect to his homestead entry of 1913), the bill alleges defendant secured the patent by fraud, in that therein he falsely represented that no one claimed or worked the land for mining purposes, that upon it were no indications of minerals, and that it was essentially nonmineral land, whereas in truth and fact defendant then was claiming and working the land for minerals, and it was essentially mineral in character.

[1] The evidence is that the land is about 18 miles from Butte, and it and the vicinity have been subjected to the scrutiny of prospectors for minerals for perhaps 50 years. No paying and operating mines have resulted, though lode claims are to some extent maintained. Upon the land in controversy is at least one rather persistent fissure from a few inches to a few feet in width, which for perhaps all the years aforesaid has been subjected to desultory, crude, and more or less superficial exploitation for minerals.

The lure thereto is that, in the filling of this fissure and at and adjacent to the surface, appear seams of quartz from the barely appreciable to several inches in width, in which occasionally have been found ores from mere samples to a few pounds, carrying bromides and chlorides of silver up to 1,400 ounces per ton, and gold up to $8 per ton. In respect to these ores there is no persistency or continuity in any direction, and in depths so far attained they have practically disappeared. The work done upon this fissure consists of cuts, holes, and shafts, and two tunnels, one a crosscut 600 feet long, and one following the fissure for some 900 feet, and attaining a depth of 200 feet. Whether the former tunnel reaches the fissure does not appear, and in the latter is disclosed nothing of value. The evidence is silent in respect to how much of this work was done by defendant.

In 1906 he acquired by location and purchase three lode claims along the fissure and extending across and beyond the land in controversy. In 1907 he established residence upon the land and claims, maintained to this day. From the beginning, to a substantial extent, he cleared, cultivated, and improved the land for a home and agricultural purposes, and to some extent prospected and worked the claims in endeavor to find ores in paying quantities. In the latter he was disappointed, though, a few pounds at a time and place, he secured and shipped ores as follows: December, 1906, 8,300 pounds, receiving $321; July, 1907, 14,700 pounds, receiving $619; September, 1909, 16,700 pounds, receiving $464.

His agricultural returns were of garden and hay crops, aggregating about 15 acres in the year of homestead final proof, and the dairy proceeds of some 6 cows. His ill health prevented return to the mines of Butte. On this land was pure air, fuel, home, comparative indepen-

dence, and at least a meager living, which occasionally might be improved by lucky finds of ores in times and labor otherwise unappropriated; and always the Argonaut's hope, however faint and ill-founded, that within the land there might be a source of the rich surface indications, a body of profitable ore, which it might be his good fortune to some time find. Incidentally, this is the dream of all homesteaders —in the mountain districts, of wealth of gold, silver, and copper; in the plains, of coal, oil, and gas.

So in 1913 he made homestead entry upon the land, and in 1916 final proof. In all things he complied with the homestead laws and performed all conditions precedent to earn the patent to the land. After final proof he recovered and shipped ores as follows: October, 1917, 24,500 pounds, receiving $194; October, 1920, 2,500 pounds, receiving $50. It does not appear to what extent defendant maintained the claims by annual labor, save that after final proof and in 1919 and 1920 he did so, and filed the usual affidavits.

He in substance testifies that the land clearly of agricultural value, and time and experience rendering doubtful its mineral value, in 1913 he concluded to and did enter it as a homestead and for a home; that in 1919 he learned plaintiff's agents were investigating the land and asserting it to be mineral, and to protect his right and to guard against other prospectors, he reasserted his mineral claims, performed annual labor, and filed proof aforesaid. Aught occurring subsequent to final proof, if competent, is of little evidentiary value; for the character of the land at final proof cannot be determined by the result of later development. See Clark, etc., Co. v. Ferguson (D. C.) 218 Fed. 964. If the land was not of known mineral character at final proof, the good fortune of the entryman in subsequent development of a bonanza would be immaterial to the issue.

Plaintiff's examiners, Galbraith and Holly, both mining engineers, in substance testify to careful examination of the land; that they would "pass" applications for lode claim patents upon the fissure, but that the barrenness of development at depth has destroyed hopes inspired by the values at surface; that now they would not be justified, nor would the average prudent man be justified, in further development, there being no basis for reasonable expectation to thereby develop a paying mine; that they would not recommend further development, save to some one with abundant money to spend, the loss of which would not embarrass him, and who was disposed "to take a long chance."

This testimony by witnesses in plaintiff's employ and of vocation interested in furthering mining development, is candid and fair, in accord with facts, and admits of but the conclusion that at the time of final proof the land was not known to contain minerals or indications of minerals to an extent warranting the average prudent man to expend money and labor in development, not known to contain them to an extent inspiring reasonable expectation that such development would disclose a paying mine, not known to be more valuable for mining than for agricultural purposes; that is to say, the land was not known to be mineral in character. And such is the finding of the court.

It is the too common case of rich samples, seams, and pockets in the outcrop, barrenness at depth, and no body of ore that is profitable to develop and extract.

Fifty years and two generations of prospectors that radiated from Butte have proven it in respect to this land. Evidently it is in the twilight zone, and could be legally patented to the first bona fide applicant, be he mineral or agricultural; for the laws are liberal to both, and in a close case will not discredit the first claimant's estimate or valuation, destroy his hopes, or deny his right. It is obvious that in respect to this land defendant did not in all things exercise good faith towards plaintiff. In his entry in 1913 he made oath that no portion of the land "is" claimed or worked for mineral, and in his final proof in 1916 he made oath that there "are" no indications of minerals upon the land.

[2] In view of the evidence herein, and the character of proof incumbent upon plaintiff to justify cancellation of a patent (U. S. v. Anderson [D. C.] 238 Fed. 649), it cannot be found that this oath in 1913 was false. There is no evidence he presently worked or even claimed the land for mineral, and his homestead entry may be taken as an abandonment of the mineral claims, even as his testimony indicates. And this without inconsistency with the ore shipments of 1917 and 1920, and the performance of annual labor in revival of the claims in 1919 and 1920, the latter for protection in event of this suit and against prospectors inclined "to take a long chance."

His oath of 1916, however, was false. It was perjury by reason of statute, and for which he might have been prosecuted. But it does not warrant cancellation of the patent. So, likewise, if the oath of 1913 was false; for, since the land was not mineral in character, had he not made the merely evidentiary false representations aforesaid, nevertheless the patent would have issued to him as a patent duly earned. Hence, within the law of fraud and to which plaintiff, as others, is subject (U. S. v. Company, 128 U. S. 676, 9 Sup. Ct. 195, 32 L. Ed. 571), these false representations were not material to the contract, for that by reason of them defendant secured nothing to which he was not otherwise entitled, and plaintiff was deprived of nothing it was not otherwise bound to yield to him. For the land not mineral in character, it was subject to entry and patent as a homestead, however limited its value for agricultural purposes. See U. S. v. Kostelak (D. C.) 207 Fed. 450. Rescission and cancellation are not decreed, where the false representations work no injury to the plaintiff, as here.

[3] If at time of entry and final proof defendant was maintaining his mineral claims upon the land, his inconsistency, though of evidentiary value, does not work an estoppel, as in some cases it might. See Bunker Hill Co. v. U. S., 226 U. S. 550, 33 Sup. Ct. 138, 57 L. Ed. 345; U. S. v. Company, 128 U. S. 683, 9 Sup. Ct. 195, 32 L. Ed. 571. It would not affect the issue here, which is only the known character of the land at final proof. Nor is any estoppel claimed.

Decree for defendant.

In re INTERBOROUGH CONSOLIDATED CORPORATION.

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

No. 26690.

1. **Corporations. ⇐583—Statute governing consolidation is read into stock contract.**
   Business Corporation Law N. Y. § 7, which was in force when preferred stock in a corporation was acquired, and which authorized a consolidation of the corporation with another with consent of two-thirds of the stockholders, must be read into the contract between the stockholders and the corporation.
2. **Corporations ⇐584—Action does not lie to recover value of stock of corporation consolidated with another.**
   An action at law or suit in equity will not lie to recover the value of stock in a corporation which has consolidated with another corporation.
3. **Corporations ⇐584—Preferred stock of a corporation consolidated with another has no lien for accumulated dividends on assets not segregated.**
   The preferred stock of a corporation, which had consolidated with another corporation with the consent of two-thirds of the stockholders, as required by statute, at a time when several of the dividends on such preferred stock had accumulated unpaid, gives to holder, who did not avail herself of the statutory procedure to have her stock appraised and the value allowed to her, no lien on the assets of the original corporation in the hands of the consolidated corporation, which had never been segregated for the payment of the preferred stock dividends.

In Bankruptcy. In the matter of the Interborough Consolidated Corporation, bankrupt. On claim of Agnes M. F. Reilly to recover dividends on preferred stock of a consolidated corporation as a preferred claim. Claim denied.

For brevity, Interborough-Metropolitan Company will be referred to as Inter-Met.; Finance & Holding Corporation, as F. & H. Co.; the bankrupt, as Consolidated Co. The claimant, acquired 300 shares of preferred stock of Inter-Met. in 1906. Inter-Met. was organized under the Business Corporations Law of the state of New York in 1906. At the time of the organization of the Corporation, and at the time when claimant acquired her shares of the preferred stock of the corporation, section 8 of the Business Corporations Law (Consol. Laws, c. 4) of the state of New York (now section 7 of the Business Corporations Law) as amended by section 520 of the Laws of 1901, provided for the consolidation of any two or more corporations organized under the laws of New York for the purpose of carrying on any kind of business of the same or of a similar nature, and set forth the procedure by which such consolidations could be accomplished. Section 9 of the Business Corporations Law (now section 8) provided for the submission of the consolidation agreement to the stockholders of the respective corporations sought to be consolidated, and the consolidation became effective under those statutes when the agreement of consolidation received the approval of the holders of two-thirds of the outstanding stock.

In 1915, Inter-Met. and F. & H. Co. were consolidated pursuant to the provisions of section 7 of the Business Corporations Law of the state of New York as enacted by chapter 12 of the Laws of 1909 (formerly section 8 of the Business Corporations Law), and pursuant to the provisions of section 8 of the Business Corporations Law as enacted in 1909 (formerly section 9 of the Business Corporations Law) the agreement was submitted to the stockholders of the respective corporations, and received the affirmative vote of the holders of 78 per cent. of the preferred stock and 81 per cent. of

the common stock of Inter-Met. There were then issued and outstanding 457,400 shares of preferred stock and 932,261 shares of common stock of Inter-Met.; 5,635 votes were cast against the consolidation, and of these 2,800 were preferred stock and 2,835 common. All of the preferred stock which voted against the consolidation has been converted into shares of stock of the Consolidated Co. The claimant did not avail herself of her right under the provisions of section 8 of the Business Corporations Law, as enacted by chapter 12 of the Laws of 1909 (formerly section 9 of the Business Corporations Law), to have her stock appraised and the value paid to her.

The preferred stock of Inter-Met. was entitled to cumulative dividends at the rate of 5 per cent. per annum. Only two quarterly dividends were ever paid on this preferred stock, to wit, the first two quarters in the year 1907. No dividends were ever paid upon the common stock of Inter-Met. By the agreement of consolidation a holder of preferred stock of Inter-Met. became entitled to exchange the same for a share of the preferred stock of the Consolidated Co., which was entitled to non-cumulative dividends at the rate of 6 per cent. per annum. Prior to the consolidation of Inter-Met. Co. with F. & H. Co., the former had sustained losses through the shrinkage in value of its assets arising by the collapse of Metropolitan Securities Company and Metropolitan Street Railway Company. When the consolidation was brought about the first balance sheet of Consolidated Co. reflected this loss. The assets were insufficient to pay the par value of the preferred and common stock of Inter-Met.

Claimant here brought suit in the New York Supreme Court against Inter-Met. Co., asserting that she was entitled to 5 per cent. cumulative dividends upon her stock and demanding that Inter-Met. account to her for the earnings of the Consolidated Co. from and after the date of the consolidations. The action was brought to trial in 1918 and the complaint was dismissed on the grounds, first, that if there were any right of action at all it was against Consolidated Co.; and, second, that no action would lie against the Consolidated Co. because of the matters set forth in the complaint.

The claimant does not allege fraud nor collusion to injure her rights, nor that any preferred stockholder was treated differently than she under the consolidation agreement. Substantially all of the preferred stock of Inter-Met., with the exception of 1,325 shares, has been converted into stock of the Consolidated Co. Of the 1,325 shares not converted, claimant owns 300. The holders of substantially all the remaining 1,025 shares cannot be located.

Consolidated Co. declared 12 quarterly dividends of 1½ per cent. each, payable upon the preferred stock of Inter-Met. which remained outstanding, and under the decision of this court in Re Interborough (D. C.) 267 Fed. 914, the holders of such stock are entitled upon the surrender of their certificates of stock of Inter-Met. to receive shares of preferred stock of Consolidated Co., together with dividends aggregating 18 per cent. thereon. The funds for this purpose are held by the trustee, who, pursuant to the order of this court, is prepared to deliver the required amount of preferred stock of Consolidated Co. and the amount payable as dividends with respect to the shares of stock of Inter-Met. held by claimant. No dividends were ever paid, nor was any other distribution ever made, to the holders of common stock of either Inter-Met. or Consolidated Co.

Claimant's contentions are stated by her counsel as follows:

"First. That she was not compelled to go into an appraisal, under the statute, of her preferred stock.

"Second. That by virtue of the language of the certificate of preferred stock the corporation had made a contract with each preferred stockholder in the nature of a vested right guaranteeing dividends with interest thereon which was 'a constituent, valuable, and an inseparable portion of the stock,' only awaiting the happening of the contingency provided for in the contract to become fixed; that this contract could not be canceled or ignored, but that the accumulated unpaid dividends had to be provided for in the consolidation, in addition to providing for the giving of new stock for the old stock, and that nothing was done in the consolidation making such provision.

"Third. That the claimant had an equitable right to have the value, not only of her stock, but of her additional claim in the accumulative dividends ascertained, irrespective of any appraisal.

"Fourth. That the claimant is not guilty of laches."

John T. Fenlon, of New York City, for claimant.
Alfred A. Cook, of New York City, for trustee in bankruptcy.

MAYER, Circuit Judge (after stating the facts as above). In the case at bar, claimant acquired her stock after the statute authorizing consolidation of corporations had been enacted. She thus held her stock with the advantages and the burdens of the statute, and the statute was read into the contract between her and the corporation. The difference in status between one who acquires stock prior to the existence of such a statute and one who acquires stock subsequent to its enactment is well illustrated in Clearwater v. Meredith, 1 Wall. 25, 40, 17 L. Ed. 604, and Nugent v. Supervisors of Putnam Co., 19 Wall. 242, 22 L. Ed. 83. See also Town of East Lincoln v. Charles Davenport, 94 U. S. 801, 24 L. Ed. 322; Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. Ed. 1024; Livingston County v. Bank of Portsmouth, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. Ed. 359.

At the time when Inter-Met. was organized, and at the time when the claimant acquired her interest in the preferred stock therein, section 8 of the Business Corporations Law provided for the consolidation of the corporation with another corporation organized for similar purposes and objects, by the approval of the holders of two-thirds of the outstanding stock, and section 9 of the Business Corporation Law provided the remedy for the dissenting stockholder, to wit, a proceeding to have the value of his stock appraised by judicial action and for the payment to him of the value ascertained. Upon the consolidation of the Business Corporations Law in 1909, section 8 became section 7 and section 9 became section 8. The statutes, however, are identical in form. When the statute here concerned was originally adopted in 1890, it carried with it the provision for a remedy to the dissenting stockholder. This was on the theory that, having deprived him of the right to prevent a consolidation, and having abrogated the rule at common law requiring unanimous approval to a consolidation, he would have a remedy in the event that he disapproved the consolidation.

[1] The theory of the statute was that a dissenting stockholder would be protected, so far as his legal rights were concerned, if procedure was established by which he could obtain the value of his holding in the event that he was not agreeable to the proposed consolidation. A corporation being the creature of the state, brought into being only by virtue of the state's permission, it is fundamental, as pointed out supra, that the statute is a part of the contract and that, when a person buys stock, he buys the same with all the obligations imposed by the statute. Colby v. Equitable Trust Co., 124 App. Div. 262, 108 N. Y. Supp. 978, affirmed 192 N. Y. 535, 84 N. E. 1111.

[2] It has been held in various jurisdictions that an action at law or in equity will not lie for the recovery of the value of the stock.

Mayfield v. Alton Gas Co., 198 Ill. 528, 65 N. E. 100; Mansfield v. Brown, 26 Ohio St. 223; Bish v. Johnson, 21 Ind. 299; Noyes on Intercorporate Relations, pp. 90, 91. The Mayfield Case, supra, contains an admirable exposition of the particular question here discussed. Without analyzing what may be the difference between the principle as set forth in the cases just cited and that of the Pennsylvania decisions (Barnett v. Phila., etc., Market Co., 218 Pa. 649, 67 Atl. 912, and Winfree v. Riverside Cotton Mills, 113 Va. 717, 75 S. E. 309), the latter cannot be accepted as sound in principle, if construed as contrary to the Mayfield Case and to the observations well stated by former Judge Noyes in section 46 of his book on Intercorporate Relations. In addition to the views here expressed is the authority of the New York Supreme Court, per Mr. Justice Hotchkiss, for whose opinions I entertain great respect. In a suit brought by this plaintiff against Inter-Met., Mr. Justice Hotchkiss said in the course of the argument:

"The statutes which provide for the consolidation of corporations have to that extent deprived minority stockholders of certain common-law rights; that is, it deprives them in a sense, for they are made subordinate to the right of the prescribed majority to carry the corporation and its assets over into the amalgamated corporations. But a minority stockholder has his rights protected under the statute. He does not need to go into the consolidation if he protests. By all the statutes I have ever had occasion to examine, it is provided that if a stockholder objects a commission shall be appointed to determine the value of his distributive share of the assets. * * * Your rights were protected by the provision of law which permitted you to have appraisers appointed and to be paid the value of your holdings. That you did not do. Whether you have irretrievably lost your right to do that I do not pretend to say. But, having failed to object to the consolidation, your rights have been determined by virtue of the statutory proceedings to which you were a party, and the benefit of which was extended to you. But you have not done that. You have remained silent."

I think the foregoing is all that need be said upon this point.

[3] In respect of the claim filed for cumulative dividends on the preferred stock, it appears that at the time of the consolidation no assets whatever of Inter-Met. were segregated or set apart for the dividends on the preferred stock. Again, Mr. Justice Hotchkiss said all that is necessary on that point:

"There is nothing in the complaint to show that there was ever a dollar of the estate of the Interborough-Metropolitan Company segregated or set apart for dividends for the preferred stockholders. Until that was done they were all general assets, on which you had no lien, but an inchoate right."

Further, on the facts as they existed, the directors would not have been justified in paying any dividends, and might have subjected themselves to personal liability, if they had done so. In brief, there is no theory upon which plaintiff's application may be sustained, nor any theory upon which the claim is preferred.

As a review of my decision is probably by petition to revise, and as the Circuit Court of Appeals on a petition to revise examines only questions of law, I find as facts the facts in the paper, entitled "Agreed Statement of Facts in re Alleged Claim Filed by Agnes M. F. Reilly

(Claim No. 2750)." Of course, the claimant still has the right considered in the case of In re Interborough Consolidated Corporation (D. C.) 267 Fed. 914.

Submit order on three days' notice.

UNITED STATES v. PAGE et al.

(District Court. W. D. Virginia, at Lynchburg. December 21, 1921.)

1. **Obstructing justice ⊂=11—Indictment for forcibly resisting officer must allege that accused knew that person assaulted was officer.**

   An indictment under Cr. Code, § 65 (Comp. St. § 10233), for forcibly assaulting and resisting an officer in the performance of his duty must allege that accused knew that the person assaulted was an officer.

2. **Obstructing justice ⊂=3—Statute protects officers only when making searches and seizures.**

   The provision of Cr. Code, § 65 (Comp. St. § 10233), making it an offense to use a dangerous weapon "in resisting any person authorized to make searches and seizures in the execution of his duty," is limited in its application to one resisting the performance of the duty of making lawful searches or seizures, either with or without a search warrant.

Criminal prosecution by the United States against J. M. Page and another. On demurrer to indictment. Demurrer sustained.

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

Wm. Kinckle Allen, of Amherst, Va., for defendants.

McDOWELL, District Judge. The indictment in this case, which has been demurred to, reads as follows:

"The grand jurors of the United States elected, impaneled, sworn, and charged to inquire for the body of said Western district of Virginia, upon their oaths present:

"That heretofore, to wit, on the 16th day of October, 1920, in Amherst county, Va., in said Western district of Virginia, and within the jurisdiction of this court, J. M. Page and Grattan Massie unlawfully and feloniously did forcibly assault, resist, oppose, prevent, impede and interfere with certain officers of the United States, to wit, S. R. Brane supervising federal prohibition agent, R. H. Drummond, R. M. Coffey, H. B. Stebbins, C. M. Campbell, and H. B. Crenshaw federal prohibition agents, whose duty it was to enforce criminal laws, and who were then and there engaged in the enforcement of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"Second Count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

"That at the time and place aforesaid, and within the jurisdiction of this court aforesaid, the said J. M. Page and Grattan Massie unlawfully and feloniously did use a deadly and dangerous weapon, to wit, a shotgun, in resisting certain persons, to wit, S. R. Brame, supervising federal prohibition agent, R. H. Drummond, R. M. Coffey, H. B. Stebbins, C. M. Campbell, and H. B. Crenshaw federal prohibition agents, said persons being then and there authorized to make searches and seizure in the execution of their duty, with the intent to commit bodily injury upon them, the said S. R. Brame, R. H. Drummond, R. M. Coffey, H. B. Stebbins, C. M. Campbell, and H. B. Cren-

shaw, prohibition agents, and to deter and prevent them from discharging their duty, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"Vio. Section 28, Title 2,
National Prohibition Act.
and Sec. 65, Penal Code."

Section 65, Crim. Code (Comp. St. § 10233) reads:

"Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer of the customs or of the internal revenue, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches and seizures, in the execution of his duty, or shall rescue, attempt to rescue, or cause to be rescued, any property which has been seized by any person so authorized; or whoever before, at, or after such seizure, in order to prevent the seizure or securing of any goods, wares, or merchandise by any person so authorized, shall stave, break, throw overboard, destroy or remove the same, shall be fined not more than two thousand dollars or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duty, shall be imprisoned not more than ten years."

[1] Without considering any other question, the first count of the indictment seems to me to be fatally defective in that there is a failure to allege that the defendants knew that the persons assaulted were prohibition officers. Pettibone v. U. S., 148 U. S. 197, 205, 13 Sup. Ct. 542, 37 L. Ed. 419; U. S. v. Taylor (C. C.) 57 Fed. 391.

The second count of the indictment, which is founded on the last clause of section 65, requires some discussion, as this clause of the statute presents at least two questions of some difficulty.

The first question is whether or not the protection afforded by this section is confined to cases where the officer is executing a search warrant, and, if not, the second question is whether or not this clause is applicable only where the official duty being performed is that of making a search or a seizure.

1. Certain customs officers were by section 24, Act July 31, 1789 (1 Stat. 29, 43), authorized to search vessels without a search warrant. See, also, to the same effect, section 68, Act of March 2, 1799 (1 Stat. 627, 677, 678). By section 2, Act March 3, 1815 (3 Stat. 232), customs officers are authorized to search without warrant any vehicle and even packages carried by persons. The proviso to that section reads:

"Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat or other vehicle of whatever form or construction, employed as a medium of transportation or to packages on any animal or animals, or carried by man on foot."

See, also, sections 3059, 3061, 3064, 3066, Rev. Stats. (Comp. St. §§ 5761, 5763, 5767, 5769), which seem clearly to provide for searches and seizures without search warrants. And in this connection it may be said that it would be absurd to contend that customs officers must be armed with a search warrant in order to search the baggage of arriving passengers at ports of entry. Beyond doubt customs officials

are legally authorized and required to make many searches and seizures without search warrants.

Now as to internal revenue officers: Section 3276, R. S. (Comp. St. § 6016), gives a right to revenue officers to enter any distillery, without a search warrant, as of course, and, if entry be obstructed, to forcibly break into the building either at night or in the daytime. And this right of entry is given in order that certain searches and seizures may be made, also without search warrant. See, for instance, section 3453, R. S. (Comp. St. § 6355), requiring the seizure of certain articles. See, also, section 3177, R. S. (section 5900), giving revenue officers the right to enter, in the daytime, or at night if the premises be open, any building or place "where articles and objects subject to tax are made, produced or kept." Such right of entry does not, by rather clear implication, require a search warrant, at least in the case of tobacco or cigar factories, rectifiers' establishments, and such like places; and, such entry having lawfully been made by a revenue officer, it seems quite clear that he can and should (without a search warrant) in some instances make the search and seizure authorized by section 3453, R. S. Moreover, searches for, and seizures of, illicit distilleries in the open country (in thickets and woods) have been for many years and in innumerable instances made by revenue officers without search warrants; and I have never known of a contention that such searches and seizures are unreasonable or illegal. Again, for many years and in innumerable instances revenue officers made, without search warrants, searches and seizures of vehicles suspected of being used in removing untaxed liquor; and such acts were, prior to the Prohibition Act (41 Stat. 305), I believe, generally, if not universally, regarded as reasonable and legal.

It is therefore clear that customs officers and revenue officers were in many cases not only authorized, but required, to make searches and seizures without search warrants. If the execution of a search warrant is so obnoxious and so provocative of resistance as to require the protection of this very drastic clause of section 65, a fortiori is such protection needed when searches or seizures are authorized and required to be made without search warrants. The statute is not so phrased as to necessarily make it applicable only when officers are executing search warrants. And in view of the need for the protection of this statute when officers are making lawful searches or seizures without a search warrant, it seems reasonable to read the statute as applicable to both of these situations. As possibly indicating a different belief, see U. S. v. Hallowell (D. C.) 271 Fed. 795. But I can see no sufficient reason for thus narrowing this salutary statute, the protection of which is obviously more needed by officers when making lawful searches or seizures without a search warrant than when fortified by a search warrant. Officers authorized to make certain searches and seizures without search warrants are literally within this provision of the statute, and are, I think, clearly within its spirit and purpose. The evil intended to be remedied was the use of dangerous weapons in resisting officers in making searches and seizures. If the intent had been to limit the protection of this clause of the statute

to officers while executing search warrants, it would seem that such intent would have been expressed. If such intent had existed the words "in the execution of any search warrant" would most probably have been used, instead of the words "in the execution of his duty."

In the foregoing discussion I have had in mind only lawful searches and seizures.

[2] 2. Whether the words "in the execution of his duty" are to be read as applicable to any official duty, or are to be restricted to occasions when the officer is making a search or a seizure (with or without a search warrant), is also a debatable question.

The performance of the duties of customs and revenue (and prohibition) officers, other than making searches or seizures, rarely arouse such hostility and spirit of resistance as do searches or seizures. Hence it seems reasonable that this very drastic clause was intended to be applicable only when the officer is engaged in making searches or seizures. The statute is unclearly expressed in this respect, but obviously the intent could have been to confine the protection of the last clause to officers while engaged in making searches or seizures, and the collocation of the words suggests and is fairly indicative of such intent. If the intent had been to make this clause applicable when the officer is engaged in any official duty, it would seem that such intent would have been more clearly indicated. In the statute the words "in the execution of his duty" immediately follow the words "person authorized to make searches and seizures." Hence it seems reasonable to assume that the duty in the mind of the draftsman was the duty of making searches and seizures; and, if so, then the inhibition of this clause of the statute was intended to apply to the use of a dangerous weapon in resisting the performance of the duty of making searches and seizures, and not to resisting the performance of other official duties.

Again, if it had been the intent to make this clause of the statute apply to all instances of armed resistance to customs and revenue officers and their assistants, it was both very unnecessary and highly inappropriate to even make mention of searches or seizures. Had the intent been to afford the protection of this clause to customs and revenue officers in the performance of any and every duty, such intent would almost inevitably have been shown, not by referring to the persons intended to be protected as persons "authorized to make searches or seizures," but as any customs or revenue officer, or any person assisting him.

This case calls for no expression of opinion as to the exact limits of the protection afforded by the last clause of section 65. It may well be that the statute applies while an officer is on his way to make a search, or while he is returning from making a seizure and in possession of the fruits thereof. The indictment here contains no allegation that the officers were engaged in a duty even remotely connected with searches or seizures.

I think the demurrer to the last count is well taken, and I base this conclusion merely on the omission of any allegation that the officers were in any sense engaged in making a search or a seizure. I have

not given consideration to the possible necessity of alleging the validity of the search warrant, where the search or seizure was being made in execution of a search warrant, nor to the necessary allegations where search or seizure was being made without a search warrant.

CLEVELAND REFINING CO., OF CLEVELAND, OHIO, v. PHIPPS.

(District Court, S. D. Ohio, E. D. December 21, 1921.)

No. 186.

1. **Commerce ⟸51—State has power to exact reasonable fees only for inspection of articles entering in interstate commerce.**

   A state has power to enact proper inspection laws and provide for the collection of the necessary expense of inspection, and is not required to fix with exactness the fees which will cover such expense, but as applied to articles of interstate commerce the fees must reasonably approximate such cost, and not be so excessive as to render the law a revenue measure.

2. **Commerce ⟸51—Ohio oil inspection law held invalid, as imposing an unlawful burden on interstate commerce.**

   Gen. Code Ohio §§ 844–868, as amended by 105 Ohio Laws, p. 309, providing for inspection of petroleum products and fixing fees to be charged therefor, which aggregated in the first year 63 per cent. greater than the inspection costs, and have since constantly increased, until, in each of the two years ending in 1920, they were more than double such cost, no distinction being made between oil produced in the state and that brought from other states, *held* invalid, as imposing an unlawful burden on interstate commerce, in violation of article 1, §§ 8 and 10, of the Constitution.

3. **Commerce ⟸41(1)—Interstate shipment protected until sale of original packages.**

   Where goods are transported into one state from another in original packages, interstate commerce therein is not completely terminated, and they are protected by the commerce clause of the Constitution against excessive inspection fees, until after their sale at the point of destination.

4. **Commerce ⟸51—Law held not valid as applied to articles of interstate and intrastate commerce.**

   Under the rule that, in the interpreting of statutes levying taxes, their provisions cannot be extended by implication beyond the clear import of the language used, where an inspection law prescribes excessive fees, without discriminating between the interstate and intrastate character of the commodity, the court cannot separate the two classes, and attribute the excess of fees collected to an excise tax on the domestic product.

In Equity. Suit by the Cleveland Refining Company of Cleveland, Ohio, against W. H. Phipps, individually and as Director of the Department of Commerce of the State of Ohio. On motion for preliminary injunction. Granted.

Chamberlin & Fuller, of Cleveland, Ohio, and H. B. Myers, of Columbus, Ohio, for plaintiff.

John G. Price, Atty. Gen., of Ohio, and Ray Martin, Sp. Counsel, of Newark, Ohio, for defendant.

Before DONAHUE, Circuit Judge, and SATER and PECK, District Judges.

PER CURIAM. The plaintiff, an Ohio corporation, assails on various grounds the constitutionality of the act passed by the General Assembly of Ohio May 19, 1915, entitled:

"An act to provide for the inspection of petroleum, illuminating oils, gasoline and naphtha and to repeal sections 844 to 868, inclusive of the General Code," Ohio Laws, vol. 105, p. 309.

The sections of the act are now known as sections 844–868, both inclusive, of such Code. Invoking proceedings under section 266 of the Judicial Code (Comp. St. § 1243), the plaintiff seeks a temporary injunction against the defendant, as an individual and as director of the state department of commerce, to prevent him from enforcing such act; the defendant, as such director, having been vested by the act of April 26, 1921 (109 Ohio Laws, p. 105), with all the powers and duties conferred on the state inspector of oils by the act of 1915, and intending to enforce its provisions. For a considerable time past the plaintiff has been and is still engaged at East Cleveland, Ohio, in the sale and distribution of kerosene, petroleum, and petroleum products, and has invested its capital in storage tanks, buildings, side tracks, machinery, and other equipment necessary for and used in receiving, handling, and delivering such kerosene, oil, and petroleum products, of all which kinds of goods it has in storage large quantities. It buys in other states, ships into Ohio, and receives at its place of business, large quantities of such articles in storage tanks, barrels, cans, and packages, and has contracts for such articles which it is bound to consummate, and which it cannot perform without great loss, except through its established business. It also employs a large number of persons to sell and deliver its goods to the public.

By the terms of the statute, oil intended for sale for illuminating purposes within the state must be inspected in Ohio. When consigned to a distributing station in tank cars, it must be inspected at the refinery where manufactured, if located in the state, or at the distributing station to which it is consigned, at the discretion and direction of the state inspector. Section 860. All mineral or petroleum oil, and any fluid or substance, the product of petroleum, or into which petroleum or a product of petroleum enters or is a constituent element, whether manufactured within the state or not, and all gasoline, petroleum ether, or similar or like substances, under whatever name held, whether manufactured within the state or not, having a lower flash test than provided by the act for illuminating oils, shall be inspected before being offered for sale to a consumer for use in the state. Sections 854, 865. Provision is made for a state oil inspector and deputy inspectors (a number of whom are required), and for payment of their prescribed salaries and their necessary traveling and other expenses, and also for the payment of the salaries of stenographers and clerks, from the state treasury. Sections 848, 849.

The statute requires that each owner of the several kinds of goods required to be inspected shall pay to the state inspector or his deputy for such inspection, for a single barrel, package, or cask, 25 cents; when the quantity inspected does not exceed 10 barrels, of 50 gallons each, in the aggregate, for each barrel, 15 cents; when the quantity in-

spected does not exceed 50 barrels, of 50 gallons each, in the aggregate, for each barrel, 10 cents; when the quantity inspected exceeds 50 barrels, of 50 gallons each, in the aggregate, for each barrel, 3 cents. All fees are payable on demand of the state inspector and in case of default beyond the tenth day of the end of the month in which such inspection is made, the fees are made a lien on the article inspected. Section 850. The state inspector is required to keep a record of inspections, showing the date of inspection, number of barrels inspected, and the name of the person for whom inspection is made. A like record must also be made by each deputy inspector regarding his activities. All fees received are paid into the state treasury, to the credit of the oil inspection fund. Sections 851, 852, 853.

If any manufacturer, vendor, or dealer shall sell or offer for sale any oil, fluid, or substance marked "Rejected for illuminating purposes," or any gasoline, petroleum ether, or similar or like substance, which, after inspection, has been marked "Dangerous," he shall be fined not to exceed $1,000, or be imprisoned in the county jail not to exceed 20 days, or both. Sections 859, 865. Any person who transfers the contents of a tank car, which have been rejected as the result of an examination, to a storage or receiving tank from which illuminating oil is distributed to consumers or dealers within the state, shall be subject to the penalty above stated (section 861); and any driver of a wagon from which oil intended for consumption for illuminating purposes within the state is delivered to consumers or dealers, and which does not bear a certificate such as covers the contents of the last tank car emptied into the storage or receiving tank from which the wagon was filled, shall be fined $10 for each day of his violation of the law.

The inspection fees collected, beginning with July 1, 1915, and ending on June 30, 1920, were $639,057.47. The disbursements were $321,188.68. In addition to the fees thus actually received, there was a considerable sum of outstanding uncollected accounts at the close of the period named. Exclusive of such accounts, the fees collected in such five years exceeded the cost of inspection by $317,868.79. On account of the increased consumption of the articles inspected, the excess of receipts over the cost of inspection in each of the years within the above-named period exceeded that of the preceding year, the excess for the year ending June 30, 1916, being $34,219.23, and thereafter the excess annually increased, until for the year ending June 30, 1920, it was $104,690.23. On account of a reduction in the number of deputy oil inspectors and change in the mode of inspection, the inspection fees and the cost of inspection for the year ending June 30, 1921, cannot be stated; but, in view of the increased use of the articles subject to inspection, it is thought the inspection fees for the year then ending will not be less than those of the preceding year, while the cost of inspection will be less, on account of the reduction in the number of inspectors.

The plaintiff contends that the inspection fees charged are excessive, that they interfere with interstate commerce, and are an unlawful impost duty upon goods shipped into Ohio from other states, and that

the statute is therefore violative of article 1, sections 8 and 10, of the federal Constitution.

[1, 2] The enactment of proper oil inspection laws is a valid exercise of the police power. Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; Red C Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 392, 32 Sup. Ct. 152, 56 L. Ed. 240. The state was without power to regulate interstate commerce, but under the federal Constitution it could collect the necessary expense of its inspection laws, with the result that interstate commerce to that extent would be lawfully burdened. The power to fix fees to cover such expenses rested primarily with the General Assembly, which in its discretion was required to determine the amount to be charged, and, on account of the fluctuation in trade and the inability to determine the sum that would be realized in the way of fees under a given law, it was not required to determine with exact nicety the difference between cost and collection. A surplus collected in any given year above inspection expenses would not necessarily indicate an invalid law, for the reason that such excess might be required to balance the deficit of some other year. In the instant case, however, leaving out of consideration the outstanding unpaid fees, the collections, when least, were 63 per cent. greater than the inspection costs. This percentage uniformly increased, and for the years ending June 30, 1919, and June 30, 1920, respectively, the collections were more than twice the cost of inspection. The excess over inspections has been uniformly great, and has so advanced from year to year that the fees provided by the statute must be held to be unreasonable and disproportionate to the service rendered, and the act must be declared unconstitutional, as imposing a direct and unlawful burden on interstate commerce, unless interstate shipments under the provisions of the act are separable from intrastate shipments, and the fees collected for the inspection of the former are equal or substantially equal to the cost of inspecting shipments of that character. The defendant's position is that the two classes of shipments are thus separable, and that interstate shipments have in fact been inspected at a loss to the state.

It is significant that the state has not, at any time, in the enforcement of the law, kept or endeavored to keep a separate record of interstate and intrastate shipments, or of the sums realized from their inspection, although a belated and imperfect effort was made at the hearing to show that such shipments and sums are separable. The construction thus placed upon the law by the state's executive officers is entitled to great respect. Hahn v. United States, 107 U. S. 402, 406, 2 Sup. Ct. 494, 27 L. Ed. 527; Smythe v. Fiske, 90 U. S. (23 Wall.) 374, 404, 23 L. Ed. 47. In the light of Castle v. Mason, supra, and Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, as well as of the express provisions of the act, such construction is correct, for the reason the statute does not contemplate a separation of interstate and intrastate shipments and contains no provision for a separate record or accounting for the same, or from whom and where purchased, or from whence shipped, or any suggestion of a classification with reference to the character of the shipments. It applies generally to any and

all kerosene, petroleum, and petroleum products, whether manufactured in this state or not, and whether shipped wholly within the state or from other states into this. Shipments of both classes, without discrimination or intent of separation, are subjected to the provisions of the act, are classified collectively with reference to the quantity only of fluids inspected, are charged with the same fees, and the commingled receipts arising from their inspection are required to be paid into the state treasury. The act, except as to the amount of fees charged for inspection, is in its essential details, and even in nearly all of the language employed, a re-enactment of the law declared unconstitutional in Castle v. Mason, supra, in which case it was found that such earlier act does not materially differ from the law declared void in Foote v. Maryland, and that considered in Red C·Oil Mfg. Co. v. Board of Agriculture, supra.

[3] The General Assembly, with at least constructive knowledge that, under the operations of the law, the excess of receipts over expenses was large and annually mounting, permitted the inspection charges to remain undisturbed, and in this respect its conduct has differed from that of the Minnesota Legislature with reference to the act considered in Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 Sup. Ct. 35, 63 L. Ed. 180. Where goods, such as the plaintiff deals in, are transported in original packages from other states into this, interstate commerce in such goods is not completely terminated, and they are protected by the commerce clause of the Constitution against excessive inspection fees, until after their sale at the point of destination within this state. Standard Oil Co. v. Graves, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, approving the conclusions reached in Castle v. Morgan; Askren v. Continental Oil Co., 252 U. S. 444, 449, 40 Sup. Ct. 355, 64 L. Ed. 654. The fees prescribed by the statute are beyond the cost of legitimate inspection to determine the quality of the articles inspected, and the act is therefore, not only a police measure, but a revenue measure also. Such cost by necessary operation unduly burdens and obstructs the freedom of interstate commerce, and, as such commerce cannot be separated from the intrastate shipments, the whole tax is void.

Bowman v. Continental Oil Co., 256 U. S. ——, 41 Sup. Ct. 606, 65 L. Ed. ——, decided by the Supreme Court of the United States June 6, 1921, on which the defense places reliance, is distinguishable from the case at bar. The New Mexico law there under consideration imposed a tax of 2 cents per gallon upon all gasoline sold or used in that state. By the terms of the statute, every distributor was required to render to the auditor of state, on a form prescribed by such officer, a monthly statement of all gasoline received, sold, distributed or used by such distributor during the preceding month, and to transmit therewith a sum equal to 2 cents per gallon for all gasoline so sold, distributed, or used during such month. The statement so rendered was further required to show from whom the gasoline so received was purchased and by whom it was shipped. Every retail dealer was also compelled to file with such officer a monthly statement showing the gasoline received, sold, and used by him, and from whom the same was

purchased. The statements so submitted would show, or in any event could be made to show, at the election of the state auditor, who prescribed the forms of returns, precisely what shipments were interstate and what were intrastate. The only duty assigned to inspectors was the examination of the books and accounts of distributors, retail dealers, warehousemen, and others receiving and storing gasoline, and of railroad and transportation companies, relating to purchases, receipts, shipments, and sales of gasoline. The reports submitted to the state auditor would necessarily show upon their face what shipments were interstate and what were intrastate, and the ease with which the separation of the kinds of shipments could be made is apparent from the facts recited in the court's opinion. The situation presented to the court closely resembled that considered in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229.

The Ohio act under consideration contains no provisions akin to those above mentioned found in the New Mexico statute. Under the Ohio law inspectors may enter upon the premises of any manufacturer, vendor, or dealer in any fluid mentioned in the act and ascertain, and may require a statement showing, the quantity sold within any named period (section 868), but their duty ends with their determination of the quantity of the specified fluids and the testing of the same in the statutory method. The statute does not contemplate that the oil inspector or his deputies shall concern themselves with where purchases were made, or whence shipped, or that they shall make any report touching the same. In the Bowman Case, the Supreme Court regarded the application of the tax to interstate commerce as separate from its application to intrastate commerce, condemning the impost on the former, but sustaining it on the latter.

[4] We are asked, in construing the Ohio law, not only to view the impost with respect to the two classes separately, but also to separate and apportion between them the expense of inspection, collection, and administration, and, having done so, to test the constitutionality of each by the result thus obtained, and to uphold the charge on interstate commerce as reasonable and that upon intrastate commerce as a combined inspection fee and excise tax. The act makes no such separation of cost, nor does it afford any means for so doing. Were we to adopt the defendant's contention, we would be compelled to prescribe rules for the division of costs, and to assume that the General Assembly intended to levy on intrastate commerce a tax as well as an inspection fee; but this is not permissible, for the reason that in the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211.

Nor is Saviers v. Smith, 101 Ohio St. 132, 128 N. E. 269, involving the Ohio Motor Vehicle Act, helpful to the defense upon the point upon which this opinion is thus far made to rest. That act provides for an annual license tax on the operation of motor vehicles on public highways of the state for the purpose of enforcing and paying the expense of administering the law and of maintaining and repairing such highways and streets. It is in no sense an inspection law, and is not

therefore subject to the limitation imposed by the federal Constitution on laws of that character, but rests upon the provisions of the state Constitution relating to the power of taxation. The police regulations contained in it are merely incidental, relate to its administration and the regulation and registration of motor vehicles, and do not affect its main intended object. On its face it purports to be, and was by the court held to be, a tax law laid on a privilege for a manifest specific purpose; i. e., the production of revenue to be used as above stated. It was said by the court that, if the law raised sufficient to pay only the expense of administering it, it would not be a tax at all, but in the nature of a license. Its enactment was but an application of one of the state's constitutional methods of producing revenue for the maintenance and repair of state and county roads and the construction and maintenance of streets in municipalities.

Other questions discussed by counsel need not be decided. Phipps, as an individual, is dismissed from the case. As such he is not charged with the enforcement of the law. As against him, as director of the department of commerce, a temporary injunction may go.

TUCKER v. UNIVERSAL AUTO CO.

(District Court, D. Connecticut. December 16, 1921.)

No. 1530.

Patents ⇐328—1,134,025, for oil hole cover, held valid and infringed.

The Tucker patent, No. 1,134,025, for an oil hole cover, for automobile oilers, *held* not anticipated and valid as a new combination of old elements producing a new and useful result; also *held* infringed.

In Equity. Suit by Charles F. Tucker against the Universal Auto Company. Decree for complainant.

Heath Sutherland, of Hartford, Conn., for plaintiff.
Arthur E. Parsons, of Syracuse, N. Y., for defendant.

THOMAS, District Judge. Letters patent No. 1,134,025 were issued to Charles F. Tucker on March 30, 1915, upon an application filed November 11, 1913. The patent relates to oil hole covers.

The plaintiff charges infringement. The defenses are invalidity and noninfringement. The only real question, however, is whether the patent is valid; if it is, it is infringed, as defendant's device is almost an exact copy of plaintiff's device. The variation is very slight, and merits no consideration, if it be held that the patent is valid.

The invention disclosed, as stated in the specification, relates to—

"oil hole covers; one of the objects of the invention being the provision of an article of this character which is simple in construction, can be inexpensively and readily made, and which is thoroughly dust proof."

There is only one claim in the patent and it reads:

"An oil hole cover having a plug member, and a cap member, the cap member having the forward end open and the rear end wholly closed, said closed end being integral with the body of the cap member, a coiled spring surrounding the plug member, the cap member having an abutment for one end of the spring, the plug member having an abutment for the other end of the spring, the plug member having a bore, and also having a port opening into said bore, said spring serving to constantly advance the cap member to cause the body thereof to normally close the port and the outer end of the plug member when the cap member is advanced, having a bearing directly against said closed end of the cap member and the interior of the cap member from its outer closed end to its abutment being of uniform diameter."

The alleged infringement by the defendant consists in the use and sale of certain oilers, which are part of the equipment on a certain well-known make of automobile, for which this defendant is selling agent in and about the city of Hartford. These oilers, or oil cups, as they are commonly called, are in use on several makes of automobiles, and are used to lubricate some of the bearings, and particularly the spring bolts and shackles. The oilers alleged to infringe the Tucker patent are not manufactured by the defendant, but by the Bowen Products Corporation, of Auburn, N. Y., which corporation has conducted the defense to this suit, so that in the discussion which follows, wherever the defendant is mentioned, reference is made to the Bowen Products Corporation, the real defendant, and not the Universal Auto Company, the nominal defendant.

The defendant's device, as disclosed in the patent, consists of three parts: (1) A plug member; (2) a cap member; and (3) a spring.

The plug member has an axial bore and a port opening into the bore through its peripheral wall.

The cap member has its forward or lower end open, and its rear or upper end wholly closed; said closed end being integral with the body or peripheral wall of the cap member. The interior of the cap member, from its closed end to an inturned flange at its open end, is of uniform diameter.

The spring surrounds the plug member within the body of the cap member. One end of the spring bears against an abutment (an inturned flange) on the lower or open end of the cap member, and its other end bears against another abutment (an outwardly extending flange) on the upper end of the plug member.

The spring serves to constantly advance the cap member, causing it to cover the port. When the cap member is advanced by the spring, the outer end of the plug member has a bearing directly against said closed end of the cap member. When the cap member is advanced by the spring, the cap completely covers the port, and advances sufficiently past the port, so as to close the port and make the oiler practically dust and dirt proof.

The lower end of the plug member is threaded for attachment to a bearing to be lubricated, and directly above this threaded end, and beneath the cap member, the plug member is formed, with flat faces constituting a wrench hold, for facilitating securement of the oiler to the bearing to be lubricated.

The defendant's structure is, as has been stated, almost a Chinese copy of plaintiff's structure, and is an aggregation of the plug, cap, and spring.

The Bowen Products Corporation and its predecessors have been for years, and long before plaintiff's patent was applied for or issued, large manufacturers of lubricators of the well-known grease cup variety, as well as of the oil cup variety.

The prior art relied upon as anticipation of plaintiff's patent is Bowen's early oiler No. 1, Bowen's early oiler No. 2, and Bowen's early sheet metal grease cup cap. The patents cited are the following: To Smyth, No. 365,547, June 28, 1887; to Lewis, No. 545,598, September 3, 1895; to Bowen, No. 583,668, June 1, 1897; to Hecht, No. 797,429, August 15, 1905; to Cole (British), No. 24,494 of 1898.

The patent in suit is a simple one. Tucker has made an oiler which prevents foreign matter of any kind from getting into the interior of the oiler when it is closed, because the cap is absolutely imperforate, and in its closed position completely covers the port and extends down far enough beyond the port to completely seal the opening, into which the nozzle of an oil can is inserted and the oil introduced into the interior of the plug member, and thence to the bearing to be lubricated.

The patents to Bowen and Lewis are the only patents of the prior art necessary to consider. In the Bowen patent the feature there described is the piston to force the oil down when the cap is released, or to prevent the oil flowing backward and away from the bearing to be lubricated when the same is attached to a wheel which is rapidly revolving. In the case of a rapidly revolving wheel, the centrifugal force naturally throws the oil away from the bearing, and the piston arrangement in the Bowen patent prevents such result, and further prevents the oil from leaking out of the cap member. That is the feature in that patent; whereas, in the patent in suit, the device is intended to be attached to a fixed position, so that the bearing to be lubricated receives the oil by force of gravity. The imperforate condition of the cap member is the feature of the patent in suit, and nothing is disclosed in the Bowen patent touching this feature.

It appears from the Lewis patent that the top of the cap member is closed by a disk resting upon an internal annular shoulder formed near the end of the cap, and is confined in place against the shoulder by a lip which is formed by bending the upper edge of the cap inwardly over the disk. This cannot, as I view it, be successfully set up as an anticipation sufficient to defeat Tucker's patent. Lewis directs attention to the fact that his construction is especially advantageous for bicycles. Both Lewis and Bowen were dealing particularly with satisfactory devices for lubricating bicycle wheels. They both say so. The patent to Lewis was issued in 1895, and Bowen secured his in 1897. The problem of proper lubricating devices for automobiles was not then presented to inventors or manufacturers.

The file wrapper and contents of the Tucker patent show that the original claims were rejected on the Lewis reference, but that the

claims were subsequently amended to satisfactorily meet the Lewis patent.

It is to be noted that the patent to Lewis expired three years before the patent to Tucker was issued. If the Lewis lubricator had possessed any practical value as a device for satisfactorily lubricating automobiles, it seems likely that the defendant would have used it. Instead, nothing was done with it.

Tucker seems to have been the first one to provide a plug member, a cap member to fit over the plug member, and an interposed spring, which acts against both the plug member and the cap member, and in which the cap member is of one piece, and which is thoroughly imperforate, as a result of which the entrance of any foreign matter into a bearing is prevented when the cap member is in its forward or closed position. I find nothing like this combination in any one patent, or in any series of patents.

The law applicable to this case is found in Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, and the cases therein cited. The Supreme Court of the United States, in Hailes v. Van Wormer, 20 Wall. 353, at page 368 (22 L. Ed. 241), said:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made."

The Tucker patent, however, cannot be met by the Bowen and Lewis patents, because neither of them discloses a wholly imperforate cap.

In Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 494, 498, 19 Sup. Ct. 641, 643 (43 L. Ed. 1058), the Supreme Court said:

"Where a combination of old devices produces a new result, such combination is doubtless patentable; but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in Hailes v. Van Wormer, 20 Wall. 353, 368."

Here we have a combination of three old devices—a plug, a cap, and a spring—producing a new and useful result, to wit, the lubrication of a bearing on an automobile, which is exposed to all the dust, dirt, and water applied at times to all the surfaces of the automobile under extreme pressure and force, but excluding, nevertheless, all such foreign matter from the bearings, furnishing at the same time, a quick, easy, and effective method of lubricating the bearings, which are constantly in use.

While it is true that the invention disclosed is a small one, it seems to me that it is more than the work of a mechanic skilled in the art, and, while it does not rise to any great dignity in the field of invention, it nevertheless passes from the zone of the work of skilled mechanics into the zone of invention, and the presumption attaching to the grant of the patent helps somewhat to carry it into that zone.

There may be a decree for the plaintiff; and it is so ordered.

THE PESARO (two cases).

(District Court, S. D. New York. October 1, 1921. Supplemental Opinion December 13, 1921.)

International law ⇐10—Ship owned and operated by foreign government, but employed in ordinary commerce, not immune from arrest.

A steamship owned and operated by the Italian government, but employed as an ordinary merchant vessel in carrying passengers and cargo for hire, *held* not immune from arrest on process from the admiralty courts of the United States, especially in view of the fact that she was not entitled to such immunity in the courts of Italy, and in the absence of any request for her exemption through the official channels of the United States.

In Admiralty. Suit by Luzzato & Sons against the steamship Pesaro, and by Berizzi Bros. & Co. against the same. On objections to jurisdiction. Overruled.

Harrington, Bigham & Englar, of New York City, for libelants.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for special claimant.

MACK, Circuit Judge. Libel in rem against the steamship Pesaro to enforce a claim for damage to a cargo of olive oil shipped thereon. Previously, when the ship was libeled to enforce the same claim, upon the direct suggestion by the Italian ambassador that the ship was owned by the Italian government and at the time of the arrest was in its possession and therefore was not subject to arrest, this court vacated the arrest. Upon appeal, the Supreme Court upheld the libelant's objection that this suggestion must come through the official channels of the United States. The court added that it had no occasion at that time to consider what the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in an appropriate way. The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. ——, decided February 28, 1921.

By stipulation, the parties have agreed that the question of jurisdiction shall be decided upon the basis of the following facts: First. That the steamship Pesaro was owned by the kingdom of Italy, registered in the name of ministry for railway and maritime transportation, a department of the Royal Italian government charged with affairs of maritime and rail transportation, which has as its head a member of the Italian cabinet. Second. That the steamship was in the possession of the Italian government, being manned by a master, officers, and crew employed by and under the direction of the ministry for railway and maritime transportation and paid by it. Such master, officers, and crew were civilians not under the orders of or connected with the Italian naval or military forces, and the vessel was not carried on the roster of the Italian navy as a naval vessel. Third. That the steamship Pesaro was engaged in commercial trade carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department

of the Italian government having to do with naval and military affairs. Fourth. That the letter (the substance of which, so far as necessary, is given in a note below [1]) of Advocatto Francisco Montefredini, dated June 21, 1920, may be read by either party on the trial of the issues raised by the libel and the special claim and plea in abatement as the evidence of Francisco Montefredini with the same force and effect as if he had testified in accordance with the said letter; subject, however, to objection by either party to the case as to the materiality, relevancy, or competency of the matters referred to in the said letter, or any of them.

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel is, when within the waters of the United States, immune from arrest in admiralty, as "important and also new," and that the "proper solution is not plain but debatable." In re Hussein Lufti Bey, 256 U. S. —, 41 Sup. Ct. 609, 65 L. Ed. —, decided June 6, 1921; In re Muir, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. —, decided January 17, 1921. For that reason a re-examination of this question would seem to be justified, if not required, notwithstanding the decision in this court in The Maipo, 252 Fed. 627, 259 Fed. 367, and the views expressed by the Circuit Court of Appeals in the Carlo Poma, 259 Fed. 369, 170 C. C. A. 345, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals, decided February 28, 1921, 255 U. S. 219, 41 Sup. Ct. 309, 65 L. Ed. —.

The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision. See Ex parte in the Matter of the State of New York, Edward S. Walsh, Superintendent, 256 U. S. —, 41 Sup. Ct. 588, 65 L. Ed. —, U. S. Sup. Ct. June 1, 1921. While the

[1] "1. Question. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian courts?

"Answer. No. Such steamers, notwithstanding they may be owned by the U. S. government are considered in Italy just the same as a privately owned merchant vessel, and are, therefore, subject to arrest, but always on the authority of the president of the tribunal. * * *

"The U. S. S. B. steamers are subject to arrest, as above, only because they are merchant vessels, as according to the Italian law there is no difference between a vessel owned by a foreign government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims. * * *

"4. Question. Is the ship owned by the Italian government operated as a merchant vessel by the Italian government free from arrest in ordinary, judicial process in the Italian courts?

"Answer. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest.

"This was simply a legal point, and the steamer was immediately released as the government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

"Now this procedure will be discontinued and all merchant vessels, whether government-owned or privately owned, will be subject to arrest."

principle has been fervently defended by some jurists as vital and fundamental to sovereignty (see dissenting opinion of Justice Gray in U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171), the extent to which it has been carried or retained in modern law has been the subject of strong criticism (Story, J., in U. S. v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694; Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447; Maguire State Liability for Tort, 30 Harvard Law Review, 20; cf. Lord, Admiralty Claims Against the Government, 19 Col. L. R., 467; Weston, Actions Against the Property of Sovereigns, 32 Harvard Law Review, 266), and there is observable a tendency to restrict its application or to guard against its extension (U. S. v. Lee, supra; cf. South Carolina v. U. S., 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737).

Where the application of the doctrine is not clear, a solution is not to be found by reference to strict Austinian theory which assumes, by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from suit may or may not justify the extension of the principle in modern law. In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law must not be assumed to be a part of the maritime law of nations.

In attempting to solve a confessedly new and unsettled problem, the court, while conforming its decision to certain forms or standards evolved from within the legal system, should not determine the application of these standards solely by logic. It may have to choose between competing judicial analogies and parallel trends of juristic thought; its conclusions should, if possible, conform to the practical ends of the law in a moving, working world.

So in dealing with an unsettled problem in the application of sovereign immunity, the court must not only consider history and logic; it must also look behind and beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.

The question of the exemption from attachment of a ship of a friendly sovereign first arose in our courts in the case of The Exchange, 7 Cranch, 117, 3 L. Ed. 287. It concerned a public foreign ship of war. Bynkershoek had stirred the question whether any ship was immune from seizure, having laid it down as a general proposition that the property of a foreign sovereign was not exempt from attachment De Foro Legatorum, ch. IB. Marshall, C. J., pointed out that—

"The jurisdiction of the nation within its own territory was necessarily exclusive and absolute and susceptible of no limitation not imposed by itself. * * * All exceptions to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * This consent may, in some instances, be tested by common usage

and by common opinion growing out of that usage. * * * One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

Marshall consequently concluded as a principle of public law that ships of war entering the port of a friendly power, open to their reception, are to be considered by the consent of that power as exempt from its jurisdiction.

While the court had no occasion to consider the case of a public ship used for trading purposes, Marshall (page 145) pointed out "a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power and maintains the dignity and independence of a nation. A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern."

While Marshall was probably referring to the private property of a prince as a private person, it is interesting to note the similarity of his language to that employed by him in the case of a state engaging in a commercial undertaking. In Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, he said:

"It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." [2]

See, also, Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437; Briscoe v. Bank of Kentucky, 11 Pet. 256, 323, 9 L. Ed. 709; Louisville R. R. v. Letson, 2 How. 497, 550, 11 L. Ed. 353; Curran v. Ark, 15 How. 304, 308, 14 L. Ed. 705; Panama R. R. v. Curran, 256 Fed. 772, 168 C. C. A. 114; Lord & Burnham v. U. S. S. B., E. F. C. (D. C.) 265 Fed. 955, 957.

[2] Compare the remarks of Lord Stowell in The Swift, 1 Dodo, 320, 339: "The utmost that I can venture to admit is that, if the king traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick; and, if the king of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is—is this distribution of the public stores for the public use, a trading within the view of the statute. Looking to authority, as well as principle, and to the public convenience, I conceive, it is not."

In U. S. v. Wilder, 3 Sumn. 308, 315–317, Fed. Cas. No. 16,694, Mr. Justice Story apparently was of the opinion that a government-owned merchant vessel might not be entitled to the same privileges and immunities as a ship of war. He said:

"A distinction was taken in that case (The Prins Frederik, 2 Dod. R. 451), which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign jure coronæ, and not to be applicable to common property of the sovereign of a commercial character or engaged in the common business of commerce. * * *

"In the case of The Schooner Exchange (7 Cranch R. 116), it was considered by the court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or navy establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, in a case of that sort, released the property. Bynkershoek has the support of other jurists in favor of his opinion at least to the extent of their common private property, found in the foreign territory. But it is not necessary to consider this point further, as there may be a clear distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

"It has been laid down by Vattel (B. 2, S. 213) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the U. S., in the case of U. S. v. Barker, 12 Wheaton R. 559. Vattel has added in the same place: 'If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws.' (Vattel, B. 2 S. 213.) I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show that it is the duty of the sovereign to fulfill all his obligations, whether founded in contract or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice."

U. S. v. Wilder, it is true, is not a direct authority for the proposition here in question. The decision in that case was simply to the effect that government-owned cargoes not in the possession of the government could be withheld by virtue of a maritime lien arising from the obligation of the cargo to contribute in general average. In The Davis, 10 Wall. 15, 19 L. Ed. 875, the Supreme Court went a step further and held that such cargoes could not only be retained without judicial process by the ship owner but could be libeled in admiralty by salvors seeking to enforce their lien against ship and cargo. See, to the same effect, Johnson Lighterage Co. (D. C.) 231 Fed. 365. But cf. The Fidelity, 16 Blatchf. 569, 8 Fed. Cases, 4758. Similarly, in Long v. Tampico (D. C.) 16 Fed. 491, revenue cutters belonging to the Mexican

government but not yet delivered into her possession were held subject to libel for salvage services. On the same principle, a requisitioned vessel manned and operated for the Italian government by her owners was held subject to attachment in The Attualita, 238 Fed. 909, 152 C. C. A. 43.

On the other hand, in Briggs v. The Light Boat, 11 Allen (Mass.) 157, in an able and exhaustive opinion which has frequently been referred to by the Supreme Court, Judge Gray held that immunity of public ships was not restricted to ships of war; that "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character"; that, in consequence, lightships belonging to and in the possession of the United States could not be attached to secure the enforcement of a mechanic's lien. It should be remembered, however, that the case did not arise in admiralty and the actual decision does not go beyond that of the Supreme Court in Ex parte in the Matter of the State of New York et al., owners of the Steam Tug Queen City, 256 U. S. ——, 41 Sup. Ct. 592, 65 L. Ed. ——, decided June 1, 1921, in which the question of the immunity of a public trading vessel from a libel in rem was expressly reserved. In Mason v. Intercolonial Railway, 197 Mass. 349, 83 N. E. 876, 16 L. R. A. (N. S.) 276, 125 Am. St. Rep. 371, 14 Ann. Cas. 574, the Massachusetts Court, relying upon Briggs v. The Light Boat, supra, held that funds belonging to the Canadian State Railway were not subject to attachment under state law by trustee process.

The English courts grant exemption to a merchant vessel owned and operated by a sovereign state even in admiralty. Sir Robert Phillimore, in the Charkieh, L. R. 4, A. and E. 59, and in the Parlement Belge, 4 Probate Div. 129, after a careful examination of the authorities and a comparison of the civil law on the subject, came to the conclusion that the exemption of a public ship from seizure did not extend to a vessel engaged in commerce, whose owner was (to use the expression of Bynkershoek) strenue mercatorem agens. But, in the latter case, on appeal (5 Prob. Div. 197), Sir Robert's opinion was not sustained. The Court of Appeals found that the carrying of passengers and merchandise had been subordinated to the duty of carrying the mails and that the mere fact that the Parlement Belge had been subordinately and partially used for trading purposes did not take away its general immunity, even if an action in rem were deemed to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer the judgment of the court. It was careful, however, to point out that in its opinion the owner was indirectly impleaded. Taking this dictum as a starting point, the English admiralty courts by successive decisions have come to recognize that all government-owned ships, whether used for military, political, or commercial purposes, are in time of peace, as well as of war, immune from seizure. Young v. Scotia, 1903 A. C. 501 (ferryboat used as part of Canadian state railways); The Jassy, 1906 Prob. Div. 270 (merchant vessel used as part of Roumanian state railways); The Broadmayne, 1916 Prob. Div. 64 (requisitioned vessel operated in

government service by private owner); The Gagara, 1919 Prob. Div. 95; Porto Alexandre, 1920 Prob. Div. 30 (merchant vessels owned and operated by friendly sovereign states).

The basis of these decisions is almost exclusively the authority of the Parlement Belge, supra. In Porto Alexandre, the great difficulties involved in granting an immunity so extensive were pressed upon the court; but it felt bound by authority. Lord Justice Scrutton expressed the view that—

> These practical difficulties must "be dealt with by negotiotions between governments and not by governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent sovereign states."

The question, however, is whether international courtesy does or does not require this immunity to friendly foreign states, particularly if the immunity does not exist in favor of the sovereign's own similar interests in his own courts. Certainly there appears to be no consensus of opinion among international jurists to this effect. See Wheaton International Law, edited by Coleman Philipson (1916) p. 161; also, 12 Revue Generale de Droit International Public (1905) p. 143. While the French Court of Appeal at Rennes held a merchantman owned by the British government carrying wheat and wool for the Allied Governments immune from seizure, it took occasion to point out that the vessel was being utilized "with an object of political interest for the need of national defense, apart from all idea of gain and speculation." More recent decisions of inferior French tribunals, following the English precedents in declining jurisdiction over public vessels employed in commercial service, have been adversely criticized. Journal de la Marine Marchande, February 3, 1921.

From the evidence before me it would appear that the Italian courts refuse to grant immunity in such cases. In section 9 of the Shipping Act (Comp. St. § 8146e), Congress expressly declared that vessels purchased from the Shipping Board, while employed solely as merchant vessels, shall be subject to the laws, regulations, and liabilities governing merchant vessels; and even during the war emergency, this section was broadly construed by the Supreme Court. The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962. Since then, the method of enforcing the liability of our public merchant vessels has been changed by the Suits in Admiralty Act so that the ships cannot and need not be arrested or detained, but the nature of their liability remains unchanged and is enforceable in the courts. Certainly then the exercise of jurisdiction by the courts in the case of public merchantmen cannot to-day be considered novel or revolutionary. The executive branch of our government, it may be assumed, will not be slow to bring to the attention of the judiciary by appropriate suggestion any matter of international courtesy or concern. The failure of our State Department to take any action in these cases is not without significance.[3] (Hearings

[3] In answer to my inquiry, the Secretary of State, through the Solicitor for the State Department, stated on August 2, 1921:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in

before Committee on Judiciary in H. R. 7124, Suits in Admiralty Act, 66th Congress, 1st Sess., August 26, 1919, p. 38), although I do not mean to say that immunity should be refused in a clear case simply because the executive branch has failed to act.

The English decisions above mentioned seem to proceed on the principle that a ship cannot be libeled in rem where the owner cannot under the common law be impleaded in personam. This doctrine, so far as effective, would appear to be peculiar to English admiralty and is not accepted as a part of the maritime law in this and other countries. As Justice Gray stated in Homer Ramsdell Co. v. Com. Gen. Trans., 182 U. S. 406, 413, 21 Sup. Ct. 831, 45 L. Ed. 1155, a case involving the liability of a ship for the negligence of a compulsory pilot:

"There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. The China, 7 Wall. 53; Ralli v. Troop (1894) 157 U. S. 386, 402, 420; The John G. Stevens (1898) 170 U. S. 113, 120–122; The Barnstable (1901) 181 U. S. 464."

See The Maria, 1 W. Rob. 95, 106; The Halley, L. R. 2 P. C. 193, 201.

Lord Stowell, in Neptune II, 1 Dod. 467, had earlier laid down the rule as to the ship's responsibility for the acts of its pilots in accordance with the general maritime law. And it is perhaps no mere accident that Sir Robert Phillimore, whose views on the maritime law were rejected by the common-law judges sitting in the Court of Appeals in the case of the Parlement Belge, supra, happened to differ from the Privy Council in the case of The Halley, L. R. 2 Ad. & Ec. 3.

It is also important to note that in the Siren, 7 Wall. 152, 19 L. Ed. 129, the Supreme Court recognized that a ship in the possession of the government might be held to respond in damages for the negligence of its officers resulting in a collision where the government brought the ship into court to be adjudicated as a prize. It would seem that even the English courts have gone so far as to apply the doctrine of respondeat superior to a public ship in admiralty where the government consents to the suit. The Athol, 1 W. Rob. 374, 382. The procedural bar removed, it would appear that even a tort liability may in some instances at least be imposed upon a ship owned and operated by the government, notwithstanding the fact that the government could not, on common-law principles, be impleaded in the court of claims on the basis of such a complaint (cf., also, Workman v. N. Y., 179 U. S. 570, 21 Sup. Ct. 212, 45 L. Ed. 314. In this connection, the words of Judge Story in U. S. v. Wilder, Fed. Cas. No. 16,694, 3 Sumn. 308, 312), are important:

"commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in such litigation."

"It is said that in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced that there can be no remedy in rem. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States, in its sovereign capacity, would seem to furnish the strongest ground, why the remedy in rem should be held to exist."

Whatever may be the common law or the civil law on the subject, and it is not necessary to go into that question here, it should be remembered that the responsibility of a ship in admiralty is not derived from either. It had its sources, as has been frequently pointed out, in the commercial usages and jurisprudence of the middle ages, and earlier. Originally, the primary liability was upon the vessel; that of the owner was not personal but incidental to her ownership; from this, he was discharged either by the loss of the vessel or by abandoning her to creditors. The China, 7 Wall. 53, 68, 19 L. Ed. 67; The Barnstable, 181 U. S. 464, 467, 21 Sup. Ct. 684, 45 L. Ed. 954. If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall, and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life.

If the Pesaro is not immune from seizure by reason of her government ownership, it would seem clear that she could not claim exemption from attachment on account of the merchant service in which she was engaged. While in The Davis, 10 Wall. 15, 19 L. Ed. 875, Long v. Tampico (D. C.) 16 Fed. 491, and The Attualita, 238 Fed. 909, 152 C. C. A. 43, the lack of possession by the government was stressed as of vital importance, in my judgment, such possession is not the exclusive criterion. Since, apart from the question of possible immunity by reason of government ownership, it is generally recognized that without treaty provisions, merchant ships are not exempt from seizure by reason of their employment in the postal service (Bonfils, Manuel de droit International [7th Ed.] 1914, § 629), immunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade. To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. See Hearings before Committee on Judiciary on H. R. 7124 (Suits in Admiralty Act), 66th Congress, 1st Session, August 26, 1919, pp. 32 and 45. The attachment of public trading vessels, in my judgment, is not incompatible with the public in-

terests of any nation or with the respect and deference due a foreign power.

In many phases of our law to-day it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state to-day may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago. In developing this field of law, expressions used by the courts have often been inept and inaccurate; the distinctions drawn in specific cases specious and negligible. Yet a sound principle, though at times perhaps dimly discerned and mistakenly applied, underlies the cases. The principle is developing in the field of municipal corporations. City of Los Angeles v. Los Angeles Gas Corporation, 251 U. S. 32, 40 Sup. Ct. 76, 64 L. Ed. 121. The principle also finds application in the delimitation of the sphere in which the instrumentalities of a state are immune under our Constitution from federal taxation. South Carolina v. U. S., 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. While these cases involve the question of substantive liability rather than procedural immunity, the analogy is none the less pertinent; in my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.

And as the Pesaro was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the Pesaro would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. The Nereide, 9 Cranch, 388, 422, 3 L. Ed. 769; Bank of Augusta v. Earle, 13 Pet. 519, 589, 10 L. Ed. 274; Beale I Conflicts of Law, pt. I, p. 103. The doctrine of reciprocity in Hilton v. Guyot, 159 U. S. 113, 16

Sup. Ct. 139, 40 L. Ed. 95, should not be extended to a case involving the very jurisdiction of the court.

But the fact that the steamship Pesaro itself is subject to the ordinary processes of the Italian court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed extra commercium in Italy should be treated as res publica and extra commercium in the United States. In Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, Chief Justice Marshall said:

"The state of Georgia, by giving to the bank its capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. * * * We think * * * that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator."

So it may be said here that the Italian government, by giving to the Pesaro the capacity to be sued in the Italian courts, voluntarily strips the Pesaro of its sovereign character and waives all privileges of that character; and that therefore the Pesaro is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship Pesaro in the courts of Italy, it is difficult to see why our tribunals should decline jurisdiction; there is less reason therefor in a case of this sort than in The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

Supplemental Opinion.

My attention has been directed, and I have given further consideration to some of the continental authorities on the subject. There is, as has already been indicated, much difference of opinion among the European jurists as to the extent of the immunity to be accorded foreign sovereign states. Conservative opinion seems to favor the nonsuability of foreign sovereign states in practically all cases. See Loening, Die Gerichtsbarkeit über fremde Staaten und Souveräne, 1903, v. Dynovsky, Unzulaessigkeit einer Zwangsvollstreckung gegen auslaendische Staaten; Van Praag, Jurisdiction et Droit International, 1915, pp. 340–405. But some of the most eminent jurists have vigorously opposed according immunity from judicial process to foreign states in matters not affecting their political or sovereign rights. Fiore, Nouveau Droit International, No. 500 ff.; Von Bar, Annuaire de l'Institut de Droit International, vol. XI, p. 414 ff.; Laurent, Le Droit Civil International, vol. III, pp. 74–89; Despagnet, Droit International Privé, No. 179; Weiss, Traité de Droit International Privé, 2d Ed., vol. V, pp. 85–115; Baudry-Lacantinerie et Houques Fourcade, Droit Civil, Des Personnes, vol. 1, No. 657; De Lapradelle, 1910, Darras-De Lapradelle (Revue de Droit International Privé) vol. VI, p. 779. The Institute of International Law at its conference at Hamburg in 1891 adopted a number of resolutions proposed in the report of Bon Bar with reference to actions against foreign states. Among those actions recognized by the Institute as properly maintainable against a foreign sovereign state were:

"Les actions qui se rapportent à un établissement de commerce ou industriel ou à un chemin de fer exploité par l'état dans le territoire. * * * Les actions en dommages—intérêts nées d'un quasi-délit, qui a ou lieu sur le territoire. Annuaire de l'Institut de Droit International, vol. XI, p. 436."

The suability of a merchant vessel owned and operated by a foreign state would apparently fall within the principles, if not the literal rules, formulated by the Institute. These principles were recognized to some extent in the Treaty of Peace with Germany, article 289 of which provided:

"If the German government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."

There seems to be quite a conflict of views in the actual jurisprudence of European countries in this matter. Walton, State Immunity in the Laws of England, France, Italy and Belgium, Journal of Comparative Legislation and International Law, October 1920 (Third Series, vol. II, pt. I, p. 252); Van Praag, op. cit., pp. 400–407. The German decisions have tended to accord foreign sovereign states virtually complete immunity. Von Hellfield v. Russian Government (Anhalt Case); In the Royal Prussian Court for the Determination of Jurisdictional Conflicts, 1910 (reported in full, 5 American Journal of International Law, 490); Salling v. U. S. Shipping Board (S. S. Ice King), Hanseatische Gerichtszeitung (Hauptblatt), 1921, p. 85, p. 110. The French jurisprudence, as has already been indicated, looks in the same direction. Lambiege & Pujol v. Spanish Government, 1849, Dalloz I, 5; The Englewood, Clunet, 1920, p. 621, and Darras-De Lapradelle, 1921, p. 74. But see Lakkowsky v. Office Suisse, Darras-De Lapradelle, 1921, p. 70. It is possible that both the French and German courts have felt that analogous actions brought against their own governments would, in the absence of statutory enactment, more naturally under their system of law, come under the purview of their administrative tribunals, which, of course, could not entertain complaints against foreign states, and they consequently may have seen some embarrassment and difficulty in subjecting foreign states to tribunals incompetent to act against their own governments. If this be true, it only emphasizes the desirability of keeping the admiralty rules so far as possible free from the peculiarities of local law and jurisprudence. It is unnecessary here to consider how the somewhat similar problem that arises where a foreign state engages in a commercial undertaking, such as the operation of a railway, within the jurisdiction of another state, should be dealt with. The Italian tribunals (Clunet, 1888, p. 289; Clunet, 1889, p. 335; Darras-De Lapradelle, 1906, p. 527) and also the Swiss (Dryfus v. Austrian Ministry of Finance, Darras-De Lapradelle, 1918, p. 172) go very far in holding foreign states subject to their jurisdiction whenever the foreign states are acting, as it is phrased, not in a sovereign or political capacity (jure imperii), but as subjects of civil rights (jure gestionis). The Belgian jurisprudence is in accord with that of Switzerland and Italy as to the power of the courts to assume jurisdiction and give judgment, but doubt is cast on the power of the courts to attach or levy execution

against the property of a foreign state. Liege & Luxemberg Ry. v. The Netherlands, Clunet, 1904, p. 417; Ottoman Government v. Gaspary and Slioberg, Pasicrisie Belge, 1911, p. 104. The doubt raised may be a source of difficulty in some cases; but where, as here, a specific claim arising in the ordinary course of trade is asserted against property employed for commercial purposes, which, if in the possession of a public service corporation, would be subject to seizure, there seems little reason against enforcing, by detention, and if need be sale, of such property of a foreign state, a judgment reached by those judicial processes which are recognized in all civilized countries as binding between individuals and corporations. In countries where declaratory judgments are authorized, such judgments might be of some value even though there were no power of compulsory execution. But the enforcement of such judgments only through resort to distant foreign lands or through the delicate medium of diplomatic representations would fail adequately to serve the needs of modern economic life. These should indeed yield to the greater need of peaceful and harmonious international relations, but it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the Pesaro would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed, it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern.

I have not attempted to discuss many points of distinction involved in the European jurisprudence and doctrine, but my examination of the foreign law, such as it was, has served to strengthen the conclusion heretofore announced in these cases.

UNITED STATES v. KELLY et al.

(District Court, E. D. North Carolina. December 9, 1921.)

Searches and seizures ⇐7—Search warrant issued without evidence of probable cause held illegal.

A search warrant issued solely on an affidavit that affiant "has good reason to believe and does verily believe" that evidence of a crime against the United States "is stored and concealed in certain farms and buildings thereon," without the statement of any facts tending to establish, or finding of probable cause, *held* illegally issued, in violation of the Const. U. S. Amend. 4, and of Act June 15, 1917, tit. 11, §§ 4–6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼d–10496¼f).

Criminal prosecution by the United States against C. J. Kelly and others. On motion by defendant named to quash search warrant. Granted.

E. F. Aydlett, U. S. Dist. Atty., of Elizabeth City, N. C.

A. A. F. Seawell and E. L. Gavin, both of Sandford, N. C., and Jones & Jones, of Raleigh, N. C., for defendant C. J. Kelly.

CONNOR, District Judge. Before the case was called for trial or the jury was impaneled, defendant C. J. Kelly moved the court to quash the search warrant issued by W. P. Batchelor, Esq., United States commissioner, for that, among other causes assigned, the affidavit upon which the warrant was issued does not conform to article 4, Amendments of the Constitution, and the provisions and requirements of chapter 30, tit. 11, §§ 3 and 5, ratified June 15, 1917 (40 Stat. p. 228 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼c, 10496¼e]), in that:

First. That said affidavit does not particularly describe the property and the place to be searched as required by said act.

Second. That said affidavit does not set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist as required by said act.

The affidavit of D. H. Graham, special agent, upon which the search warrant was issued, avers:

"That he has good reason to believe and does verily believe that evidence of the transportation of stolen automobiles in interstate commerce has been, and is, stored and concealed in certain farms and buildings thereon, being the premises of one C. J. (Big Curt) Kelly and being situate in the county of Lee, state of North Carolina, and district aforesaid, the said evidence consisting of certain automobiles to wit: [Giving a list of the property.]"

The warrant follows the recital in the affidavit, but does not find, as a fact, that probable cause for the belief of said Graham exists, etc.

Passing, for the present, the first ground assigned for the motion, the description of the place and property to be searched, and, proceeding to the consideration of the second ground, we find that the act provides:

That a search warrant authorized by the act may be issued by a judge of the United States District Court or United States commissioner.

That the grounds upon which it may be issued is "when property has been stolen or embezzled in violation of the law of the United States, in which case it may be taken on the warrant, from any house or other place in which it is concealed or from the possession of the person by whom it was stolen or from any person in whose possession it may be."

"When the property was used as the means of committing a felony," etc. Section 2 (section 10496¼b).

Section 3 (section 10496¼c) provides that the warrant "cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Section 4 (section 10496¼d) provides that the commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

Section 5 (section 10496¼e) provides that the affidavits or depositions must "set forth the facts tending to establish the grounds of

the application or probable cause for believing that they exist." Fed. Stat. Annotated Supplement 1918, p. 128.

It is uniformly held by the Supreme Court of the United States that the power, with its express limitations, conferred upon any officer of the government to issue a search warrant, is found in the Fourth Amendment to the Constitution, and that any statute prescribing the method in which such warrants may be issued must be read and construed in the light of and conform in all essential respects to the provisions of that article. Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and other cases. This is fundamental.

The authors of the act of 1917 manifestly had this truth in view in framing its several provisions. Because of the recent date of the enactment, the statute has not been under discussion or construction by the Supreme Court of the United States, and but few cases in that respect are found in the reports of the Circuit and District Courts. In Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338 (C. C. A. 7th Cir.), a motion was made, as here, to quash the search warrant upon similar grounds assigned in this motion. Circuit Judge Baker says:

"No search warrant shall be issued unless the judge [or commissioner] has first been furnished with facts under oath, not suspicions, beliefs, or surmises, but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury.

"Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and in law.

"The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the judge [or commissioner] to the accuser [of affiant]."

In re Tri-State Coal & Coke Co. (D. C. W. D. Pa.) 253 Fed. 605, Judge Thompson, after citing cases in which the general principles are discussed, says:

"These cases all recognize, not only the binding force of this constitutional provision, but its high necessity to protect the sanctity of the home and the privacies of life; that this protection is so broad and ample that it embraces all persons, even those accused of crime; and that the duty of giving it full effect rests upon all intrusted under our federal system with the enforcement of the laws. * * *

"Under section 5, tit. 11, the affidavits * * * must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

In State v. McDonald, 14 N. C. 468, Mr. Justice Daniel says that—

"Warrants to search for stolen goods are authorized by the principles of the common law." A search warrant in this state is to be granted only when a larceny is charged to have been committed. "It is not to be granted without oath made before a justice [of the peace] that a felony has been committed, and that the party complaining has probable cause to suspect that the stolen goods are in such a place, and he should show his reasons for the sus-

picion. * * * The justice * * * had jurisdiction to issue a warrant to search for stolen goods, and whether the facts set forth in the affidavit of the applicant * * * constituted a larceny of the goods was for his determination."

In Veeder's Case, supra, the affidavit, as in this case made by the agent of the government, stated that "he has good reason to believe and does * * * believe," etc. The criticism made by the judge of the affidavit applies with equal force here:

"He does not say why he believes. He gives no facts or circumstances to which the judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts. And under our system of government the accuser is not permitted to be also the judge. * * *

"We find that the Constitution and this statute forbid a search warrant unless the issuing magistrate shall first properly draw the legal conclusion from facts * * * presented to him under the oath of his accuser. And in the record now before us we find no such presentation of facts."

In both cases cited the warrant was quashed for the reason that no facts were stated in the affidavit upon which the commissioner did or could have found the essential jurisdictional fact that probable cause existed for the belief of affiant as required by the statute.

In United States v. Premises, etc. (D. C. Mont.) 246 Fed. 185, an application for a warrant to search the premises, particularly described, of one Carl Pahl, upon an affidavit of a government officer stating "that he has good reason to believe and does verily believe" that certain property, describing it, which has been unlawfully used to violate a federal statute, describing the offense which is made a felony, etc.

In denying the application, the District Judge says:

"Mere belief and suspicion are not enough; 'probable cause' within the meaning of the Constitution arising only from facts and circumstances sufficient to create in the minds of men of average prudence a reasonable belief that a crime has been committed, and that the guilty person or the instruments or fruits of crime are in certain premises. Then only can a warrant to search and seize issue. In the instant case there is no more than suspicion."

The judge refused to issue the warrant. An examination of the textbooks on criminal procedure, both English and American, discloses no suggestion that, either at common law or under any statute, a search warrant may be issued upon an affidavit in which only the belief or suspicion of the affiant is given as the basis for the application.

Sir Mathew Hale, after noting that Sir Edward Coke denied the power in the court to issue a search warrant, says:

"In the case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house and show the cause of his suspicion, the justice may grant a warrant to search in those suspected places mentioned in his warrant." 2 Pleas of the Crown, 113.

This statement of the common law is quoted with uniform approval in every case which I have examined. That the power to issue the

warrant is dependent, not upon the applicant's suspicion or belief, however strong, but upon the finding by the judge, or other judicial officer, of the fact that the belief of the applicant is founded upon "probable cause," which is declared essential by the Constitution and the statute, clearly appears by reference to the sixth section of the act (section 10496¼f):

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant."

There is no finding or suggestion of the existence of "probable cause" to believe, etc., or any other finding of fact or conclusion of law, but simply a recital that affiant swears that he "has reasonable cause to believe and does verily believe," thus basing the warrant entirely on affiant's statement that he has reasonable cause to believe.

It cannot be that the homes of citizens may be searched upon the "suspicion" or "belief" of an administrative officer that property desired to be used as evidence in a proposed criminal proceeding, unsupported by the statement of any facts upon which the commissioner could find "probable cause" for such suspicion or belief. To do so would be to make the express language of the Fourth Amendment to the Constitution of none effect.

The canon of construction of this guaranty of the sanctity of the home of the citizen from "unreasonable search and seizure" is laid down by Justice Bradley in Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 524, 29 L. Ed. 746, and uniformly approved:

"Illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereupon. Their motto should be obsta principiis."

Several other grounds were urged in support of the motion to quash the warrant. Of the property alleged to be concealed was a number of letters, telegrams, and receipts, which were included in the search warrant. The sole value, and only purpose, of seizing these papers was to use them as evidence in such criminal proceedings as should upon further investigation be instituted against Kelly and such other persons as might be incriminated in the alleged transportation of stolen cars in interstate commerce. These papers could not, when seized, have been used as evidence against the accused and were of no value for any other purpose. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. ——; Honeycutt v. United States, 277 Fed. 939, 941 (C. C. A. 4th Cir.).

The use of search warrants incident to recent legislation with the frequent failure on the part of administrative officers and commissioners to observe the constitutional limitations and statutory regulations emphasizes the necessity for at least a reasonable observance of the constitutional limitations and statutory provisions in regard to their issuance and manner of execution.

Conceding that at times prompt action is necessary to detect and disclose crime and its perpetrator, the people have not committed to their officers any discretion, upon the plea of necessity to suspend or set aside their supreme law.

To this suggestion, made nearly 200 years ago, Lord Camden said:

"And with respect to the argument of state necessity, or a distinction that has been aimed at between state offenses and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction."

To the suggestion that the judges had the power to entertain such a suggestion the same great judge replied:

"If the King himself had no power to declare when the law ought to be violated for reason of state, I am sure we, his judges, have no such power, * * * whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

Such was the doctrine of the common law. The same principles are incorporated into the fundamental supreme law binding upon every department of the government. The language of the Constitution is too clear to be misunderstood and should not be misinterpreted:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

A search and seizure made by authority of warrant, complying with the express language of this constitutional provision, is reasonable and legal; any other is unreasonable and illegal. Justice Bradley in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, gives an interesting history, sustained by liberal quotations from the celebrated opinion of Lord Camden in Entic v. Carrington (1752) 19 Howell's St. Trials, 1029, of the origin and use of search warrants in England. This opinion, he says, is regarded as "one of the permanent landmarks of the British Constitution." The learned justice says that the American statesmen of the Revolutionary period were familiar with "this monument of English freedom, and considered it as the true and ultimate expression of constitutional law." It was in the minds of those who framed the Fourth Amendment to the Constitution and was considered as sufficiently explanatory of what was meant by unreasonable seizures.

Lord Camden, delivering his judgment in the Carrington Case, says:

"Papers are the owner's goods and chattels; they are his dearest property; and, so far from enduring a seizure, that they will hardly bear an inspection."

To the suggestion that the right to search for and seize papers may be supported upon the same or similar reasons as the right to search for and seize stolen goods, which Sir Mathew Hale says "is necessary to detect and punish a felon," he says:

"The difference is apparent. In the one case I am permitted to seize my own goods which are placed in the hands of a public officer till the felon's conviction shall entitle me to restitution. In the other the party's own property is seized before and without conviction and he has no power to reclaim his goods even after his innocence is secured by acquittal."

Whether the power conferred by the act of 1917 (section 2 [2]) to issue a search warrant "when the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be," for the purpose of using such property as evidence against the person charged with the felony, on his trial, is violative of the prohibitions of the Fifth Amendment, is not necessary upon this motion to decide.

The warrant directs the officer to whom it is directed to search for and seize articles, other than the property alleged to have been stolen, as evidence of the transportation of the automobiles.

If, as is held in the Gouled Case, supra, private papers cannot be seized when of value only as evidence, may other articles of property be so taken and used? The right to seize stolen property is based upon the fact that the felon has no title to it, but the same learned judge says this reason does not obtain when it is sought to seize the accused's "own property" to be used as evidence. The security guaranteed by the Fourth Amendment against unreasonable searches and seizures includes "persons, houses, papers and effects."

Excluding articles the possession of which is made unlawful and criminal by statute, such as counterfeiting tools or implements, gambling implements, and, under the Volstead Act, intoxicating liquor, the question recurs: May a search warrant authorize search for and seizure of property, the owning and possessing of which is lawful, and has no other than evidential relation to the alleged crime? Is the immunity confined to papers? This question does not appear to have been expressly decided. In Weeks' Case, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, no search warrant was issued. The same is true in Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. ——, in which the whisky sought to be used as evidence was taken without any search warrant.

Sir Mathew Hale confines the right at common law to issue a search warrant "to the case of a complaint on oath of goods stolen."

In Boyd's Case, Week's Case, and Gouled's Case, supra, the right to search for and seize property for purpose of evidence involved only papers.

Without further pursuing the inquiry regarding this question, it is sufficient, for the purpose of this motion, to say that the warrant is invalid for the reason that no facts were set out upon which the commissioner could find the existence of probable cause, which is declared essential both by the Constitution and the statute.

The warrant will be quashed and the marshal directed to return the property seized to the defendant.

MIDDLETON v. MEE, Collector of Internal Revenue, and nine other cases.

(District Court, D. South Dakota, S. D. November 29, 1921.)

No. 111.

1. **Internal revenue ⟸45—Distraint and sale of property for enforcement of penalties imposed by Prohibition Act may be enjoined; "tax."**

So-called "taxes" imposed by the Internal Revenue Department, under National Prohibition Act, tit. 2, § 35, are not taxes within the meaning of Rev. St. § 3224 (Comp. St. § 5947), and a suit in equity to enjoin their enforcement by distraint and sale of property may be maintained, where by reason of his inability to make the payments demanded the complainant is without other adequate remedy.

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

2. **Internal revenue ⟸45—Penalties may not be assessed and collected by administrative officers by distraint without hearing.**

The impositions authorized by National Prohibition Act, tit. 2, § 35, for violation of the act, being penalties, may not lawfully be assessed by administrative officers and enforced by distraint and sale of property without a judicial hearing.

In Equity. Separate suits by Joe Middleton, by Frank M. Lawler, by Henry Schoberl, by Lee Schoberl, by Andrew Anderson, by Emil Mutschelknaus, by Charles Rosenbaum, Sr., by Charles Rosenbaum, Jr., by Henry Goehring, and by Matt Evans against J. W. Mee, Collector of Internal Revenue. On motion for preliminary injunction and motion by defendant to dismiss. Motion to dismiss denied and injunction granted.

Joe H. Kirby and R. A. Bielski, both of Sioux Falls, S. D., for plaintiffs.

S. W. Clark, U. S. Atty., of Redfield, S. D., for defendant.

ELLIOTT, District Judge. Separate suits in equity having been brought by Joe Middleton, Frank M. Lawler, Henry Schoberl, Lee Schoberl, Andrew Anderson, Emil Mutschelknaus, Charles Rosenbaum, Sr., Charles Rosenbaum, Jr., Henry Goehring, and Matt Evans, against

J. W. Mee, collector of internal revenue for the district of South Dakota, upon motion of the plaintiff an order to show cause was entered in each case, and the motion of the respective plaintiffs for preliminary injunctions against the defendant, as collector of internal revenue, restraining him, pending the suits, from seizing and selling the property of the respective plaintiffs under threatened warrants of distraint. Counsel have presented the motions in all of these cases, and they are here for determination and will be disposed of by the court in this memorandum.

The cases, while not all presenting exactly the same state of facts, are nearly enough alike, so that it is unnecessary to state the facts in more than one of them. Taking the case first named in the title, and we find that it appears upon the face of the complaint that the plaintiff is a citizen of the state of South Dakota, a resident of McCook county, and that he brings this action against Mee, collector of internal revenue of the United States for the district of South Dakota. Plaintiff further shows, in substance:

That the plaintiff, at all the times mentioned in the bill, owned and operated a farm in McCook county, S. D. That on or about the 1st day of May, 1920, certain persons, claiming to be federal prohibition agents and agents of the Commissioner of Internal Revenue of the United States, proceeded with force and violence, and without his consent, to search his residence on said farm, and in the course of the search they seized and carried away certain personal property. That thereafter plaintiff was arrested and taken before the United States commissioner at Sioux Falls, and bound over to the grand jury. That thereafter an indictment was duly returned by the grand jury of this court, consisting of five different counts. That thereafter, upon motion of the United States district attorney, the count charging the carrying on of the business of a distiller without having given bond required by law, the count that charged that the plaintiff did ferment a certain mash fit for the production of spirits in a building other than a distillery, and the count of said indictment which charged that the plaintiff by distillation did separate alcoholic spirits from a certain mash, were dismissed. That thereafter plaintiff was tried upon count 1 of said indictment, which charged the plaintiff with manufacturing intoxicating liquor, and count 2 of the indictment, the only counts remaining therein; the latter charging the unlawful possession of certain property designed for the manufacture of intoxicating liquor. That the jury, by its verdict in this court, found the complainant guilty of count 2, the same charging possession of property designed for the manufacture of intoxicating liquor, and found him not guilty on count 1. That this court duly sentenced plaintiff to pay a fine of $500 upon the verdict of the jury on count 2, charging him with the possession of property designed for the manufacture of intoxicating liquor, and that plaintiff paid this fine and was duly discharged. That on the 14th day of September, 1921, plaintiff was notified by the defendant that a tax had been levied and assessed against plaintiff as a retail liquor dealer on account of plaintiff's alleged vio-

lation of law, and an alleged tax had been imposed upon plaintiff as a manufacturer of intoxicating liquor, all in the sum of $3,474.

Plaintiff pleads a copy of said notice, which is as follows:

"Treasury Department, U. S. Internal Revenue.

"Form 1—17—Revised Nov., 1919. Pro. Nar.

"Original Notice and Demand for Tax and Receipt.

"Collector's Office, ——— District of S. Dak., at Aberdeen, Date 9—14—21.

"Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure to do so will cause a 5 per cent. penalty to accrue with interest at 1 per cent. per month from due date until paid.

"J. W. Mee, Collector of Internal Revenue.

"Due date 9—24—21.

"Name—Joe Middleton,

"No. and Street—Salem.

"City and State—S. Dak.

"This notice must be presented at the time payment is tendered as when properly stamped 'paid' by the collector it becomes a receipt for taxes. See instructions on back.

"List 23A (Year) 1920 (Month) May (Folio) 2 (Line) 0—1—2.

"Illicit distilling and R. L. D. (character of tax or liability) for period ended 12 mos. 6—30, 1920.

Taxes, Penalties, etc. Amount of tax	$3,474.00
per cent. penalty	
5 per cent. penalty	
Total	$3,474.00

"Received Payment.

"————, Collector of Internal Revenue.

"Payment may be made in currency, post office money order, draft or certified check on a national or state bank or trust company, providing that such checks can be collected without cost to the government. It should also be borne in mind that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly. Collectors cannot receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders, drafts and certified checks must be made payable to the collector of internal revenue."

On the 24th day of September, 1921, plaintiff was notified by defendant that a further tax or penalty of $173.70, with interest, in the amount of $208.44, making a total of $3,856.14, had been levied and assessed against plaintiff as a retail liquor dealer and for the illicit distilling of intoxicating liquor. Said notice was pleaded and is as follows:

"Treasury Department, U. S. Internal Revenue.

Form 1—21—Revised Nov., 1919. Pro Nar.

"Original Second Notice and Demand for Tax and Receipt.

"Collector's Office, District of S. Dak., at Aberdeen, Date 9/24/21.

"Having failed to make a payment of taxes set opposite within the prescribed time after notice and demand, Form 17, there has attached a 5 per cent. penalty on said tax and interest at 1 per cent. per month from date given below. Demand is made for said taxes, penalty, and such interest as may

accrue before payment. If payment is not made within ten days from the above date, it will be my duty to collect the same with costs by seizure and sale of property.

"Date interest began 7/26/20.

"J. W. Mee, Collector of Internal Revenue.

"Name—Joe Middleton.
"No. and Street—Salem.
"City and State—S. Dak.

"List 23A (Year) 1920 (Month) May (Folio) 2 (Line) O—1—2.
"Illicit distilling and R. L. D. (character of tax or liability) for period ended 12 mos. 6/30/1920.
"Form 17, dated ———.

Taxes, Penalties, etc. Tax	$3,474.00
per cent. penalty	
5 per cent. penalty	173.79
Interest at 6 per cent	208.44
Total	$3,856.14

"Received payment.
"This notice must be presented at the time payment is tendered as when properly stamped 'paid' by the collector it becomes a receipt for taxes. Disregard all previous notices. See instructions on back.

"————, Collector of Internal Revenue.

"Payment may be made in currency, post office money order, draft or certified check on a national or state bank or trust company, providing that such checks can be collected without cost to the government. It should also be borne in mind that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly. Collectors cannot receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders, drafts and certified checks must be made payable to the collector of internal revenue."

Plaintiff alleges: That these taxes, claimed to have been levied or assessed, are in fact penalties, and are levied without authority of law, for assumed or alleged infraction of the National Prohibition Act (41 Stat. 305). That as taxes they are wholly illegal and void. That as penalties they are levied without authority, and as such cannot be summarily imposed by the collector of internal revenue upon the plaintiff. That after the notices above set forth the defendant notified plaintiff that he was about to proceed to enforce the collection of these alleged taxes and penalties by distraint, by the levying upon, and sale of, plaintiff's property, under the provisions of section 3187 to 3209, inclusive, as amended, of the Revised Statutes of the United States (Comp. St. §§ 5909–5931), and further notified the plaintiff, that pursuant thereto the defendant collector would distrain, levy, and sell so much of plaintiff's property as might be necessary to pay and discharge said taxes and penalties. That on the 11th day of October, 1921, the defendant did levy upon, under an alleged warrant of distraint, the real property, the home of the plaintiff, and did, on that date, serve notice upon plaintiff that such property would be sold at public auction to the highest bidder on November 2, 1921, to satisfy such taxes and penalties, which notice was in words and figures as follows:

"Treasury Department, Internal Revenue Service.

"Office of the Deputy Collector, District of South Dakota.

"October 11, 1921.

"Mr. Joe Middleton, Salem, South Dakota—Sir: By virtue of a warrant for distraint issued to me by the collector of internal revenue of the district of South Dakota, I have levied on the following as your property: The northeast quarter of section twenty-two (22), township one hundred two (102), range fifty-five (55), McCook county, South Dakota. This levy is made on account of tax due for the year 1920, as follows:

"Illicit distilling 12 months ending 6—30—20. Section 1001, Revenue Act 1918. Illicit distilling 6 months ending 6—30—20. Sec. 35, National Prohibition Act. Retail Liquor Dealer, 12 months and 6 months ending 6—30—20, Sec. 35, National Prohibition Act, and tax on 35 gallons of spirits.

Tax	$3,474.00
5% Pen.	173.70
Interest	243.18

"You are hereby notified that I will offer for sale at public auction, to the highest bidder for cash, the property described above on Wednesday, November 2, 1921, at 2 o'clock p. m. Said sale to be conducted at front door of courthouse in Salem, South Dakota.

Wm. Kelley,
Deputy Collector of Internal Revenue, District of South Dakota."

Plaintiff alleges that the defendant is not financially able to respond in damages for the value of the property of the plaintiff which he threatens to seize, and on that account plaintiff is without an adequate remedy at law. Plaintiff further alleges: That he is unable to pay the demands of the defendant, and that it is absolutely impossible for him to raise sufficient money to satisfy these alleged claims, and that, if the defendant so seizes the real property of the plaintiff, it will put a cloud upon the title thereto, and that the filing of this claim and assessment is a cloud thereon, to the irreparable injury of the plaintiff. That it further appears in these cases, to the satisfaction of the court upon this hearing, that these plaintiffs cannot raise the money with which to pay these alleged assessments. That to require them to raise this money, and pay it as a tax, and then present their claims, respectively, for rebates, to the Commissioner of Internal Revenue of the United States, to the end that he may act thereon within six months, to repay the same if his action is in their favor, or they may proceed against him in a court of competent jurisdiction if he denies them the relief they ask, or if he fails to act within that time, is to absolutely deny them any remedy at law. As a matter of fact, I find that to require these respective plaintiffs, poor men, to pay these exorbitant sums taxed against them, and then to go into court and sue for the return of the money, is absolutely prohibitive in each case, and the impossibility of their compliance with such a requirement leaves them with no remedy at law.

Plaintiffs then pray for an order and decree permanently enjoining and restraining defendant, and all persons acting under or by his authority, from the execution of the warrant of distraint, or threatened distress, levy of sale. Plaintiff also prays that in the meantime a restraining order may be issued and granted by this court, enjoining and restraining defendant collector and all persons acting under him or under his authority, from the issuance or execution of any war-

rant for distraint, or the levying upon or sale of any property of the plaintiff, for the collection of these alleged taxes and penalties. It is conceded by all parties that there has been no adjudication that plaintiffs are liable for the payment of these taxes or penalties, and no proceeding instituted, giving the plaintiff his day in court, having as its purpose the assessment of the penalties herein named, or any penalties, against the plaintiff and in behalf of the United States.

There are differences in the petitions of the different plaintiffs, though they all contain these material allegations. In the case of one plaintiff it is alleged that he was arrested and taken before a commissioner, and never was indicted, alleging that same was presented to the grand jury and no bill returned; another, that he was arrested for selling a bottle of Pep-Tonic, being a drug clerk, poor and without means; another that he was a druggist, and sold a bottle of this same Pep-Tonic; and so, with minor differences, but the same arbitrary assessment of this large amount of taxes or penalties appearing in all the cases. In each case the assessment has been made and the same filed as a lien against the property of the respective plaintiffs, and distraint in each case has been made or is threatened. In other cases plaintiffs have either been convicted, or have pleaded guilty to a violation of the National Prohibition Act, being the same act under which the alleged assessment of taxes and penalties was made by the defendant. In other cases no arrests have been made, no indictment returned, no proceedings have been taken thereunder, and in others indictments have been returned, and arrests made, but no trial.

The defendant, upon the date of the return of the order to show cause and the hearing of plaintiff's motion for a preliminary injunction, moved the court, in each case, that the action be dismissed, in that the plaintiff does not state facts sufficient to constitute a cause of action against the defendant; for want of equity, in that the plaintiff has a plain and adequate and speedy remedy at law; and that plaintiff may not maintain this action by reason of the provisions of section 3224 of the Revised Statutes of the United States.

[1] The first question presented by counsel upon the motion to dismiss is whether or not these so-called taxes and penalties, which have been assessed by the defendant and sought to be collected, are, in fact, a tax within the meaning of that term as used in section 3224, R. S. (Compiled Statutes, § 5947). This question was fully considered by District Judge Booth, in Thome v. Lynch (D. C.) 269 Fed. 995, and his analysis is so full and complete, and meets my own judgment of a proper interpretation of these statutes, that no good purpose can be served by a review of the statutes or a restatement of his analysis, which appeals to me as being sound and as an interpretation of the rights of these parties, and as being unquestionably the rights of the parties to these actions under the facts presented, considered with the various statutes necessarily to be construed.

Counsel in this case do not urge that, if these are not taxes, as distinguished from penalties, still the proceedings adopted by the defendant are a proper method of collecting the amount claimed, and it is, I think, conceded that, if these sums attempted to be assessed against

the various plaintiffs are penalties, then they must be enforced through some proper proceeding, in which the plaintiffs will have notice and their day in court and their right to be heard. I am of the opinion that the collection of a penalty, where the method is not specifically prescribed by statute, is by suit or other appropriate proceeding in court. This method is expressly provided by the statutes of the United States. Section 3213, R. S. (Comp. St. § 5937). But that isn't all. The method of procedure by suit is specifically provided for by this same section 35, title 2, of the National Prohibition Act under consideration here. Section 3187 of the Revised Statutes of the United States (Comp. St. § 5909), while authorizing the collector of internal revenue to collect taxes by distraint, does not pretend to authorize the collection of penalties by that method, but only certain specified penalties that attach to the taxes, legally levied, for nonpayment on demand, etc. In this statute these penalties are clearly additions provided by the statute for purposes of revenue.

In Ketchum v. U. S., Welden v. U. S., Henderson v. U. S., 270 Fed. 416, the Court of Appeals of this circuit had these statutes under consideration, and in that opinion the court, properly, I think, held that the word "inconsistent" used in the National Prohibition Act, section 35, title 2, repealing inconsistent laws, had a broad meaning, and speaking generally, a law, having for its primary purpose the absolute prohibition of the manufacture and sale of spirituous liquors, is inconsistent with legislation seeking to derive a revenue from such manufacture and sale by the imposition of taxes. The use of the words "tax" and "penalty" is not conclusive of the intent and purpose of Congress. In this connection it is proper to refer to the claim that is urged that by section 35, no one is relieved "from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers."

The claim is made in these cases that, notwithstanding the manufacture and sale of spirituous liquors is absolutely prohibited, still the government intends to collect revenue taxes on such business. I think the Circuit Court of Appeals in Ketchum v. U. S., supra, declared a rational, reasonable interpretation of these statutes in the following language:

> "The language of the section absolutely prohibits the payment of any tax in advance, which negatives the idea that the business may be taxed in the sense of the sections of the law upon which the indictment in this case is based."

It is urged that the Supreme Court of the United States in U. S. v. Yuginovitch, 256 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, has interpreted these statutes favorably to the contention of the defendant. I have carefully reviewed the opinion, and find it an affirmance of the action of the trial court in quashing the indictment therein being con-

sidered upon the grounds that the acts of Congress under which the same were found were repealed before the finding of the indictment, and that the acts charged to have been committed by them were after the date upon which the Eighteenth Amendment to the Constitution and the Volstead Act became effective. This indictment involved:

(1) A charge that the defendants unlawfully engaged in the business of distillers within the intent and meaning of the internal revenue laws of the United States, and that in fact they did distill spirits subject to the internal revenue tax imposed by the laws of the United States, and did defraud and attempt to defraud the United States of the tax on said spirits.

(2) That the second charge, which was based on section 3279, U. S. R. S., charged that the defendants failed to keep on the distillery, conducted by them, any sign exhibiting the name or firm of the distiller, etc., as required by statute.

(3) The defendant was charged with carrying on the business of distilling within the intent and meaning of the revenue laws of the United States without giving bond required by law, in violation of section 3281, U. S. R. S.

(4) The defendant was charged with unlawfully making a mash fit for the distillation of alcoholic liquors, in a building not a distillery, duly authorized by law, in violation of section 3282, R. S. U. S.

"These statutes long constituted a part of the internal revenue legislation of the United States and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the federal government was concerned, to manufacture and sell ardent spirits for beverage purposes. The government derived much revenue from taxing the business, which it sought to realize and protect by the systems of law of which the sections in question were a part. This policy was radically changed by the adoption of the Eighteenth Amendment to the federal Constitution, and the enactment of legislation to make the amendment effective. The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture and sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the amendment by proper legislation. To this end Congress passed the National Prohibition Law, known as the Volstead Act. 41 Stat. 305. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes." U. S. v. Yuginovitch, supra.

This, then, is an interpretation by the Supreme Court of the United States of the intent and purpose of the statutes as they stood prior to the enactment of the Volstead Act, and an interpretation of the intent and purpose of the Volstead Act as well. The court then proceeds, after consideration of the power of Congress under this broad authority to tax intoxicating liquors, notwithstanding their production is prohibited and punished, and notwithstanding the fact that the statute in this aspect had a moral end in view, as well as the raising of revenue, and holds that these present no valid constitutional objection to its enactment, and yet it was not necessary in that case to determine, and it was not determined, that such a tax was actually imposed, or that the penalties imposed by section 35 were or were not intended to be taxes, as a part of the system for obtaining revenue for the government, as distinguished from penalties for the violation of a prohibition statute.

It must be conceded, I think, that Congress, in the exercise of its power to provide for the raising of revenues, might lawfully impose a tax upon illicit distilling of spirituous liquors, and if such an authority had been exercised in a general plan outlined for the raising of revenue in which this was an item that had evidently been duly considered, and an intent and purpose to raise money in that way, it might be determined a tax, rather than a penalty. As said by the Supreme Court in this case, "by the enactment of the Volstead Law, this business, that had been taxed by the government, was destroyed," and it was no longer possible to raise the great amount of revenue theretofore assessed thereon, and that system of raising revenue must necessarily have been abandoned by the passage of the constitutional amendment and the enactment of the Volstead Law. Then, again, one of the outstanding phases of this statute, as suggested in this Supreme Court opinion, was to protect, by this system of laws, this large revenue from taxing this then legitimate business interest. The court specifically emphasizes the fact that this policy was radically changed by the adoption of this amendment and the enactment of this legislation.

[2] Viewing the administration of this statute in the light of the allegations of this bill and the facts that have developed in the investigation of these and other cases, it does not seem reasonable to attribute to Congress an intent and purpose that sovereignty should be exercised by administrative officers of the government for the purpose of taxation—this harsh and drastic procedure by an administrative officer, not in the enforcement of a general plan of taxation for the purpose of raising revenue, but in the power and the exercise of that power by an administrative officer in the exceptional case and independent of any general scheme or plan for the raising of revenue. To say that Congress contemplated this action is to say that they contemplated its administration in the way that has been demonstrated in these and other cases.

The levy of this tax upon the individual that is poor, because he has violated a statute, committed a misdemeanor, violated the police regulations of the country, and without a hearing, without notice, charge up to him large sums of money, immensely more than any of these plaintiffs here can possibly pay, file it in the proper county office, and thus constitute it a lien against anything that the plaintiff then had, or might thereafter acquire, with no hope on the plaintiff's part that he may ever be able to pay it, with no possibility of ever being relieved from it, not even by bankruptcy proceedings, and with an intent and purpose on the part of Congress to forever bar him from the possibility of progress along the lines of developing a home or the necessities of himself or family, if he is married, for the future, all in the name of a desire to raise revenue.

Conceding that Congress foresaw the enforcement of this statute in this way, it would, at the same time, have foreseen that a very negligible amount of revenue would thus be obtained, because of the poverty of the class of people who are naturally charged with a violation of these statutes. On the other hand, if there was an earnest effort on the part

of Congress to enforce the amendment to the Constitution, to prohibit the manufacture, possession, sale, and traffic in intoxicating liquors, and if in their judgment the imposition of these large penalties, as such, would tend to accomplish an enforcement of the statutes, the rights of those against whom these penalties were unjustly assessed can be preserved, because, if these are penalties, and if that was the intent and purpose of Congress, it is conceded that they cannot be taxed by an officer in the way this statute has been attempted to be enforced. All claims must necessarily be brought in some form of proceeding, and the question of the violation of the statute on the part of the citizen must be judicially determined. I cannot believe that it was ever the intent and purpose of Congress that a deputy collector of internal revenue, taking the word of various special agents, should list the reports made by them, and with that as a foundation, and that only, assess these harsh penalties, indiscriminately, against the citizenship of the country, and then sustain it in the name of the intent and purpose to raise revenue for the support of the government.

I have no antipathy toward this law. I believe that it should be enforced, just as any other law. I believe, however, that a defendant, charged with a violation of this statute, should have his day in court, and an interpretation of this statute that closes to him forever the hope of financial progress, by placing this lien against him, is to imply an intent and purpose on the part of Congress, inconsistent with the intent and purpose of the act. I am, therefore, of the opinion that such of these provisions of the Volstead Act as may be enforced against violators of that law are penalties, and not taxes; that such penalties cannot be assessed by an internal revenue collector, without giving the person charged his day in court. Finally, the procedure by distraint for the collection of these penalties, as threatened in these cases, cannot be sanctioned. There has been no adjudication in court as to the liability of the plaintiffs. This liability is denied. There has been no hearing. Distraint under such circumstances is not due process of law. Thome v. Lynch, supra, and cases cited.

In each of these cases, the motion for preliminary injunction is granted, and counsel may prepare proper preliminary injunctions in said cases, respectively, enjoining and restraining defendant, and all persons acting under his direction or control, pending final determination of said cases, respectively, under and by virtue of warrants for distraint, issued or threatened, as set forth in the complaint in said cases, respectively; said warrant for distraint purporting to be for the purpose of collecting certain alleged taxes and penalties from said plaintiffs, respectively, as set forth in their respective complaints. The issue of the preliminary injunction in each of said cases is conditioned that the plaintiff, or some one in his behalf, shall make and file in this court a bond or undertaking to the United States, to be approved by the court, or the clerk of this court, for the benefit of all persons interested, in the sum of $150; the said bond or undertaking conditioned that said plaintiff will pay such costs or actual damages as may be awarded by this court to such persons interested, in case it shall be finally determined that the preliminary injunction was erroneously issued.

The restraining order heretofore issued shall remain in force in each case, for the period of 10 days from the date hereof, within which time plaintiff in each case may make and present the bond herein provided for.

McPHEE et al. v. GREAT NORTHERN RY. CO. et al.

(District Court, W. D. Washington, N. D. July 19, 1921. On Supplemental Briefs, November 9, 1921.)

No. 13-E.

1. **Public lands ⟸81(1)—Land occupied by homestead claimant when selected held not to pass under railroad grant.**

   The right of a railroad company to select indemnity lands, under Act Aug. 5, 1892, does not include land held, at the time of its selection and when subsequently surveyed, by a bona fide homestead settler, nor does it pass under such selection on its subsequent relinquishment by the homesteader.

2. **Public lands ⟸106(1)—Ruling that land was not subject to homestead entry held not to conclude subsequent applicant.**

   The rejection of a homestead application on the ground that the land had passed under a railroad grant is not res judicata as between the railroad company and the United States, and does not bind a purchaser of the applicant's improvements, and in whose favor he executed a relinquishment, who may institute a new homestead entry, if the land is in fact public land and subject to entry.

In Equity. Suit by Albert R. McPhee and Frances McPhee against the Great Northern Railway Company and another. On motion to dismiss bill. Denied.

S. M. Bruce, of Bellingham, Wash., for plaintiffs.

Clinton W. Howard, of Bellingham, Wash., for Bellingham Bay Improvement Co.

Thomas Balmer, of Seattle, Wash., for Great Northern Ry. Co.

NETERER, District Judge. Plaintiffs seek to establish title to the W. ½ of the N. W. ¼ and N. W. ¼ of the S. W. ¼ of section 12, township 39 north, range 6 east, and to have the defendants, in whom the said title rests by virtue of patent issued on the 24th day of July, 1919, declared as trustees for the plaintiff. Plaintiff in substance alleges that in 1901 one C. C. Cole, qualified to enter public lands, settled upon and claimed said land, with the intention of acquiring a homestead. Said lands at the said time were unsurveyed. Cole erected a home and opened roads, and in the month of October, 1901, sold his improvements and right of occupancy to Daniel O'Donnell, qualified to make a homestead entry upon public lands; that O'Donnell went into the possession of said land with the intention of acquiring title, established his residence, "built houses and sheds, fenced and cleared ground, and posted notices showing the particular lands claimed by him," and continued to reside on said land until 1906, when for a valuable consideration he sold and conveyed his possessory right to one

Thurston, qualified to enter public lands, who entered upon the land for the purpose of acquiring homestead, and continued in possession until November, 1906, when for value he sold his improvements and possessory rights to the S. W. ¼ N. W. ¼, to Peter Beebe, who was qualified to enter public lands, with the intention of acquiring title under the homestead laws; that in September, 1909, for a valuable consideration, Beebe sold and conveyed his possessory rights and improvements to the plaintiffs, who entered into the possession of said lands for the purposes and intention of acquiring title thereto under the homestead laws, plaintiff being qualified to enter lands under the public land laws; that on the 19th of May, 1902, while O'Donnell was actually residing upon the said land with the intention as stated, the land being unsurveyed, the defendants filed in the office of United States Land Office at Seattle list No. 44, selecting said lands among others as lieu selection under the act of Congress approved August 5, 1892; that on February 6, 1907, the survey for said land was filed, and on the 23d of said month defendants described said lands conformable to such survey, which conformed to the lands claimed by the plaintiff by reason of the possessory rights and improvements made thereon and notices posted; that the defendants knew of the rights and claims of the plaintiff and his grantors, and that said lands were settled upon, and that homestead rights had been initiated and actively asserted; that on September 27, 1909, plaintiff made application to file his homestead entry on and for said land, tendered the money to the proper officers, which application was rejected, because in conflict with lieu selection list No. 44; from said decision plaintiffs appealed to the Commissioner of the General Land Office, and thereafter to the Secretary of the Interior, and that the proofs presented establish the right of the plaintiff to said land; that the filing of list No. 44 was a fraud upon the plaintiffs' grantors, making defendants trustees for the plaintiffs in obtaining the patent by misleading the officers of the Land Department; that the Land Department committed error of law in denying to the plaintiffs such land and awarding same to defendants. Many other allegations appear in the bill of complaint, but this is all that is material.

The defendants move to dismiss. From the exhibits and proceedings in the Land Department, the proofs entered as set forth in the complaint, it appears that on September 27, 1909, plaintiff, McPhee, tendered his homestead application for the lands herein described, which was rejected December 8, 1910, and November 18, 1914, for conflict with selection list No. 44, filed May 19, 1902, by the St. Paul, Minneapolis, & Manitoba Railway Company under the list filed May 19, 1902, under the Act of August 5, 1892, 27 Stat. 390, and plat of survey was filed in the local office February 6, 1907. On February 23, 1907, the railway company described the same lands as conforming to the survey. On April 8, 1916, plaintiff filed a petition for the exercise by department of supervisory authority in the matter of his application, which was decided April 18, 1916, against the plaintiff. In the decision the Assistant Secretary says:

"The affidavit of McPhee alleges that the land applied for by him was, in 1901, embraced in the settlement of one Al. Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land, and was a settler thereon at the time of the filing of railway company's list. O'Donnell later sold his improvements to John W. Thurston, it being further alleged that O'Donnell's house or cabin was situated upon the S. W. ¼ N. W. ¼, Sec. 12, as to which McPhee is corroborated by one Benson. The affidavit of Peter Beebe states that, beginning in August, 1906, he claimed a settlement right upon the S. ½ S. W. ¼, Sec. 1, and N. ½ N. W. ¼, Sec. 12. In November, 1906, however, in consideration of $50 paid to him by Thurston, he changed his claim to the S. W. ¼ S. W. ¼, Sec. 1, W. ½ N. W. ¼ and N. W. ¼ S. W. ¼, Sec. 12, which included the tract upon which O'Donnell's cabin was located. No affidavit by O'Donnell has been filed by McPhee.

"The records of the department disclose that upon February 6, 1907, John W. Thurston made homestead application * * * for the S. W. ¼ S. W. ¼, Sec. 1, E. ½ N. W. ¼ and N. E. ¼ S. W. ¼, Sec. 12, which was rejected because of conflict with the railway company's selection as to all tracts except the S. E. ¼ S. W. ¼, Sec. 1. By departmental decision of March 19, 1910, a hearing was ordered to determine the rights between Thurston and the railway company. At this hearing Small testified that in 1901 he was employed to construct a cabin upon the land by C. C. Cole. Cole sold the cabin before its completion to Dan O'Donnell, who finished it and established residence therein prior to May 9, 1902. O'Donnell also posted a notice of his settlement, but the exact description of the land claimed by him does not appear. O'Donnell testified to his settlement upon the land claimed by Thurston and that he sold whatever rights he had to Thurston in the fall of 1906. Thurston testified that his purchase from O'Donnell was upon October 22, 1906, and that he himself established residence in December, 1906. Thurston stated in his testimony: 'Q. Now when did you take up your residence on the land? A. That same fall; being a quarter of a mile back from there, I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.' This may, perhaps, refer to the transaction alleged in Beebe's affidavit. As the result of the hearing, Thurston's application was allowed August 23, 1911. He made final proof September 28, 1912, final certificate issuing January 24, 1913, and patent April 29, 1913.

"February 6, 1907, Peter Beebe filed homestead application for the S. W. ¼ S. W. ¼, Sec. 1, W. ½ N. W. ¼ and N. W. ¼ S. W. ¼, Sec. 12, which was rejected by the register and receiver as to the lands in section 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W. ½ N. W. ¼ and N. W. ¼ S. W. ¼, Sec. 12, to the United States, stating therein that he has transferred 'my right and good will to E. R. McPhee.' The relinquishment which had been purchased by McPhee for the sum of $50.00 was filed September 27, 1909, concurrently with his homestead application. Beebe's application was allowed as to the S. W. ¼ S. W. ¼, Sec. 1, August 21, 1909, * * * upon which patent was issued April 23, 1915.

"From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under his settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Donnell. Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that, if the showing made in the affidavits submitted by McPhee is correct, the action of the department in allowing Thurston's application was erroneous, and that a suit to set aside the patent issued to Thurston might be instituted. Thurston's final proof, which was substantiated by

a filed investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre, and has a house, barn, and other improvements valued at $3,000.

"O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee, but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him, and was so determined by the department without objection from McPhee. *McPhee purchased Beebe's relinquishment after Beebe's application had been rejected*, and failed to file any protest against the allowance of Thurston's entry." (Italics mine.)

The facts as found by the Assistant Commissioner are supported by the testimony in the record. The legal conclusion of the Commissioner as to the fact of residence, and the boundaries of the O'Donnell claim so far as settlement and residence is concerned, is erroneous. The cabin was built by Cole and O'Donnell, occupied by O'Donnell, and was upon the S. W. ¼ of the N. W. ¼ of section 12, at the time the script was filed. That O'Donnell conveyed his right to his claim, including the S. W. ¼ N. W. ¼ to Thurston, and that Thurston conveyed his right to the S. W. ¼ N. W. ¼ to Beebe, is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive, and Thurston testifies that, "being a quarter of a mile back from there, I drops one forty and takes another forty." The 40 that he dropped was the 40 that Beebe obtained, on which was the cabin; and the 40 Thurston took was the 40 he got from Beebe.

The intent of the occupant O'Donnell, in the absence of proof to the contrary, is conclusive that it was to enter the land that he occupied, and as the qualifications of Dan O'Donnell as a settler upon public land is absent from the formal application, the department having jurisdiction, opportunity should have been given to supply the qualification, as was done in the Thurston Case, decision October 25, 1910, in which it is said:

"* * * There appears in the record of the proceedings no testimony tending to prove O'Donnell's qualifications to make entry of the land. You will therefore call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses as to his qualifications on May 9, 1902, for consideration with the evidence in the case."

This proof in this case was filed by McPhee with his petition. By this the privity between O'Donnell and McPhee is established, provided the decision of the Commissioner of July 28, 1909, upon appeal, rejecting the application of Peter Beebe for homestead entry upon the S. W. ¼ of the N. W. ¼ of section 12 does not intervene. The right of Beebe to the cabin and improvements could be transferred to McPhee, notwithstanding the rejection of his application. There is no proof in the record, other than the departmental decision, as to the Beebe rejection; but I think the department has a right to judicially know the condition and status of its own records, especially in view of the relation of Beebe, Thurston, and McPhee to this record.

By Departmental Decision, Frank et al. v. Northern Pac. Ry. Co., 37 Land. Dec. 193, and page 502 on review, it is held that public land may not be selected under the Act of August 5, 1892, when embraced within a bona fide settlement claim. The Supreme Court, in St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed.

941, held in effect that the right under the Act of August 5, 1892, to select indemnity lands to which no adverse rights or claim had attached, or been initiated, does not include land which had been entered in good faith by a homesteader at the time of the supplemental selection, and, on a relinquishment being properly filed by the homesteader, the land becomes open for settlement, and the railway under the act is not entitled to the land under a selection filed prior to such relinquishment.

There is no question from the record in this case that O'Donnell was a qualified entryman in 1902, and that he had settled upon the S. W. ¼ N. W. ¼ of section 12 with the intention of making a homestead entry, that he transferred this right to Thurston, which included adjoining lands, that Thurston conveyed his right to this 40 acres to Beebe, and that at the time the scrip was filed a bona fide settlement was initiated. This, however, Beebe failed to establish. As a matter of law at the time of filing the scrip the Railway Company had no right by reason of its selection to this land. Did the adjustment of the survey February 23, 1907, validate the railway selection, when Beebe's relinquishment was filed, or when his right was adjudicated against him, or was the land open for settlement, and did the settlement and application to enter on the part of McPhee initiate a right to the land which should upon the record have been allowed by the Land Department?

Upon this issue the parties may present a further brief.

On Supplemental Briefs.

[1, 2] Upon consideration of the supplemental briefs, the conclusion must follow that upon the settlement by O'Donnell in 1902 a claim was initiated and attached which reserved the land in issue from operation of lieu selection. Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849; Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Holten v. St. Paul, M. & M. Ry. Co., 17 Land Dec. 537; and the continuity of interest in the improvements and settlement upon the land from O'Donnell to McPhee being established, McPhee by his complaint shows a right to the land. N. P. Ry. Co. v. Trodick, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. Ed. 704; Osborn v. Froyseth, 216 U. S. 571, 30 Sup. Ct. 420, 54 L. Ed. 619; Svor v. Morris, 227 U. S. 524, 33 Sup. Ct. 385, 57 L. Ed. 623. The adjustment of the survey did not validate the selection as the land was not open for selection. Kan. P. Ry. Co. v. Dunmeyer, supra. The rejection of Beebe's application is not res adjudicata as to the United States. The land being open to entry, McPhee, being competent, was qualified to assert any right which might be claimed by the United States.

The mala fides charged in argument with relation to transfer from Thurston to Beebe, tainting the transaction with fraud, destroying transferable interest, is not established. The intent is clearly established that the purpose was not to procure land for another, but rather to procure the particular land for themselves, and an exchange of improvements and right of occupancy to the particular subdivisions shown

is not conduct denounced, as contrary to public policy. Bailey v. Sanders, 228 U. S. 603, 33 Sup. Ct. 602, 57 L. Ed. 985, and other cases cited are predicated upon a different state of facts, and where the person occupied a wholly different relation than McPhee.

The demurrer is overruled.

A. MECKY CO. v. GARTON TOY CO.

(District Court, E. D. Wisconsin. September 24, 1921.)

1. **Patents ⟸319(1)—Profits on infringing article may be considered in determining reasonable royalty.**
   While a reasonable royalty charged against an infringing manufacturer need not be measured by the profit actually made without the royalty, the entire profit made on the article containing the infringing part may be considered in determining what would be a reasonable royalty.

2. **Patents ⟸319(1)—Reasonable royalty is probable agreement between two parties willing to make license contract.**
   The reasonable royalty of a patentee from an infringer should be fixed by endeavoring to ascertain what the two parties would have agreed on, if the patentee was willing to grant a license on terms enabling its use and which the infringer desired to obtain.

3. **Patents ⟸318(4)—Patentee not entitled to all profits from sale of velocipede containing patented hub.**
   The owner of a patent for a hub for velocipedes is not entitled to recover from an infringer all the profits made by the infringer on the sales of velocipedes containing the patented hub, unless it is impossible, either inherently or because of the infringer's conduct, to segregate the profits on the infringing hub.

4. **Patents ⟸319(1)—Royalty may exceed infringer's profits.**
   The mere circumstance that damage for infringement awarded on the basis of reasonable royalty exceeds the profits which the infringer in fact made is not alone ground for treating the award as excessive.

5. **Patents ⟸322—Master's finding, not involving credibility of witnesses who testified orally, not entitled to weight.**
   The ordinary rule in patent infringement suits, that the finding of the master on matters of fact is to be given weight, loses its significance when the testimony is such that the matter of credit to be accorded to an individual witness, whom the master saw and heard, is eliminated.

6. **Patents ⟸319(1)—One dollar royalty for infringing article held excessive.**
   In a suit for infringement of a patent for velocipede hub, where the evidence showed that the defendant sold the velocipedes containing the infringing hub at $3.50 or less, thereby realizing a profit of 90 cents, and that a license under the patent would not have given the defendant a monopoly which would have enabled him to increase his sale price, *held* to show that the master's award of $1 as reasonable royalty for each infringing article was excessive, and should be reduced to 40 cents.

7. **Patents ⟸319(1)—Willfulness of infringement does not enter into determination of reasonable royalty.**
   The circumstance of defendant's willful infringement, or any other circumstance of an aggravating character merely personal to parties, should not enter into the determination of a reasonable royalty for the

use of the patent, though the statute contemplates that damages, once fixed, may in the contingency of willfulness be enhanced, if the court sees fit to do so.

In Equity. Suit for infringment of a patent by the A. Mecky Company against the Garton Toy Company. On exceptions to report of the special master in the accounting proceeding pursuant to the decree. Master's report modified.

E. Hayward Fairbanks and J. Bonsall Taylor, both of Philadelphia, Pa., and John W. McMillan, of Milwaukee, Wis., for plaintiff.

Bottum, Hudnall, Lecher & McNamara, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. The case is before the court upon exceptions to the report of the special master in the accounting proceedings pursuant to the decree. Although numerous exceptions have been filed, the parties agree that there is really but one question, the finding and award of damages to the complainant upon the measure of $1 as a reasonable royalty upon each of the infringing structures made and sold by the defendant. It is conceded that the defendant made and sold approximately 15,800 infringing structures, the aggregate selling price being approximately $49,000.

As a preliminary to a consideration of the question submitted, reference may be made to the record in its disclosure of matters bearing pertinently upon the inquiry made by the master, respecting profits arising upon manufacture and sale, and by this is meant the ordinary manufacturing and selling profits. The defendant, in response to the equity rule, filed its account in debtor and creditor form, giving on the one hand the items entering into manufacturing and selling costs; on the other, the sales; the account balancing by disclosure of profits in the sum of $9,208.65. It appears that, upon this account, either with or without exception to specific items, inquiry was made through reference to the defendant's books and records with the aid of skilled accountants, for the purpose of testing the accuracy of the disclosure. The master, after noting the profit conceded by the defendant, observes:

"The account is unsatisfactory as to the actual labor and material cost entering into the infringing velocipedes, and as to the overhead is a mere arbitrary charge. It appears from the testimony of Mr. Whitehead, secretary and treasurer of defendant company, and that of Mr. White, the accountant employed by the complainant, that it is impossible to obtain the actual cost of either labor or material from defendant's books of account and records. The account filed by defendant shows greater credit for material cost than the computation made by Mr. White, and no real check could be made from any available data. There is no proof of sales lost by complainant by reason of this computation. Complainant had never been granted licenses for the use of its invention. The one satisfactory method of determining the measure of damages suffered by complainant by reason of the wrongful act of defendant would seem to be the determination of such sum as under all circumstances would have been a reasonable royalty for the defendant to have paid for such use."

After considering testimony bearing upon reasonable royalty, the master reports:

"* * * That it is impossible to make a satisfactory computation of the actual profits, gains, and advantages which have accrued by reason of said infringement; that the damages to the complainant by reason of the said infringement by the defendant are the sum of $15,592."

Respecting the determination that $1 per velocipede sold would be a reasonable royalty, the master remarks:

"While this determination results in an amount in excess of the total profits as shown by defendant's account on the sale of infringing velocipedes, yet, as indicated, such profits are not based on actual, but on estimated, cost, which cannot be checked. Further, it appearing to the master that infringement was willful, and after an actual notice of complainant's claims, continued during the progress of the litigation, the sum of $1 per infringing velocipede manufactured and sold by the defendant company is deemed under all the circumstances, and taking into account the nature of the invention and its advantages, and the additional value given to the completed velocipede, a reasonable royalty, and a proper measure of complainant's damages by reason of the infringement."

If upon an accounting in a patent case, the profits and the damages may be severally inquired into and determined, leaving it to the plaintiff to elect which he shall ask to be awarded by the judgment, the defendant probably cannot complain if but one or the other is in fact determined upon the hearing—assuming that the evidence, though "unsatisfactory," would enable determination of both. Therefore, in this case, the failure on the part of the master to fix and determine the profits, if the evidence warranted it, may not be ground for just exception, nor furnish a basis for overthrowing an award of damages. The parties here seem quite agreed that it is entirely permissible to ascertain damages through a determination of a reasonable royalty for the use of the invention, and that in determining such question resort may be had to all competent and pertinent proofs available to the parties.

And while the defendant takes the position that upon the evidence the plaintiff was not entitled to a determination of profits, because it failed to discharge the burden of proving profits attributable to the invention, it likewise concedes that upon the record the master could not escape determining that the defendant made a total profit of $9,200 approximately upon the sale of the devices which contained the patented hub. Therefore the defendant urges—regardless of the tenability of its claim that if the master were dealing with the single issue of assessing attributable profits the burden required of the plaintiff to show a segregation had not been discharged—that the evidence concerning aggregate profits must break down the master's finding of reasonable royalty as being unwarranted in amount.

Counsel calls attention to the testimony in the record upon which the plaintiff relies in support of the reasonable royalty finding. Two witnesses testified that in their opinion $1 per velocipede would be a reasonable royalty. One of these witnesses probably did not qualify to speak upon the subject. The other was allowed to qualify—an ob-

jection made being to materiality of the testimony, and not to want of qualification—by stating that his experience enabled him to testify. As noted by the master, no royalty contracts had ever been made, and apparently the infringing competition did not enable plaintiff to claim a loss of sales.

While the master characterized the evidence respecting profits as "unsatisfactory," and upon an argument before the court counsel for the plaintiff placed some stress upon the inability of witnesses, expert accountants, to fix accurately items of cost, I do not believe that the situation was substantially different from that found in many cases where profits are in fact determined. Where a manufacturer is engaged in diversified lines, his books are rarely kept—and by that I mean his regular account books—so that, upon turning to them, the factory cost of one line, or a single article, is readily disclosed. True, cost, systems, or so-called "efficiency methods," may be introduced as a part of a manufacturer's record, which will disclose unit costs. But in such cases the same method is from day to day required to be pursued as must be pursued upon inquiry into costs, and the like, where no such record is kept. Reference is made to overhead. There are few cases in which overhead and its proportional allotment to various lines in a single factory is not entirely a matter of judgment or estimate; and, of course, no matter what the basis of allotment, it is in a sense arbitrary.

Now, these observations are preliminary to a consideration of two propositions:

[1] First. That upon the record as made by the parties a finding that the defendant made a profit of approximately $9,200 upon the sale of the velocipedes embodying the patented hub would not only be unassailable, but fair—certainly fair in the sense that defendant could not complain, because it conceded such to be the fact. It is approximately 22½ per cent., clearly, as a matter of common knowledge, not an abnormally small manufacturing profit. It may not be abnormally large, but, when considered in connection with the total sales price and the absence of a claim that the defendant was selling its structure at low price, shows that, although an infringer, it did nothing abnormal in the way of surprisingly low costs or high selling prices to bring about abnormal profits. Therefore the defendant manufactured the velocipedes at a cost of approximately $2.50 or $2.80 each, enabling a profit of 80 to 90 cents upon a sale from $3.30 to $3.50 each. It is fair to assume that both plaintiff's and defendant's structures are not, and cannot be, considered as susceptible of sale—by the manufacturer—at a figure very greatly in excess of these amounts.

Clearly the question respecting reasonable royalty may be well tested by asking whether a manufacturer, who, without a license burden, manufactures and sells at approximately $3.30 to $3.50 to make a profit of 22½ per cent. as against competitors (the record shows that the parties have eight or ten rivals), who likewise are not burdened with a license royalty upon the patented hub, could in any event add to his manufacturing cost and profit a burden of $1, or nearly 33⅓ per cent., and still compete? It is true, as this court observed in the

Beckwith Case, 247 Fed. 795, that the royalty need not be measured by the profit actually made without the royalty; but it is also true that royalty payments must be considered by manufacturers as items of cost, and if, in a survey of the competitive field, it is found that the royalty cost of an ingredient entering into a structure will wipe out the profit, or make it hazardous, when due consideration is given to the fact that the patented ingredient may not dominate the competitive field, then the ratio of the royalty to the normal cost, plus profit, may be most persuasive upon the question of the reasonableness of a claimed royalty.

[2] Now, if we ignore for the present the situation of parties in litigation, where one claims the other to have been a trespasser, and approach the consideration of the question, as I think it can be approached, by endeavoring to ascertain what these parties would say to each other, if, being honorable business rivals, the defendant should desire, and the plaintiff should be willing to grant, a license upon reasonable terms; that is, that terms should be discussed which would enable, and not forbid, the defendant's acceptance thereof, and which the plaintiff, as the patentee, should desire to be accepted and not rejected, to the end that, as patentee, it receive reasonable remuneration. Broadly speaking, no terms could be discussed, if they imposed upon the licensed party burdens which forbade his entry into the competitive field, or such as would not make acceptance worth the while. Clearly the terms must be such as exhibit the right of the patentee to reasonable pecuniary reward for the use, but not such as, because of their severity, would simply intrench him in his monopoly by forbidding even an agreed use. They must be such as—on the basis of probability—in the minds of reasonable men contemplate user, and not abandonment, of the granted right.

This all has reference to the practical aspect of a determination of "reasonableness" and the manner in which such determination must be effected. Is it probable that the plaintiff and defendant, thus negotiating, would recognize "reasonableness" to reside in a royalty which added nearly one-third to the defendant's normal burden, assuming that without the royalty he could manufacture upon an equality with the plaintiff? Is it possible that, if the plaintiff and defendant could each manufacture the article at $3 and at a profit of from 20 to 30 per cent., the defendant, for the sake of introducing the plaintiff's novel construction, would assume such a burden and as a practical matter endeavor, not only to get his former normal profit, but an augmented profit, because of the augmented cost; that plaintiff could continue to sell at a profit at $3, but that defendant could readily compete by selling at $4; and that their respective distributors could freely compete upon the same or relatively greater differences which ultimate retail selling prices would exhibit? This leaves out of consideration a second proposition, which, if the court were considering an award of profits, can hardly be left out of the case, viz.:

[3] Second. That the profit, which is recoverable, ought to bear some relation to the patented structure, whose use by the defendant constituted the infringement. While it is true that in the present

case the patented structure was the hub, enabling the assembling of what the parties have called a "take-apartable" velocipede, and also that the patented structure contributed to the advantages and to the salability of the velocipede, the plaintiff was not, as a matter of law, entitled to the profits derived from the sale of the velocipede, in the sense that the velocipede as a whole constituted the infringing article. In other words, if upon adoption of some fair method, the profit made through the use of the hub could be segregated from the profit attributable to the saddle, the handle bar, the tire, or other elements of the structure, the plaintiff could claim no more as profits. Of course, the situation may have developed so that it would have been impossible, either inherently, or because of the conduct of the defendant, to segregate, and therefore the defendant could not have complained if the assessment of the total profits realized upon a sale of the entire structure had been made.

But no such question is here raised, and the case was not disposed of by the master upon the hypothesis that the profits to be attributed to the patented hub could not be ascertained, but that the evidence was unsatisfactory, dealing apparently with the evidence showing the profits—22½ per cent.—made upon sale of the entire structure. This is referred to with the idea that the profits of $9,200 approximately made upon the aggregate sales of velocipedes would probably prove considerably in excess of any apportionment which rationally should be made of profits attributable solely to the infringing feature, viz. the hub, of defendant's construction; and it all fortifies the suggestion above made that, were the parties dealing with each other for the purposes of ascertaining reasonableness of a royalty, neither of them could accede to a burden of $1 added to normal manufacturing cost of the velocipede embodying the patented hub.

[4] As already observed, the mere circumstance that damage awarded upon the basis of reasonable royalty may exceed the profits which the infringer in fact made is not alone ground for treating the award as excessive. In the Beckwith Case, the damages awarded were greatly in excess of the profits apportioned to the infringing structure. But upon the record in that case the royalty determined bore a reasonable relation to the manufacturing cost of the structure; and the amount of such royalty could be fixed upon a more liberal basis, because the infringing structure formed a part of a larger structure in combination with which it was used, the manufacturing and selling cost of the whole being such that the royalty fixed was one which, in the competitive field, could without difficulty be absorbed as an item of cost; and it is significant that, despite the results obtained by skilled accountants in their attempts to segregate or apportion profits, the Court of Appeals was apparently inclined to view the profits as having been determined at too low, or at least at a very moderate, figure.

[5] The court is not unmindful of the ordinary rule which requires finding of a master upon matters of fact to be given weight. The rule, however, loses its significance, when upon a record the testimony is such that the matter of credit to be accorded to an individual witness,

and depending upon the fact that the master saw and heard the witness, is eliminated. The question is whether the award, based, as it is, upon the mere statement of two witnesses who name that sum as a matter of opinion, and who apparently were not called upon to test out the fairness of their estimate by a consideration of what has heretofore been alluded to, ought to stand. Conceding to the full the great practical character of the rule for estimating damage upon a reasonable royalty basis, there are two dangerous tendencies which may develop in its application: The one is undue liberality in respect of the proofs requisite to make out the case, as a result of which the awards become so high as to induce patentees to countenance infringement; the other is such strictness or inadequacy as will promote freedom to commit infringement.

[6] It seems to me that in the present case, when an effort is made to fix the reasonable value of the use in the manner indicated, an award of $1 as a reasonable royalty is excessive upon any fair view of the record. It is true that, when an effort is made to fix another amount, the final act of determination—as noted with respect to profits—must have an element of the arbitrary. That is true whenever the patentee, in the absence of proof which in some cases he can adduce, rests his case upon what are more or less arbitrary opinions. In such case I think the court may well say that the opinions as such are not at all conclusive; that, if given by witnesses who are highly interested, the court may subordinate them wholly to such facts as a jury might consider as dominating, and prompt them to arbitrate, as best they can, the amount. It is my judgment that, if this proposition were for consideration, having in mind the competitive field, the number who are engaged as workers therein, the limit of cost and selling price, which is fairly constant in such structures as the parties are manufacturing (I think this is a matter of common knowledge) royalties of not less than 25, or more than 50, cents per structure would be agreed upon as meeting the requirement of reasonableness.

[7] It is quite clear that in the application of the rule care should be taken to ascertain reasonableness of a royalty as of the time and under the circumstances attending the commencement and duration of the infringement, but wholly regardless of circumstances, which though doubtless existing and possibly of an aggravating character, are merely personal to the parties, and for that reason should not enter into determination of the broad question: What would be or is a reasonable royalty? This question, after all, should be determined very much in the manner of determining reasonable or market value in any buying or selling situation. The circumstance of the defendant's willful infringement ought not therefore, to enter into a determination of reasonableness. The statute evidently contemplates that damages, once fixed, may in the contingency of willfulness be enhanced, if the court, in its discretion, sees fit to do so. It is my judgment that a royalty of 40 cents, instead of $1, is a fair basis for computation of the damage in the present case, and the report may be modified accordingly.

The plaintiff has called attention to two matters by way of motion (which I shall treat as equivalent to exceptions) to correct the master's report. The master's findings may be modified to disclose the number of infringing structures shown by the defendant's second report, and interest may be awarded upon the amount fixed as royalty damage, as requested by the plaintiff.

An order may be entered, modifying the master's report, as indicated in this opinion.

In re WRIGHT & WEISSINGER.

(District Court, N. D. Mississippi, Delta Division. December 9, 1921.)

1. **Bankruptcy ⟸191(½)—State purchase-money lien statute held not to confer lien superior to trustee's claim.**

Where shoes were sold to a retail dealer, who subsequently became bankrupt, the seller *held* not to have a lien superior to the claim of the trustee in bankruptcy, under Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), conferring a purchase-money lien on personal property while in the hands of the first purchaser, or one deriving title or possession through him with notice that the purchase money was unpaid, where the sale was made to the retail dealer for the purpose of resale with the knowledge and consent of the seller.

2. **Bankruptcy ⟸200(3)—Attachment suit held discharged by bankruptcy.**

Where seller, claiming purchase-money lien under Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), sued the buyers and attached the goods, within 4 months of the buyers filing petition in bankruptcy, the property was "wholly discharged and released" by the adjudication in bankruptcy, and passed to the trustee as part of the bankrupt's estate under Bankruptcy Act, § 67f (Comp. St. § 9651); the goods sold being intended for resale, and hence not coming within the protection of the statute.

3. **Bankruptcy ⟸143(1)—Title and rights taken by trustee stated.**

Since a trustee in bankruptcy takes, not only the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him, but also the rights of a creditor holding a lien by legal or equitable proceedings thereon, under Bankruptcy Act, § 47a2, as amended, and section 70 (Comp. St. §§ 9631, 9654), shoes sold to a bankrupt pass into the trustee's possession as property which the bankrupt "could by any means have transferred"; the shoes being intended for resale to customers under the implied consent of the seller.

4. **Bankruptcy ⟸189—Deeds fraudulent as against creditors are also fraudulent as against trustee.**

Where shoes are sold to a retail dealer, who subsequently becomes a bankrupt, any deed of trust or other contractual lien on such shoes, where fraudulent and void as against creditors, would also be fraudulent and void against the trustee in bankruptcy.

5. **Bankruptcy ⟸188(1)—To be preserved by Bankruptcy Act, lien must have been given or accepted in good faith.**

In order for a lien to be preserved by Bankruptcy Act, § 67d, as amended by Act June 25, 1910 (Comp. St. § 9651), it must have been given or accepted in good faith, and not in fraud on the act.

6. **Sales ⟸301—Purchase-money lien statute held not to apply to merchandise held for resale with vendor's consent.**

Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), giving a purchase-money lien on personal property, does not give a lien by operation of law on merchandise held for resale with the knowledge and consent of the vendor.

7. **Bankruptcy ⟸191(½)—Consent to resale of merchandise held waiver of lien as against trustee.**

By consenting to a resale of goods prior to their delivery to the merchant, and selling them to him for that purpose, a vendor of merchandise waives the benefit of Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), giving a purchase-money lien on personalty, so that he can acquire no lien which can prevail as against the trustee in bankruptcy of the purchaser.

8. **Bankruptcy ⟸215—Burden to establish lien as against trustee is on claimant.**

Where a seller of merchandise to a retail dealer, who subsequently becomes bankrupt, claims a lien on the merchandise under a state statute which has no extraterritorial effect, the burden is on the claimant to establish the lien, and such burden is not sustained where it does not appear that the sale was not consummated and title perfected in the purchasers in another state.

In Bankruptcy. Proceeding by the Brown Shoe Company to enforce a claim against Wright & Weissinger, bankrupts. A decision adverse to claimant was entered by the referee, and claimant petitions for review. Decree on referee's decision ordered.

Marcus L. Kaufman, of Rosedale, Miss., Douglas E. Beams, of Shaw, Miss., and A. M. Maxson, of Clarksdale, Miss., for trustee and creditors.

Chambers & Trenholm, of Jackson, Miss., for Brown Shoe Co.

HOLMES, District Judge. On January 27, 1921, the Brown Shoe Company, of St. Louis, Mo., filed suit in the circuit court of Bolivar county, Miss., against Wright & Weissinger, merchants doing business in said county, for the balance due on the purchase price of certain shoes, which were purchased for the purpose, with the knowledge and consent of the seller, of being resold at retail in the mercantile business of the buyers. In said suit the plaintiff claimed a lien on the shoes for the purchase money under a state statute. In accordance with the procedure provided in such cases, a writ of seizure was issued, commanding the sheriff to seize the property and deal with it as in the case of an attachment for debt. Under this writ the sheriff seized 278 pairs of shoes and had them in his possession at the time of the adjudication in bankruptcy.

On February 2, 1921, Wright & Weissinger filed a voluntary petition in bankruptcy, and were duly adjudicated bankrupts. Thereafter a trustee was duly elected, and claimed title to said shoes, free from any lien for purchase money. Under an order of the bankruptcy court the trustee took the shoes out of the possession of the sheriff, and the same were sold by the trustee under an agreement between the parties that the proceeds thereof should stand in lieu of the shoes. The Brown Shoe Company filed its duly verified claim, and petitioned the court for priority over the general creditors as to the said proceeds because of its alleged lien for purchase money.

An issue was made up and trial had before the referee, and the referee held that the seller had no lien for the purchase money, because

the goods were sold to retail dealers for the purpose of resale with the knowledge and consent of the seller, and that the Mississippi purchase-money lien statute did not apply, but that, even if it did apply, the lien was cut off in this case by the Mississippi sign statute.

[1, 2] The case comes before me on petition to review the decision of the referee. I shall not discuss the applicability of the sign statute (section 4784, Code Miss. 1906), because I agree with the referee that the seller in this case never obtained any lien on the shoes for the purchase money which is superior to the claim of the trustee in bankruptcy. The question for decision is not affected by the prior proceedings in the state court, as the lien asserted is one created by statute, and not by the suit in the state court. That suit having been brought and the attachment levied within four months of the filing of the petition in bankruptcy, the property affected was "wholly discharged and released" by the adjudication in bankruptcy, and passed to the trustee as a part of the estate of the bankrupt under subdivision (f) of section 67 of the Bankruptcy Act (Comp. St. § 9651).

The statute relied on is section 3079, Code Miss. 1906 (section 2436 of Hemingway's Code), and reads as follows:

"*Purchase Money—Lien on Personal Property.*—The vendor of personal property shall have a lien thereon for the purchase money while it remains in the hands of the first purchaser, or of one deriving title or possession through him, with notice that the purchase money was unpaid."

It must be conceded, if the property in question were fixtures or other articles not intended for resale, that the statute would give the seller a lien for the purchase money not affected by the Bankruptcy Act. Norris v. Trenholm, 209 Fed. 827, 126 C. C. A. 551, 31 Am. Bankr. Rep. 353. The sole difference between this case and Norris v. Trenholm, supra, consists in the fact that the shoes here constituted part of a stock of merchandise held for sale, and were bought with the knowledge and consent of the seller for the purpose of resale in the mercantile business.

[3] In a contest between the buyer and the seller, in a suit to enforce a lien for the purchase money, this fact might not be sufficient to defeat the lien. It is not necessary here to decide that question, because this is a contest between the vendor and the trustee in bankruptcy, whose rights and remedies are superior in some respects to those of the bankrupt. The trustee took, not only the title of the bankrupt to all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, but also the rights of a creditor holding a lien by legal or equitable proceedings thereon. Section 47a2, as amended, and section 70 of the Bankruptcy Act (Comp. St. §§ 9631, 9654); Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268–275, 36 Sup. Ct. 50, 60 L. Ed. 275; Gillaspy v. International Harvester Co., 109 Miss. 136, 67 South. 904.

Disregarding the proceedings in the state court, in so far as the levy and attachment affected the property in controversy, it is clear that the shoes in question were property which prior to the filing of the petition the bankrupt "could by any means have transferred." This

is true, because they were sold for the purpose of being transferred—that is, sold—to customers. If further light be needed as to the meaning of the word "transfer," there is a declaration in Bankruptcy Act July 1, 1898, 30 Stat. 544, 545, § 1, cl. 25 (Comp. St. § 9585), that the word "transfer" shall be taken to include every mode of disposing of or parting with property. It is clear, therefore, that as Wright & Weissinger had the implied consent of the Brown Shoe Company to resell these shoes, and their customers would have taken the shoes free from any lien, the trustee in bankruptcy, under said section 70, was vested by operation of law with title to them as "property which prior to the filing of the petition he could by any means have transferred." As, however, under said section 47a2, the trustee has all the rights of a creditor holding a lien by legal or equitable proceedings, I shall now turn to a discussion of whether or not the claimants have a statutory lien for purchase money superior to creditors so constituted.

[4] Preliminarily, it might be well to observe that a deed of trust or other contractual lien on the shoes in question would be held fraudulent and void as against creditors, and therefore as against the trustee in bankruptcy. Farmers' Bank v. Douglass, 11 Smedes & M. 469; Summers & Brannin v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Harmon v. Hoskins, 56 Miss. 142; Joseph v. Levi & Co., 58 Miss. 843; Britton & Mason v. Criswell, 63 Miss. 394; Tallman & Co. v. Tuttle Bros., 65 Miss. 492, 4 South. 553; Bank v. Caperton, 74 Miss. 857, 22 South. 60; Acme Lumber Co. v. Hoyt, 71 Miss. 106, 14 South. 464; Bank v. Goodbar, 73 Miss. 566, 19 South. 204; Belknap v. Lyell, 89 Miss. 197, 42 South. 799; Newton Oil Co. v. Carr, 97 Miss. 234, 52 South. 353; Dugan v. Beckett, 129 Fed. 56, 63 C. C. A. 498; Egan State Bank v. Rice, 119 Fed. 107, 56 C. C. A. 157; In re Franklin (D. C.) 151 Fed. 642, 18 Am. Bankr. Rep. 218.

Speaking of a deed of trust on a stock of goods, where the grantor retained possession and continued to carry on the business with the consent of the beneficiary, the Supreme Court of Mississippi, in Tallman & Co. v. Tuttle Bros., supra, said:

"The legal effect of the arrangement disclosed by the record was to hinder, delay, and defraud creditors, and the law imputes to it conclusively a fraudulent purpose, without regard to the actual motives of the parties."

In Acme Lumber Co. v. Hoyt, supra, where the deed of trust, in addition to certain personal property, included timber lands and timber rights upon leased lands, the court said:

"As the business of the company consisted in converting growing timber into lumber for sale, it is evident that the effect of the arrangement made would be to convert the most valuable part of its assets—the growing timber—into money, and distribute the same to the stockholders, to the exclusion of the rights of its creditors. It is well settled in this state that the mortgage of property consumable in its use, with the reservation of possession by the mortgagor, is prima facie fraudulent, and, if the mortgage reserves to the mortgagor the right to use such property, it is per se fraudulent."

The rule announced in Acme Lumber Co. v. Hoyt, and similar cases above cited, has been practically abrogated with reference to all chattels, except merchandise, by chapter 243 of the Mississippi Laws of

1920, which authorizes the execution of valid deeds of trust or mortgages on property presently owned or afterwards acquired and on changing chattels (not including merchandise), even though the grantor has no actual or potential interest therein; but the rule announced in those cases remains in full force and effect with reference to merchandise, such as the shoes here in question.

[5] In order for a lien to be preserved by the Bankruptcy Act, under section 67d, as amended by Act June 25, 1910 (Comp. St. § 9651), it must have been given or accepted in good faith, and not in fraud upon the act, and under section 70e the trustee may avoid any transfer which any creditor might have avoided. That a mortgagee who knows that the mortgagor is selling the mortgaged chattels for his own use, and who consents to his doing so, is not a bona fide holder of the mortgage within the meaning of said section 70e, and that the mortgagor's trustee in bankruptcy may have the mortgage set aside as fraudulent and void as to other creditors, was held in Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413, 11 Am. Bankr. Rep. 766. See, also, In re Hallbauer (D. C.) 275 Fed. 126.

So we see that, if this were a contractual instead of a statutory lien, which is here attempted to be asserted, not only would it be void as to creditors, but the trustee in bankruptcy might have the same set aside as fraudulent and void. But the lien here asserted is not contractual. It is entirely statutory, and the language of the statute is broad enough to give the vendor of personal property a lien for the purchase money on a stock of merchandise, unless (1) the meaning of the statute is restricted by the settled jurisprudence of the state, so as not to give a lien in exactly the same state of facts, where such a lien by contract has been repeatedly condemned as fraudulent and void as to creditors, and where under other legislation of the state such a construction would entail absurd consequences not reasonably attributable to the legislative intent; or (2) unless the seller by his conduct has waived the benefit of the statute.

[6] On the first proposition, in addition to what has been said with reference to contractual liens being void under similar circumstances, when we consider the well-known facts that the great majority of stocks of goods are bought on credit, that if there is a lien under the statute it exists during all the time the merchant is retailing the goods, that section 895 of Hemingway's Code makes it a crime to sell any property on which there is a lien of any kind by contract or by law without informing the person to whom he so sells of the said lien, and that merchants daily make such sales without giving the purchaser any information on the subject, we see the logical consequences of the claim that there is a lien by law on the goods of every merchant which are not paid for. We see that either the merchant is guilty of a crime when he sells the goods without informing the customer, or the customer takes the goods subject to the lien. I therefore conclude that the language of the statute is broader than its meaning, and was not intended to give a lien by operation of law on merchandise held for resale with the knowledge and consent of the vendor.

[7] On the second proposition, if it be held that the lien exists and is good between the parties, it is not good as against the trustee in bankruptcy, who occupies the position of a judgment creditor, as well as of a creditor holding a lien by legal or equitable proceedings. By consenting to a resale of the goods prior to their delivery to the merchant, and selling them to him for that purpose, the vendor waives the benefit of the statute, and acquires no lien which can prevail against the claim of the trustee. Any lien which he may have, as between him and the merchant, he is estopped to assert against creditors, and consequently against the trustee. Columbus Buggy Co. v. Turley, 73 Miss. 529, 19 South. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550.

[8] But there is another view of this case. The burden of proof to establish the lien is on the Brown Shoe Company. The act of the Mississippi Legislature can have no extraterritorial effect. Property bought in other states and delivered to the purchaser outside of Mississippi is not affected by the statute under consideration. It does not appear from the record in this case where the contract of sale was made, or whether the shoes were delivered to Wright & Weissinger in the state of Missouri or the state of Mississippi. There is nothing in this record to show that the sale was not consummated and the title perfected in the purchasers in the state of Missouri. The lex loci contractus governs. Erman v. Lehman, 47 La. Ann. 1651, 18 South. 650; Newman v. Cannon, Sheriff, 43 La. Ann. 712, 9 South. 439.

The decision of the referee is correct, and a decree may be entered accordingly

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VALIER & SPIERS MILLING CO. v. FOOTE.

In re J. F. HOWARD & CO.

(District Court, S. D. Mississippi, S. D. December 15, 1921.)

No. 485.

1. **Bankruptcy ⟸184(2)—No lien under unrecorded contract retaining title in seller.**
   Where one who had sold flour to a bankrupt claimed a lien for the purchase money under a contract whereby it retained title, *held*, that there could be no lien where the contract was not recorded.

2. **Bankruptcy ⟸188(2)—No lien where merchandise delivered to bankrupt for resale in usual course of business.**
   Where a seller of flour delivered it to the bankrupt for the purpose of resale in the usual course of business, the seller could retain no lien thereto, notwithstanding an unrecorded contract whereby the seller sought to retain title.

3. **Bankruptcy ⟸188(2)—No lien against trustee as to property delivered for resale.**
   A vendor of personal property, held by a merchant or trader to whom he has delivered it for the purpose of being resold, has no lien thereon for the purchase money which he can assert against the trustee in bankruptcy of the buyer, in view of the Mississippi sign statute (Code Miss. 1906, § 4784).

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

4. Bankruptcy ⊂=151—Trustee held vested with rights of creditor.

The trustee in bankruptcy not only takes the title of the bankrupt, but is vested with all the rights of a creditor holding a lien by legal or equitable proceedings, and also a judgment creditor holding an execution duly returned and unsatisfied.

In Bankruptcy. Petition by the Valier & Spiers Milling Company against George M. Foote, trustee of J. F. Howard & Co., bankrupts. Decision of referee, denying petition, affirmed.

Gex, Dedeaux & Waller, of Gulfport, Miss., for petitioner.
C. R. Haydon, of Gulfport, Miss., for trustee.

HOLMES, District Judge. The firm of J. F. Howard & Co., prior to the filing of a voluntary petition in bankruptcy, was engaged in the wholesale grocery business in the city of Gulfport, and at the time the company was adjudicated a bankrupt it had on hand a certain lot of flour stored with other articles of merchandise in its place of business, which flour was manufactured by the petitioner, Valier & Spiers Milling Company. The trustee in bankruptcy took charge of the flour, together with other merchandise and personal property of the bankrupt, and sold the same at a public sale held under an order of the referee.

After the sale the Milling Company filed a petition in this cause, setting up that said flour had been sold by it to the bankrupt under a contract whereby it retained title to the same, and prayed that, if said property had been sold, the proceeds of said sale be paid over to it. To this petition the trustee filed an answer denying both the allegations of fact and the conclusions of law therein set forth.

Thereupon evidence was taken from which it appears that the petitioner contracted with the bankrupt to sell it flour at the market price, for which the bankrupt was to make weekly settlements; that the petitioner retained the right, in selling any of its flour outside of the territory of the bankrupt, to send such orders to the bankrupt which it would fill and ship from the stock then on hand, charging the petitioner 20 cents profit for each barrel so shipped, with the right to call upon petitioner to replace such flour at the price it had cost without regard to a change in the market.

The petitioner retained title to the flour and carried fire insurance thereon in its own name, but held Howard & Co. responsible for any losses on said flour resulting from all causes except fire. The referee denied the petition.

It is clear that the bankrupt was doing business as a trader in the city of Gulfport under the style and firm name of J. F. Howard & Co., with a sign displaying said firm name in front of its place of business, and that there was no sign showing that it was acting as the agent of any one in the sale of the flour or other merchandise which constituted the stock of goods.

The flour in question was used and acquired by the bankrupt in carrying on its business, and under the undisputed facts the bankrupt had

the right to sell any part or all of said flour in the usual course of business. The contract relied upon by the petitioner was not recorded.

[1, 2] The petitioner had no lien for the purchase money on the flour, not only because it retained title thereto under an unrecorded contract, but because it delivered the flour to the bankrupt for the purpose of resale in the usual course of business. It is utterly inconsistent to retain title to personal property and at the same time to claim a lien thereon for the purchase money.

[3] But if this were not true, the vendor of personal property held for resale by a merchant or trader to whom he has delivered it for the purpose of being resold has no lien thereon for the purchase money which he can assert against the trustee in bankruptcy of the buyer. See In re Wright & Weissinger, 277 Fed. 514.

This case differs from the case last cited, however, in that by retaining title to the flour under a contract not recorded, and delivering it to a trader to be resold, under the circumstances above set forth, the petitioner brings the case squarely within the terms of the Mississippi sign statute, and obviates any discussion as to the applicability of Dodds v. Pratt, 64 Miss. 123, 8 South. 167, holding that the sign statute does not derange the priority of liens.

Section 4784 of the Code of 1906 is as follows:

"4784 (4234) *Business Sign, and What to Contain.*—If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

[4] The trustee in bankruptcy not only took the title of the bankrupt, but was vested with all the rights of a creditor holding a lien by legal or equitable proceedings and also a judgment creditor holding an execution duly returned unsatisfied. Gillaspy v. International Harvester Co., 109 Miss. 136, 67 South. 904.

An order will be entered, affirming the decisions of the referee.

In re SHUMAKER.

INTERNATIONAL SHOE CO. v. SHUMAKER'S TRUSTEE.

(District Court, N. D. Mississippi, E. D. January 24, 1922.)

No. 362.

1. Sales ⇐301—No lien on goods sold to dealer for resale.

Under Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), providing that a vendor of personal property shall have a lien for the unpaid purchase money, there was no lien on shoes sold to a dealer for purpose of resale by him in his mercantile business.

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

2. Sales ⟸302—**No lien under statute on goods sold and delivered in another state.**

Code Miss. 1906, § 3079 (Hemingway's Code, § 2436), giving the seller of personal property a lien for the unpaid purchase money has no extra-territorial effect, and if a sale was consummated and delivery had beyond the limits of the state to one doing business in the state, the title was perfected in the purchaser before the goods were brought into the state, and the statute could not operate to give a lien.

3. Principal and agent ⟸145(1)—**No lien on goods sold dealer, when seller had no sign at dealer's place of business.**

Even though one selling goods to a dealer for resale had a purchase-money lien thereon, it was cut off by Code Miss. 1906, § 4784 (Hemingway's Code, § 3128), relative to business signs, where the seller had no sign displayed at or about the buyer's place of business, and no instrument was on record evidencing the lien.

In Bankruptcy. In the matter of S. J. Shumaker, bankrupt. On review of an order of the referee denying the claim of the International Shoe Company to a lien on certain property. Affirmed.

The petitioner, the International Shoe Company, doing business in the state of Missouri, sold certain shoes to S. J. Shumaker amounting to $3,193.05. Thereafter the said Shumaker was adjudicated a bankrupt and a trustee appointed, whereupon the said shoe company filed its duly verified claim alleging that certain shoes on hand were sold by it to the said Shumaker, and that it was entitled to a lien on said shoes by virtue of section 3079 of the Mississippi Code of 1906. It was conceded that Shumaker was a merchant doing business in Mississippi, and that said shoes were sold by the petitioner to him for the purpose of resale and that said Shumaker bought said shoes with the intention of reselling them in his mercantile business in Mississippi, all of which was known to the seller of the shoes, and impliedly consented to. It was further conceded for the purpose of this hearing that the said Shumaker was doing business in Mississippi under the sign "S. J. Shumaker," and that the petitioner, International Shoe Company, had no sign displayed at or about Shumaker's place of business, nor did they have any instrument on record with regard to the shoes; the only lien claimed being a statutory lien under section 3079 of the Mississippi Code of 1906. It does not appear from the record whether said shoes were bought in the state of Missouri or the state of Mississippi, nor when nor where they were delivered to the said Shumaker by the said International Shoe Company. The referee, S. P. Clayton, denied the petition. His opinion is as follows:

"This is a suit brought by the Peters Branch of the International Shoe Company, commonly called the Peters Shoe Company, and it will be referred to by me as the Peters Shoe Company. The substance of the claim is that the petitioner claims a purchase-money lien on a certain lot of shoes now in the possession of the trustee by virtue of section 3079 of the Code of 1906 of the state of Mississippi, which is section 2436 of Hemingway's Code. The shoes, by agreement, were sold by the trustee separately and brought $225, and the litigation is with reference to the proceeds. The question involved in this case has already been decided by Hon. Edwin R. Holmes, District Judge, in the case of Brown Shoe Co. v. Wright & Weissinger, 277 Fed. 514, which case went up from the Delta Division. In his opinion, Judge Holmes held that the title of the trustee was superior to that of petitioning creditors. In that case, however, Judge Holmes did not consider the question of the effect upon this matter of what is known as our "business sign statute," which is section 4784 of the Code of 1906 and section 3128 of Hemingway's Code, and in view of the request of counsel to that effect I am going to give my views as to what effect this statute has upon a case like the present.

"The present counsel for the Peters Shoe Company also represented the Brown Shoe Company in the case of Brown Shoe Co. v. Wright & Weissinger, above cited. In their brief in that case, and which they have made their brief in this case, they stress the point that under the decision of the Supreme Court of Mississippi in the case of Dodds v. Pratt, 64 Miss. 123, 8 South. 167, Judge Campbell in deciding that case held that this business sign statute was not intended to derange the order of priority among the creditors of a merchant. It is true that Judge Campbell used that language in that case, and as applied to the facts of that case his decision and statement was unquestionably correct. An examination of the Dodds Case and the case of Paine v. Hall Safe Co., 64 Miss. 175, 1 South. 56, also decided by Judge Campbell, and the case of Tufts v. Stone, 70 Miss. 54, 11 South. 792, will disclose the fact that in the Dodds Case the deed of trust upon the stock of merchandise from Kizer to Dodds as trustee was recorded, and of course was prior to the judgment lien. This fact is not disclosed in the statement of facts in the Dodds Case, but a reading of the Dodds Case in connection with the other cases mentioned above will disclose that fact. Then the case of Dodds v. Pratt simply held that when a creditor has a prior lien which is recorded, then his lien cannot be disturbed by the business sign statute. This is clearly shown by the decision of Judge Woods in the Tufts Case, cited in 70 Miss. 58, 11 South. 793, in which he says: 'While the trader must unite in himself title and possession of property used in his business, he may surely incumber the same by mortgage, and, with the instrument acknowledged and recorded, his mortgagee must not be stripped of his rights under the mortgage. See Dodds v. Pratt, 64 Miss. 123, 8 South. 167.'

"Does not this show the real meaning of Dodds v. Pratt? Certainly Judge Woods would not have cited it as he did unless it meant that the trust deed in that case was recorded. And again, referring to Paine v. Hall, 64 Miss. 175, 1 South. 56, you will see on page 57 of 70 Miss., page 792 of 11 South., that the counsel for Mrs. Stone say that the Tufts Case only differs from the case they were briefing in that in the Paine Case the retention of the safe was not recorded. I think this disposes of Dodds v. Pratt. As to the case of Norris v. Trenholm, 209 Fed. 827, 126 C. C. A. 551, 31 Am. Bankr. Rep. 353, it is sufficient to say that in that case only fixtures were involved, and besides that the business sign statute was not mentioned or considered. The purpose of this business sign statute has been set out time and time again by the Supreme Court of this state as being intended to cut off all secret claims, so as to prevent the assertion against the creditors of the trader, to unite in him both possession and title. One of the most recent cases is that of Fitz Gerald v. American Mfg. Co., 114 Miss. 580, 75 South. 440.

"So far as I have been able to find, there is only one state in the Union which has a statute practically the same as ours, and that is Virginia. I think our statute must have been practically copied from theirs. This Virginia statute has been construed by the Circuit Court of Appeals of the Fourth Circuit on several occasions. In the recent case of Virginia Book Co. v. Sites, Trustee, 254 Fed. 46, 165 C. C. A. 456, it again passed upon their statute, which is therein set out in full. One Magee was a book seller, and had consigned to him books for sale under an unrecorded contract, by which the title to the books remained in the book company. Two days before the petition in bankruptcy was filed the book company took possession of its books then on hand, as it had a right to do under its contract. The court, after setting out the business sign statute, held that this property did not belong to the book company, but passed to the trustee.

"With this construction before me I am therefore of the opinion that the business sign statute of this state, in a case like the one in question before me would cut off any claim under a purchase-money lien, unless the claim was duly recorded, and, if recorded as to merchandise, it would be invalid. There will be an order therefore dismissing the petition."

James T. Crawley, of Kosciusko, Miss., for the bankrupt.
Leftwich & Tubb, of Aberdeen, Miss., for objecting creditors.

HOLMES, District Judge (after stating the facts as above). [1] The International Shoe Company had no lien upon the shoes in controversy because it sold said shoes to S. J. Shumaker for the purpose of resale in the mercantile business of the latter. See In re Matter of Wright & Weissinger, 47 Am. Bankr. Rep. 283, 277 Fed. 514; also Valier & Spiers Milling Co., Petitioners, v. George M. Foote, Trustee of J. F. Howard & Co., 277 Fed. 519.

[2] Furthermore, it does not appear from the record where the contract of sale was entered into, or where the shoes were delivered to the purchaser. Certainly the Mississippi statute can have no extraterritorial effect. If the transaction was consummated and delivery had beyond the limits of the state of Mississippi, then the title to the shoes was perfected in the purchaser before they were brought into the state, and the Mississippi purchase-money lien statute could not operate to give a lien in a transaction that took place under another sovereignty.

[3] In addition to what has been said in the Cases of Wright & Weissinger and Valier & Spiers Milling Company, supra, it may be added that, conceding the petitioner had a purchase-money lien, it was cut off by the Mississippi sign statute, viz. section 4784 of the Mississippi Code of 1906. Secret unrecorded liens of this kind were exactly the evils which the sign statute was intended to do away with.

The decision of the referee is correct, and will be affirmed.

UNITED STATES v. ONE PAIGE AUTOMOBILE et al.

(District Court, S. D. Texas, at Galveston. January 7, 1922.)

No. 690.

1. **Customs duties ⟸130—Intoxicating liquors ⟸245—Proceedings to forfeit vehicles used in importing liquor must be brought under National Prohibition Act instead of under customs laws.**

   Proceedings to forfeit vehicles used in the importation of liquor must be brought under the National Prohibition Act, § 26, protecting a bona fide lienor, and cannot be brought under the customs laws, permitting judgment of forfeiture invalidating bona fide lien; the National Prohibition Act having superseded the customs laws prohibiting the importation of liquor.

2. **Customs duties ⟸130—Intoxicating liquors ⟸251—Vehicles used in importation of liquor cannot be forfeited under customs laws for violation thereof in importation of bottles containing the liquor; lienors protected regardless of illegal importation.**

   Vehicles used in importation of liquor cannot be forfeited under the customs laws, permitting judgment of forfeiture invalidating bona fide lien, instead of under National Prohibition Act, § 26, protecting bona fide lienor, on the theory that there was direct violation of the customs laws in regard to the importation of the glass bottles containing the liquor, since the transaction cannot be split into separate parts so as to create two crimes, and since the Prohibition Act protects bona fide lienors regardless of the containers in which the liquor being imported is carried.

Libel by the United States against one Paige automobile, one lot of intoxicating liquor, sixty-two glass bottles, one skiff, and two pistols. Judgment forfeiting and condemning the vehicles, and establishing as valid a lien asserted against the automobile.

D. A. Simmons, Asst. U. S. Atty., of Houston, Tex.

HUTCHESON, District Judge. This case is a libel filed by the government to forfeit an automobile, liquor, and the bottles in which the liquor was contained, the skiff which transported them, and the pistols which were found in and about the skiff or on the persons of those concerned with the liquor. A conviction was had, and, there being no sufficient cause shown to the contrary by the owner of the vehicles, a judgment was entered in accordance with section 26 of title 2 of the Volstead Act (41 Stat. 315), forfeiting and condemning the vehicles, and establishing as valid a lien asserted against the automobile.

To the entry of this judgment the government objected on the ground that they had prosecuted the defendant under the customs laws (38 Stat. 114) for the violation of those laws, both as to the importation of the liquor and the bottles which contained the liquor, and that under the established law, beginning with United States v. One Black Horse (D. C.) 129 Fed. 167, and United States v. One Black Horse (D. C.) 147 Fed. 770, a lienholder was not protected against forfeiture.

Briefs were invited from the district attorney and the claimant of the lien, and the district attorney filed a very interesting and able brief, presenting his side of the contention. No briefs have been received from the claimant.

The position of the district attorney is briefly stated: (1) The National Prohibition Act, in prohibiting the importation of liquor except under the regulations provided for in said act, is not inconsistent with the provisions of the customs laws which require that goods be unladen and inspected, and that, since the government in this case expressly proceeded under the customs laws as well as the prohibition laws, they have a right to insist upon the forfeiture under either law applicable, and that, since under the construction given the customs laws a lienor, even though bona fide, is not protected, the government is entitled to a judgment of forfeiture invalidating the lien, though it is a bona fide one.

They say further that, even if, as to the importation of the liquor itself, it be held that the National Prohibition Act has superseded the customs laws prohibiting its importation, there was a direct violation of the customs laws in this case in regard to the importation of the glass bottles, which are themselves dutiable, and that the National Prohibition Law contains no provision which could in any manner be construed as inconsistent with the customs laws as to dutiable glass bottles.

[1] As to the first position of the district attorney, that the customs laws prohibiting the importation of liquor are still in force, and that prosecutions are still maintainable under those laws, this court is firmly fixed in the view heretofore expressed in other cases that the National Prohibition Law has undertaken to occupy the entire field of

liquor regulations as to liquor importations; that it expressly forbids, except upon regulations established under its authority, the importation of any kind of liquor; that it has for the violation of the act a comprehensive provision for penalties; and that prosecutions for liquor importation must be brought under its provisions.

I am further of the opinion that section 26 of the Prohibition Act expressly and comprehensively provides for the assertion and establishment of the bona fides of a lien, and makes the provision:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, * * * he shall take possession of the vehicle * * * and shall arrest any person in charge thereof"

—and thereafter provides for the proof, establishment, and protection of any bona fide lien created against said vehicle without the lienor having any notice that the carrying vehicle was being used or was to be used for the illegal transportation of liquor; it undertakes to comprehensively provide for the assertion and establishment of bona fide liens upon vehicles by whomsoever seized and for the protection of that lien against destruction when those bona fides have been established, and I am of the opinion that this protection has been in such plain and unmistakable language conferred by Congress as that to attempt to apply against a bona fide lienor the old judicial theory of the destruction of his lien which by judicial interpretation of the customs laws under those laws existed would be by inexcusable judicial legislation to set aside the plain, legislative will of Congress in order to bring about an effect which Congress has, by express terms, stated shall not arise under the enforcement of the liquor laws.

[2] Nor does the government strengthen its position by its effort to split the single offense of carrying liquor in a vehicle into two offenses, so as to afford two grounds of seizure, resting one upon the seizure of the liquor itself, and the other upon the seizure of the bottles in which the liquor was contained, for: (1) The splitting of a single transaction into separate parts so as to create two crimes, where only one exists, is not permitted in law, except under special and peculiar circumstances, as to the existence of which in this case, there is in my mind grave doubt; and (2) a complete and comprehensive answer to the government's position is that section 26 of the Prohibition Act, applicable to the seizure of vehicles for the transportation of liquor, provides for the complete protection of the lien, if bona fide, irrespective of the containers in which the liquor is carried, and for the court to deny the protection to the lien which section 26 extends to it because of the fact that the liquor was carried in bottles would be for the court to read into the statute conferring the right upon the lienor an exception which the statute does not even remotely contain.

It is therefore my opinion, and it will be so ordered, that the judgment of the court as entered be adhered to, and that judgment should be entered forfeiting the liquor and the vehicles, with the protection afforded the lienor as to his lien in the form and manner provided by statute.

GREEN v. COMMERCIAL BANK & TRUST CO.

(District Court, D. Wyoming. January 19, 1922.)

No. 1193.

1. **Pleading ⟸126—Answer held to state a "negative pregnant."**
In an action against a trust company on a deposit certificate, the answer admitting the certificate's execution, and defendant admitting deposit of the money by motion and affidavit for interpleader, and a portion of the answer denying that plaintiff delivered or deposited the money *held* evasive and to contain a "negative pregnant," which is such a form of negative expression as may imply or carry within it an affirmative.

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

2. **Banks and banking ⟸315(3)—Defendant trust company cannot plead fraud as against another party only and its interest in a matter ultra vires the corporation.**
In an action against a trust company on a certificate of deposit, the defendant should not be allowed to answer, alleging a fraud not directly perpetrated on the defendant, but on a third party, and that it was financially interested in the matter, which was ultra vires the corporation.

At Law. Action by George W. F. Green against the Commercial Bank & Trust Company. On plaintiff's motion to strike portions of defendant's answer and for judgment on the pleadings. Motion granted.

Henry T. Rogers, Lewis B. Johnson, Pierpont Fuller, Erl H. Ellis, and Frank A. Kemp, Jr., all of Denver, Colo., for plaintiff.

W. H. Taylor, of Cheyenne, Wyo., for defendant.

KENNEDY, District Judge. The above cause comes before the court upon motion of the plaintiff to strike portions of defendant's answer, and for judgment upon the pleadings. The action is one at law to recover upon a certificate of deposit in the amount of $10,000, issued by the defendant, through its cashier, payable to the order of the plaintiff in current funds, with a certain rate of interest after six months from its date. The certificate is the ordinary bank certificate of deposit drawing interest, and need not be set forth in detail.

The petition alleges the deposit of the money and the execution and delivery of the certificate; that after maturity, upon proper indorsement, the certificate of deposit was presented for payment in the regular course to the defendant, and payment refused by defendant. Before answer, the defendant interposed a motion for interpleader, supported by affidavit of defendant bank and trust company, by which it was made to appear that the money represented by the certificate of deposit was claimed by a third party, namely, the Lance Creek Royalties Company, and moved the court that that company be required to interplead, that the rights of all claimants to the money might be adjudicated by the court. The motion for interpleader was heard by Judge Riner and overruled.

The defendant thereupon filed its answer, which, for the purposes of disposing of this motion, may be briefly described in the following man-

ner: The defendant denied that on or about the date of the certificate the sum designated thereon was delivered to or deposited with the defendant by or for the plaintiff. Defendant admits that the certificate in controversy was executed by the defendant to the plaintiff. Then appears in the answer an attempted defense, in which it is alleged that the certificate of deposit was secured by misrepresentation and fraud, in that the plaintiff conspired with other named persons in connection with a contract involving certain oil properties with the Lance Creek Royalties Company; that upon consideration of this misrepresentation and fraud, and no other, said certificate was issued; that the defendant was financially interested in the matter of the representations in connection with the contract covering said oil properties, and relying upon said representations said certificate was issued; that the consideration for the said certificate of deposit entirely failed; that the plaintiff should not be entitled to recover; and that by reason of the allegations as briefly outlined above the defendant had been damaged, and seeks a recovery of $15,000.

The motion before the court seeks to strike out paragraph 4 of the answer, upon the ground that said paragraph is not a sufficient denial in law, is evasive, frivolous, and irrelevant, and is shown to be false and a sham by the sworn statements of the defendant set forth in its motion and affidavit for interpleader. It is especially contended by plaintiff that the defense is simply a negative pregnant, and should be treated by the court as an admission of the implied fact.

[1] As before stated, the answer admits the execution of the certificate, and the motion and affidavit for interpleader admits the deposit of the money for which the certificate was issued. The portion of the answer now challenged denies that the money was delivered or deposited by or for the plaintiff, which is clearly, in the opinion of the court, evasive, and comes within the classification of a pleading denominated as a negative pregnant. Such a pleading has been defined as "such a form of negative expression as may imply or carry within it an affirmative." In the case of Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, the court, in speaking of a pleading thus classified, says:

> "The denial of this charge was a mere negative pregnant, amounting only to a denial of the attending circumstances and legal consequences ascribed to the act."

This language fairly well describes the import of defendant's denial in the fourth paragraph of its answer. Such would be clearly true, at least, taking it in connection with other affirmative allegations of the answer.

[2] In those affirmative allegations hereinbefore briefly described, the defendant has attempted to base a defense to the action upon the certificate upon an alleged conspiracy between the plaintiff and certain other persons and a third party, who is not a party to this action. By the allegations of the answer the fraud alleged was not directly perpetrated upon the defendant but upon the third party. In addition is the allegation that the defendant was financially interested in the matter concerning which the representations, alleged to amount to a fraud,

were made. As to how a banking concern or a trust company could be financially interested in any contract concerning oil operations between two parties other than itself, this court cannot understand, nor has it been satisfactorily explained by counsel. Clearly any such financial interest would not only be ultra vires, but would be in violation of the banking laws of our state. If the defendant bank has permitted itself to be used through its officers in putting through private deals concerning oil operations, in issuing its certificates of deposit without a deposit of moneys as required by the banking laws, it is a situation which should not only be discouraged but frowned upon by the courts.

Moreover, it would establish a dangerous precedent to encourage a bank in repudiating its own solemn, written obligations for the purpose of defending the quarrels of its depositors and patrons. With paragraph 4 of the answer and affirmative allegations stricken from the pleadings, it leaves no defense, and the motion for judgment should obtain.

For the reasons stated, the motion will be granted, striking out the objectionable features referred to in the motion, and awarding judgment to the plaintiff as prayed in the petition, to which the defendant may have an exception.

BAY STATE WHOLESALE DRUG CO. v. POTTER.

(District Court, D. Massachusetts. January 12, 1922.)

No. 1409.

1. **Intoxicating liquors ⟸106(1)—Authority to revoke permits in Commissioner of Internal Revenue.**
   Under Prohibition Act, title 2, §§ 5, 9, providing for a hearing by the holder of a revoked permit to review the action of the commissioner, who by title 2, § 1, cl. 3, the "commissioner" is the Commissioner of Internal Revenue, and Regulation 60, § 16, delegating this power to the federal Prohibition Commissioner.

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

2. **Intoxicating liquors ⟸106(1)—No power in federal prohibition director to revoke permits.**
   A federal prohibition director has no power to revoke a liquor permit.

3. **Intoxicating liquors ⟸108(10)—Commissioners of Internal Revenue and federal Prohibition Commissioner parties to suit to review revoked permit.**
   Revocation of a permit being ultimately the act of the Commissioner of Internal Revenue, in a proceeding to review action of the federal prohibition director in revoking a liquor permit, the Commissioner of Internal Revenue and the federal Prohibition Commissioner are necessary parties.

4. **Equity ⟸38—Bill reviewing revocation of permit, etc., retained as proceeding for return of liquors unlawfully seized.**
   In a bill to review the action of a federal prohibition director in revoking a permit and for return of liquors, where the bill shows no valid revocation, and defendant is before the court and subject to its jurisdiction, the bill will be retained as a proceeding for the return of liquors illegally seized.

In Equity. Suit by the Bay State Wholesale Drug Company against Elmer C. Potter, Federal Prohibition Director. On motion to dismiss. Bill dismissed as to review of revocation of permits, but retained as proceeding for return of liquors illegally seized.

Arthur P. French, of Boston, Mass., for plaintiff.

Wm. J. White, Jr., Asst. U. S. Atty., of Lowell, Mass., and Elihu D. Stone, Asst. U. S. Atty., of Boston, Mass., for defendant.

MORTON, District Judge. The bill of complaint alleges that the complainant received permits issued by the Prohibition Commissioner under date of July 26, 1920, authorizing it to use intoxicating liquor in the manufacture of medical preparations and to sell intoxicating liquor for other than beverage purposes to persons authorized to purchase it; that on September 8, 1920, while its permits were outstanding, a lot of liquors described in the petition, of which it was rightfully in possession, were wrongfully seized by a federal prohibition agent, and are now under the control of the respondent as federal prohibition director for this district; that on January 26, 1921, Mr. Daniel F. O'Connell, then federal prohibition director for this district, duly notified the complainant to appear before him and show cause why the permits to it above referred to should not be canceled for violations of the provisions of the Prohibition Act (41 Stat. 305); that a hearing was held, and that on March 12, 1921, an order was made by Mr. O'Connell canceling and revoking the permits upon the grounds that the complainant had violated certain sections of the Prohibition Act and had not in good faith conformed to the act and to the terms of the permits. The bill charges that this action of Mr. O'Connell was without warrant in fact or law; that the seizure of liquor on or about September 8th was also illegal; that the retention of the liquor seized is illegal; and that the complainant is entitled to the return of it. The prayers of the bill are that the action of Mr. O'Connell, as prohibition director, in revoking and canceling the permits, be set aside, and that an order be entered directing the return of the seized liquor.

[1, 2] Permits of the character in question are provided for by the Prohibition Act and in the regulations under it. The act also provides (title 2, §§ 5 and 9) that a permit may be revoked after notice and hearing, and that the holder of a revoked permit may "by appropriate proceedings in a court of equity have the action of the Commissioner reviewed." Title 2, § 5. The "commissioner" referred to in the act means the Commissioner of Internal Revenue. Title 2, § 1, cl. 3. He is the official who, under the section referred to, has the authority to revoke such permits. By regulation 60 the Commissioner of Internal Revenue delegated this power to the federal Prohibition Commissioner. Regulation 60, § 16.

It thus appears that the power to revoke the permits here in question was, at the time in question, lodged in the federal Prohibition Commissioner. There is nowhere any delegation of his power to the federal prohibition director. On the allegations of the bill, however, the Commissioner did not pass upon the revocation of these permits, which is alleged to have been done by Mr. O'Connell as prohibition director. He

had no power so to act. On the allegations of the bill there has not been a valid revocation of the permits, nor any proceeding proper in form to accomplish that result. It follows that there is nothing on which the bill in equity, under sections 5 and 9, to review the alleged revocation, can be based.

[3] Moreover, considered as a proceeding to review the action of the Commissioner in revoking a permit, the bill is fatally defective in parties. Revocation is the act ultimately of the Commissioner of Internal Revenue. According to the regulations, he acts through the federal Prohibition Commissioner. The Commissioner of Internal Revenue, or the federal Prohibition Commissioner, or perhaps both, are necessary parties to such a suit as this. Neither is a party to this bill or is before the court.

[4] There remains the question whether the bill can properly be retained as a proceeding for the return of liquor illegally seized. Upon this point it alleges an illegal seizure of the complainant's property, which is now being unlawfully held by the respondent, and it prays for an order directing the return of the property. Due service has been made upon the respondent, who holds the property, and he is now before the court and subject to its jurisdiction. In this respect the bill seems to me sufficient, and to come within cases already decided. For this purpose, and this alone, the bill will be retained, and the motion to dismiss overruled. So far as the bill seeks to review the revocation of the permits, it states no case, and lacks necessary parties, and the motion to dismiss on these points is sustained.

Ordered accordingly.

SEAMAN v. MILLER, Alien Property Custodian, et al.

(District Court, E. D. New York. November 10, 1921.)

Equity ⊜437—District Court may restrain transfer of stock issued to avoid effect of decree.

The District Court, on motion of a party, whose right to 490 of 500 shares of stock of a corporation was established by its decree, in an action of which it had jurisdiction, may restrain the transfer or assignment of additional shares issued to avoid the effect of such decree.

Motion by Elizabeth C. Seaman for injunction pendente lite restraining Thomas W. Miller, as Alien Property Custodian of the United States, and others, from transferring stock of a corporation. Objection to jurisdiction of court overruled.

Booth & Hewitt, of New York City (Spier Whitaker, of New York City, of counsel), for complainant.

Griggs, Baldwin & Baldwin, of New York City (Martin Conboy, of New York City, of counsel), for defendants Steel Barrel Co. of America and Paul Towner.

GARVIN, District Judge. This is a motion by plaintiff for an injunction pendente lite, restraining the defendants Cochrane, Towner,

and Steel Barrel Company of America, Inc., from transferring, assigning, or attempting to transfer or assign to any one 750 shares of the capital stock of defendant Steel Barrel Company of America, Inc., which were issued by that company for the obvious purpose of avoiding the effect of a decree of this court following a trial of the action of Cochrane v. Garvan et al., decided heretofore and reported at 263 Fed. 940. The stock appears to have been actually issued before the decision was announced.

The defendants Steel Barrel Company of America and Towner appear specially for the purpose of questioning the jurisdiction of the court, upon the ground that the facts in this controversy are not germane to the original action. The relief demanded by the plaintiff in the suit at bar is that the action of the stockholders of the Steel Barrel Company of America in increasing its capital stock from 500 shares to 1,250 shares be declared illegal, null, and void, and that the Alien Property Custodian and the Steel Barrel Company of America be ordered, directed, and required to transfer to plaintiff upon the records and books of said corporation 490 shares out of a total authorized capital stock of 500 shares of said Steel Barrel Company of America, and that the latter company be ordered and required to issue and deliver to plaintiff a certificate representing said 490 shares.

I have carefully examined all the authorities submitted by the defendants who appear specially, and I do not find that any of them even suggests that a party whose rights have been fixed and settled by a decree of a federal court made in an action of which that court concededly had jurisdiction, is without remedy to enforce those rights by way of supplemental bill and bill of revivor against an attempt to render worthless the relief granted by the court in the original suit. If solemn judgments of the court are thus to be set at naught, by parties who fear a result unfavorable, decrees are meaningless, and one of the great branches of the government, through which justice is intended to be secured, is shorn of power. I regard the action of these defendants as a deliberate, willful, and premeditated attempt to avoid the effect intended by the court to follow its decision—a decision which no party affected thereby attempted to review.

The objection to the jurisdiction of the court is overruled, and the motion may be argued upon the merits as soon as counsel find it convenient.

REDMAN v. SMITH.

(Court of Appeals of District of Columbia. Submitted November 9, 1921. Decided December 5, 1921.)

No. 3497.

1. **Trial ⟸260(1)—Correct request, already covered, need not be given.**
   Requests to instruct on a subject fully and correctly covered by the general charge need not be given, even though they were correct in law and applicable to the case.
2. **Trial ⟸260(9)—Requested charge to find for defendant, if he indorsed notes for plaintiff's accommodation, held covered.**
   A requested instruction that, if defendant indorsed the notes for the accommodation of plaintiff, he would not be liable, though the indorsement was also for the benefit of the makers, was covered by the charge to find for defendant, if he indorsed the notes for the accommodation of plaintiff, but otherwise for the plaintiff, and that it was not sufficient that defendant was an accommodation indorser only, but the question was whether he indorsed for the accommodation of the plaintiff.
3. **Bills and notes ⟸538(1)—Request denying recovery, if indorsement was to further deal, held improper.**
   A requested instruction, that defendant was not liable if he indorsed the note sued on to further the consummation of the contract between plaintiff and a lumber company, was erroneous, and properly refused, where there was no question but that he indorsed for that purpose, but there was evidence that his indorsement was for the accommodation only of the lumber company, and that plaintiff had no knowledge of the conditions on which defendant's indorsement had been procured by the makers.

Appeal from the Supreme Court of the District of Columbia.

Action by A. C. Smith, against Samuel C. Redman, revived in the name of Edwin J. Smith after the death of the original plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry E. Davis, of Washington, D. C., for appellant.

Vernon E. West, of Washington, D. C., for appellee.

SMYTH, Chief Justice. W. T. Redman & Co. made and delivered to A. C. Smith several promissory notes, which were indorsed before delivery by Samuel C. Redman, under the name of S. C. Redman. The notes, having been duly presented for payment, were dishonored. Due notice thereof was given to Samuel C. Redman, who failed to pay them. Thereupon this action was brought. A. C. Smith died after the institution of the action, and it was revived in the name of Edwin J. Smith. From a judgment in favor of the plaintiff, Samuel C. Redman brings the case here for review.

He asserts that he signed the notes for the accommodation, not only of W. T. Redman & Co., but also for that of Smith, the payee. It is admitted that he was an accommodation indorser for the benefit of the former, but it is denied that he was for the latter. Three errors are assigned, all of which relate to the refusal of the court to give certain instructions bearing upon the question as to whether or not Samuel C. Redman signed for the accommodation of Smith.

[1] Appellee says the subject was fully and correctly covered by the instruction given by the court in its general charge. If this be true, there was no error in refusing the requests (Finney v. District of Columbia, 47 App. D. C. 48, L. R. A. 1918D, 1103; Sinclair v. United States, 49 App. D. C. 351, 265 Fed. 991; Smith v. United States, 50 App. D. C. 208, 269 Fed. 860), even if we assume they were correct in point of law and applicable to the case.

Smith was the owner of a tract of timber land and a sawmill located thereon, which he sold to the McQuay Lumber Company, a corporation, upon an agreement whereby the latter was to pay him a stated sum, $1,000 in cash, and the balance in monthly installments of $1,000. Upon the completion of the payments, Smith was to give the company a warranty deed to the property. The cash payment was not made, but in place thereof Smith accepted the note of the company for the amount. The company, in time finding itself unable to carry out its agreement, entered into an arrangement with McQuay, its president, and one William T. Redman, a relative of the defendant, under the name of W. T. Redman & Co., whereby they were to help the lumber company. Later W. T. Redman & Co. attempted to raise money from certain parties upon notes signed by them, payable to McQuay, and indorsed by Samuel C. Redman. In this they were unsuccessful. They then applied to Smith to take the notes, but he declined, saying, however, that, if McQuay would have the notes made payable to his (Smith's) order, he would discount them at his bank, take up the lumber company's note for $1,000 to himself, and turn over the remainder to W. T. Redman & Co. This was done, the notes first having been indorsed by the defendant.

Defendant testified in effect that he knew, from conversations with Redman and McQuay, the purposes for which they needed the notes, but says that he had no conversation with the plaintiff before he indorsed the notes; nor is there any testimony that the plaintiff either directly or indirectly requested the defendant to indorse them. Defendant says that he indorsed the notes with the understanding that he was accommodating Smith, as well as the others. Suppose this to be true; Smith was in no wise responsible for his understanding. No one says that Smith had any intimation that Redman was an accommodation indorser. So far as Smith knew, the defendant was an indorser for value, and Smith dealt with the notes on that theory.

[2] The instruction requested said in effect that, if the defendant indorsed the notes for the accommodation of Smith, he would not be liable, even though the jury should find that he also indorsed for the benefit of the makers of the notes. Nor would he be liable, according to the requests, if the jury found that he had indorsed the notes before delivery for the purpose of aiding in the carrying out of the contract between the plaintiff and the lumber company. These requests were refused.

The court, however, told the jury that, if defendant indorsed the notes for the accommodation of Smith, their verdict should be for the defendant, but that, if he did not, their verdict should be for the plaintiff. Further charging the jury the court said:

"It is not enough for you to decide that Mr. S. C. Redman was an accommodation indorser only. The question is whether he is an accomodation indorser for the benefit of Smith; whether he accommodated Smith, or whether, which is what he said himself at one point of his testimony, he indorsed this paper for the accommodation of his relative and Mr. McQuay."

This statement was repeated in variant forms by the court, so that the jury must have clearly understood that, if the notes were signed for the accommodation of Smith, the verdict should be for the defendant.

[3] The request which asked the court to say to the jury that the defendant had indorsed the notes to the end that the carrying out of the contract between the plaintiff and the lumber company "might be furthered and aided" was improper, and should not have been granted. No one denies that he indorsed for that purpose, but there is not a particle of evidence that he did so at the request of Smith, or that the latter had any knowledge of the conditions upon which his indorsement had been procured by the makers of the notes. Smith's only suggestion in that regard was that, if the makers would change the form of the notes, so that they would be made payable to him, instead of to McQuay, he could handle them. At this time, as we have seen, S. C. Redman's name was on the notes as an indorser. Owing to the infirmity we have just pointed out, the court was not required to yield to the request. Jackson v. United States, 48 App. D. C. 272.

There is no occasion for the consideration of decisions cited by appellant, where under certain facts a party was held to have indorsed for the accommodation of the plaintiff. It is conceded here by appellant that there was evidence sufficient to support a verdict against him, if the jury so found. He did not ask for an instructed verdict, but that the matter go to the jury for its determination; his theory being that there was evidence tending to show that he accommodated Smith. That theory, we have shown, was fully and fairly submitted to the jury, and was found to be unwarranted by the testimony. He has, therefore, no cause for complaint.

The judgment is affirmed, with costs.

Affirmed.

DETROIT & T. S. L. R. CO. v. INTERSTATE COMMERCE COMMISSION.

(Court of Appeals of District of Columbia. Submitted November 8, 1921. Decided December 5, 1921.)

No. 3697.

1. **Courts ⇐522—Jurisdiction first to attach is exclusive.**

Where another federal court had obtained jurisdiction over a suit to determine which of two railroads was entitled to a fund, that jurisdiction is exclusive, and the District of Columbia courts will not entertain certiorari to compel the Interstate Commerce Commission to credit the amount of that fund as part of the operating revenue of one of the railroads, in determining the compensation to which it was entitled while under federal control, which would involve the determination of the right of that railroad to the fund.

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

2. **Certiorari ⊜29—Not issued to review decision of administrative body within jurisdiction.**
   Certiorari will not issue to an administrative officer or body to review a decision in a matter over which the officer or body had jurisdiction.
3. **Commerce ⊜85—Decision of right to deduct from operating income held within Interstate Commerce Commission's jurisdiction.**
   Under Act March 21, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾a), making it the duty of the Interstate Commerce Commission to ascertain the average annual operating income on which the compensation of a railroad during federal control was to be based, it was necessary for the Commission to determine what items should be included in the income, and a decision deducting from the income the item in controversy was within its jurisdiction, and not reviewable by certiorari.
4. **Commerce ⊜88—Certiorari does not issue to review decision of Interstate Commerce Commission.**
   A writ of certiorari should not issue to review a decision of the Interstate Commerce Commission, even if such decision was beyond its jurisdiction, especially where the Commission's action was not final under the statute.

Appeal from the Supreme Court of the District of Columbia.

Petition for certiorari by the Detroit & Toledo Shore Line Railroad Company against Interstate Commerce Commission. From a judgment dismissing the petition, petitioner appeals. Affirmed.

S. McC. Hawken and Alfred G. Hagerty, both of Washington, D. C., for appellant.

P. J. Farrell, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The court of first instance denied the appellant's petition for a writ of certiorari, which would command the Interstate Commerce Commission to certify to the court the record upon which the Commission refused certain relief prayed for, and the appellant brings the case here, alleging error and asking for a reversal.

By an act of Congress approved March 21, 1918 (40 Stat. 451; Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), provision is made for compensating the owners of railroads brought under governmental control during the World War. It is provided therein that the President may make an agreement with each carrier to pay it annually during the period of federal control a sum "equivalent as nearly as may be to its average annual railway operating income for the three years ending June 30, 1917." For the purpose of furnishing a basis for the agreement it is made the duty of the Interstate Commerce Commission to ascertain the average annual railway operating income during the period mentioned and certify it to the President, and its certificate, for the purposes of the agreement is to be taken as conclusive. Section 1.

It is further provided that, in the event the President and the carrier are not able to agree upon the amount, the carrier's claim for compensation may be submitted either by the President or the carrier to a board consisting of three referees to be appointed by the In-

terstate Commerce Commission, which is given authority to summon witnesses, require the production of records, etc., view the property of the carrier, administer oaths and hold hearings wherever the convenience of the parties may require. The President is authorized to make an agreement with the carrier based on the finding of the board, but if he and the carrier cannot agree, either the United States or the carrier is given the right to apply to the Court of Claims to determine the amount which the carrier is justly entitled to, and the court is required to give the matter precedence and expedite its disposition in every practicable way. Section 1.

In the process of ascertaining the average annual railway operating income of the appellant, the Commission's attention was directed by the appellant to an item of $164,800, which, it claimed, had been erroneously deducted on its books from its operating revenues during the test period, and it sought authority from the Commission to change its books by eliminating the deduction.

The elimination, if permitted, would have had the effect of increasing appellant's operating income by the amount of the item. Appellant also directed attention to the fact that the item in question represented a claim made by another carrier against it, and that this claim was in litigation in the federal court for the Eastern district of Michigan, Southern division, at the time the request was made. The authority was denied, and the Commission in its certificate treated the amount as it found it on the books of the appellant.

[1] Before the writ could be granted it would be necessary for the court to decide that the item of $164,800 should not be deducted; but whether it should be or not is, in effect, the question before the federal court in Michigan. If the plaintiff in the action there pending succeeds, it must be deducted. The jurisdiction of that court, being the first to attach, is exclusive, and we have no right to interfere with it. In re Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Insurance Co. v. Dunn, 19 Wall. 214, 22 L. Ed. 68; New Orleans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

[2] The Interstate Commerce Commission is an administrative body. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047. Recently we had occasion to consider whether or not a writ of certiorari would issue to an administrative officer for the purpose of reviewing his decision in a matter over which he had jurisdiction, and we held, following a decision of this court (Degge v. Hitchcock, 35 App. D. C. 218), affirmed by the Supreme Court of the United States (229 U. S. 162) 33 Sup. Ct. 639, 57 L. Ed. 1135), that it would not. Mickadiet v. Payne, 269 Fed. 194, 50 App. D. C. 115.

[3] Appellant recognizes the soundness of this rule, but seeks to escape its effect by endeavoring to show that the Commission acted outside of its jurisdiction. The Commission was charged with the duty of ascertaining the operating income of the company. In performing that duty it was necessary for it to determine what items should be included in the income and what should not be. It therefore

was acting within its jurisdiction when it decided that the item of $164,800 should be treated as the company had treated it on its books, namely, as a deduction.

[4] Even though the Commission had acted outside of its jurisdiction, the writ should not issue. In Degge v. Hitchcock, supra, the Supreme Court of the United States was asked to decide whether or not the writ would issue to review the action of the Postmaster General denying to Degge the use of the mails. The court, after stating that the order was administrative, said that this—

"was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final, unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for, had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Philadelphia Co. v. Stimson, 223 U. S. 605, 620. The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice."

Here, as we have seen, the action of the Commission was not final, for the carrier had the right to apply to the board of referees, and, if not satisfied by its decision, to the Court of Claims.

We think the judgment discharging the rule and dismissing the petition was clearly right, and it is affirmed, with costs.

Affirmed.

UNITED STATES ex rel., MEMBERS OF WASTE MERCHANTS' ASS'N OF NEW YORK, VOLUNTARY ASS'N, v. INTERSTATE COMMERCE COMMISSION.

(Court of Appeals of District of Columbia. Submitted April 4, 1921. Decided December 5, 1921. Writ of Error to Remove Cause to Supreme Court of United States Allowed December 24, 1921.)

No. 3498.

1. Commerce ⇐85—Interstate Commerce Commission is required to allow compensation for services performed by shipper.

Under the amendment to Interstate Commerce Act, § 15, by Act June 29, 1906, § 4 (Comp. St. § 8583), providing for compensation to the owner of property transported for services rendered by such owner, the owner of the goods, who loaded them into the cars, though the loading was included in the services for which the tariff rate was fixed, is entitled to reasonable compensation for such services, even though the agreement it should load the goods was for the mutual benefit of the owner and the carrier, and the statute requires the Commission to fix a reasonable allowance for such services, and was not intended merely to prohibit an excessive allowance.

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2. Carriers ⇐32(2)—Allowance for shipper's services cannot be denied in one case and allowed in similar case.

Since reasonable compensation by a carrier to a shipper for legitimate services rendered by the shipper is not a rebate or discrimination, the Interstate Commerce Commission may not allow compensation for such services in one case, and withhold it in another case, where similar services have been performed, for such a course would constitute discrimination.

3. Carriers ⇐32(2)—Shipper's service in loading held bona fide.

The test of the right of a shipper to compensation for services rendered is whether there was a reasonable and proper basis for the performance of the services, and there was such basis when the shipper loaded goods which it was the carrier's duty to load under its published tariff, on the carrier's suggestion that, because of labor shortage due to the war, there would otherwise occur delay in loading.

4. Mandamus ⇐101—Lies to compel Interstate Commerce Commission to perform statutory duty.

Where the Interstate Commerce Commission refused to award compensation for the services rendered to the carrier, because it misconceived the effect of the statute requiring such compensation as that statute had been interpreted by the Supreme Court, the shipper is entitled to mandamus to compel said Commission to make such allowance.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of the members of the Waste Merchants' Association of New York, Voluntary Association, against the Interstate Commerce Commission. From a judgment dismissing the petition, relators appeal. Reversed and remanded.

Alexander H. Bell, Percy H. Marshall, and F. J. Rice, all of Washington, D. C., for appellants.

P. J. Farrell, of Washington, D. C., for appellee.

ROBB, Associate Justice. This appeal is from a judgment in the Supreme Court of the District dismissing appellant's petition for a writ of mandamus directing the appellee, Interstate Commerce Commission, to fix the amount of damages or compensation to which appellant alleges it is entitled for services performed for the carriers in connection with the loading of certain freight shipped by it. The case was disposed of on petition, answer, and demurrer to the answer.

Ordinarily, shippers are required to load carload freight, but carriers serving New York Harbor points, owing to conditions peculiar to that locality, have undertaken this work, and a charge therefor is included in their published tariff rates. In the early part of 1917, shippers of paper stock from New York were informed by the carriers that labor was so scarce and difficult to obtain that the service of loading cars must be performed by the shippers, and thereafter this service was performed by appellant as to freight shipped by it from that point, to the extent of many thousand carloads. A controversy having arisen as to compensation for the performance of this service by the shippers, a complaint was filed by them with the appellee Commission. An examiner was appointed, and the undisputed evidence adduced was to the

effect above indicated. The examiner recommended that the shippers receive as reparation an amount to be determined on the basis of 12 cents per ton and a minimum of $2 per car. A hearing before the Commission resulted in a report on June 1, 1920—the Commission holding that the variance from the practice of the tariff undertakings was as much in the interest of the shippers as of the carriers; that the rates collected were not unreasonable, unjustly discriminatory, or unduly prejudicial for the transportation service rendered, although, in reviewing the evidence, the Commission found:

"There is no evidence to indicate that the rates or the charges paid on complainant's shipments were excessive for the total transportation service actually rendered to them by the carriers, *excluding loading.*" (Italics ours.)

In its report the Commission said:

"It is undisputed that defendants did not load a large part of complainant's members' paper stock into cars during this period, contrary to their tariff undertaking, and that employees of these shippers actually performed the loading service."

The Commission then pointed out that, owing to unusual conditions, it was to the advantage of the shipper to be permitted to do the loading, as otherwise there would have been great delay and a corresponding limitation in the amount shipped. The Commission then said:

"Either the carriers or the shippers suggested that the movement of paper stock would be facilitated, if the shippers were willing to load their paper stock into empty cars for out-bound movement. The evidence is somewhat conflicting as to the origin of this suggestion. However, from the evidence as a whole, there is little doubt that an agreement, tacit or expressed, was arrived at between the carriers and the shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks onto the piers of the former with but short periods of waiting."

This arrangement the Commission found to have been "for the mutual benefit of both parties under the extraordinary conditions of war times," but also said:

"It is obvious as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to incur the expense of loading by means of their own employees."

Further allusion to the departure of the carriers from their published tariffs was made in these words:

"For any failure to observe their published tariffs the carriers may be answerable in another process."

[1] In section 15 of Act Feb. 4, 1887, c. 104, as amended by section 4 of Act June 29, 1906 (34 Stat. 584; Comp. St. § 8583[8]), amending "An act to regulate commerce," it is provided:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, * * * determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered

or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

In Interstate Com. Comm. v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, it was held that contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, did not amount to illegal discriminations or rebates when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time to their own advantage. It was further held that the act of 1906 contemplates payment of reasonable compensation by carriers for services rendered or facilities furnished by owners of property transported, *the only power of the Commission being to determine the maximum of such compensation.* After quoting that part of section 15 above set forth, the court said:

"Thus Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result."

Later in the opinion the court said:

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15, the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act June 18, 1910, c. 309, § 12, 36 Stat. 539, 551."

In Union Pac. R. R. v. Updike Grain Co., 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. 171, where a railroad company had refused to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad, because of failure to return cars within an unreasonable time fixed by that railroad, the court said:

"When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose. Having earned the compensation, the elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association, of which the Union Pacific was a member and over which the elevator companies had no control."

It thus appears that the Supreme Court, prior to the ruling of the Commission in this case, had interpreted section 15 as clearly contemplating that for any legitimate service performed for the carrier by a shipper the Commission, either upon its own motion or after complaint, should make a reasonable allowance. In the present case the Commission has found that service was performed, but it has declined to make any allowance whatever, because satisfied that the arrangement was to the mutual advantage of the parties. The Commission in its report said:

"Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience," and that section 15 of the act "is intended merely to provide against excessive allowances."

This conclusion, in our view, is inconsistent with the interpretation placed upon the statute by the Supreme Court. It must be presumed that every arrangement contemplated by the statute would be to the mutual advantage of the parties, else it would not be entered into in the first place. There is nothing in the statute upon which to base a conclusion that Congress intended to withhold compensation from shippers performing proper services for a carrier, where, as here, the arrangement was for their mutual advantage, the theory of the statute evidently being that the carrier, receiving from the shipper services which, under the carrier's tariff schedules, it was obligated to perform, should in fairness be compelled to make reasonable allowance therefor—and this, as we read its decisions, is what the Supreme Court has held.

[2, 3] In view of the surrounding circumstances as disclosed by the record, and the absence of a finding to the contrary by the Commission, it is fair to assume that when these services were performed by the shippers they expected to be reasonably compensated therefor. Certainly it is nowhere suggested that their arrangement with the carriers did not contemplate compensation. The Supreme Court having held that reasonable compensation to a shipper for legitimate services rendered the carrier does not constitute a rebate or discrimination, it logically follows that the Commission may not allow compensation in one case and withhold it in another, where similar services have been performed, for such a course would constitute discrimination in favor of one shipper and against the other. In our view, the test as to the right to compensation is the bona fides of the transaction—whether, in the light of surrounding circumstances, there was a reasonable and proper basis for the performance of the services.

That there was such a basis in the present case is not disputed. The carrier could not fulfill its tariff undertaking and entered into an arrangement with the shipper whereby the shipper in good faith performed services which, under the law, the carrier should have performed. Under these facts, the shipper was "entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed." United States v. Balt. & Ohio R. R. Co., 231 U. S. 274, 293, 34 Sup. Ct. 75, 81 (58 L. Ed. 218).

[4] The question then presents itself as to whether mandamus is the proper remedy. The solution of this question likewise is to be found in a decision of the Supreme Court. In Kansas City So. Ry. v. Interstate Com. Comm., 252 U. S. 178, 40 Sup. Ct. 187, 64 L. Ed. 517, the Commission had failed to give force and effect to a statute requiring it to report, inter alia, the present cost of condemnation and damages or of purchase of the lands, rights of way and terminals of carriers in excess of their original cost or present value, apart from improvements. After stating the case the learned Chief Justice, who wrote the opinion, said:

"It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. * * * We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess."

In the present case the Commission's conclusion of law is inconsistent with its finding of fact, and this inconsistency results from a misconception of the statute, as interpreted by the Supreme Court. The complaint is not that the Commission has erred in the exercise of its discretion, but rather that its failure to give effect to the plain mandate of the statute amounts to a refusal to exercise any discretion under the statute. This circumstance, as indicated by the Supreme Court in the case just reviewed, justified the remedy sought, no other adequate remedy being available.

The judgment is reversed, with costs, and the cause remanded, with directions to issue the writ.

Reversed and remanded.

SMYTH, Chief Justice, dissents.

GRACIE v. AMERICAN SECURITY & TRUST CO. et al.

(Court of Appeals of District of Columbia. Submitted November 10, 1921. Decided December 5, 1921. Supplemental Opinion December 20, 1921.)

No. 3503.

1. **Wills ⟸248—Probate jurisdiction governed by local law.**
   The probate of wills is controlled entirely by local law, so that the District Code alone determines whether the equity branch of the Supreme Court has jurisdiction to establish a lost will.

2. **Courts ⟸472(4)—Jurisdiction of probate court to establish lost will is exclusive.**
   Under Code of Law 1901, §§ 116, 117, 119, 135, 136, relating to probate of wills, the jurisdiction of the probate court, which is a special term of the Supreme Court, over probate matters is exclusive, and the equity branch of the Supreme Court has no jurisdiction over a cross-bill seeking to establish a lost will.

Supplemental Opinion.

3. **Courts ⟸483—Cross-bill to establish lost will transferred to probate court.**
   A cross-bill filed in a suit in equity in the Supreme Court, praying for the establishment of a lost will, should be transferred to the probate court under Code of Law 1901, § 1535b, as added by Act April 19, 1920, and not dismissed.

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

Appeal from the Supreme Court of the District of Columbia.

Interpleader by the American Security & Trust Company against Constance Schack Gracie and Dunbar B. Adams and others, in which Constance Schack Gracie filed a cross-bill, asking, among other things, for the probate of a lost will. From a decree dismissing the cross-bill, in so far as it sought the probate, the cross-complainant appeals. Decree affirmed, in so far as it held the court was without jurisdiction over the probate, and the court below directed to transfer that aspect of the cross-bill to the probate court.

Hannis Taylor and Hannis Taylor, Jr., both of Washington, D. C., for appellant.

A. A. Hoehling, Jr., S. C. Peelle, C. F. R. Ogilby, and Enoch A. Chase, all of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellant's cross-bill, seeking, inter alia, to establish an alleged lost will of personal property.

Edith Temple Gracie Adams, over whose estate this litigation arose, died in the city of New York on December 31, 1918. On February 26, 1919, letters of administration upon her estate were granted in New York to Dunbar B. Adams, her surviving husband, and in May following ancillary letters of administration were granted him by the Supreme Court of this District, holding probate court. Inasmuch as the major part of decedent's estate in this jurisdiction was in a safe deposit vault of the American Security & Trust Company, counsel for Mrs. Constance Schack Gracie, mother of Mrs. Adams, notified the Trust Company that Mrs. Gracie claimed the estate. Thereupon the Trust Company filed a bill of interpleader in the Supreme Court, naming Mr. Adams and Mrs. Gracie defendants. Separate answers were filed by the parties, and Mrs. Gracie also filed a cross-bill, in which she averred, upon information and belief, that her daughter, Mrs. Adams, shortly before her death, "executed, before two witnesses and according to law, her last will and testament, devising and bequeathing to the plaintiff in this cross-bill, as her sole devisee, her entire estate, wherever situated, excepting only a few jewels or trinkets to a friend." In the prayers of this cross-bill, the court was asked, after proof of its execution and contents by secondary evidence, to "set up, establish, probate, and enforce said last will by all proper decrees according to the rules which regulate the jurisdiction of a court of equity."

The court sustained a motion by the appellee Adams to dismiss this aspect of the cross-bill, upon the ground that a court of equity in this jurisdiction has no power to set up a lost will of personalty. Other questions were raised by the cross-bill, but, owing to the view we take of the main question, it is unnecessary to consider them at this time.

[1] The probate of wills is controlled entirely by local law, "for it is that law which confers the power to make a will, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between

parties, can arise until preliminary probate has first been made." Ellis v. Davis, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006. It becomes apparent, therefore, that the provisions of our local law, as set forth in the District Code, must control the question whether the equity branch of the Supreme Court has any jurisdiction to establish a lost will relating to personal property.

Our probate court is a branch of the Supreme Court, and its powers are fully set forth in the Code. Section 116 prescribes that a special term of the Supreme Court shall be known as the probate court, and that the justice holding this court shall have and exercise all the powers and the jurisdiction held and exercised by the orphans' court of Washington county, District of Columbia, prior to June 21, 1870. In section 117 it is provided that, in addition to the jurisdiction conferred in section 116, "plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate * * * shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons res judicata, subject, nevertheless, to the provisions hereinafter contained." Section 119 empowers the probate court "to take the proof of wills of either personal or real estate and admit the same to probate and record, and for cause to revoke the probate thereof; to grant and, for any of the causes hereinafter mentioned, to revoke letters testamentary, letters of administration," etc. In section 135 there is a proviso "that in no case shall any will or testament be admitted to probate and record save upon formal proof of its proper execution," and section 136 and following sections prescribe the procedure to be followed in event of a contest.

[2] It thus appears that our probate court has been clothed with full and complete jurisdiction to take proof of wills of either personal or real estate, and to admit the same to probate and record. That it was the intent of Congress to make this jurisdiction exclusive is too plain to admit of serious doubt. When we come to consider that this probate court is a branch of the Supreme Court, and possesses all necessary power in the premises, it becomes apparent that there is every reason for assuming that Congress, having established this special court for this special purpose, intended its jurisdiction to be exclusive. This question was quite fully considered in Fitzgerald v. Wynne, 1 App. D. C. 107. There land had been conveyed in trust for a Mrs. Keenan, the trustee to convey as she might direct in any instrument of writing in shape of a last will or testament, and, in the absence of such instrument, to her heirs at law. Some years after Mrs. Keenan's death her next of kin filed a bill to compel the trustee to execute the power of conveyance to them. Her husband, who had been receiving the rents and profits from the estate, interposed an answer in which he attempted to set up a lost will. The court said:

"The fact that the will had been illegally destroyed or lost did not, by any means, preclude the beneficiaries thereunder from taking proceedings and having the will established and admitted to probate, on due proof. Sugden v. Lord St. Leonards, 1 Prob. Div. 154. But such proceedings should have been taken as preliminary to setting up the will as the foundation of a right or claim to an estate in a litigation inter partes. * * * This, as we have seen, is not a proceeding for the establishment of the will. If Mrs. Keenan made a will and left it uncanceled and unrevoked, and the party claiming under it intended to make it a muniment of title and a medium of evidence, he should, by petition, have invoked the probate jurisdiction of the Supreme Court of this District, and offered to prove the due execution and contents of the alleged destroyed will, and have the same, upon proof, admitted to probate."

Being clearly of the view that the jurisdiction of the probate court in this case is exclusive, it follows that we must affirm the decree.

Decree dismissing cross-bill affirmed, with costs.

Supplemental Opinion.

[3] Appellant has filed a motion for rehearing, and has suggested, for the first time, that "it was manifestly the duty of this court, not to affirm the dismissal of the first aspect of the cross-bill, but to transfer the trial of that issue presented by it to the probate court, under the terms of the statute approved April 19, 1920 (41 Stat. 555), and now known as section 1535b of the District Code."

In conformity with this suggestion, the decree below will be affirmed, with costs, in so far as it holds that the equity court is without jurisdiction to set up a lost will as to personalty, and the court below is directed to transfer this aspect of appellant's cross-bill to the probate court on appellant's application, if made within 20 days from the going down of the mandate.

VICORY v. TOTARO et al.

(Court of Appeals of District of Columbia. Submitted November 9, 1921. Decided December 5, 1921. Motion to Rehear or Modify Denied December 31, 1921.)

No. 3495.

1. **Certiorari ⇐44—Writ granted on petition presented before filing was properly quashed.**
   Under Supreme Court rule 22, providing that applications for certiorari shall be heard by the court or before one of the justices at chambers, but not until a petition has been filed and docketed, a writ of certiorari issued to the municipal court was properly quashed, where the petition had not been filed or docketed at the time the writ was granted.

2. **Certiorari ⇐8—Not remedy for refusal to approve appeal undertaking.**
   Since only the municipal court can approve an appeal undertaking under Code, § 31, a writ of certiorari is not the proper remedy for the refusal to approve such undertaking, as the Supreme Court could give no relief on such a writ, but the proper remedy was by rule to show cause why the undertaking should not be accepted.

Appeal from the Supreme Court of the District of Columbia.

Petition for certiorari by Carl Vicory against Carmelo Totaro and others, to bring up for review the action of a municipal court in setting aside its approval of an appeal undertaking. From a judgment quashing the writ of certiorari, petitioner appeals. Affirmed.

Raymond M. Hudson, of Washington, D. C., for appellant.

Robert T. Lang, of Washington, D. C., for appellees.

SMYTH, Chief Justice. The municipal court approved an appeal undertaking in a case which had been decided by it, and the next day, upon a further showing, set aside the approval. Thereupon the defeated party, Vicory, appellant here, presented a petition to one of the justices of the Supreme Court for a writ of certiorari to bring up for review the action of the municipal court.

[1] The writ was issued, but was later quashed on motion, on the ground that the petition for the writ was not filed before it was presented to the justice, as required by rule 22 of the Supreme Court. The rule reads:

"Motions or applications for special remedial writs, such as writs of quo warranto, mandamus, certiorari, supersedeas, etc., shall be heard by the circuit or criminal court, or before one of the justices at chambers, but not until a petition, verified by affidavit, which shall be made by the applicant in cases of quo warranto and mandamus, and stating the grounds of the application, has been filed and docketed."

This rule is prohibitive. It says no petition for a writ of certiorari shall be heard by any of the justices of the court until it has been filed and docketed.

It is conceded that the petition had not been filed or docketed at the time the writ was granted. The court, interpreting its own rule, held this to be fatal, and quashed the writ. We see no reason for disturbing its action.

While the motion to quash was pending, Vicory moved for an alias writ. At this time his petition, duly verified as required by the rule, was on file, and, we assume, docketed, because nearly four months had intervened between the date of the filing as given in the record and the date of the application for the alias writ.

[2] Perhaps an alias writ supposes a pre-existing valid one, which for some reason had lost its efficacy (Roberts v. Church, 17 Conn. 145), for its opening clause usually runs thus: "We command you as we have heretofore commanded you;" and, if so, Vicory was not entitled to such a writ. We prefer, however, to put our judgment on a broader ground. If the alias writ was granted, or, for that matter, if the original writ was valid, and the record of the lower court, in pursuance of its command, laid before the Supreme Court, what relief could that court have given? It had no power, upon reviewing the record, to approve the undertaking. Only the municipal court could do that. Code, § 31. Vicory's purpose required a writ commanding the judge of that court to approve the undertaking. Deposit Co. v. Beck, 12 App. D. C. 237; Church v. Fidelity & Deposit Co., 13 App. D. C. 264; Bundy v. United States Ex rel. Darling, 25 App. D. C. 459. In the first case

the petition for a writ of certiorari alleged, inter alia, that the justice of the peace refused to approve the proposed bond, or any bond that might be presented by the petitioner. The writ was issued, but subsequently quashed, by the Supreme Court. On appeal Mr. Chief Justice Alvey, speaking for this court, said:

"The remedy in such case is not by writ of certiorari to simply remove the proceedings from before the justice, but by a proceeding to reach the justice himself."

Accordingly the court held that the proper procedure indicated a rule upon the justice to show cause why the undertaking should not be accepted, and affirmed the action of the lower court in quashing the writ. This and the other decisions referred to make it plain that the court committed no error in refusing the alias writ.

The judgment is affirmed, with costs.

Affirmed.

COMMERCIAL SOLVENTS CORPORATION v. MELLON, Secretary of the Treasury, et al.

(Court of Appeals of District of Columbia. Submitted December 5, 1921. Decided January 3, 1922.)

No. 3738.

1. **Appeal and error ⟸927(2)—Allegations of bill, dismissed on submission on bill, taken as true.**

   On appeal from a decree dismissing a bill, after the cause was submitted on the bill alone, the case must be disposed of on the assumption that all the allegations of the bill are true.

2. **Customs duties ⟸22—Congress can fix conditions on which privilege granted by it can be enjoyed.**

   Dye and Chemical Control Act May 27, 1921, tit. 5, extends a privilege to manufacturers of certain chemicals and their substitutes to have the importation of competing goods prohibited, and it was competent for Congress to fix the conditions under which the privilege should be enjoyed.

3. **Customs duties ⟸53—Authority to administer act excluding importation includes interpretation of act.**

   The authority given to the Secretary of the Treasury by Dye and Chemical Control Act May 27, 1921, tit. 5, to administer that act, gives him the implied authority to interpret it, because interpretation is necessary to the performance of his administrative duty.

4. **Injunction ⟸75—Mandamus ⟸73(1)—Courts cannot review, by mandamus or injunction, decision of administrative officer within jurisdiction.**

   The courts cannot review, by mandamus or injunction, a decision of the Secretary of the Treasury, made within his jurisdiction, to interpret Dye and Chemical Control Act May 27, 1921, tit. 5, if he did not act in a capricious or arbitrary manner.

5. **Injunction ⟸75—Decision that fusel oil is not organic compound held within jurisdiction of Secretary of the Treasury, and not reviewable on suit for injunction.**

   A decision by the Secretary of the Treasury that fusel oil was not a synthetic organic chemical, within Dye and Chemical Control Act May 27,

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1921, tit. 5, prohibiting the importation of such chemicals, unless the Secretary of the Treasury determines that the article or a satisfactory substitute therefor is not obtainable in the United States, which decision involved the determination of a question of fact requiring the application of technical knowledge, as to which there was evidence on both sides sufficient to sustain a decision, was within the jurisdiction of the Secretary of the treasury, and cannot be reviewed by the courts in a suit for injunction.

Appeal from the Supreme Court of the District of Columbia.

Suit for injunction by the Commercial Solvents Corporation against Andrew W. Mellon, Secretary of the Treasury, and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

B. H. Warner, Jr., of Washington, D. C., and Edward P. Keech, Jr., of Baltimore, Md., for appellant.

Peyton Gordon and C. W. Arth, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. The Dye and Chemical Control Act, approved May 27, 1921, by title 5, provides, among other things, that—

"No synthetic organic drugs or synthetic organic chemicals shall be admitted to entry or delivered from customs custody in the United States * * * unless the Secretary [of the Treasury] determines that such article or a satisfactory substitute therefor is not obtainable in the United States * * * in sufficient quantities and on reasonable terms as to quality, price and delivery," etc.

Hon. Edward Clifford, Assistant Secretary of the Treasury, with the approval of Mr. Secretary Mellon, issued an order on September 30, 1921, that "fusel oil should not be considered to be a synthetic organic chemical within the meaning of the act," and that permits for its release from customs custody were not required.

The Commercial Solvents Corporation, hereafter referred to as the corporation, manufactures at its plant in Indiana butyl alcohol, which it alleges can be used, and is in fact being used, by practically all of the former users of fusel oil as a satisfactory and efficient substitute for that oil. It asserts that fusel oil is a synthetic organic chemical, and that its entry into the United States is prohibited by the act, since the corporation's plant has ample capacity to manufacture a satisfactory substitute for it, is able to supply all the needs and demands for such oil, and offers the same for sale at a reasonable price, and on even and equal terms with all purchasers, having regard for the quantities of their purchases, any difference in price being merely sufficient to equalize the difference in the cost of selling in large or small quantities. It also alleges that, if the Secretary of the Treasury should permit the importation of fusel oil in accordance with the order just mentioned, the corporation would sustain great loss and damage.

Accordingly it filed its bill in the Supreme Court of the District, praying for an injunction forbidding the Secretary and the other appellees to give any instruction to any collector of a port of the United States, or other person, permitting the importation of fusel oil,

except in the special cases provided for in the act. In response to a rule to show cause the Secretary of the Treasury and his associate appellees filed an answer. Upon a consideration of the bill and answer, an injunction pendente lite was denied. Thereupon the plaintiff submitted the cause on its bill alone. The court, being of the opinion that the bill did not state a sufficient cause for the relief sought, dismissed it, and the corporation brings the case here for our review.

[1] The case must be disposed of on the assumption that all the allegations of the bill are true. If, when thus taken, they do not disclose a cause for action, the decree must be affirmed.

[2, 3] The act in question operates to extend a privilege to manufacturers of certain chemicals and their substitutes. It was competent for Congress to fix the conditions under which the privilege should be enjoyed. Calhoun v. Massie, 253 U. S. 170, 176, 40 Sup. Ct. 474, 64 L. Ed. 843. Among them is the one that the Secretary of the Treasury shall administer the act. To do this he has implied authority to interpret it, because that is necessary to the performance of his administrative duty. Hall v. Payne, 254 U. S. 343, 41 Sup. Ct. 131, 65 L. Ed. ——.

The corporation alleges in its bill that various importers and would-be importers of fusel oil made representations to various bureaus and officials of the Treasury Department to the effect that such oil is not a synthetic organic chemical; that these representations were considered by the appellees in their respective capacities as Chief of the Dye and Chemical Control Section, as Chief of the Customs Division, and as Secretary of the Treasury; that the Secretary of the Treasury decided that fusel oil was not a synthetic organic chemical, and that its importation, except subject to special license, etc., was not prohibited by the terms of the act. It also alleges that this decision, made after the consideration just mentioned, is not correct, and asks the court to review and reverse it, on the assumption that the court has the right to exercise its independent judgment with respect to the facts set forth in the bill and decide the case on the merits; in other words, that we have a right to substitute our judgment for that of the Secretary, if we think he was wrong, even though he was acting within his jurisdiction when he rendered his decision.

[4] With commendable candor counsel for the corporation say:

"It is not contended in this case that the Treasury Department has acted in a capricious or arbitrary manner."

This being admitted have we the power to grant the relief prayed? The law is well settled that we have not. New Orleans v. Paine, 147 U. S. 261; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074; Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; Duncan Townsite Co. v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309; Houston v. St. Louis Packing Co., 249 U. S. 475, 484, 39 Sup. Ct. 332, 63 L. Ed. 717, and cases cited; Brougham v. Blanton Manufacturing Co., 249 U. S. 495, 39 Sup. Ct. 363, 63 L. Ed. 725; Hall v. Payne, 254 U. S. 343, 41 Sup. Ct. 131, 65

L. Ed. ——; Handel v. Lane, 45 App. D. C. 389; Ashley v. Roper, 48 App. D. C. 69; Hall v. Lane, 48 App. D. C. 279.

In the Riverside Oil Co. Case the court, speaking of a decision of the Secretary of the Interior, said:

"Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." 190 U. S. 324, 23 Sup. Ct. 702, 47 L. Ed. 1074.

This language is used after reviewing earlier decisions which were to the same effect. The question was again examined in the Ness Case, and the conclusion reached that, where the Secretary's decision was not arbitrary or capricious, the courts would not disturb it. One of the latest decisions of the court is in the Payne Case, where the rule is adhered to.

Counsel for the corporation, as we understand them, do not challenge this doctrine. On the contrary, they, in effect, admit its soundness, but deny that it is applicable to this case, and direct our attention to decisions which they claim support their contention. The decisions chiefly relied upon are United States v. United Verde Co., 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449; Waite v. Macy, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892; Macy v. Browne (D. C.) 215 Fed. 456; and Macy v. Browne, 224 Fed. 359, 140 C. C. A. 45.

The United Verde Case turned on the meaning of the word "domestic" in an act permitting citizens in mineral districts to remove, for building, agricultural, mining, "or other domestic purposes," any timbers growing on mineral lands of the United States. The Secretary of the Interior, who was authorized to administer the act, made a regulation to the effect that no timber could be removed from such lands "for smelting purposes." The court held that those purposes were domestic purposes, within the purview of the act, and that the regulation was outside the jurisdiction of the Secretary; that it was in effect an amendment of the act. That we are right in this view of the holding is demonstrated by the decision in the Waite Case, supra, 246 U. S. 608, 38 Sup. Ct. 395, 62 L. Ed. 892.

The Macy Case involved the action of a board appointed by the Secretary of the Treasury under the Act of March 2, 1897 (29 Stat. 604 [Comp. St. §§ 8786–8796]). The Secretary was authorized, upon the recommendation of the board, to establish "uniform standards of purity, quality and fitness for consumption of all kinds of tea imported," etc. Standards were adopted. Macy and others proceeded to import tea, which, while of admitted excellence, did not conform to the standards, and importation was refused. An application for an injunction against the board was denied by the District Court, 215 Fed. 456. On review the Circuit Court of Appeals reversed the ruling, holding in effect that, since it was admitted that the tea was excellent in quality and in no sense deleterious to health, the Secretary of the Treasury acted outside of his jurisdiction in denying it importation. 224 Fed. 359, 140 C. C. A. 45. The case went

to the Supreme Court of the United States under the name of Waite v. Macy, supra, and was there affirmed, the court saying:

"No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption."

In support of its conclusion it cited cases among which is United Verde Co., supra. It will be observed that the decision was not placed upon the ground that the Secretary had merely erred, but upon the basis that his action was not within his jurisdiction; therefore was arbitrary and unwarranted. This decision is in harmony with the many cases which we have cited above, and there is nothing in it or in any of the other cases relied upon which supports the position of the corporation.

[5] If it could be said that the action of the Secretary was beyond his jurisdiction, cases cited by the corporation would be in point; but it cannot be. Clearly, as was ruled in Hall v. Payne, supra, the Secretary of the Treasury "could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion," which may not be disturbed by the courts. The question to be decided was one of fact, involving the application of technical knowledge. There was evidence on both sides sufficient to sustain a decision either for or against the contention of the corporation. This is admitted in effect by the latter, for it says that his action was not arbitrary or capricious. The Secretary was acting, therefore, within his jurisdiction, and the courts will not revise his decision.

We see no escape from the conclusion that the lower court was right, and its decree is therefore affirmed, with costs.

Affirmed.

BAUMGARDNER v. HUDSON.

(Court of Appeals of District of Columbia. Submitted November 15, 1921. Decided January 3, 1922.)

No. 1428.

1. **Patents ⟸91(4)—Evidence held to show junior applicant revealed idea to senior applicant.**

   In interference proceedings, where it appeared that prior to either application the senior applicant had been the attorney and business associate of the junior applicant, evidence *held* to show that the junior applicant had, during the continuance of the relation between them, revealed the idea underlying the invention to the senior applicant.

2. **Attorney and client ⟸125—Patents ⟸90(7)—Attorney and associate cannot use information acquired from former client against the client.**

   An attorney and business associate of an inventor cannot, even after the termination of the relation, use information revealed to him by client, and claim priority over the client for an invention based on such information, even though the information did not amount to a full disclosure of the invention.

8. Attorney and client ⊂=125—Patents ⊂=91(1)—Attorney has heavy burden to show invention not derived from former client.

In interference proceedings between a patent attorney and his former client, the attorney has a heavy burden to show that his invention was not based on information derived from the former client, and where he fails to sustain the burden he cannot defeat his client's priority by claiming want of diligence.

Appeal from the Commissioner of Patents.

Interference proceedings between Frank J. Baumgardner and Arthur J. Hudson. From a decision of the Commissioner of Patents awarding priority to Hudson, Baumgardner appeals. Reversed.

Obed C. Billman, of Cleveland, Ohio, for appellant.

A. J. Hudson, of Cleveland, Ohio, for appellee.

VAN ORSDEL, Associate Justice. The issue of this interference is expressed in the following counts:

"1. A rubber article, having incorporated therein and inseparably mixed in the rubber finely ground oyster shells for the purpose described.

"2. As an ingredient of a rubber compound, finely ground oyster shells intimately mixed in the rubber compound.

"3. A new plastic composition, composed of rubber, sulphur, and ground mollusk shells.

"4. As a new composition of matter, a rubber product, including a filler of ground mollusk shells thoroughly incorporated and vulcanized therein.

"5. A new rubber composition, comprising comminuted mollusk shells."

Appellee, Hudson, filed his application April 9, 1917, and appellant, Baumgardner, filed the application in issue November 12, 1917.

It appears that appellant conceived of the use of finely ground oyster shells as a filler for paint and printers' ink; it being a cheap substitute for aluminum hydrate, zinc oxide, white lead, and similar substances used in the manufacture of paints and inks. He accordingly filed an application for a patent for paint containing oyster shell as a filler on July 9, 1915, and an application for a patent for ink containing the same filler April 29, 1915. Hudson acted as his attorney in the preparation and prosecution of these applications.

Appellant testified that in June, 1915, he prepared a sample of the rubber solution containing ground oyster shell, and showed and described it to his son and one Erwin. These witnesses corroborated appellant as to this disclosure, and identified a box containing the solution as the one shown them in 1915. This box, with its contents, is in evidence as "Baumgardner's Exhibit B." Appellant also testified that he disclosed the invention to appellee, Hudson, at that time acting as his attorney in patent matters. In the applications for patents prepared and filed by appellee, appellant used ground oyster shell as the substitute for aluminum hydrate in ink and for white lead in paint.

In November, 1915, a company was incorporated to exploit the Baumgardner patents, known as the Royal Printing Ink Company. This company consisted of Baumgardner, Hudson, and one Hoyt. Appellant was employed by the company for the purpose—

"of developing and perfecting printing inks, colors, and other substances, which utilize a certain base substance, which the said Baumgardner discovered and used generally to originate and perfect printing inks."

Appellant assigned a one-half interest in his patents to Hudson and Hoyt. It therefore appears that at this date appellee held toward appellant the double relation of attorney and business associate. It was shortly after the formation of this company that appellant claims he disclosed the present invention to Hudson and Hoyt. On this point he testified:

"I just told Hudson and Hoyt that it could be used in paper and rubber as a filler, and Hudson said, 'Let that go; we will go through with our printing ink first.'"

This is denied by Hudson and Hoyt. The organization of the company failed through inability to secure the subscription of 10 per cent. of the capital stock as required by law.

Appellee claims to have conceived the invention as the result of hearing a lecture by one Dr. Geer, of the Goodrich Rubber Company. The lecturer, according to appellee, dwelt upon the use of zinc oxide as a filler for rubber, and set forth in some detail the disadvantages connected with its use. He says it was then that the idea occurred to him to substitute ground oyster shell for zinc oxide. Appellee states that he disclosed his idea to Hoyt, and in this he is corroborated by Hoyt. This, together with the denial of any disclosure to him by appellant, constitutes Hudson's case.

[1] Priority of invention in this instance depends largely upon the issue of originality, growing out of the fiduciary relation which appellee bore to appellant. We think the circumstances establish that appellant revealed his idea of the use of oyster shell as a filler for paper and rubber to Hudson and Hoyt, as set forth in his testimony. It is undenied that at about the same time he made a disclosure to his son and the witness Erwin. This shows that he had a conception of the invention of the issue. Baumgardner, Hudson, and Hoyt had organized a company to promote the development of the use of oyster shell as a filler. It was but natural that appellant, having the conception, should make the remark to his associates, as testified to by him. It may be that the remark was not sufficient to constitute a full disclosure, but it was a suggestion of the use of oyster shell as a filler for rubber. Appellant is further corroborated by the fact that he subsequently filed an application for a patent for oyster shell as a filler for paper before appellee came into the field.

The suggestion of its use for rubber may or may not have made an impression on appellee, but when he heard the Geer lecture he would naturally have been impressed with the practicability of the suggestion of appellant. It was then that he, acting upon the suggestion, the value of which had been made clear by the difficulties Geer was seeking to overcome, rushed into the Patent Office with his application.

[2] We think, therefore, appellee is not in position to avail himself of the subject-matter of this invention, which belonged originally to appellant. Oyster shell as a filler substitute for more expensive substances in paint, ink, and products requiring the use of a filler, such as

white lead for paint, aluminum hydrate for ink, and zinc oxide for rubber, was the sole discovery of appellant. The fact that appellee, at the time he claims to have conceived the idea of using oyster shell as a filler for rubber, no longer occupied the relation to appellant of attorney or business associate (unless the assignment of one-half interest in the Baumgardner patents still existed) is beside the case, since the information which enabled him to apply it to rubber was acquired in his fiduciary capacity.

We do not agree with the Board of Examiners in Chief that the case is "one of straight priority of invention," and that "the two ideas of use are entirely different, and knowledge of one is not suggestive of the other." The whole invention consists in substituting oyster shell for zinc oxide, and without the knowledge derived in a fiduciary capacity of the use of oyster shell as a filler for materials where a substance of that character is essential, appellee does not pretend that his conception would have been possible. It therefore follows that the information he had derived from appellant logically suggested the idea which he now seeks to exalt to the dignity of inventive conception. An attorney cannot avail himself of information thus acquired, to the damage of his client, though the relation of attorney and client has ceased.

Assuming that appellant's suggestion to Hudson and Hoyt did not amount to a disclosure of the invention in issue, but merely of the use to which oyster shell as a filler might be put, this would not be sufficient, in the peculiar circumstances of this case, to establish appellee's status as the original inventor. The knowledge which enabled him, after hearing the Geer lecture, to form an inventive conception, was derived from his client while the fiduciary relation of attorney and client existed. Consequently the opportunity to improve on his client's discovery, even to the limited extent here disclosed, was not open to appropriation by him. In a case involving the relation of partners (Milton v. Kingsley, 7 App. D. C. 531), Mr. Justice Morris, speaking for the court, said:

"It might be a question under some circumstances whether the employee or person in a fiduciary relation to the original inventor should not be regarded in a technical sense under the terms of the law as being entitled to have letters patent issued to him in his own name for improvements devised by him, subject to the processes of equity to compel an immediate assignment thereof to the original inventor. But we understand the jurisdiction of this court in the premises to be of an equitable as well as of a purely legal and technical character, and that circuitous course, under the circumstances, would seem to be wholly unnecessary."

[3] In a case of this sort, the burden is heavily upon the attorney to show, not only priority, but that his conception of the invention was in no way the result of confidential knowledge derived from his client. Overholt v. Matthews, 48 App. D. C. 482. Here the case turns chiefly upon the question of originality, and we are of the opinion that appellee, at a time when the relation of attorney and client existed, derived the information from appellant which enabled him subsequently to conceive the invention in issue. The relation of an attorney to his client is too sacred to admit of even the shadow of abuse. Courts will

not only closely scrutinize such transactions, but will resolve every doubt in favor of a client whose confidence has thus been betrayed.

Inasmuch as appellee is not an independent inventor, it is unnecessary to consider whether the information which appellant imparted to him in 1915 was sufficiently clear to amount to a disclosure of the invention of the issue. It was of such a nature that appellee, owing to the fiduciary relation which he occupied, was not at liberty, then or in the future, to use it to appellant's disadvantage. For the same reason the question of appellant's diligence at and immediately before appellee entered the field need not be considered.

The decision of the Commissioner of Patents is reversed.

Reversed.

PORTER v. GARDNER.

(Court of Appeals of District of Columbia. Submitted on Petition for Writ of Prohibition December 5, 1921. Decided as to Writ January 3, 1922.)

No. 3724.

1. **Landlord and tenant ⟸278½, New, vol. 11A Key-No. Series—Supersedeas authorized pending appeal from Rent Commission in case involving possession.**

   District of Columbia Rent Law (Act Oct. 22, 1919, as amended by Act Aug. 24, 1921) § 110, providing that, pending final decision on appeal from a determination of the Rent Commission, the determination shall be in full force and effect, and the appeal shall not operate as a supersedeas or stay, or postpone its enforcement, when construed with other provisions of that section and of sections 107 to 109, applies only to determinations as to questions of fair rent, and there may be a supersedeas pending appeals from determinations involving the right of possession, as where the owner seeks to recover possession as for her personal use and occupancy.

2. **Prohibition ⟸3(3)—Lies to prevent exercise of jurisdiction by municipal court pending appeal from Rent Commission to Court of Appeals.**

   Pending appeal to the Court of Appeals from a determination of the Rent Commission in favor of the owner of leased premises, seeking to recover their possession as for her personal use and occupancy, on which a supersedeas bond has been filed and approved, the municipal court, in assuming jurisdiction of possessory proceedings by the owner, is acting beyond its power, and the Court of Appeals, in aid of its jurisdiction, will issue a writ of prohibition, and will not withhold such writ because, in the exercise of its discretion, it might grant a writ of error to the municipal court.

   Smyth, Chief Justice, dissenting.

Appeal from the Rent Commission of the District of Columbia.

Proceeding before the Rent Commission by Annie Gardner, owner, against Chester A. Porter, tenant. From a decision in favor of the owner, the tenant appeals. On petition for writ of prohibition. Writ granted.

Raymond M. Hudson, of Washington, D. C., for appellant
E. M. Hewlett, of Washington, D. C., for appellee.
Chapin Brown, of Washington, D. C., for Rent Commission.
F. H. Stephens and F. W. Hill, Jr., both of Washington, D. C., for Municipal Court.

ROBB, Associate Justice. This is an application for a writ of prohibition to a judge of the municipal court of the District of Columbia, to prohibit the enforcement by him of a decision of the Rent Commission, pending an appeal to this court from that decision.

Annie Gardner, as the bona fide owner of premises No. 614 R Street, N. W., this city, duly served notice upon her tenant, Chester A. Porter, that she necessarily required the premises for her personal use and occupancy, and that of her family and dependents. The tenant challenging her right to possession, the owner invoked the jurisdiction of the Rent Commission, and, the Commission deciding in favor of the owner, the tenant duly noted an appeal to this court, and filed a supersedeas bond approved by the Commission. Thereafter the owner commenced possessory proceedings in the municipal court, but the tenant, challenging the jurisdiction of that court, pending his appeal to this court from the decision of the Rent Commission, petitioned for this writ of prohibition.

[1] The "District of Columbia Rent Law" of October 22, 1919 (41 Stat. 297), as amended by the Act of August 24, 1921, empowers the Rent Commission, upon complaint or its own initiative, to fix rents for certain classes of property within this District. Section 107 of the act provides that "a determination of the Commission fixing a fair and reasonable rent or charge made in a proceeding begun by complaint shall be effective from the date of the filing of the complaint," and that the difference between the amount of rent and charges paid for the period between the filing of the complaint and the determination of the Commission "may be added to or subtracted from, as the case demands, future rent payments, or after the final decision of an appeal from the Commission's determination may be sued for and recovered in an action in the municipal court of the District of Columbia." Section 108 provides for appeals to this court. In section 109 it is provided that "the rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents," etc., and that, if there is a dispute between the owner and tenant as to the owner's right to possession, the matters in dispute shall be determined by the Commission. Section 110 provides as follows:

"Pending the final decision on appeal from a determination of the Commission, the Commission's determination shall be in full force and effect and the appeal shall not operate as a supersedeas or in any manner stay or postpone the enforcement of the determination appealed from. Immediately upon the entry of a final decision on the appeal the Commission shall, if necessary, modify its determination in order to make it conform to such decision. The difference, if any, between the amount of rent and charges paid for the period

from the date of the filing by the Commission of the determination appealed from and the amount that would have been payable for such period under the determination as modified in accordance with the final decision on appeal may be added to or allowed on account of, as the case demands, future rent payments or may be sued for and recovered in an action in the municipal court in the District of Columbia."

The primary object of Congress in the enactment of this law was the regulation of rents. As said by the Supreme Court in Block v. Hirsh (April 18, 1921), 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. ——:

"While the act is in force there is little to decide, except whether the rent allowed is reasonable, and upon that question the courts are given the last word."

The provision as to the right of certain owners to possession is secondary and incidental to the main purpose of the act. Counsel for respondent in effect contend that the sentence in section 110 should be given a literal interpretation, without reference to other and, as we view them, controlling provisions of that and other sections of the act. Under well-recognized canons of construction, the act must be read as a complete and harmonious whole, to the end that each of its material provisions may be given the force and effect intended by Congress. In the first place, it is expressly provided that final decisions of the Commission shall be reviewable by this court, and it must be assumed that in making this provision Congress intended the judgments of this court to be effective. Yet, under the contention of counsel for respondent, the tenant, pending an appeal to this court on the question of the landlord's right to possession, may be proceeded against as indicated in the municipal court and dispossessed; our jurisdiction thereby being rendered futile and abortive. Obviously such an interpretation should not be placed upon the act, unless its provisions plainly compel it. Not only do we find nothing in the act compelling such a reductio ad absurdum, but, on the contrary, we find many provisions inconsistent therewith. Turning now to section 107, it may be noted that there is a provision deferring the right to bring suit in the municipal court, for the difference between the amount of rent paid for the period from the filing of the complaint to the date of the Commission's determination of the fair rent that should have been payable, until *"after the final decision of an appeal* from the Commission's determination." This provision is significant. In section 110, after the provision upon which counsel for respondent rely, it is made the duty of the Commission, immediately upon the entry of a final decision on the appeal to this court, to modify its determination to conform to our decision. Then follows the significant provision that the difference, if any, *"between the amount of rent and charges"* paid *"and the amount that would have been payable"* under the determination as modified, may be added to or allowed on account of future rent payments, "or may be sued for and recovered in an action in the municipal court in the District of Columbia." These provisions indicate, if they indicate anything, that the jurisdiction of the municipal court, which was to be invoked in this class of cases merely, for the purpose of executing final judgments, was to be sus-

pended until this court had finally determined the issues brought here. In other words, while that court is clothed with jurisdiction of the general subject-matter, it has no right or power to proceed in appealed cases until after the termination of the appeals. The provision in the first part of section 110 that an appeal shall not operate as a supersedeas was intended to cover, and therefore must be restricted to, determinations of the Commission as to fair rents, in connection with which it evidently was the view of Congress that no substantial injustice could result from a denial of a supersedeas. Nevertheless Congress was careful, even in such cases, to suspend jurisdiction in the municipal court until after final judgment in this court on appeal. Moreover, inasmuch as Congress, in the enactment of this law, has contemplated the protection of tenants, as indicated by the Supreme Court in the Block-Hirsh Case, an intent is not to be presumed to provide for appeals to this court in this class of cases, and, at the same time, to render such appeals abortive by clothing the municipal court with power to execute the decisions of the Rent Commission pending those appeals.

Reading the act as a whole, we are of the view, and therefore rule, that, pending final decision on appeals to this court from determinations of the Rent Commission as to questions of fair rent, there may be no supersedeas, but that, pending appeals to this court from determinations of the Commission involving the right of possession, supersedeas may be had under the rules of this court.

[2] It thus appears that the municipal court, by prematurely assuming jurisdiction, is acting beyond its power, and that, if allowed to proceed, it in effect will oust this court of jurisdiction. The power of this court, in aid of its jurisdiction, to issue the writ of prohibition, designed to keep inferior courts within the limits and bounds prescribed to them by law and issued in the exercise of sound judicial discretion according to particular circumstances, is established. In re MacFarland, 30 App. D. C. 365. It plainly appearing that the municipal court is proceeding beyond the limits and bounds prescribed, the writ should not be withheld merely because this court, in the exercise of its discretion, might grant a writ of error to the municipal court after an unnecessary proceeding there. That court having prematurely and mistakenly assumed jurisdiction in this case, it is to be presumed that it will do so in similar cases; the result being that, before a determination of the question in this court through writ of error to that court, many other tenants might be subjected to the same unnecessary trouble and expense through possessory proceedings in the municipal court. The circumstances, in our view, plainly require the issuance of the writ here.

In Deffer v. Kimball, 7 App. D. C. 499, alluded to by counsel for respondent, the relators, after a trial in the police court, where "they took their chances of acquittal on the facts of the case, and were convicted," the writ was withheld. The difference between that case and this is too plain to require further comment. In Holmead v. Barnard, 29 App. D. C. 431, it was not clearly shown that the court below was

exceeding its jurisdiction, and, moreover, it did appear that the petitioner had a more beneficial remedy by way of appeal. In re Dahlgren, 30 App. D. C. 588, there were no circumstances from which this court could say that the remedy by appeal, which was open to complainant, was inadequate.

The writ of prohibition will issue as prayed.

Application granted.

SMYTH, Chief Justice (dissenting). Assuming, without expressing any opinion upon the subject, that the decision of the Rent Commission was properly superseded, I think there is no warrant for the issuance of the writ of prohibition.

It has been repeatedly decided by the Supreme Court of the United States that, where a "court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right; but where there is another legal remedy, by appeal or otherwise, * * * the granting or refusal of the writ is discretionary." In re Huguely Manufacturing Co., 184 U. S. 297, 301, 22 Sup. Ct. 455, 456 (46 L. Ed. 549). That is, to state the question negatively, the writ never issues, except where the lower court is without jurisdiction, and not then if there is another remedy. To the same effect are Ex parte Hagar, 104 U. S. 520, 26 L. Ed. 816; Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; Ex parte Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431; Ex parte Tiffany, 252 U. S. 32, 40 Sup. Ct. 239, 64 L. Ed. 443; Deffer v. Kimball, 7 App. D. C. 499; Morris v. Scott, 25 App. D. C. 88; Holmead v. Barnard, 29 App. D. C. 431; In re Dahlgren, 30 App. D. C. 588; In re MacFarland, 30 App. D. C. 365.

In the Dahlgren Case, Mr. Justice Robb, who spoke for the court, said:

"The court, having general jurisdiction over the subject-matter and over the parties, should be allowed to proceed to decision. In re New York & P. R. S. S. Co., 155 U. S. 523, 39 L. Ed. 246, 15 Sup. Ct. 183. Even assuming that the judgment of the court in the circumstances of the case will be void, it may nevertheless be corrected on appeal."

And he concluded thus:

"It appearing that the Supreme Court of the District, holding probate court, had general jurisdiction over the subject-matter of the controversy, and that, if error is committed, it may be corrected on appeal the writ of prohibition is denied."

Summarized, the reasons of the court for granting the writ in the pending case are: (a) That the lower court has prematurely assumed jurisdiction, I presume of the subject-matter, because there is no question about its jurisdiction of the parties; (b) that the writ should not be withheld merely because in the exercise of his discretion a justice of this court might grant a writ of error; and (c) because, if the trial court is permitted to proceed to judgment, our

jurisdiction of the appeal from the Rent Commission would be rendered futile and abortive. I take issue with all these.

(a) We have held recently in a number of cases that the municipal court continues to have jurisdiction of suits between landlords and tenants just as it had before the passage of the Ball Act, and can render judgment without regard to the decision of the Rent Commission, if no objection is made by the defendant to its proceeding; but, if objection is made, it must await the decision of the Rent Commission. Two of those cases are Killgore v. Zinkham, —— App. D. C. ——, 274 Fed. 140, and Smith v. Pyne, —— App. D. C. ——, 274 Fed. 142. In other words, that where the defendant insists upon it, the only evidence which the court can consider is the decision of the Commission, which is binding upon it. These cases establish clearly and beyond any possibility of controversy that the municipal court has jurisdiction of the subject-matter of the suit in question. Hence there is no authority for issuing the writ.

(b) If it be true that the decision of the Rent Commission has been properly superseded, then it would be error for the municipal court to receive it in evidence. If nevertheless it did receive it and rendered judgment of ouster upon it, thus committing error, an application could be made to a justice of this court for a writ of error, and the presumption is that the writ would be granted, because it would be his duty to grant it, and we must assume that he would perform his duty. Boley v. Griswold, 20 Wall. 486, 22 L. Ed. 375; Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. It would require no more effort or expense—in fact, not as much—to make application for the writ of error than to apply for the writ of prohibition. No one justice may grant the latter writ, while the writ of error may be issued by any one of the three justices of this court.

(c) Finally, after the case on the writ of error had been docketed here, both it and the appeal from the decision of the Rent Commission would be subject to the control and discretion of the court. If the court should reverse the Rent Commission's decision, it could also reverse the decision of the municipal court, on the ground that it had committed error in giving effect to the Rent Commission's superseded decision. If, on the other hand, the decision of the Rent Commission is sustained, the judgment of the municipal court would also be sustained. This demonstrates that the lower court, by proceeding to judgment, would not render futile our decision in the Rent Commission appeal.

The course just indicated would be in harmony with the firmly established law with respect to the writ of prohibition, while the decision of the court, as I view it, disregards that law.

Therefore I dissent.

KING v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted December 6, 1921. Decided January 3, 1922.)

No. 3661.

1. **Licenses ⇐11(1)—Agreement as to operation of motor vehicles by person from other state held not to exclude driver, whose District license was revoked.**
   An agreement between the District of Columbia and the state of Virginia providing that any one legally entitled to operate a motor vehicle in Virginia might operate such vehicle in the District without a District license tag or driver's permit, did not exclude from its protection one whose District driver's permit had been revoked.

2. **Statutes ⇐219—When meaning doubtful, great weight given construction by department charged with execution.**
   When the meaning of a statute is doubtful, great weight should be given to the construction placed on it by the department charged with its execution.

3. **Licenses ⇐11(1), 14(1)—Statute as to operation of motor vehicles by nonresidents held to exempt operator as well as vehicle.**
   Act March 3, 1917, providing that motor vehicles, owned or operated by nonresidents having complied with the laws of the state of their residence requiring the registration of motor vehicles or licensing of operators, shall not be required to be licensed or registered under the laws and regulations of the District of Columbia, dispenses with the operator's license as well as the registration of the vehicle, the words "licensed or registered" in the latter part of the statute being used in the same relation as their noun forms in the first part of the act, especially where this was the construction placed thereon by an agreement between the District of Columbia and the state of Virginia.

4. **Statutes ⇐206—Every clause and word to be given effect, if possible.**
   In construing a statute, it is the duty of the court to give effect, if possible, to every clause and word of the statute.

5. **Statutes ⇐189—Literal interpretation rejected, when contrary to evident meaning of whole statute.**
   If a literal interpretation of a statute would be contrary to the evident meaning of the statute, taken as a whole, it should be rejected.

6. **Statutes ⇐181(1)—Construed in case of doubt to serve legislative design.**
   Where there is doubt concerning the meaning of a statute, it should be construed, if possible, so as to serve the legislative design.

7. **District of Columbia ⇐22—Nonresident operator of motor vehicle subject to traffic regulations.**
   Notwithstanding Act March 3, 1917, providing that motor vehicles owned or operated by persons complying with the laws of the state of their residence need not be licensed or registered under the laws and regulations of the District of Columbia, such a nonresident operator is amenable to valid traffic regulations, and may be punished for negligence or other infraction of the law.

In Error to the Police Court of the District of Columbia.

Arthur D. King was convicted of operating an automobile without a permit, and he brings error. Reversed and remanded.

T. M. Wampler, of Washington, D. C., for plaintiff in error.

F. H. Stephens and F. W. Madigan, both of Washington, D. C., for defendant in error.

SMYTH, Chief Justice. King was charged in the police court with operating an automobile in the District of Columbia without having obtained a permit to do so. The trial was had upon an agreed statement of facts, the important parts of which are that the defendant, a bona fide resident of Virginia, at the time of his arrest was driving his own automobile in the city of Washington; that it had attached to it proper Virginia license tags, issued to him in accordance with the laws of that state, and that he had in his possession, and exhibited, a permit from the state of Virginia to operate a motor vehicle such as the one he was then operating; that there was then an agreement between the District and Virginia "that any one legally entitled to operate a motor vehicle in the state of Virginia shall be entitled to operate such vehicle in the District of Columbia, without having District of Columbia license tags, and without having a District of Columbia driver's permit, so long as the Virginia authorities permit residents of the District of Columbia, legally entitled to operate motor vehicles there, to operate the same within the state of Virginia without Virginia license tags and without a Virginia driver's permit"; that an act of Congress, approved March 3, 1917 (39 Stat. 1012), provided "that motor vehicles, owned or operated by persons not legal residents of the District of Columbia, but who shall have complied with the laws of the state of their legal residence requiring the registration of motor vehicles or licensing of operators thereof, * * * shall not be required to be licensed or registered * * * under the laws and regulations of the District if the state in which the owner or operator of such motor vehicle has his legal residence extends the same privilege to the motor vehicles owned or operated by legal residents of the District of Columbia"; and that the state of Virginia extends the same privilege to the motor vehicles owned or operated by legal residents of the District of Columbia.

[1] It appears, then, that at the time of defendant's arrest there was an agreement between the District and Virginia providing that a person entitled to operate a motor vehicle in Virginia was entitled to operate one in the District without having a District driver's permit. The argument of counsel for the District seems to be that this agreement was not authorized by the act of Congress, for they say that the only question involved is whether or not the act authorized the operation of a motor vehicle in the District by a nonresident whose District operator's permit had been revoked. The agreement does not exclude such a person from its protection. Nothing is said therein about a nonresident whose permit had been revoked. It provides broadly that any one legally entitled to operate a motor vehicle in Virginia is entitled to do so in the District without a District driver's permit, so long as that state extends the same privilege to residents of the District. King came squarely within the agreement, and if it is valid he was wrongfully convicted.

[2, 3] The District argues that the reciprocity provided for by the act of Congress relates only to the licensing of motor vehicles, and not to driver's permits. This is in conflict with the above-mentioned agreement, which represents the District's interpretation of the act at the time the agreement was made. Upon the District was imposed the duty of enforcing the act. It is the law that—

"When the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution." United States v. Hermanos y Compañia, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821.

The meaning of this statute is doubtful. Why, then, should not the District's interpretation as evidenced by the agreement prevail?

If the present contention of the District be correct, a nonresident may not operate his own car in Washington even while passing through the city unless he has a District permit. He could not even drive to the license office for the purpose of securing a permit without subjecting himself to arrest. Not only that, but a resident of the District who drove into Virginia would violate the law of that state unless he possessed a Virginia driver's permit. We think the act was passed for the purpose of obviating all the trouble and inconvenience, not to say expense, which would result if the District's contention is sustained.

The statute says in the first part that vehicles owned or operated by persons not legal residents of the District who have complied with the laws of the state of their legal residence "requiring the registration of motor vehicles or licensing of operators thereof * * * shall not be required to be licensed or registered" by the District. It is argued that this exempts only the vehicle, and not the operator, from the District regulation. We may concede that the statute is open to such a construction, but when we consider its purpose we do not think that meaning should be attributed to it. Why limit the District privilege to vehicles owned or operated by nonresidents who had complied with the law of the state of their residence requiring registration of motor vehicles or licensing of operators, if it was not intended to recognize the licensing of the operator as well as the registration of the vehicle?

[4] On the assumption that the District's present position is sound, it would be entirely immaterial to it whether or not a nonresident had a driver's permit, because, if he had one, it would not attach any value to it. Yet we must attribute some significance to that requirement, for it is our duty to give effect, if possible, "to every clause and word of a statute." Montclair v. Ramsdell, 107 U. S. 147, 152, 2 Sup. Ct. 391, 27 L. Ed. 431. See also Grand Lodge, etc., v. Groves, 48 App. D. C. 151.

The statute is inartificially drawn, but when its purpose is kept in mind we think its correct meaning can be reached. In the first part of the act the word "registration" is applied to the vehicle, and the word "licensing" to the operator, while in the latter part the words "licensed or registered" seem to refer to the vehicle only. We think, however, that "licensed or registered" should be treated as used in the

same relation as their noun forms in the first part of the act, and that the true meaning of the latter part is that it shall not be necessary to "license the operator" or "register the vehicle." No other construction will effectuate the purpose of the act.

[5, 6] If a literal interpretation would be contrary to the evident meaning of a statute, taken as a whole, it should be rejected. Heydenfeldt v. Daney Gold, etc., Co., 93 U. S. 634, 638, 23 L. Ed. 995. Where there is doubt concerning the meaning of a statute, it should be construed, if possible, so as to serve the legislative design. Porto Rico Railway Co. v. Mor, 253 U. S. 345, 348, 40 Sup. Ct. 516, 64 L. Ed. 944. In such a case as this the reason of the law should prevail over its letter. Baender v. Barnett, 255 U. S. 224, 226, 41 Sup. Ct. 271, 65 L. Ed. ——. We believe that the agreement between the District and the state expresses correctly the meaning of the statute.

[7] In passing, we may say that our holding does not relieve a nonresident operator of amenability to valid traffic regulations. If guilty of negligence or other infraction of the law, he may be punished.

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion; costs to be assessed against the defendant in error.

Reversed and remanded.

STEWART v. UNITED STATES ex rel. SMITH.

(Court of Appeals of District of Columbia. Submitted November 10, 1921. Decided January 3, 1922.)

No. 3504.

1. **Divorce ⇐=84—Creditor cannot enforce ne exeat bond against surety after permitting violation.**

   Plaintiff in a suit for divorce, who had secured a writ of ne exeat against defendant, cannot collect the penalty of the bond given to secure defendant's obedience to the writ from the surety on the bond, after plaintiff had consented to defendant's absence by receiving for several months payments of alimony from defendant from points without the District, without objecting to his violation of the ne exeat until he had ceased to make payments of alimony.

2. **Divorce ⇐=84—Evidence held to raise jury question whether plaintiff had waived compliance with ne exeat bond.**

   In an action against the surety on a ne exeat bond, executed by defendant in a divorce action, evidence that plaintiff and her counsel knew that defendant's business required his presence outside of the District, and received payments from him from without the District without objection, *held* to raise a question for the jury whether the plaintiff had consented to the violation of the bond by defendant, so as to release the surety therefrom.

Appeal from the Supreme Court of the District of Columbia.

Suit by the United States, on the relation of Margaret C. Smith, against William W. Stewart, to recover the penalty of a ne exeat bond. Judgment for plaintiff on directed verdict, and defendant appeals. Reversed and remanded.

Wm. E. Leahy, Clinton Robb, and J. E. Padgett, all of Washington, D. C., for appellant.

J. T. Sherier and J. V. Morgan, both of Washington, D. C., for appellee.

HOEHLING, Acting Associate Justice. This is a suit brought against the surety on a ne exeat bond to recover the full penalty thereof in the sum of $2,000. The defense interposed on behalf of the surety was substantially that, notwithstanding the condition of the bond, the beneficial plaintiff thereunder agreed that the principal in said bond should leave the District of Columbia and go to the state of New York, and that such agreement was without the knowledge and consent of the surety.

At the trial, evidence was adduced on behalf of defendant, surety on the bond, in support of the defense stated. At the conclusion of the testimony, on both sides, plaintiff moved for a directed verdict, "on the ground that there was no sufficient evidence offered by defendant to go to the jury on the question of plaintiff's consenting to defendant's leaving the jurisdiction." The motion was granted over the objection and exception of defendant, and that action of the court is assigned as error.

In order correctly to dispose of the matter, it becomes necessary to examine the testimony in some detail, and which may be summarized thus:

In March, 1916, Margaret C. Smith, use plaintiff herein, brought suit in the court below for divorce and alimony against her husband, Percy G. Smith. Affidavit was filed therein, to the effect that the husband had stated that, in a short time, he would go to Russia, and, perhaps, would never return to the United States, and that, in the event he did not go to Russia, he would take up a permanent residence in Havana, Cuba. On March 22, 1916, order was passed in the cause, directing the issuance of the writ of ne exeat, the same "to be marked for security in the sum of $2,000." Thereupon defendant filed ne exeat bond, dated March 23, 1916, executed by himself, as principal, and by William W. Stewart (appellant herein), as surety, in the penal sum of $2,000, conditioned that the principal "shall not go, or attempt to go, beyond or without the District of Columbia, or the jurisdiction of this court, without leave therefrom." On the day following, order was entered directing defendant to pay to his wife the sum of $85 a month as alimony pendente lite. That order was prepared by counsel for defendant, following a conference with counsel for plaintiff, and, as prepared, it contained a concluding paragraph to the effect that the "defendant be, and he is hereby, permitted to leave the District of Columbia, pending the final hearing of this case." Upon presentation of the order in that form to counsel for plaintiff, just before its submission to the court, objection was made to the concluding paragraph just referred to, and accordingly it was stricken from the proposed order, and, as thus modified, the order was signed by the court.

After the release of defendant, upon the giving of ne exeat bond, as above, counsel for the parties had an extended conference concern-

ing the amount of alimony that would be mutually agreeable. Discussion was had as to the position and salary of defendant with the Goodyear Tire & Rubber Company, his expenses in New York City, and his expense in coming to this District. Counsel for defendant endeavored to convince counsel for plaintiff that $75 was as much as he could pay; whereas counsel for plaintiff endeavored to convince counsel for defendant that he should pay more, with the result that $85 was finally agreed upon as a compromise. It further appears that counsel for defendant, in endeavoring to reach a compromise agreement as to the amount of alimony, as above, wished to avoid the necessity of having defendant return to the District for the purpose of the rule to show cause then outstanding, and which was returnable March 31, 1916, and that no objection was raised by counsel for plaintiff to that method in order to avoid the necessity of defendant so returning; also that the conversation between counsel was all along the line that defendant was to return (to New York) and take up his position and try to make the money to pay the alimony; that his clothes and everything he had were in New York; that, when the proposed order was presented to the court, counsel for plaintiff objected to incorporating therein permission to defendant to leave the District of Columbia, although counsel for defendant (testifying herein) stated that he did not think that counsel for plaintiff expressed any objection at the time to defendant leaving the District.

It further appears that plaintiff knew that her husband was employed by the Goodyear Tire & Rubber Company, working in New York; that he had been sending her $75 a month for several months prior to the filing of the suit for divorce; that she thought the payments came from Akron, Ohio, the headquarters of the Goodyear Tire & Rubber Company. There was also testimony in the case to the effect that the payments of alimony made by defendant came principally in the shape of money orders from Akron, Ohio, and New York City, signed by defendant and payable to his wife, and that some of the money orders were sent direct to plaintiff, at the request of her counsel when the latter was away.

The plaintiff testified that she had given her attorney full authority. Her counsel testified that he knew that defendant in the divorce case after executing the ne exeat bond, left the District of Columbia; that he saw him in Cleveland, Ohio, about two months after the signing of the bond; that he knew defendant was in Cleveland without leave of court, for the reason that he examined the proceedings in the case, and the record did not disclose that any permission of the court had been given for his leaving.

Appellant in this case, surety on the ne exeat bond, testified that he was not present at the conference between counsel for the husband and wife, respectively; that he had no personal knowledge in respect of any arrangement made between said counsel; that he did not give defendant any permission to leave the District of Columbia; and that he had not been told about any arrangement concerning the matter.

On May 9, 1917, decree was entered in the equity cause, granting the plaintiff a limited divorce from her husband, and directing the payment

of alimony by him in the sum of $100 per month from June 1, 1917, and until the further order of the court.

On December 11, 1917, further order in the cause was passed, stating that defendant had failed to pay the alimony for the months of October, November, and December, 1917, and further that he had absented himself from the jurisdiction of the court "without cause," and accordingly plaintiff was granted leave to proceed at law against the principal and surety for recovery of the penalty of the ne exeat bond. That suit was brought, and from the judgment for plaintiff therein this appeal was taken.

From the above statement, it appears that the agreement in respect of the payment of alimony pendente lite ($85 per month) was kept and performed by defendant, including the increased amount of alimony ($100 per month) as fixed by the decree of court of May 9, 1917, until October, 1917—in other words, from March 23, 1916, to October, 1917, payments of alimony were made by the defendant to his wife, and no dissent was made by the wife, so far as disclosed by the record herein, in respect of the receipt by her of the alimony to which she was entitled; nor was any objection made to the fact that, during all of that time, the payments were received by her from defendant from places outside of the District of Columbia.

From the foregoing testimony (and which does not seem to have been seriously controverted, save only as to its legal sufficiency) it would seem fairly to result that, during all of the period from March 24, 1916, to October, 1917, it was never intimated or suggested by plaintiff or her counsel that defendant had violated the condition of the bond concerning his continued presence in the District of Columbia; nor was any such objection interposed until some time following default made by defendant in the payment of alimony, beginning with the month of October, 1917, and thereafter continuing, and which default resulted in the order of court, entered December 11, 1917, supra, which authorized plaintiff to proceed at law against the principal and surety for the recovery of the penalty of the ne exeat bond.

The inference is fairly deducible, from all of the evidence in the case, that plaintiff and her counsel (without the knowledge or consent of appellant, surety on the bond) were willing and content that defendant should be and remain outside of the District of Columbia, in order to earn moneys with which to pay alimony, so long as he continued to make the payments, and, but for the fact that, ultimately, the payments of alimony ceased, it is reasonable to assume that no objection ever would have been interposed concerning the absence of defendant from this District.

[1] There is no contradiction in the record of the testimony of the surety (appellant) that he had no knowledge of any arrangement made concerning permission to the defendant to leave the District of Columbia, and that he gave no such permission. Obviously the plaintiff, under such situation, could not waive the condition of the bond for her own purposes and for such period as it resulted to her financial benefit, and, at the same time, be permitted to assert that the condition of the bond was and continued in full force and effect and enforceable as

against the surety whenever, in the future, the payments of alimony should cease.

[2] The theory upon which the court below granted a directed verdict for plaintiff in the instant case was that there was no sufficient evidence offered by defendant to go to the jury on the question of consent of plaintiff to the defendant's leaving the jurisdiction—that is to say, that, giving full effect to every legitimate inference that might be deduced from the testimony in the case, there was no issue of fact sufficient in law to go to the jury on the question of the consent of plaintiff in respect of the matter mentioned.

In this we think that the trial court erred, since, as we have heretofore decided in prior cases, disputed questions of fact are not to be determined by the court as matter of law, but should be submitted to the jury. The court is of opinion that, under the testimony adduced in this case, there was sufficient evidence to go to the jury upon the question of consent on the part of plaintiff to a modification of the express condition of the ne exeat bond, and that, if the jury should find, from all of the evidence in the cause, that the plaintiff had so consented, either by express or implied agreement or arrangement in that behalf, without the knowledge and consent of the surety on the ne exeat undertaking, the jury would have been justified in returning a verdict for the defendant, appellant herein.

Several other alleged errors are assigned by appellant; but, in the view we have taken of the case, as hereinabove expressed, we do not deem it necessary to consider the same.

Accordingly the judgment of the court below is reversed, with costs to appellant, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

HARRIS, Adjutant General, v. WALSH.

(Court of Appeals of District of Columbia. Submitted November 8, 1921. Decided January 3, 1922.)

No. 3489.

1. Army and navy ⇐20—Draft regulations protect informants.

The regulation of the president for the operation of the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), prohibiting search of the records by registrant and others, but authorizing the giving of certain information to the registrants, as interpreted by the notes to such rule, was for the protection of those giving confidential information to the boards, and the right to have an affidavit submitted to the board kept secret is one which can only be waived by the informants.

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

2. **Army and navy ⟸20—Protection to informants not limited to war's duration.**

The protection of secrecy guaranteed to those giving confidential information to the draft boards was intended to be perpetual, and was not limited to the duration of the war.

3. **Witnesses ⟸298—Transfer of confidential draft records to hands of Adjutant General does not terminate secrecy.**

The fact that an affidavit containing confidential information to a draft board had been transferred to the custody of the Adjutant General does not entitle the registrant to have it made public, and the Adjutant General cannot therefore be required to produce it in court.

4. **Witnesses ⟸298—Knowledge of contents of information to draft board does not authorize registrant to use it.**

The fact that a registrant for the draft knew that his wife had made an affidavit giving confidential information to the draft board, and knew the contents of the affidavit, does not entitle him to have the affidavit produced in court.

5. **Witnesses ⟸298—Adjutant General cannot be compelled to produce confidential affidavits over protest of informant.**

The Adjutant General of the army cannot be compelled by a draft registrant to produce, in support of the registrant's action for divorce, an affidavit made by the registrant's wife in opposition to his claim for exemption, if the wife resisted such production.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by Harry A. Walsh against Peter C. Harris, Adjutant General of the United States Army, to compel the Adjutant General to produce an affidavit which was in his official possession. From a judgment requiring production of the affidavit, or committing for contempt, the Adjutant General appeals. Reversed and remanded, with directions to vacate the order.

John E. Laskey, Peyton Gordon and Grant T. Trent, all of Washington, D. C., for appellant.

Frederick C. Bryan, 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 adjudging appellant, Peter C. Harris, Adjutant General of the United States Army, in contempt of court, and requiring him to produce a certain affidavit in his official possession, or stand committed for failure to comply with the order of the court.

The order was made in a divorce proceeding pending in a court of competent jurisdiction in Summit county, Ohio, wherein Harry H. Walsh is plaintiff and Mary H. Walsh is defendant. The subpœna duces tecum issued out of the District Supreme Court, commanding the appellant to appear before a notary public in this city to testify on behalf of the plaintiff and to produce the affidavit in question.

Plaintiff, Walsh, in his petition for divorce, charges neglect of duty and extreme cruelty on the part of his wife, in that she, by filing this affidavit with the draft board at Akron, Ohio, caused him to be inducted into the military service of the United States.

The single question presented is whether appellant is required to

respond to the order of the court and produce the affidavit as therein directed. By the act of Congress of May 18, 1917 (40 Stat. 76), and acts amendatory thereof (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), the President was invested with full power "to increase temporarily the military establishment of the United States." The organization of the selective draft system was left largely to the discretion of the President. The act of Congress declared that the selective draft "shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act." Rules and regulations were accordingly promulgated, known as the "Selective Service Regulations." Section 11 of the rules protected from publication "answers of any registrant concerning the condition of his health, mental or physical," without the consent of the registrant, and imposed a severe penalty on any one—

"who shall divulge or impart, to any person not entitled under the foregoing paragraph to receive the same, any information contained in the record as to a registrant's physical condition, or as to his answers concerning dependency."

The rule further provided that—

"The portions of such records as are hereinbefore held to be confidential shall not, without the consent of the registrant, be produced and published in response to any subpœna or summons of any court, except as they may be so produced and published for the purpose of being used in the prosecution of the registrant, or of any person acting in collusion with such registrant, for perjury or for any violation of the provisions of the Selective Service Law or of these Rules and Regulations."

It will be observed that the foregoing are exceptions to the general provision of the rule that—

"All records required by these Rules and Regulations to be filed with and kept by local and district boards, Adjutants General, and other persons in connection with the registration, examination, selection, and mobilization of registrants under the Selective Service Law, and these regulations, shall be public records and shall be open during usual business hours for public inspection of any and all persons."

Section 12 of the regulations provides, as stated in the opinion of the court below:

"That whenever any registrant or other person (except one of the class of persons named in the proviso of the foregoing section 11) applies to a local or district board to inspect any of the records of such boards, such registrant or other person shall not be permitted to search through such records; but it shall be the duty of members or clerks of local and district boards and other persons having the custody of such records to discover, open and point out to the registrant or other person the portion of the record containing the information requested by such person so applying; subject to the limitations as to disclosures provided in the foregoing section 11."

While it may be said that this regulation merely restricts the method by which persons may consult the records, it is further explained by note 2, which, among other things, provides:

"The spirit and intent of the regulation requires board members to be in possession of every available fact touching on or pertaining to cases within their respective jurisdiction. No small amount of such information is confidential. To open to the public such information would be a breach of the

confidence under which persons interested in the successful operation of the Selective Service Law have furnished the information and will discourage giving further information, to the consequent serious impairment of the fair and equitable selection of registrants. The public, therefore, should not be given access to confidential records or reports. A registrant is entitled to access to his questionnaire and to the record in his case, including the record of his physical examination (form 1010, p. 227), but where such records contain statements or letters of a confidential nature, other than those offered by himself, the names of the informants should not, without their consent, be divulged to the registrant, who is, however, entitled to be advised of all statements and allegations which form part of the records in his case. Ample precaution should be taken to prevent a registrant from ascertaining the name or names of persons who have given such confidential information."

It is further provided in section 5 of the Regulations, 2d edition, that—

"All notes contained in these Rules and Regulations are a part thereof and have the same force and effect as the regulations themselves."

[1] The court below seemed to consider the rules as for the sole protection of the registrant, an immunity which, however, he might waive, and which he here tenders himself willing to waive. That construction might be applicable to section 11, but we think section 12 places certain required information beyond even the control of the registrant. It looks to the protection of those furnishing information. While the registrant may secure information as to the contents of affidavits and documents, yet the officers were enjoined to keep secret the names of the informants. While a registrant might have access to his questionnaire and the record in the case, "to be advised of all statements and allegations which form part of the records in his case," the Regulations provide that "the names of the informants should not, without their consent, be divulged," and that "ample precaution should be taken to prevent a registrant from ascertaining the name or names of persons who have given such confidential information." It will be observed that the informant is the one here protected.

Besides, a question of public policy is involved. The President was charged with the duty of hastily bringing into existence a great army for the country's defense. Draft boards were organized throughout the country to aid in this work. There was great temptation to registrants to avoid the draft, and it was essential that the boards should have every possible facility for securing information, and this could be best accomplished by giving assurance that the names of informants should be kept confidential.

[2, 3] Nor was this restriction to continue only during the war. No limitation is fixed in the regulations, and we think none can be inferred. The cloak of protection thrown around these informants was intended to be perpetual. It is, therefore, beside the case that the records have passed into the custody of the Adjutant General for safekeeping. The same injunction of secrecy is imposed upon him as rested upon the draft boards, and his duty as to giving out information is the same as theirs. It will hardly be suggested that a board would have been justified in divulging the names of informants, merely to enable a registrant to find ground for bringing suit for divorce.

[4] Nor does the fact that the contents of the affidavit are known to the parties and the public alter the case. The court below laid stress upon this point in the following language:

"The application for the production of this document is by the registrant. Any right that he may have had under the regulations in question to the document being considered as confidential, he waives necessarily by his application. There is, as far as the court is advised, no proceeding pending against the affiant of a criminal character. There has been a divorce suit pending between the petitioner herein, the plaintiff in the divorce suit, and his wife. Is the affidavit under those circumstances entitled to be given the scope which is claimed here by the Adjutant General? What public danger is to be apprehended, if the affidavit should be produced in this proceeding? The court does not conceive that the interests of the government would be jeoparded at all. Is it conceivable that there might arise a condition where the court would be justified in refusing to permit a defendant on trial in a criminal case to insist upon the right to know the nature of the criminal act charged? In this case the affidavit is known, the contents are known, the maker is known."

[5] It will be observed that the learned justice fell into error in holding the exclusive right of waiver in the registrant. The right of waiver as to this affidavit is in the informant, who signed and swore to the document. Though its contents are known, and the name of the author is known, the fact remains that it cannot be proved so long as she refuses to waive the privilege, a protection thrown around her by the regulations, which, in this instance, have the force and effect of law, and, so long as she elects to avail herself of the protection which the law thus affords, the Adjutant General, as custodian of the affidavit, cannot be compelled to produce it in court to be used to her disadvantage. What modification of the rule might be indulged, if the registrant were on trial under a criminal charge, and the production of the affidavit were necessary for the protection of life or liberty, it is unnecessary to decide, since that situation is neither before us nor analogous to the instant case.

The judgment is reversed, with costs, and the cause remanded, with directions to vacate the order holding appellant in contempt of court.

Reversed and remanded.

UNITED STATES ex rel. McALESTER-EDWARDS COAL CO. v. FALL, Secretary of the Interior, et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1921. Decided January 3, 1922. Writ of Error to Supreme Court of United States Allowed January 20, 1922.)

No. 3695.

1. **Indians ⇐15(1)—Lessee of coal under lands can purchase surface at previously appraised value.**

Act Feb. 8, 1918, authorizing the sale of coal in the segregated mineral lands of the Choctaw and Chickasaw Nations after such minerals have been appraised, and giving lessees of such minerals the preferential right, if exercised within 90 days after the appraisal of the minerals, to purchase, at the appraised value, the surface of the lands theretofore reserved

by the Secretary of the Interior, did not intend that the value of the surface should again be appraised, since the act makes no provision for such appraisement, and it could not be made within the 90 days during which the lessee must purchase, and therefore the lessee is entitled to purchase the surface at the value placed on it by appraisal, under Act Feb. 19, 1912.

2. **Mandamus ⟸72—Does not lie to review erroneous decision by ministerial officer, based on interpretation of statute.**

The rule that mandamus will not lie to control the exercise of discretion by an executive officer applies, where the law reposes in the officer the power to do an act on the fulfillment of certain conditions, and who must find compliance therewith as a condition precedent to granting relief, or where the construction of a statute is essential to determine whether the party seeking relief comes within its provisions.

3. **Mandamus ⟸71—Writ issues to compel performance of ministerial acts refused on erroneous construction of statute.**

Mandamus will issue to compel an executive officer to perform a ministerial act required of him by statute, even though his refusal to perform the act is based on an erroneous construction by him of a statute.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of the McAlester-Edwards Coal Company, against Albert B. Fall, Secretary of the Interior, and others. From a judgment denying the writ, relator appeals. Reversed and remanded.

J. W. Beller, of Washington, D. C., Geo. M. Porter, of McAlester, Okl., and C. H. Syme, of Washington, D. C., for appellant.

C. E. Wright, of Washington, D. C., G. G. McVay, of Ardmore, Okl., and Edwin O. Clark, of Stigler, Okl., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from a judgment of the Supreme Court of the District of Columbia denying a writ of mandamus to compel the Secretary of the Interior and the other formal respondents to receive a balance alleged to be due upon the purchase price of certain coal lands in Oklahoma and to issue a patent therefor.

It is alleged by the petitioner, the McAlester-Edwards Coal Company, and admitted by the government, that, under the provisions of the act of Congress of July 1, 1902 (32 Stat. 641), the Secretary of the Interior reserved the lands in question from allotment to the individual members of the Choctaw and Chickasaw Nations; that petitioner is the owner of coal mine leases upon said lands, executed under the act of Congress of June 28, 1898 (30 Stat. 495), and extended in area under the act of Congress of March 4, 1913 (37 Stat. 1007).

By the act of Congress of February 19, 1912 (37 Stat. 67), the Secretary of the Interior was authorized to sell the surface leased and unleased of the lands segregated and reserved under the act of July 1, 1902, reserving the coal and asphalt thereunder. The act required the Secretary to classify and appraise the surface to be sold. Section 2 of the act provided:

"That after such classification and appraisement has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice

in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to five per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior: Provided, that the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than ten per centum of such surface: Provided further, that such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved: Provided further, that if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purposes of future operations, prospecting, and for ingress and egress, as hereinafter reserved."

Pursuant to this act, the Secretary classified and appraised the lands. but appellant company elected not to purchase under the provisions of the act, since under the terms of its leases, it claimed the right to the free use of sufficient surface lands to enable it to conduct its mining operations. In recognition of this claim, the Secretary alleges in his answer:

"That the relator failing to exercise its right to purchase the surface to the extent authorized by the act of February 19, 1912 (37 Stat. 67), the Secretary of the Interior, acting under section 2 of said act, in his discretion and with the consent of the relator, designated certain portions of the land occupied by said company as necessary to its continued operations and reserved the same from sale, the residue not thus designated becoming thereby subject to sale."

By the act of Congress of February 8, 1918 (40 Stat. 433), the Secretary of the Interior was authorized to sell the coal and asphalt mineral deposits in the segregated mineral lands of the Choctaw and Chickasaw Nations, and was required, before offering the same for sale, to cause them to be appraised. Pursuant to this act, appellant company purchased the coal under at least one of its leases, paying therefor $83,319.32. The act, among other things, provides:

"That any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior."

Pursuant to this provision of the act, officers of the department, acting under the Secretary, within 90 days after the completion of the appraisement of the minerals, notified appellant company of the price at which its reserved surface lands could be purchased, based upon the appraisement made under the act of 1912, and, within the time required by law, appellant company exercised its preferential right to purchase, and paid its first payment of $2,291.76, which was duly accepted. Appellant company thereafter, within the time pre-

scribed by the Secretary, made payments, and on October 15, 1920, tendered the balance of the purchase price, $10,360.06, which was refused. Hence this action to compel the Secretary to accept the balance of the purchase price and execute a patent for the lands in controversy.

The Secretary attempts to justify his refusal upon the ground that, under the act of 1918, he was authorized to make a new appraisement of said lands and sell them upon that basis. In pursuance thereof, he answers that he—

"caused an appraisement to be made by three competent persons of all the surface lands belonging to the Choctaw and Chickasaw Nations of Indians in Oklahoma embraced within coal-mining leases and reserved from sale, including the lands here in controversy, for the purpose of fixing the price to be paid therefor by the said coal-mining lessees including relator, in the exercise of the preferential rights of purchase granted by said act."

The Secretary then alleges the valuation fixed upon appellant's land to be $20,482.60, but that he—

"permitted his subordinate officers to receive applications for purchase of said lands by lessees, including the relator herein, at a different valuation, to wit, at a valuation placed thereon by an appraisement made some years before under authority of the act of February 19, 1912."

Petitioner demurred to the answer of respondents. On hearing, the court overruled the demurrer, and, petitioner electing to stand upon the demurrer, judgment was entered, discharging the rule and dismissing the petition. From the judgment this appeal was prosecuted.

[1] Coming to the construction of the statutes, we think there is no room for doubt as to their meaning. They relate to the same subject, and confer rights respecting the same subject-matter. The act of 1912 provided for an appraisement of the surface of the reserved lands, with a view to their sale. This appraisement was had in compliance with the statute, and reduced to record. The act of 1918 provided for an appraisement of the minerals under the lands, with a view to their sale. Money was appropriated from the funds of the Indians to meet the expenses of the two appraisements, and the most specific directions as to how they should be conducted were contained in the statutes.

In respect of the appraisement of the surface of the reserved lands, the act of 1918 contains no directions as to how such an appraisement should be made, and no provision for the payment of the expenses thereof. It is clear, we think, from a comparison of the two acts, that the right granted by the act of 1918 to purchase "at the appraised value" meant, and could only mean, the price fixed by the appraisement under the act of 1912.

The construction contended for by the government would preclude generally the exercise of preferential rights under the act of 1918. The act provides that a person or company desiring to avail itself of the right must do so, if at all, "within ninety days after the approval of the completion of the appraisement of the minerals, as herein provided." It is conceded that the attempted appraisement of the lands did not occur until long after that date. Indeed, the department was

proceeding to dispose of the lands at the price fixed by the appraisement made under the act of 1912, and payments had been received on the sales so made, when suddenly the Secretary changed front and ordered an appraisement to be made under the act of 1918. Besides, if such an appraisement of the lands was authorized by the 1918 act, why was not the time for purchase fixed with reference to that appraisement, rather than the appraisement of the minerals?

Contractual relation between the United States and appellant company is not here involved. Congress was dealing with Indian lands as guardian of the Indians, and granted a preferential right in appellant company to purchase the lands in question at a fixed price. No discretion was reposed in the Secretary, except to ascertain the facts which would bring appellant company within the class upon whom Congress conferred the right. That appellant company did comply with every requirement of law, except to yield to an erroneous interpretation of the statute, is conceded by respondents in their answer. It therefore appears that nothing remains in the present case for the Secretary to do, except the mere ministerial acts of accepting the balance of the purchase price and of directing the issuance of a patent.

[2] We do not overlook the well-established rule that mandamus will not lie to control the exercise of discretion by an executive officer. But that applies where the law reposes in the officer the power to do an act upon the fulfillment of certain conditions, and compliance therewith must be found by the officer as a condition precedent to granting relief, or where the construction of a statute is essential to determine whether the party seeking relief under it comes within its provisions. In such a case the courts refuse to convert the writ of mandamus into a writ of error to review possible errors of the officer in his findings of fact or his interpretation of the law as a basis for reaching his conclusion.

[3] But we are not confronted by such a situation, since it is conceded the conditions have been complied with and appellant company is within the preferential class provided for in the statute. The Secretary refuses to perform a purely ministerial act, solely upon a construction which he places upon the law, and insists that the court has no power in this sort of proceeding to disturb his conclusion. No discretion is committed to the Secretary in respect of the performance of the duties imposed by the statute in this case. The right of appellant company to purchase the land under one or the other appraisement is absolute, and the court is not foreclosed from deciding which the Secretary should apply.

This case, we think, falls squarely within the rule announced in Roberts v. United States, 176 U. S. 221, 231, 20 Sup. Ct. 376, 44 L. Ed. 443, and quoted with approval in the recent case of Lane v. Hoglund, 244 U. S. 174, 182, 37 Sup. Ct. 558, 560 (61 L. Ed. 1066), as follows:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties

may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, or how plainly they violated their duty in refusing to perform the act required."

Unless the relief here sought is granted, appellant company will be left without an adequate remedy to enforce its rights. Unlike cases involving the disposition of public lands, there will be no outstanding conflicting patent which would furnish ground for an action in equity, where the holder of such a patent might be adjudged to hold the title in trust for appellant company.

The judgment is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SMYTH, Chief Justice, dissents.

KARRICK et al. v. CANTRILL et al.

(Court of Appeals of District of Columbia. Submitted December 8, 1920. Rehearing Granted April 29, 1921. Resubmitted October 10, 1921. Restored to Calendar for Reargument December 2, 1921. Resubmitted December 7, 1921. Decided January 3, 1922.)

No. 3408.

1. **Landlord and tenant ⟸200(1½)—Courts can review facts in determining whether rents fixed by commission are confiscatory.**

   Though the law creating the rent commission undertakes to limit the appellate court to a review of questions of law, the courts can review such proceedings both as to law and fact, where it is suggested that the rental rates fixed are such that they will result in confiscation, since to deny a party a judicial determination of that question would conflict with the due process clause of the Fourteenth Amendment.

2. **Landlord and tenant ⟸200(1½)—Fair rental depends on market value at time of valuation.**

   The value of the property to be considered in fixing a fair rental therefor is its fair market value at the time the valuation is made.

3. Landlord and tenant ⊂⊃200(1½)—Cost of new building may be considered as approximate market value.

In proceedings before the rent commission to fix reasonable rental, the cost of the building may be considered as approximately establishing its market value, where the building is new, though it is improper ordinarily to base a rental on such cost.

4. Landlord and tenant ⊂⊃200(1½)—Incumbrances not considered in fixing fair rental.

The incumbrances on the building are in no case to be considered in fixing the fair rental value thereof.

5. Landlord and tenant ⊂⊃200(1½)—Rent of apartments in building must be based on value of those particular apartments.

In proceedings before the rent commission to fix the fair rental value of a part only of the apartments in a building, the commission should ascertain the reasonable market value of those apartments, and base the rental thereon, without regard to the income received from other apartments not involved in the proceeding.

6. Landlord and tenant ⊂⊃200(1½)—Rental yielding less than 6 per cent. is confiscatory.

Considering the hazards of the business of renting apartments and the prevailing rates of interest, rent for apartments fixed by the commission, the income from which falls below 6 per cent. of the value of the property, is confiscatory.

7. Landlord and tenant ⊂⊃200(1½)—Operating expenses and repairs must be deducted from gross income in determining rent.

In determining the rent to which a landlord is entitled, the operating expenses and repairs paid by him must be deducted from the gross income before determining whether the rent yields a fair return.

8. Landlord and tenant ⊂⊃200(1½)—New construction to replace worn-out parts may be considered as repairs.

In fixing the reasonable rent for apartments, new construction therein to replace worn-out parts may be considered as general repairs, and deducted from the gross income, not charged against the depreciation account, nor spread over a term of years.

9. Landlord and tenant ⊂⊃200(1½)—Method of computing reasonable rent stated.

In ascertaining a reasonable rent, the rent commission should first determine the fair market value of the property, considering original cost, cost of reproduction, and rental value, then determine the gross rentals demanded, and then compute the operating expenses and deduct them from the gross rental, which will give the net rental from which a percentage of income on the fair market value can be computed.

10. Landlord and tenant ⊂⊃200(1½)—Rent commission's finding as to cost of building held too low.

Evidence in proceedings to fix the fair rental for apartments in a building *held* to show that the cost of the building, as determined by the rent commission, was too low.

11. Constitutional law ⊂⊃298(1)—Landlord and tenant ⊂⊃200(1½)—Fixing rents, yielding less than 3½ per cent. is unfair, and deprivation of property without due process.

Where the rental fixed by the rent commission for a portion of an apartment building, which yielded about two-thirds of the income received from the entire building, would yield a return of between 2.62 per cent. and 3.5 per cent. on two-thirds of the valuation of the property, the rents so fixed are unfair and unreasonable, and amount to deprivation of property without due process of law, contrary to the Fourteenth Amendment.

12. Landlord and tenant ⟸200(1½)—Commission held not to have given landlord fair hearing.

The rent commission did not give the landlord a fair and impartial hearing, where parts of the hearing were had in the absence of counsel, the commission acting in the double capacity of judges and counsel, and where in other instances counsel were not allowed to be heard in defense of the landlord's rights.

Appeal from the Rent Commission of the District of Columbia.

Appeal by James L. Karrick and another against James E. Cantrill and others to review an order of the rent commission fixing rental rates upon apartments. Order reversed, and cause remanded, with directions to grant a rehearing.

C. H. Merillat, of Washington, D. C., for appellant.

Raymond M. Hudson, of Washington, D. C., for appellees.

Chapin Brown, of Washington, D. C., for rent commission.

VAN ORSDEL, Associate Justice. By this appeal a review is sought of an order of the rent commission of the District of Columbia fixing rental rates upon 76 apartments in the Monmouth apartment house in this city.

[1] The first question to be considered is whether the rates fixed will give defendant Karrick a reasonable return on the value of the specific property affected by the order of the commission. While the law creating the rent commission undertakes to limit the appellate court to a review of questions of law, if it is suggested that the rental rates fixed are such that they will result in confiscation, it then becomes the duty of the court, for the proper determination of that issue, to review the proceedings had before the commission, both as to law and fact. On this point, defendant cannot be deprived of a judicial investigation; otherwise, he would not be accorded due process of law.

"In all such cases, if the owner claims confiscation of his property would 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." Ohio Valley Co. v. Ben Avon Borough, 253 U. S., 287, 289, 40 Sup. Ct. 527, 528 (64 L. Ed. 908).

[2] It is important to determine the elements to be considered by the commission in fixing rental rates. The first thing, of course, is to ascertain the fair market value of the property at the time of fixing the rates. As the court, construing a similar statute in New York, said in Hirsch v. Weiner (Sup.) 190 N. Y. Supp. 111 (not yet [officially] reported):

"We know no other logical method for determining rental value than to take the present market value of the property, regardless of its encumbrances as one of the factors. What the owner paid for it may be some evidence of its present value, or it may not be, depending upon the time of, and the circumstances surrounding, its purchase."

The statute here involved is analogous to statutes providing for the fixing of rates for public utilities. The statutes, and the decisions in the absence of express statutes, provide that the basis for the fixing

of rates must be the fair value of the property in use at the time the valuation is made.

[3, 4] The commission, instead of inquiring into the market value of the Monmouth at the date of the investigation, took as a basis the value of the ground, plus the cost of constructing the building. Proof of the cost of the building, like proof of the purchase price, may or may not be an important factor in determining market value. This will depend upon the circumstances of each particular case. In determining the justice of the finding in the present case, we will have to adhere to the method of ascertaining value used by the commission, which, in the present case, since the building was new, may be considered as approximately a fair basis upon which to establish market value. It is, however, an improper method, and should not be employed in any future case. In no case is the question of incumbrance to be considered. On this point we adopt the reasoning of the New York court in Hirsch v. Weiner, supra.

[5] From the order and the record, it is impossible to ascertain the exact basis upon which the rates were fixed on the 76 apartments considered. From the trend of the evidence, it is apparent, however, that the rates were based upon the entire income derived from the building. This was error. While the commission, on its own motion, had power to fix rates upon the entire building, it did not do so, but fixed rates on 76 apartments based upon the total income and value of the property. This is a false basis. The rates should be based upon the value of the 76 apartments in the proportion which their value bears to the value of the entire property. A moment's reflection will demonstrate the injustice of the course pursued by the commission. If rates were to be fixed on but a few apartments in a large building on the theory followed by the commission, it might well be that the rents received on the portion of the building not affected would be sufficient to forbid any allowance whatever on the small portion under consideration. If the rates were fixed for the benefit of the tenants first applying to the commission for relief on the basis of the total income, this would prevent a reduction of the rents of other tenants in the same building subsequently applying.

Again, a common custom prevails in this District of selling apartments and executing conveyances therefor. Suppose an apartment so owned is leased, and the commission is called upon to fix a fair rental value thereon. Could the income derived from the balance of the building be considered? The proposition answers itself. The only proper basis would be to ascertain the value of the apartment from its proportionate relation to the value of the entire property, and fix the rent so as to give the owner a fair income on the value so found, regardless of the rents obtaining in other parts of the building.

This rule of valuation for the purpose of fixing rates is well established. As was said in the Minnesota Rate Cases, 230 U. S. 352, 435, 33 Sup. Ct. 729, 755, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18:

"Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intras-

tate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in the business under the rates prescribed. This was also ruled in the Smyth Case, Id., p. 541. The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business."

Coming now to what would be a fair rate, the New York court found that the landlord should have a net income from the rental of 10 per cent. of the value of the leased property. A rate that will avoid the charge of confiscation must, of necessity, depend more or less upon the facts in each particular case. In Willcox v. Consolidated Gas Co., 212 U. S. 19, 49, 29 Sup. Ct. 192, 199 (53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034), the court affirmed the holding of the New York court:

"That a rate which would permit a return of 6 per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York."

But in Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 267, 39 Sup. Ct. 454, 63 L. Ed. 968, the court refused to approve a finding that a return of 6 per cent. could not be regarded as confiscatory, since 7 per cent. was the legal rate of interest, and "8 per cent. was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business" in the state of Nebraska.

[6, 7] Considering, therefore, the hazards of the business, the value of money at the present time, and the prevailing rates of interest in the District of Columbia, we think that, if the net income from the rental falls below 6 per cent. of the value of the leased property, it should be treated as confiscatory. This rate, however, must be clear of the ordinary expenses. The New York court, supra, on the matter of the allowance of expenses, announced the following rule, which we approve as just and equitable:

"It is obvious that expenses for taxes, insurance, janitor services, repairs, gas and electricity, should be allowed an owner in calculating what gross income should be allowed. We think it is established in this case, as well as in other cases before us, that an annual charge for depreciation on the value of the buildings at the time for which rent is sought should be allowed. The great weight of evidence is that an annual charge of 2 per cent. per year for depreciation on the value of the buildings is fair. The federal and state governments allow such depreciation in the calculation of income tax. There is also judicial authorities for some allowance for depreciation. Schwartz v. Deutsch, 187 N. Y. Supp. 521. When vacancies are proven allowance should also be made for failure to rent by reason thereof. It also appeared in the evidence that the landlords had paid or obligated themselves to pay for repairs made to a boiler on the premises. Two sections of the boiler had become defective and were replaced by the landlords at an expense of $575. There was also included in the repair account a new floor on the roof at a cost of $400, new electric wiring, $773, awnings and window shades, $45, and new plumbing, $925. Appellant claims that the items for boiler, awnings and window shades and new plumbing should be distributable

against future earnings for 'a period of years,' that the item for new floor should be considered 'a replacement chargeable against depreciation reserve,' and that the item for electric wiring should be considered an addition to investment and capitalized. We think all of these items were properly allowed by the court below as current repairs. There are of course instances where buildings are largely remodeled and rebuilt where the improvements should be charged to increase of capital, but the items here for review are not of that character. Nor is the court impressed with the argument that repairs should be spread over a period of years and charged against future income. If that were so repairs made in the past should be brought forward and charged to current income."

[8] It follows from this analysis that, where new construction is installed to replace parts of the structure which have worn out or become defective, it belongs under the general head of repairs.

[9] In ascertaining a reasonable rate in any case, the commission should first determine the fair market value of the property. In doing this, it may consider original cost, as well as cost of reproduction; also, rental value may be considered. These are all elements to be considered; none of which, or all combined, is necessarily conclusive. Second, it should determine the gross rentals demanded by the landlord. Third, it should compute the operating expenses, to be ascertained as herein outlined, and deduct the gross expense from the gross rental. This will give the net rental, from which a percentage of income can be computed on the fair market value of the property.

As suggested, it is impossible to arrive at an accurate conclusion from this record, since evidence as to the proper items of expense in the nature of repairs was ruled out, and the evidence as to costs was so indefinite that we can only approximately arrive at a just basis, resolving all doubts in favor of the commission.

The record discloses that the total annual income from the building at the time of the investigation, allowing nothing for vacant apartments, was as follows:

76 apartments considered by the commission	$ 75,960.00
12 furnished apartments not involved in this investigation	14,760.00
22 unfurnished apartments not involved in this investigation	17,280.00
Café	2,400.00
East Annex	1,800.00
West Annex	1,560.00
Total income	$113,760.00

It will be observed that the 76 apartments considered by the commission furnish approximately two-thirds of the income.

[10] Coming, now, to the cost of the building, which, in the state of this record, must be considered in fixing its fair value, there is a sharp conflict in the evidence. It is attempted by counsel for the commission to estimate the cost of construction of the building upon a statement made by the witness Wardman that he could have built it for 35 cents per cubic foot. But this is inconsistent with his testimony as a whole, since he testified that building materials had increased 125 per cent. from 1914 to the time of the hearing; that the Calverton apartment, of similar construction, which he had recently erected, would cost him 60 cents per cubic foot; that the Somerset apartment, which

he completed just before the war, cost him from 35 cents to 40 cents per cubic foot.

The witness Essex testified that in 1917 the Monmouth would cost from 45 cents to 50 cents per cubic foot. Witness Harding testified that he estimated the Monmouth cost from $452,000 to $475,000. The witness Warren fixed the cost at the date of the hearing at 60 cents per cubic foot.

From this evidence, the injustice of estimating the cost of the building at 35 cents per cubic foot is apparent. The commission did not make any finding of value upon which to base rentals, but merely named arbitrary rates. In determining whether the rates fixed are confiscatory, we must, from all the evidence, arrive at a just basis for computing the cost in order to reach a fair basis of valuation. Considering all the evidence on the subject, and that some secondhand material was used in the construction, we think 45 cents per cubic foot a conservative cost price. On this basis we have a total value as follows:

946,312 cubic feet at 45 cents	$435,840.40
Furniture, according to the witness Plager, who paid the bills	25,000.00
Value of ground, upon which there is no dispute	91,975.00
Total value	$552,815.40

Taking two-thirds of this as a basis upon which to compute the value of the portion of the property under consideration by the commission, we have $368,543.20.

In arriving at the annual expense of operating the apartments from the testimony of the witness Plager, the only witness who attempted to testify by items, it appears as follows:

Pay roll	$ 9,378.36
Extra help	197.00
Coal	5,582.15
Gas	1,827.47
Electricity	3,672.86
Water rent	292.36
Trash and ashes	500.00
Miscellaneous expenses enumerated	768.86
Repairs	10,034.88
Repairs to elevator	1,602.26
Taxes, real and personal	3,231.00
Insurance	462.00
Depreciation on building, 2 per cent	8,716.00
Total	$46.265.20

[11] Taking two-thirds of this as the portion to be borne by the 76 apartments adjudicated, we have $30,843. Deducting this from the total gross income allowed by the commission on the 76 apartments—$41,496—results in a balance of net income of $10,653, which, on the proportionate value which the 76 apartments bear to the whole property, $368,543.20, yields an income of 2.62 per cent. Computing, however, upon the unsupported statement of Wardman, it would only yield 3.5 per cent. It is apparent that this result is so unfair and unreasonable that it amounts to deprivation of property without due pro-

cess of law, within the inhibition of the Fifth Amendment to the Constitution. The rates fixed are confiscatory, and therefore void.

[12] This, however, is not the only error calling for a reversal. From this record we are convinced that, as matter of law, defendant did not have a fair and impartial hearing. Parts of the hearing were had in the absence of counsel, the commission acting in the double capacity of judges and counsel. In other instances counsel were not allowed to be heard in defense of defendant's rights. Indeed, the proceedings were conducted more in the nature of an inquisition than a judicial investigation, in which the commission was called upon to judicially determine valuable property rights.

Defendant constructed the Monmouth apartment at a time when money was in great demand and very difficult to obtain, when building materials could only be procured with difficulty and at very high prices, and when the congested condition of the District, due to the government's war activities, was acute. Defendant, assuming the hazards attendant upon this enterprise, and constructing the building in a location best suited in some degree to afford housing accommodations for government clerks and officials, should not be considered in the light of a malefactor, but rather as a public benefactor. It was this congested condition, which defendant sought in some degree to relieve, that furnished the legal basis for the emergency statute creating the rent commission.

The order is reversed with costs, and the cause remanded, with directions to the commission to vacate its order and to grant a rehearing.

Reversed and remanded.

Mr. Justice HITZ of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

KARRICK v. COLMAN.

(Court of Appeals of District of Columbia. Submitted March 8, 1921. Rehearing Granted April 29, 1921. Resubmitted October 1, 1921. Restored to Calendar for Reargument December 2, 1921. Resubmitted December 7, 1921. Decided January 3, 1922.)

No. 3461.

1. **Landlord and tenant ⟸200(1½)—Rent law is constitutional.**
   The constitutionality of the rent law is no longer an open question.
2. **Landlord and tenant ⟸200(1½)—Without evidence before rent commission, it is presumed to support finding.**
   Where the record does not contain the evidence produced before the rent commission, it is presumed that the commission's finding was supported by the testimony.

Appeal from the Rent Commission of the District of Columbia.

Appeal by James L. Karrick against William A. Colman from an order of the rent commission finding appellant guilty of refusing to furnish electric current. Decision of the rent commission affirmed.

C. H. Merillat, of Washington, D. C., for appellant.
Raymond M. Hudson, of Washington, D. C., for appellee.
Chapin Brown, of Washington, D. C., for rent commission.

VAN ORSDEL, Associate Justice. This appeal is from an order of the rent commission finding appellant guilty of refusing to furnish appellee, a tenant in the Monmouth apartment house, in this city, with electric current for lighting purposes for a period of 12 days, as in his lease he had agreed to do, and fixing reasonable compensation at $150.

[1, 2] The appeal is here to contest the constitutionality of the rent law, but this is no longer an open question. Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. ——. The record does not contain the evidence adduced before the commission; hence it will be presumed that the finding of the commission is supported by the testimony.

The decision is affirmed, with costs.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr Chief Justice SMYTH in the hearing and determination of this appeal.

GOODRUM v. CLEMENT.

(Court of Appeals of District of Columbia. Submitted November 18, 1921. Decided January 3, 1922.)

Nos. 1441–1444.

1. **Attorney and client ⇐125—Transaction in which attorney assumes antagonistic position closely scrutinized.**
   The relation of attorney and client is one of the highest trust and confidence, and demands the utmost good faith on the part of the attorney, and the courts will closely scrutinize any transaction in which the attorney has assumed a position antagonistic to his client.

2. **Attorney and client ⇐125—Patents ⇐91(1)—Attorney, claiming invention claimed by client, held to have burden of proof.**
   A patent attorney, filing an application for a patent on an alleged invention by him on which his client also seeks a patent, has the burden of proving his good faith, though his application was first filed.

3. **Patents ⇐91(4)—Evidence held to show client conceived invention and disclosed it to attorney.**
   In an interference proceeding between a patent attorney and a client, of whom the attorney had also been a partner, evidence *held* to show that the client conceived the invention and disclosed it to the attorney.

4. **Attorney and client ⇐125—Patents ⇐90(7)—Patent attorney could not file application relating to same subject-matter as client's invention, or profit by client's disclosure.**
   A patent attorney, who was also his client's partner, was precluded from filing any application of his own relating to the same general subject-matter to which his client's invention related, and, where the client disclosed the basic idea to him, could not profit by information that he

obtained at his client's expense, and his attempt to do so was a betrayal of trust, which could not avail him.

5. **Patents ⇐113(1)—Contention that earlier decision is res judicata too late, when not made in Patent Office.**

The contention in an interference proceeding that the decision in an earlier proceeding was res judicata came too late, when not made in the Patent Office, but first made in the Court of Appeals.

6. **Patents ⇐112(4)—Interference decision not res judicata in subsequent proceeding involving broader issue and additional party.**

The decision in an interference proceeding between two parties was not res judicata in a subsequent proceeding between three parties involving a broader issue, especially where the third party did not even contend that he could have claimed the narrower issue in the prior interference.

Smyth, Chief Justice, dissenting in part.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Charles L. Goodrum, Edward E. Clement, and Harry G. Webster, and interference proceeding between Harry G. Webster and Edward E. Clement. From a judgment in the three-party interference in favor of Clement, the other parties appeal; and from a decision in the other proceeding in favor of Clement, Webster appeals. Decision in the three-party case reversed, and priority awarded to Goodrum. Decision in the other case affirmed.

J. G. Roberts and G. W. Rich, both of New York City, and C. C. Bulkley, of Chicago, Ill., for Goodrum.

H. A. Dodge, of Washington, D. C., and W. G. McKnight, of New York City, for Clement.

Thos. H. Ferguson and Curtis B. Camp, both of Chicago, Ill., for Webster.

ROBB, Associate Justice. Nos. 1441, 1442, and 1443 are appeals from a decision of the Patent Office, in an interference proceeding, finding the party Clement to be the original and prior inventor of the subject-matter of the counts. The invention relates to the art of automatic telephony, in which, prior to this invention, the mechanism at the central station was controlled by a pair of relays for each telephone, and was known as a three-wire system. This invention dispenses with the use of a third wire by making one relay of each pair slow to release, and the other relay faster, so that, by properly timing the interruption of a circuit, one or both of the relays may be actuated. The issue is expressed in five counts, but the first, here reproduced, will sufficiently illustrate the group:

"1. In an automatic telephone system, a progressively movable switching mechanism, comprising a motor magnet and two relays controlling the operation of said motor magnet, one of which relays responds to impulses of current with greater rapidity than the other, in combination with a telephone instrument metallic circuit, and means for despatching current impulses thereover to operate said relays."

We first will consider the Goodrum and Clement applications. Prior to 1904 Goodrum had made inventions in the art of automatic telephony, and also had done considerable work in that art jointly with a Mr. J. W. Lattig. The efforts of these two inventors to exploit their

inventions having failed to progress as satisfactorily as desired, they entered into negotiations with the party Clement, a patent lawyer peculiarly skilled in this art, and who not only had made several inventions, but, in addition, had engaged in the manufacture of telephone apparatus. These negotiations resulted in a contract, dated August 1, 1904, under which Clement undertook to prepare and prosecute applications upon inventions in this art and to assist in disposing of them. For these services Clement was to be paid a sum covering his actual professional work and to receive a one-third interest in the remaining proceeds. The terms of this contract were enlarged later to include all the inventions of Goodrum and Lattig, as is evidenced by letters written by Clement. Under date of November 17, 1904, referring to a doubt as to whether a certain invention was "a joint or sole case," he wrote:

"I am willing to handle this or any other inventions you may have under our continuing understanding as to the division of profits into thirds, I to have one-third."

On March 10, 1905, in a letter to Mr. Lattig in which he mentioned that he had "filed one of the Goodrum cases yesterday," he stated:

"We have agreed that I have a one-third interest in all the original inventions, and a one-fourth interest in the new ones."

That such was the arrangement of the parties is so clear that we shall not dwell further on the evidence relating to it. The Assistant Commissioner, after alluding to the contract, these letters, and the contention of Goodrum "that a partnership relationship existed between Clement and Goodrum," said:

"I think that the contention that such a relationship is thus shown to have existed is well taken. Clement evidently entered into the further agreement with a view to benefiting by any additional inventions that Lattig and Goodrum might make, and which were not included among the original inventions, in view of which the memorandum agreement of August 1, 1904, was drawn."

There is no dispute that the parties, Lattig, Goodrum, and Clement, met at Atlantic City about the middle of August, 1904, for a conference, and that during the conference it was decided that a basic or omnibus application, covering as much of the work of these two inventors as could be covered in one application, should be prepared and filed. There also is no dispute that Clement was supplied then and there with all information necessary to the filing of that application, and that, as result, he filed an application on August 29th, following, known as the Grandfather Case. Goodrum and Lattig both testified that Goodrum then communicated to Clement an idea of means consisting in the employment of quick and slow relays in series in one circuit, as contradistinguished from the two-circuit arrangement of the prior art, and that Goodrum thereupon made a drawing illustrative of his conception. As the result of this disclosure Mr. Clement, according to the testimony of Goodrum and Lattig, said he could incorporate the general idea in the omnibus application he was to prepare "by calling these relays quick and slow."

It is undisputed that Clement placed the words "quick" and "slow" opposite two relays on Fig. 3 of the application drawings, but he denies having told Goodrum that protection could be obtained by thus designating these two relays. However, it is a fact that Clement has entirely failed to give any other explanation for the presence of these significant words on the drawings. That Goodrum was in possession of the invention at that time is testified to by John and Charles Erickson, witnesses whose character and credibility are unimpeached, who were skilled in the art and capable of understanding and appreciating such a disclosure. One of these witnesses testified that Goodrum made a sketch, which witness kept for some time, but finally lost. He produced from memory, however, a copy of the sketch which disclosed the invention. The date was fixed by him with reference to the time he left the employ of one firm and entered that of another. That the basic idea underlying the invention was present in the mind of Goodrum prior to the Atlantic City meeting is conclusively shown by a letter he wrote Lattig on July 18, 1904, in which he said:

"Now have system in mind [that automatic] that will send all signals over the two wires, doing away with the ground at subscriber's station; how is that?"

A witness by the name of B. G. Dunham, a telephone engineer, produced a letter addressed to him under date of June 6, 1905, and signed by Goodrum, containing a description of the two-wire system. Dunham testified that he understood the disclosure sufficiently well to enable him to set up switches embodying the new idea. There is no reason to doubt either the authenticity of this letter or the testimony of Mr. Dunham as to what he did. Later, in May of 1906, a system embodying the issue was installed, under the direction of Goodrum, in the Ellis Hospital at Schenectady, N. Y., and it may be noted here that no other party actually has reduced the invention to practice.

On December 9, 1905, Clement, who then sustained the relationship of attorney and partner to Goodrum, filed an application covering the invention of the issue, a fact which, so long as possible, he concealed from Goodrum. In this connection it will be well to keep in mind that Clement testified that Goodrum not only failed to make a disclosure to him at Atlantic City, but that no such disclosure was made by Goodrum at any time prior to the taking of testimony in this case. His denial was in these words:

"His [Goodrum's] statement is absolutely without foundation. He not only made no disclosure to me then, at that time, of any such thing, but he never made it at any other time prior to the present. Any statement to the contrary is either a serious mistake or a deliberate falsehood."

We come now to the correspondence between these parties. On February 16, 1906, Goodrum wrote his partner and attorney, Clement, in part as follows:

"I thought it would be of interest to you to know I have finished my drawing of the metallic circuit system, using only the two wires and no ground. * * * I have tried it out, and it is all one could desire. * * * The new two-wire system will reach you in a very few days through the regular channel."

It will be obvious that this letter referred to the system of this issue and must have been so understood by Clement. Indeed, as found by one of the tribunals of the Patent Office, the phraseology of the letter clearly indicates that Clement already was advised of Goodrum's activity along that line. To this letter Clement replied, on the 19th, in part as follows:

"Your valued favor of the 16th is received. Am glad to hear of your progress and trust to see you soon. I would suggest that you hold up any further systems until I have the opportunity of taking up matters with your people there, and have some definite arrangement which will be satisfactory."

One month earlier Clement had alluded to the very definite arrangement existing between the parties, an arrangement which was in full force when this letter was written. On May 8th, following, in a letter to Lattig, Clement wrote:

"You will recall that I told you some time ago I had some other clients who own some automatic systems and apparatus, and that in case it seemed desirable at any time I thought you could take advantage of their devices under licenses. * * * I am, of course, entirely unaware who all the other parties are; but I think it quite likely that the Office has gathered up a large bunch, and I suspect that the Chicago automatic crowd is in it."

To this letter Lattig responded with a request that Clement—

"kindly advise us of what these systems and apparatus consist, so that we may be able to intelligently consider the question as to whether or not we would desire to negotiate for the same."

On May 14th, following, in answer to this letter, Clement stated:

"As far as I am at present advised, there are no other systems in my custody which are the same as yours."

Under date of May 16th, in another letter to Lattig, Clement said:

"With regard to the metallic circuit system, no one has been able to get any broad claims on this, and no one will."

Shortly after this Goodrum came to Washington for the purpose of having Clement prepare certain applications, including the two-wire system. He testified that he then showed Clement his drawings and explained the invention to him in detail; that, finally, Clement said—

"he was in a very peculiar position, and that he was afraid he would be unable to file this case, as well as the others, and asked to delay until he had time to think it over a little bit."

Later, according to Goodrum's testimony, Clement informed him that other clients objected to having him prepare the application for the two-wire system. Clement, however, declined to disclose the identity of his other clients, and refused to answer an inquiry by Goodrum as to whether he (Clement) was the inventor. On June 4th, following, Clement wrote Lattig:

"Mr. Goodrum left here Saturday, and most of the descriptive matter for your new system case was written while he was here. I regret to say that, from what he tells me, that system case is in the same line of work which I have in my hands for other clients, even if it does not actually interfere. In order to secure myself against the possibility of criticism, I have communicated with the other clients as soon as I had an idea of what was in this

system, and they strenuously object to my proceeding in any doubtful case. The papers in the case have been sealed up and forwarded by express."

Under date of June 8th Clement again wrote Lattig, saying:

"You will kindly recall that I had no information *as to the nature of the means employed* in your metallic circuit system until recently; but, as it happens, it would not have changed the situation, even if I had." (Italics ours.)

Further correspondence of a cumulative nature followed, but we need not detail it here.

The Examiner of Interferences awarded priority to Goodrum, but the Examiners in Chief and the Assistent Commissioner, proceeding upon the theory that, as between Clement and Goodrum, the burden was upon Goodrum, because Clement's application antedated his, found that Goodrum had not sustained the burden, and accordingly awarded priority to Clement.

[1, 2] The relation of attorney and client is one of the highest trust and confidence, and demands the utmost good faith on the part of the attorney. This relation is not only highly confidential, but presents so many opportunities for the reaping of special benefits at the expense of the client by an attorney so disposed, that courts will closely scrutinize any transaction in which the attorney has assumed a position antagonistic to his client. And where, as here, the evidence shows that as a result of assuming such a position the attorney has gained an advantage, the burden is on him to prove good faith, rather than on the client to prove the absence of it. Overholt v. Matthews, 48 App. D. C. 492. In Milton v. Kingsley, 7 App. D. C. 531, where only a partnership relationship existed, and one partner had communicated the general plan and underlying basic idea of means for an invention to his copartner, who thereafter claimed to be the inventor of an improvement on that basic idea, the court ruled that the invention belonged to the first partner, saying:

"It is in direct antagonism to the fundamental theory of the law of partnership that one partner should, without the consent of his copartners, carry on for his own exclusive advantage any business within the scope of the business of the partnership."

Even greater reasons obtain for denying such a privilege to one who sustained the double relation of attorney and partner.

[3] That Goodrum had conceived this invention prior to the meeting at Atlantic City in 1904, we think, is established. The testimony of Lattig and the two Ericksons, and the letter from Goodrum to Lattig under date of July 18, 1904, all indicate this. That Goodrum fully disclosed his idea to Clement at that meeting we regard as equally well established. He says he did, and on this point Lattig and the surrounding circumstances strongly corroborate him. For some reason the words "quick" and "slow," which have a peculiar significance in this art, were placed in the Grandfather application by Clement at the request of Goodrum. Goodrum and Lattig have told us why this was done; but Clement, the lawyer and confidential adviser, is yet to be heard from with any degree of satisfaction on this point, although, as

we have seen, the burden was on him to establish his good faith. While he testified positively that never, down to the taking of testimony in this case, did Goodrum disclose the invention to him, his own letters so clearly contradict him that his testimony throughout is not entitled to the weight it otherwise might have. In those letters he clearly admitted he had derived knowledge of this invention from Goodrum at least as early as May of 1906. His attitude toward his client was characterized by bad faith almost from the first. On February 16, 1906, Mr. Goodrum in terms alluded to "my drawing of *the* metallic circuit system using only the two wires and no ground." (Italics ours.) Instead of promptly notifying his client that he (Clement) already had on file an application covering the invention, he expressed his gratification at the progress of his client, but cautiously suggested a delay on the part of the latter, and not until several months later, when circumstances compelled, did he disclose to his client and partner his real attitude. If such conduct on the part of an attorney, and particularly a patent attorney, whose opportunities for personal gain as the result of the relation, are perhaps even greater than those of a general practitioner, may go unrebuked, and the attorney be permitted to profit thereby, courts of justice will have ceased to function.

[4] We have not entered upon a technical consideration of the claims of the issue and the precise extent of the disclosures by Goodrum, because we have deemed such a course unnecessary. As the attorney and partner of Goodrum, Clement clearly was precluded from filing any application of his own relating to this general subject-matter, and when Goodrum, as the evidence clearly shows, disclosed the basic idea to him, Clement could not thereafter profit by information thus obtained at the expense of his client. His attempt to do so was a betrayal of trust, which cannot avail him here. In such circumstances, it is quite immaterial that he preceded his client in the Patent Office. He has wholly failed to sustain the heavy burden resting upon him, and we rule, therefore, that, as between Goodrum and himself, Goodrum is the real inventor.

Coming now to the case of Webster, we accept the finding of the Patent Office that he conceived the invention in July, 1905, and we agree with the Examiners in Chief and the Assistant Commissioner that he was wholly lacking in diligence for more than a year thereafter, during which time his assignee, the Kellogg Company, filed 22 applications in the Patent Office covering his inventions. See Derr v. Gleason, 49 App. D. C. 69, 258 Fed. 969; Clement v. Roberts, — App. D. C. —, 273 Fed. 757.

[5, 6] It developed during the argument of this case that Webster and Goodrum were parties to an interference proceeding in which priority was awarded Webster on counts narrower than the counts here involved, and it now is suggested that the decision is res adjudicata here as between Webster and Goodrum. In the first place, this contention comes too late, as it should have been made in the Patent Office; but it is apparent that, had it been made seasonably, it would have availed Webster nothing, for the obvious reason that neither the issue nor the parties are the same. Moreover, the third party here does

not even contend that he could have claimed the narrower issue in the prior interference.

In No. 1444 the party Webster appeals from a decision awarding priority of invention to Clement. The counts are 8 in number, and differ somewhat from those of the three-party interference. The Assistant Commissioner, upon the same evidence he reviewed in the three-party cases, held Webster lacking in diligence. We have carefully considered and given due weight to the well-prepared brief of counsel for Webster and the evidence in the record, but, as in the three-party cases, we have found no reason to disturb the ruling of the Patent Office on this point.

In Nos. 1441, 1442, and 1443, the decision of the Patent Office is reversed, and priority of invention awarded Goodrum. In No. 1444. the decision of the Patent Office is affirmed.

Reversed as to Nos. 1441, 1442, and 1443.

Affirmed as to No. 1444.

SMYTH, Chief Justice, dissenting in part. See 278 Fed. ——.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

WEBSTER v. FISH.

(Court of Appeals of District of Columbia. Submitted November 17, 1921. Decided January 3, 1922.)

No. 1418.

Appeal from a Decision of an Assistant Commissioner of Patents.

Interference proceeding between Harry G. Webster and Herbert L. Fish. From a decision in favor of Fish, Webster appeals. Affirmed.

Curtis B. Camp and Thos. H. Ferguson, both of Chicago, Ill., for appellant.

Charles C. Bulkley, of Chicago, Ill., for appellee.

ROBB, Associate Justice. This is an appeal from a decision of the Patent Office in an interference proceeding, in which priority was awarded the senior party, Fish. The invention relates to automatic telephony, and the two counts differ from the counts in Nos. 1441 to 1444, inclusive, 277 Fed. 586, this day decided, in that they contain an additional limitation. Count 1, which is sufficiently illustrative, reads as follows:

"1. In a telephone system, a pair of subscribers' lines connected by trunk lines at a central office, automatic switching devices for said subscribers' lines having movements in planes at right angles to each other to select a given line, and means whereby either the calling or called subscriber may release by simply opening the talking circuit, whereby the system is independent of the ground at the substations for releasing purposes."

In addition to the evidence here, it has been stipulated that evidence offered in behalf of Webster in the case above referred to is to be considered.

The Examiners in Chief and the Assistant Commissioner have found Webster lacking in diligence here, as in the other cases, and, as in those cases, we find no sufficient reason for disturbing the finding.

The decision is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

WEEKS, Secretary of War, v. UNITED STATES ex rel. CREARY.

(Court of Appeals of District of Columbia. Submitted October 10, 1921. Decided January 3, 1922. Writ of Error to Supreme Court of United States Allowed January 20, 1922.)

No. 3693.

1. **Army and navy ⟸11—Officer, not objecting to proceedings before court of inquiry, cannot object in mandamus proceeding to compel reinstatement.**
   Where an army officer, at whose request a court of inquiry was convened, to pass upon his classification under National Defense Act, § 24b, was not furnished with a full copy of his record in the War Department, as required by the statute, but was permitted to examine all the original records in the presence of the court, and interposed no objection to the proceedings, it is too late to raise the objection in a mandamus proceeding to compel the Secretary of War to vacate an order discharging him, and to restore him to his former rank.
2. **Army and navy ⟸11—Board convened to determine cause of officer's unsatisfactory classification not confined to record of court of inquiry.**
   Under National Defense Act, § 24b, providing for the classification of army officers, for an opportunity to any officer classed in class B to appear before a court of inquiry, and for the forwarding of the record of such court to a final classification board, and providing that, when an officer is placed in class B, a board shall be convened to determine whether his classification was due to his neglect, misconduct, or avoidable habits, its finding to determine whether he shall be discharged or placed on the retired list, the board convened to determine whether his classification was due to his neglect, misconduct, or avoidable habits is not confined to the record made by the court of inquiry.
3. **United States ⟸28—President may not delegate judicial duties.**
   Where a duty imposed upon the President is judicial in character, it may not be delegated away.
4. **Army and navy ⟸11—President's duty to act on findings of classification board may be delegated to Secretary of War.**
   Under National Defense Act, § 24b, providing for the classification of army officers, the proceedings are purely administrative, and do not partake in any sense of a judicial character, and the President's duty with respect to reviewing the findings of the final classification board and issuing an order of approval or disapproval is purely executive, and can be lawfully delegated to the Secretary of War.
5. **Army and navy ⟸11—Officer has no property or contract rights in office, and holds subject to revocation at will.**
   An army officer has no property right or contract right in his office, and the office he holds is revocable by the sovereignty at will.

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6. **United States ⟸28—President's duty may be delegated to department heads, unless exercise of power expressly or impliedly made judicial.**
The President, as commander-in-chief of the army and navy is vested with wide administrative and executive powers, and unless the exercise thereof is made judicial by express provision of statute, or is such by clear implication, authority may be given by the President to the proper head of a department to act for him and in his name, especially in view of Rev. St. § 216 (Comp. St. § 318), relative to the duties of the Secretary of War.

7. **Army and navy ⟸12—Order discharging officer must be vacated before mandamus lies to compel reinstatement.**
An order discharging an army officer receiving an unfavorable classification under National Defense Act, § 24b, whether made personally by the President or by the Secretary of War under delegated authority, is an order of the President, and must be vacated as a condition precedent to the reinstatement of the officer by mandamus.

8. **Mandamus ⟸64—Will not lie to compel vacation of order discharging army officer.**
Mandamus will not lie to compel the vacation of an order of the Secretary of War, under authority delegated to him by the President, discharging an army officer receiving an unfavorable classification under National Defense Act, § 24b, as the executive and administrative action of the President cannot be controlled by mandamus.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by the United States, on the relation of William P. Creary, against Newton D. Baker, Secretary of War, in which John W. Weeks, his successor as Secretary of War, was substituted as defendant. From a judgment for the relator, defendant appeals. Reversed and remanded.

John E. Laskey and Peyton Gordon, both of Washington, D. C., Frederick M. Brown, of New York City, and L. H. Vandoren, of Washington, D. C., for appellant.

E. S. Bailey, S. T. Ansell, and T. T. Ansberry, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Relator Creary filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel respondent, Newton D. Baker, Secretary of War, to vacate an order discharging the relator from the army of the United States and to restore him to the rank of colonel. A rule to show cause was issued. Respondent answered the petition, and the relator demurred to the answer. Later, present respondent, John W. Weeks, Secretary of War, was substituted for Baker. From a judgment for relator, the case comes here on appeal.

The controversy involves the construction of section 24b of the National Defense Act of June 4, 1920, 41 Stat. 759, 773. The material portions of the section read as follows:

"Immediately upon the passage of this act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and class B, of

officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay."

[1] The relator was placed by the classification board in class B, and at his request a court of inquiry was convened, before which he appeared with counsel. Complaint is made that he was not furnished with a full copy of his record in the War Department, but was furnished only with copies of the unfavorable parts of his record. He was, however, permitted to examine all original records in the presence of the court while in session. No objection was interposed by him or his counsel to the proceedings before the court of inquiry; hence it is too late to raise objection now.

The record of the court of inquiry was then sent to the classification board, which placed relator in class B. Following his final classification, a board of officers (referred to as the "Honest and Faithful Board") was convened, as provided in the act, to determine the cause of such classification. The board held that relator's classification was due to his own neglect, misconduct, or avoidable habits, and he was accordingly discharged from the army.

[2] We think the statute is not difficult of construction, since it expressly provides that the record made by the court of inquiry shall be reviewed by the classification board for the purpose of the final determination of the class to which the officer belongs. There is nothing in the statute, however, which provides that the Honest and Faithful Board, convened for the determination of "whether such classification is due to his neglect, misconduct or avoidable habits," shall be confined to the record made before the court of inquiry. The duty of the Final Classification Board is to determine the general classification to which the officer belongs, while the duty imposed upon the Honest and Faithful Board is to ascertain, as a basis for his retirement from the service, whether or not the disqualification resulted from the officer's own misconduct or from causes over which he had no control. Therefore the record made before the court of inquiry might or might not contain material pertinent to the investigation which the statute imposes upon the Honest and Faithful Board.

Objection is made that relator was not given notice of the hearing before the Honest and Faithful Board, or an opportunity afforded him to be heard personally and by counsel in his own defense. It also appears that one member of the board had formerly sat as a member of an administrative board which had classified relator as a "misfit" for the duties which he was then performing. It is therefore urged that through lack of notice he was deprived of an opportunity to take exception to the personnel of the board.

But this contention may be laid aside, since, in our view, the case turns upon a question of jurisdiction. Upon the following order relator was dismissed from the army:

"The action of the classification board in finally classifying Col. William F. Creary, Infantry, in class B is approved by the President, and by his direction, a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Col. Creary is discharged from the service under the provisions of section 24b of the act of Congress approved June 4, 1920. [Signed] W. R. Williams, Assistant Secretary of War."

[3] It appears that this order was made under authority of a general order of the President authorizing the Secretary of War to take such action in the name of the President as might be necessary in carrying out the provisions of the statute in respect of the classification and retirement or discharge of officers thereunder. The question which at once suggests itself is whether the authority conferred by the statute upon the President is such that it could be legally delegated to the Secretary of War. It is well settled that, where the duty imposed upon the President is judicial in character, it may not be delegated away. Runkle v. United States, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

In that case, the appeal was from a judgment of the Court of Claims in a suit for longevity pay as an officer in the United States army. The case turned upon the legality of Runkle's discharge from the service, where the President had failed to review the court-martial proceedings. The duty of the President to review court-martial proceedings was the principal question before the court. It was held to be a judicial function, expressly imposed by statute, and, as such, could not be delegated away. A court-martial is defined in the opinion of the court as follows:

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. * * * Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively, and it is not enough that they may be inferred argumentatively."

It follows, therefore, that proceedings in court-martial are judicial in character.

True, in the Runkle Case, as here, the order involved the dismissal of an officer from the army. But there the statute expressly provided that—

No "sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case."

The officer was court-martialed for misconduct, convicted, and, as a penalty, dismissed from the service. The proceedings related to the discipline of the army.

[4, 5] Here we are dealing with a general act of Congress for the reorganization of the army, and the proceedings relate to the classification of the officers—those classified in class A to be retained, and those classified in class B to be retired or dismissed according to the cause of unfitness. The proceedings are purely administrative, and do not partake in any sense of a judicial character. Relator has no property right in the office to which he seeks reinstatement, Taylor and Marshall v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187; no contract right is involved, Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472; and the office he held was revocable by the sovereignty at will, Crenshaw v. United States, 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825. In other words, the relator's rights are measured by the statute. Reaves v. Ainsworth, 219 U. S. 296, 31 Sup. Ct. 230, 55 L. Ed. 225; Ex parte Garland, 4 Wall. 333, 378, 18 L. Ed. 366.

[6] The President, as commander-in-chief of the army and navy, is vested with wide administrative and executive power, and, unless the exercise thereof is made judicial by express provision of statute, or is such by clear implication, authority may be given by the President to the proper head of a department to act for him and in his name. The power of the President to delegate authority to the Secretary of War in military affairs is expressed in section 216, R. S. (Comp. St. § 318), as follows:

"The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the department in such manner as the President shall direct."

This implies authority in the President to impose upon the Secretary of War the administration in his name or by his order of much of the general executive power reposed in him as commander-in-chief of the army. The limitation upon the power of the President to so delegate his authority in administrative military affairs seems to extend only to those cases where he is expressly or by clear implication required by statute to act in his individual official capacity.

Nothing in the present statute relating to the classification of officers imposes a judicial duty upon the President to review the findings of the final classification board or personally to issue the order of approval or disapproval. The duty is purely executive, and can be performed lawfully by the Secretary of War. As was said in the Runkle Case:

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. Wilcox v. Jackson, 13 Pet. 498, 513; United States v. Eliason, 16 Pet. 291, 302; Confiscation Cases, 20 Wall. 92, 109; United States v. Farden, 99 U. S. 10, 19; Wolsey v. Chapman, 101 U. S. 755, 769."

[7, 8] The President may, of course, perform this function personally, or, as in this instance, he may delegate it to the Secretary of War. But, in either case, it is an administrative order of the President, and, as such, must be vacated as a condition precedent to reinstatement under the writ. But this cannot be accomplished in this proceeding, since the executive and administrative action of the President cannot be controlled by mandamus. In Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, it was held that the writ of mandamus may issue against the heads of departments to compel the performance of a purely ministerial act, not involving judgment or discretion; but this case has been generally construed as holding that courts have no jurisdiction to compel the President by mandamus to perform even a purely ministerial act incidental to his office.

In Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437, where the state of Mississippi sought by injunction to restrain President Johnson from the execution of the Reconstruction Acts of Congress, upon the ground that they were unconstitutional, the court clearly declared that it was without jurisdiction either to compel the execution of a constitutional law by the President, or to restrain him from executing unconstitutional legislation. The reason for the refusal of the court to exercise the power was stated in the opinion as follows:

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?"

Since, therefore, we are without jurisdiction to compel the vacation of the order of dismissal from the service, the reinstatement of relator cannot be accomplished in this proceeding. Of course, if it is apparent that injustice has been done, the power lies with the President, upon the petition of the relator, to vacate the order and direct a rehearing by the final classification board. The courts, however, are powerless to compel such action.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WEEKS, Secretary of War, v. UNITED STATES ex rel. FRENCH.

(Court of Appeals of District of Columbia. Submitted October 10, 1921. Decided January 3, 1922. Writ of Error to Supreme Court of United States Allowed January 20, 1922.)

No. 3694.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by the United States, on the relation of John W. French, against John W. Weeks, Secretary of War. From a judgment for the relator, defendant appeals. Reversed and remanded.

John E. Laskey and Peyton Gordon, both of Washington, D. C., Frederick M. Brown, of New York City, and L. H. Vandoren, of Washington, D. C., for appellant.

E. S. Bailey, S. T. Ansell, and T. T. Ansberry, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. The only distinction between this case and No. 3693, Weeks v. United States ex rel. Creary, 277 Fed. 594, just decided, is that the Honest and Faithful Board found that appellee's classification in class B was not due to his neglect, misconduct, or avoidable habits. He was accordingly retired from the service. The same reasons for denial of the writ of mandamus exist here as in the Creary Case.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

DOULETT v. MUTHER.

(Court of Appeals of District of Columbia. Submitted November 17, 1921. Decided January 3, 1922.)

Nos. 1424, 1425, 1433–1439.

Patents ⟸93—Inventor held not guilty of such concealment of invention as forfeited rights.

Where an employé of a manufacturer of shoes, inventing a tool for use in setting invisible eyelets, completed and successfully operated the device, which was thereafter used in his employer's factory, and one member of the firm and several other persons skilled in the art were familiar with it, and those in whose presence it was operated were not under his control, his request that they should not divulge the invention to any machine company, when prompted by a desire to prevent the appropriation of his invention, and not by any desire to conceal or suppress it, was within his rights, and did not constitute such concealment as forfeited his rights.

Appeal from decisions of the Patent Office.

Interference proceedings between Henry T. Doulett and Lorenz Muther, between Henry T. Doulett and Frederick S. Glines, between Frederick S. Glines and Henry T. Doulett, and between Albert F. Deitsch and Alfred B. Wales, with three proceedings between Alfred F. Deitsch and Henry T. Doulett, and two proceedings between Alfred F. Deitsch and Robert B. Smith. From adverse decisions Doulett,

Deitsch, and Glines appeal. Decisions in the first two cases reversed, and decisions in the other cases affirmed.

Frederick L. Emery, Lawrence G. Miller, and Edward G. Curtis, all of Boston, Mass., and A. M. Holcombe, of Washington, D. C., for Doulett, Wales, and Smith.

F. J. V. Dakin, of Boston, Mass., for Muther, Glines, and Deitsch.

J. H. Milans and C. T. Milans, both of Washington, D. C., for Deitsch and Glines.

ROBB, Associate Justice. These interferences involve a tool used in setting invisible eyelets in shoes. By stipulation the testimony taken in any one of the interferences may be used in any of the others.

We first will consider No. 1433. That interference involves five counts, of which the first reads as follows:

"1. An eyelet setting device consisting of means for setting eyelets in one or more of the layers of material, comprising an upsetting device having a slightly projecting outwardly and upwardly curved setting shoulder combined with an anvil cooperating therewith, said upsetting device being arranged to spread and progressively turn the end of the eyelet over on said material between the said layers."

Each of the tribunals of the Patent Office found that, while Deitsch conceived the invention in August of 1912, he did substantially nothing toward its reduction to practice prior to his filing date, about two years later, and hence that, as stated by the Assistant Commissioner, he "was utterly lacking in diligence." Each of the tribunals has satisfactorily discussed the evidence bearing upon this question, and we are content to adopt their conclusion without further consideration of that evidence.

Doulett, a stitching room operator, was employed by Leonard & Barrows, shoe manufacturers, of Middleboro, Mass. He commenced his experiments in April of 1913, and by the 24th of September following had completed and successfully operated his Exhibit No. 10, which embodies the subject-matter of the issue in this and the other interferences. From that time on the device was used exclusively in the Leonard & Barrows factory for the setting of invisible eyelets. Five or six other witnesses testified to having seen this machine in successful operation at about the time it was first installed. One of them, an employee of the Regal Shoe Company, was given a sample of the work done on the machine in his presence. The evidence so clearly shows, as found by the Patent Office, the machine thus to have been successfully operated, that we pass, without more, to the question whether Doulett's subsequent conduct amounted to such a concealment of the invention as to deprive him of the fruits thereof.

Doulett was practically without means, and had been cautioned that if representatives of certain corporations should see his device, they probably would copy it, to his injury. Therefore, although the employees of Leonard & Barrows and certain friends were allowed to become perfectly familiar with this invention it was not shown to strangers for several months. In cross-examination Doulett was asked the following question:

"At that time you didn't want anybody, outside of the operator and one or two friends, to see Exhibit W, No. 10 set, for fear they might copy it. Isn't that true?"

His reply was:

"The truth of the matter is that I did not want any machine company to see it."

Early in 1914 Doulett machines were introduced in the Belfast, Me., factory of Leonard & Barrows, and there openly used. It is apparent from the evidence that he appreciated the fact that he had made a valuable invention and had no idea of abandoning it. On August 1, 1914, he filed an application for patent, but this application did not disclose the "contracted portion above the setting shoulder," which forms the subject-matter of the counts in No. 1424, and it was not until November 13th following that Doulett filed another and continuing application covering this feature.

The Examiner of Interferences ruled that Doulett's conduct was justifiable and did not amount to a concealment of the invention, within the rule announced in Mason v. Hepburn, 13 App. D. C. 86, but rather came within the doctrine announced in Oliver v. Felbel, 20 App. D. C. 255, Meyer v. Sarfert, 21 App. D. C. 26, Burson v. Vogel, 29 App. D. C. 388, Gaisman v. Gillette, 36 App. D. C. 440, and Lederer v. Walker, 39 App. D. C. 122. He accordingly awarded all the counts to Doulett. The Examiners in Chief and the Assistant Commissioner awarded the counts in interference No. 1433, the broad counts, to Doulett, on the theory that, even though he concealed the invention, the concealment was terminated by the filing of his earlier application prior to the filing of the Deitsch application, and before either the Glines or Muther patent issued, but they denied to Doulett the narrower claims on the ground of concealment and the finding that he was stirred into activity by the issuance of the two patents above mentioned.

We agree with the Examiner of Interferences that the conduct of Doulett was prompted solely by a desire to prevent the appropriation of his invention by what he conceived to be unfriendly interests, and not by any desire to conceal or suppress it. In the first place, the machine was in daily use in the factory where he was employed. One member of the firm was familiar with its use, and, as already noted, some half a dozen witnesses, most of whom were peculiarly skilled in the art, were equally familiar with it. Knowledge of the invention, therefore, was sufficiently general to insure its preservation, and, because the character of the invention was such as to render its appropriation easy, the conduct of Doulett was consistent and reasonable, in the circumstances. Moreover, he was not operating this machine under conditions that permitted its control by him. On the contrary, the operation of the machine was for his employers and in the presence of witnesses over whom he had no real control. In Jenner v. Bowen, 139 Fed. 556, 71 C. C. A. 540, Judge Lurton, later Mr. Justice Lurton of the Supreme Court, speaking of a use very similar to that of the Doulett machine in this case, said:

"That the number of persons who had an opportunity to see the machine in operation was limited, and included some who, by reason of youth and in-

experience, were not likely to understand or be able to describe the mechanism, is of no great importance, in view of the fact that the inventor made and set up this machine for Bowen for the purpose of being commercially operated. Bowen understood its mechanism and its method of use, and was under no restriction as to the place or manner of its operation, and under no obligation of secrecy."

In the case at bar the witnesses who saw this machine were under no general injunction as to secrecy. They were merely requested not to divulge it to "any machine company," and we think this precaution was clearly within the inventor's rights.

In No. 1424, involving the narrower claims, the earliest date awarded Muther for conception was January of 1914. Inasmuch as Doulett, as early as September of 1913, had successfully reduced to practice and thereafter continued to operate in the manner already detailed a machine embodying the subject-matter of this interference, we agree with the Examiner of Interferences that the award of priority should go to Doulett. In No. 1425, wherein the counts are limited as in No. 1424, since March 19, 1914, is the earliest date claimed by Glines for conception, it follows that priority also should be given Doulett, as found by the Examiner of Interferences. In each of the other interferences we accept the reasoning and conclusions of the Patent Office.

The decisions will be affirmed in Nos. 1433, 1434, 1435, 1436, 1437, 1438, and 1439, and reversed in Nos. 1424 and 1425.

Affirmed in Nos. 1433, 1434, 1435, 1436, 1437, 1438, and 1439.

Reversed in Nos. 1424 and 1425.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

In re GLAFCKE.

(Court of Appeals of District of Columbia. Submitted November 22, 1921. Decided January 3, 1922.)

No. 1449.

1. **Patents ⇐17, 37, 66—Application for patent on cobbling outfit held novel, to involve invention, and not anticipated.**

   A cobbling outfit, consisting of a tubular post or pedestal having a socket to support lasts of different sizes and shapes, and so adjusted that the last would revolve freely, and a binding head so adjusted as to slide and rotate freely, and having arms with an attached strap intended to hold the shoe in place, and tightened by stepping on the arms, which would lock automatically, *held* novel, and to involve invention, and not mere mechanical skill, and not anticipated by devices in which the last would not revolve freely, and the head would not slide or rotate freely.

2. **Patents ⇐36—Doubt should be resolved in favor of invention.**

   A doubt as to whether a device constitutes an invention or a mere mechanical improvement should be resolved in favor of invention.

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3. Patents ⇐22—Use of snap to attach strap, or use of tube, instead of solid rod, not invention.

The use of a snap for the purpose of attaching a strap to a part of a cobbling outfit, or the use of a tube, instead of a solid rod, for a pedestal, does not constitute invention.

Appeal from a Decision of the Commissioner of Patents.

Application by Charles L. Glafcke for a patent. From a decision rejecting the application, the applicant appeals. Affirmed in part, and reversed in part.

Joshua R. H. Potts and B. G. Richards, both of Chicago, Ill., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. [1] This appeal is from the decision of the Commissioner of Patents rejecting appellant's application for a patent, the claims of which are illustrated by claims 3 and 6, as follows:

"3. A cobbling outfit comprising a pedestal; a tubular socket at the upper end of said pedestal; a last provided with a stem removably fitting within said socket; a head freely slidable vertically on said pedestal, laterally extending arms on said head; a leaf hinged at one end to the under side of one of said arms and having an oblong opening therein slidably engaging said pedestal; and a looped strap secured to said head and passing over said last, substantially as described."

"6. A cobbling outfit comprising a smooth cylindrical pedestal; a last at the top of said pedestal; a head loosely mounted on said pedestal and capable of free rotatable and slidable movement thereon; means for automatically securing said head in adjusted positions on said pedestal; and a flexible binding loop secured to said head and passing around said last, substantially as described."

The construction consists of a base, on which stands a tubular post or pedestal having a socket at the upper end to receive and support cobblers' lasts of different sizes and shapes. The receiving socket is so adjusted that the stem of the last will revolve freely therein. A binding head is so adjusted on the pedestal that it will slide and rotate freely thereon. The head contains two arms extending laterally to the pedestal, to which is attached the ends of a strap which extends over the last to hold firmly in position a shoe placed thereon. When it is desired to tighten the strap about the shoe, the operator steps upon one of the lateral arms and forces it down the pedestal until the strap is drawn taut. Underneath one of the arms is a locking leaf pivotally mounted, which slidably engages the pedestal, so as to permit a free downward movement, but automatically interlocks with the pedestal to prevent an upward movement. Thus the shoe is held firmly on the last until the operator wishes to remove it, when he touches the locking leaf at the free end with his toe, and the head is released and moved upwards sufficiently to loosen the strap and permit of the removal of the shoe.

Two references were cited in the Patent Office against the patentability of appellant's device. It is conceded that appellant has made a

valuable improvement in the art, but it was held not sufficiently novel to amount to invention.

In the reference to the Brown patents, No. 305,506, September 23, 1884, and No. 353,200, November 23, 1886, the last is so adjusted to the pedestal that it will not revolve thereon, and the head consists of a lever permanently pivoted at one end to the pedestal. The ends of the strap are connected with the lever. To the lever is connected a locking plate, which, when the lever is pressed downward to tighten the strap, offers no resistance to the downward movement, but engages with the pedestal, so as to prevent an upward movement.

In the reference to the Wicks patent, No. 342,155, May 18, 1886, the last will not revolve on the pedestal, and the head is arranged so that it can only ascend and descend the pedestal in a certain position, since the pedestal is supplied on each side with a row of lugs with which the head, when pressed down sufficiently to tighten the strap, is revolved by the operator into engagement. To release the shoe, the operator must revolve the head out of engagement with the lugs on the side of the pedestal into the track of vertical movement and manually raise it until the strap is relaxed.

Neither of the references, nor both combined, is a complete anticipation of appellant's invention. Neither contains the element of the last stem so adjusted in the socket at the top of the pedestal as to permit of the free rotation of the last. In neither case will the head slide freely on the pedestal, and in neither case will the head rotate freely on the pedestal.

In the Brown patents, the lever is permanently pivoted at one end to the pedestal, which manifestly prevents rotation and limits the vertical movement to the radial action of the lever. In the Wicks patent the vertical action is limited to a fixed course, and the rotary movement is limited to a position which will bring the head into engagement with one of the lugs permanently attached in vertical rows on opposite sides of the pedestal.

It will be observed that appellant's device is a vast improvement over the prior art. The rotation of the last on the pedestal, the free vertical and rotary movement of the head on the pedestal, the ability to operate it with either foot, leaving the hands free to properly adjust the shoe, the application of the tension centrally and in line with the pedestal and last, and the wide range of adjustment which is permitted both vertically and rotatively, are not elements found in either the Brown patents or the Wick patent.

It was held by the tribunals below that the improvements of appellant were so obvious as to amount merely to the application of mechanical skill. It may be suggested that the inventions of Brown and Wicks were patented in 1886, and more than a generation passed before any one discovered these improvements, which the officials below now denominate as obvious mechanical changes. It remained for appellant to discover and put in operation that which had so long been delayed through lack of an inventive mind to comprehend its value or the means of accomplishing it. The rule in such cases is well illus-

trated by Chief Justice Taft in the recent case of Hildreth v. Mastoras, 256 U. S. ——, 42 Sup. Ct. 20, 66 L. Ed. ——, as follows:

"The history of the art shows that Dickinson took the important, but long-delayed, and therefore not obvious, step from the pulling of candy by two hands, guided by a human mind and will, to the performance of the same function by machine. The ultimate effect of this step, with the mechanical or patentable improvements of his device, was to make candypulling more sanitary, to reduce its cost to one-tenth of what it had been before him, and to enlarge the field of the art."

[2] There is a twilight zone between invention and mechanical improvement, where it is sometimes difficult to determine in which scale of the balance the applicant belongs; but we have consistently held that, in a close case, we will resolve the doubt in favor of invention. As we said in Re Katzenberger, 46 App. D. C. 539:

"Where a distinct advance has been made * * * in a given art, and the question of patentability is close, it will be resolved in favor of the applicant, especially where [as here] his claims are specific."

[3] Claim 5, which relates to the attaching of the ends of the strap to the head by means of snaps, and claim 7, which calls for a tubular pedestal, should not be allowed, since it is neither invention to use snaps for attaching the ends of the strap to the head, or to use a tube instead of a solid rod for a pedestal. Neither is exclusively essential to the successful operation of appellant's device.

The decision of the Commissioner is affirmed as to claims 5 and 7, and reversed as to claims 1, 2, 3, 4, and 6.

Affirmed as to claims 5 and 7, and reversed as to claims 1, 2, 3, 4, and 6.

SHOEMAKER et al. v. HUNTINGTON.

(Court of Appeals of District of Columbia. Submitted November 21, 1921. Decided January 3, 1922.)

No. 1432.

1. **Patents ⟸91(3)—Applicant, after patent has issued to another, must prove priority beyond a reasonable doubt.**
   An applicant for patent, whose application was not filed until a patent for the same invention had already issued to another, is required to establish his claim to priority beyond a reasonable doubt.
2. **Patents ⟸91(4)—Junior applicant held not to have shown prior invention.**
   In interference proceedings between patentees and a junior applicant, whose application was not filed until the patent had issued, evidence *held* not to establish priority of invention by the junior applicant, who had, between the date of his claimed invention and the date of his application, filed another application, which did not cover the invention in issue.

Appeal from the Commissioner of Patents.

Interference proceedings between John H. Shoemaker and Henry Bruck, patentees, and Henry C. Huntington, junior applicant. From a decision awarding priority of invention to the junior applicant, the patentees appeal. Reversed, and priority awarded to appellants.

D. P. Wolhaupter, of Washington, D. C., for appellants.
T. J. Geisler, of Portland, Or., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Patent Office in an interference proceeding in which priority of invention was awarded the party, Huntington, whose application was not filed until after the issuance of a patent to Shoemaker and Bruck. The invention, though simple, is very useful, and relates to rubber shoe taps or half soles, with a shank edge reinforced by a fabric strip to prevent withdrawal of the nails. The first and second of the four counts sufficiently illustrate it and are here reproduced:

"1. A shoe tap having upper and lower thicknesses of fibrous, reinforced material embedded in the rear edge portion thereof, said thicknesses being separated from each other so as not to form a double thickness.

"2. A shoe tap including a composition body and a fabric strip extending throughout the width of the body at the back edge thereof, said strip being completely housed within the tap and being folded longitudinally to form spaced plies."

[1] The Examiner of Interferences, who found for the appellants, carefully reviewed the evidence, and we therefore shall do little more than state our conclusions. In the first place, Huntington was required to establish his claim to priority beyond a reasonable doubt, as all the tribunals recognized. All the tribunals also recognized that Shoemaker and Bruck, prior to the entry of Huntington into the field, "had the idea broadly of reinforcing the half sole on the rear edge thereof" (Assistant Commissioner's decision). Appellants were practical men in this art, operating, as they did, one of the largest shoe repair establishments on the Pacific Coast. Appreciating the necessity for a device of this kind, they set to work to design one. The witness Mastick, whom all the tribunals found to be disinterested and truthful, and who was skilled in the art, testified that in the spring of 1916 Mr. Shoemaker explained to him that he and Bruck proposed to overcome the trouble resulting from the failure of nails to hold in the rubber half sole by putting "a piece of canvas in there, in between the sole, that would hold the nails." This was long prior to Huntington's entry into the field. Later, according to Mr. Mastick. Shoemaker showed him a completed sole, and, when asked who made it, replied that—

"The Portland people [Huntington's concern] made it, and then after that he told me that he had received his patent."

The two higher tribunals of the Patent Office criticized this testimony, because Mastick did not say that the disclosure to him showed that a folded piece of fabric was used. While the witness did not state just how the fabric was used, the later declaration by Shoemaker that he had received his patent indicates very clearly that the early structure and the patent structure were one and the same. However, the statements of another disinterested and reliable witness, a Mr. Goldsmith, were more specific on this point—in September of 1916, at the Shoemaker and Bruck establishment, although not in their employ when he testified. Between the middle of September and the first of October of that year Mr. Shoemaker told him he was having a pair

of soles made "with a folded piece of canvas in the end and they would hold; that is, he thought they would hold." Later he saw the soles alluded to by the witness Mastick, and, when asked whether Shoemaker had informed him how they were made, said:

"Yes; he did. He said that they were made with a piece of folded canvas in the end of the sole."

On cross-examination he was asked:

"What kind of material did Mr. Shoemaker or Mr. Bruck tell you was to be put in the shank edge?"

And he replied:

"Mr. Bruck never told me anything. Mr. Shoemaker told me."

Then followed these questions and replies:

"Q. What did he tell you? A. He said a piece of canvas folded.
"Q. Didn't he tell you how it was going to be put in there? A. He said a folded piece of canvas on the edge; that is all he told me."

These soles were put on a pair of shoes, and were worn by Shoemaker continuously for more than six months. Being satisfied, then, that the invention was practical, appellants, on April 17, 1917, filed their application, upon which a patent was granted September 11th following.

Mr. Huntington manufactured and sold certain products, including rubber heels for shoes, and appellants purchased supplies from him. In his preliminary statement he says he conceived, disclosed, and reduced the invention to practice about November 1, 1916, and his earliest activity, under the evidence, commenced after the middle of October of that year. Under the view we take of the case, we deem it unnecessary to consider the contention of Shoemaker and Bruck that Huntington derived the invention from them.

[2] About two months after Mr. Huntington claims to have reduced this invention to practice, he filed an application for a patent on a composition sole with a reinforced shank edge, which admittedly did not disclose the invention of the issue. He is an intelligent man, yet he has given no satisfactory explanation as to why, if he then thought himself the inventor of the subject-matter of this interference, he did not claim it. Stress is laid by the higher tribunals of the Patent Office upon the fact that, during the pendency of appellants' application in the Patent Office, Huntington refused to supply them with soles of the issue, and Huntington insists that, even prior to the date of the Shoemaker and Bruck application, he was making a sole bearing the words "Pat. Applied for," and that appellants made no protest.

As to the first point, appellants well may have concluded that, until their patent issued, their safer course would be to purchase these soles from jobbers, as other repair men were required to do. As to the second point, the Patent Office has entirely overlooked the significant fact that no patent was applied for on this invention until two months after appellants' patent issued. The words "Pat. Applied for," therefore, obviously referred to the application Huntington did file one

month after he claims to have made this invention, but which, as we have seen, did not cover it.

Without further discussion of the evidence, we are clearly of the view that Huntington has not sustained the heavy burden resting upon him, and therefore reverse the decision appealed from, and award priority to Shoemaker and Bruck.

Reversed.

HERNANDEZ-MEJIA v. KELLEY.

(Court of Appeals of District of Columbia. Submitted November 15, 1921. Decided January 3, 1922.)

No. 1429.

1. **Patents ⟸91(3)—Applicant, interfering with issued patent, must prove case beyond reasonable doubt.**
   Where an interference is declared between an issued patent and an application filed after the issuance, the applicant cannot succeed, unless he proves beyond a reasonable doubt the facts necessary to overcome the patent.

2. **Patents ⟸106(2)—Patentability of claims cannot be questioned in interference proceedings.**
   The contention that the claims in interference did not disclose invention, in view of a prior patent issued to the junior applicant, raises the question of the patentability of the claims, which cannot be done in interference proceedings, since the interference is declared on the assumption that the claims are patentable, and that assumption is not open to attack.

3. **Patents ⟸106(2)—Commissioner's discretion in denying leave to amend preliminary statement not reviewed, unless abused.**
   An application for leave to amend a preliminary statement in interference proceedings, so as to make the date of reduction to practice earlier than first stated, was addressed to the discretion of the commissioner, and his denial thereof will not be reviewed, unless there was a palpable abuse of his discretion.

Appeal from the Commissioner of Patents.

Interference proceedings between Arturo Hernandez-Mejia and William V. D. Kelley. From a decision of the Commissioner of Patents, awarding all the claims to Kelley, Hernandez-Mejia appeals. Affirmed.

Benjamin Roman, of New York City, for appellant.

Melville Church and A. S. Stewart, both of Washington, D. C., and J. S. Wooster, of New York City, for appellee.

SMYTH, Chief Justice. This is an interference between an application and a patent. It relates to the art of making and coloring motion picture films to reproduce the objects in their natural colors. Eighteen counts are involved. Counts 1 and 18 are typical.

Count 1. The method of producing a double-colored photographic transparency which consists in printing images in registry on opposite sides of a

double-sensitized transparent base, developing and fixing said images, treating one of said images to render it capable of absorbing dye and transmitting light, dyeing said image, washing and drying the entire base, applying a protective coating to the dyed side, treating the other image to render it dye-absorbent and capable of transmitting light, dyeing with a second color, and washing and drying to complete the transparency.

Count 18. A double-coated perforated photographic transparency having a record on each side, each of said records being registered horizontally with a certain perforation as a standard, and vertically with a certain other perforation as a standard, the records on said sides being colored in different colors.

A patent was issued to Kelley March 12, 1918, on an application filed July 26, 1917. Hernandez-Mejia's application was filed June 25, 1918. The Examiner of Interferences awarded all the claims to Hernandez-Mejia except four, which he gave to Kelley. The latter appealed, and the Board of Examiners in Chief held that he was entitled to all the claims. This action was affirmed by the Assistant Commissioner.

[1] It is well established that, where an interference is declared between a patent and an application filed after the issuance of the patent, the applicant cannot succeed unless he proves beyond a reasonable doubt the facts necessary to overcome the patent. Braun v. Wiegand, 49 App. D. C. 193, 262 Fed. 647, and decisions there cited.

The Assistant Commissioner found that Hernandez-Mejia was undoubtedly working in the specific art to which the invention belongs before Kelley began, and that the latter, so far as the proofs go, had no conception of the invention in issue prior to his filing date; but Hernandez-Mejia, according to the Assistant Commissioner, had failed to show even prima facie that he had reduced the invention to practice, or that he had even conceived it, before that date. There are references, he said, in Hernandez-Mejia's proofs to some features embodied in the claims, but there is nothing disclosing the entire process required by them. The Assistant Commissioner's conclusion is based partly on his own analysis of the testimony and partly on that of the Board of Examiners. We fully agree with him. To set out here the steps by which we arrive at this opinion would be to restate in effect what he and the Board have said, and this would be of no practical use to any one. Hernandez-Mejia has failed to discharge the very heavy task which the law imposed upon him with regard to the burden of proof.

[2] Hernandez-Mejia urges that the substance of the invention is disclosed by a patent issued to him in 1916, and that the details necessary to bring what is there disclosed into harmony with the claims in issue would not require invention, but would occur to any one skilled in the art in carrying out the processes described in his patent. This raises the question of the patentability of the claims—something which cannot be done in an interference proceeding. The interference is declared on the assumption that the claims are patentable, and this assumption is not open to attack. Wintroath v. Chapman, 47 App. D. C. 428, and cases cited; Cowles v. Rody, 49 App. D. C. 135, 261 Fed. 1015. The Assistant Commissioner, however, went into the question

quite carefully, and found that the appealed claims were distinguishable from the disclosure of the earlier patent, and that Hernandez-Mejia had no conception of the specific limitations which characterize them.

[3] The assertion that Kelley derived the invention from Hernandez-Mejia cannot be upheld, in view of the finding just made that the latter did not have it at the time Kelley entered the field. Hernandez-Mejia's application for leave to amend his preliminary statement, so as to show that his date of reduction to practice was not in 1916, but in 1911 or 1912, was denied. This was a matter addressed to the discretion of the Commissioner, and his action will not be reviewed, unless there was a palpable abuse of his power. Cross v. Phillips, 14 App. D. C. 228; Fowler v. Boyce, 27 App. D. C. 55. There was no such abuse.

A motion to strike out certain testimony received in behalf of Kelley was overruled. Even if the testimony was improperly admitted, there was no prejudicial error, for it had no tendency to injure Hernandez-Mejia's case.

The decision of the Commissioner is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL, in the hearing and determination of this appeal.

CLARK v. BUFFUM.

(Court of Appeals of District of Columbia. Submitted November 17, 1921. Decided January 3, 1922.)

No. 1440.

1. **Patents ⇐91(1)—Junior applicant has burden in interference proceedings.**

   In interference proceedings, the party whose application was last filed has the burden of proof.

2. **Patents ⇐90(5)—Tests by junior applicant held sufficient reduction to practice.**

   Tests of a head for automatic sprinkler system, which demonstrated that the link was able to withstand the pull to which it was subjected at ordinary temperature, and would readily separate on fusion of the solder, satisfied the requirements of a reduction to practice; it being unnecessary that it should satisfy the tests prescribed by insurance companies.

3. **Patents ⇐113(7)—Concurrent findings of three Office tribunals, not manifestly wrong, will not be disturbed.**

   The finding of the Assistant Commissioner of Patents, which accords with the finding of each of the lower tribunals, will not be disturbed, if not manifestly wrong.

Appeal from the Commissioner of Patents.

Interference proceedings between Ezra E. Clark and Herbert H. Buffum. From a decision awarding priority to Buffum, the junior applicant, Clark, appeals. Affirmed.

Nathan Heard and Frederick A. Tennant, both of Boston, Mass., for appellant.

Lawrence G. Miller, of Boston, Mass., for appellee.

SMYTH, Chief Justice. From a decision of the First Assistant Commissioner of Patents, awarding priority of invention to Buffum, Clark appeals. The contest relates to sprinkler heads for automatic sprinkler systems, and specifically to the means for holding the toggle arms together, and for releasing them when a fire occurs in the vicinity of a head. Sprinkler heads of this general type are old: The invention lies in the link itself. There is but one count, which reads as follows:

> A device of the class described comprising a plate having engaging means, a locking plate secured to said first mentioned plate by fusible solder, and carrying a hooklike extension having a bill extended at substantially right angles entering and terminally supported by said first plate, and another plate having engaging means and also having a crossbar engaging and suspended by said extension.

[1] Clark filed September 26, 1916, and Buffum May 10, 1917. Hence the burden is on Buffum. It is contended on his behalf that he conceived as early as August 3, 1916, reduced to practice some time before the last of September of that year, and was diligent in the meantime. It is contended, also, that Clark did not conceive earlier than August 11, 1916, and did not make any actual reduction to practice before his filing date. If these contentions be correct, Buffum is entitled to prevail.

[2] Clark argues that Buffum did not establish a reduction to practice prior to his filing date, which, as we have seen, was May 10, 1917, and, granting his claimed date of conception, was not diligent. He proceeds upon the assumption that in order to actually reduce to practice it was necessary for Buffum to prove that the link would satisfy the tests provided by laboratories of certain insurance companies, but the First Assistant Commissioner found that this was not the sole test by which to determine whether or not the invention was capable of doing what it was intended to do, that other tests might be employed. "The link here in controversy," said the Examiner of Interferences, "must have three essential characteristics. The solder used must be fusible at temperatures above the ordinary, and yet very low, as below the temperature of boiling water. The link must at ordinary temperatures be able to withstand the pull to which it is subjected in use, even for a long time; and, on fusion of the solder, it must, because of its form, readily separate under very slight pull upon it." It was found by the Assistant Commissioner that the link responded to all these tests, and that they were made sometime before August 3, 1916. The tests applied were as effective as those used in Esty v. Newton, 14 App. D. C. 50, Rolfe v. Kaisling, 32 App. D. C. 582, and Rolfe v. Hoffman, 26 App. D. C. 336.

[3] The finding of the Assistant Commissioner accords with the finding of each of the lower tribunals. It is not manifestly wrong, and therefore we will not disturb it. Allen v. Hill, 50 App. D. C. 255,

270 Fed. 691; Massey v. Ridge, 50 App. D. C. 271, 270 Fed. 879, and cases cited.

Clark urges that, even if Buffum did reduce to practice before August 3, he abandoned his invention. There is no evidence that he concealed the invention (Mason v. Hepburn, 13 App. D. C. 86), or that he did anything which would justify the conclusion that the test to which he subjected the link in the early part of August, 1916, was nothing more than an abandoned experiment.

We think the Patent Office is right, and the decision of the Commissioner is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

In re INDERRIEDEN CANNING CO.

(Court of Appeals of District of Columbia. Submitted November 18, 1921. Decided January 3, 1922.)

No. 1445.

1. **Trade-marks and trade-names and unfair competition ⟸43—Canned pineapple has same descriptive properties as canned peas or corn.**
   Within Act Feb. 20, 1905, § 5 (Comp. St. § 9490), prohibiting the registration of trade-marks identical with a registered trade-mark used by another on merchandise of the same descriptive properties, or so nearly resembling it as to cause confusion or deceive purchasers, canned pineapple has the same descriptive properties as canned peas and corn, and a trade-mark used on canned peas or corn cannot be registered by another for use on canned pineapple.

2. **Trade-marks and trade-names and unfair competition ⟸43—Confusion to purchasers relying on first impression defeats trade-mark.**
   Where there is such a resemblance between trade-marks that confusion would result in the case of a purchaser relying on his first impression, registration should be denied, though there would be no confusion if the purchaser made a careful examination of all that appeared on the containers of the goods.

3. **Trade-marks and trade-names and unfair competition ⟸43—That goods are put up at distant points does not justify similarity in trade-mark sought to be registered.**
   That the goods of the owner of a registered trade-mark are put up in Hawaii, while those of one applying for registration of a similar trade-mark are put up in Chicago, is immaterial, as the goods of both might come into the same market, and be handled by the same jobber or retail grocer.

Appeal from a Decision of the Commissioner of Patents.

Application by the Inderrieden Canning Company for registration of a trade-mark. From a decision denying registration, the applicant appeals. Affirmed.

A. E. Wallace, of Chicago, Ill., for appellant.
T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

SMYTH, Chief Justice. The application of Inderrieden Canning Company for registration of the words "Peter-Pan," together with a representation of that character as a trade-mark for canned peas and canned corn, was rejected in view of the prior registration for Davis & Co., of the same mark for canned pineapple, and the Canning Company appeals. The ground of the rejection was that the goods to which these marks are applied are of the same descriptive properties.

[1] It is not easy to define with exactness the phrase "same descriptive properties," as used in the statute. 33 Stat. 725, § 5 (Comp. St. § 9490). If we consider pineapple, corn, and peas in their original state, we cannot say with correctness that the qualities by which they may be described are the same. We are not, however, dealing with them in that state, but as canned articles. As such they have been passed through a process which gives them certain properties in common. After this has been done, it is usual and proper to refer to them by the same descriptive term, namely, canned goods. Where a trade-mark is applied to them, they are known to the public as canned goods of the variety indicated by the mark. For years it has been the practice in the Patent Office to treat canned fruits and canned vegetables as goods of the same descriptive qualities. And it has been ruled by this court that coffee has the same descriptive qualities as tea, cocoa as coffee, pancake flour as corn meal. Macy & Co. v. New York Grocery Co., 50 App. D. C. 105, 267 Fed. 749; Baker & Co., Ltd., v. Harrison, 32 App. D. C. 272; Williams v. Kern & Sons, 47 App. D. C. 441.

[2] Of course, as counsel for the Commissioner says, it is not conceivable that the mark would lead any one to make the mistake of purchasing canned pineapple, when he intended to purchase canned corn or canned peas; but if he liked pineapple of the "Peter-Pan" brand, and desired to purchase canned peas or canned corn, he would be likely to select the peas or corn offered in containers bearing the "Peter-Pan" mark, because he would assume that it was put out by the concern which canned the pineapple. Undoubtedly, if he made a careful examination of all that appeared on the containers, he might not be confused; but a purchaser is not required to do this. Patton Paint Co. v. Orr Zinc White, Ltd., 48 App. D. C. 221. He may rely on his first impression, and, if he does so, the confusion which the statute is designed to guard against would be likely to result.

[3] The goods of the owner of the registered trade-mark are put up in Hawaii, while those of the applicant are canned in Chicago. But this is immaterial. It has no tendency to establish, in a commercial age like the present, which has practically annihilated distance, that the goods of both would not come into the same market, and be handled by the same jobber or retail grocer. It might be of importance in an infringement suit (United Drug Co. v. Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141), but not in a proceeding of this character.

We think the goods possess the same descriptive properties, and that

the mark, if registered, would be likely to cause confusion in the minds of prospective purchasers. We therefore affirm the decision of the Commissioner.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

McILHENNY CO. v. TRAPPEY.

(Court of Appeals of District of Columbia. Submitted November 21, 1921. Decided January 3, 1922.)

No. 1446.

1. **Trade-marks and trade-names and unfair competition ⟸9—"Tabasco" is a geographical name, and not registerable as trade-mark.**
   The word "Tabasco" is a geographical term, which could not be exclusively appropriated as a trade-mark.
2. **Trade-marks and trade-names and unfair competition ⟸44—Opposer need not show superior right to mark.**
   Under Trade-Mark Act, § 6 (Comp. St. § 9491), permitting any person who believes he would be damaged by the registration of a mark to oppose the same, it is not necessary that the opposer should show a superior right to the mark, but he must show that he would be damaged by the registration.
3. **Trade-marks and trade-names and unfair competition ⟸44—Opposition held not to show belief registration would damage opposer.**
   An opposition to the registration of a trade-mark, which merely alleged a belief that the registration was sought to commit the Patent Office to a position for the possible effect it would have in a suit then pending between the applicant and the opposer, is not a sufficient showing that the opposer believed he would be damaged by the registration, so that the opposition was properly dismissed.

Appeal from the Commissioner of Patents.

Application by B. F. Trappey for the registration of a trade-mark, opposed by the McIlhenny Company. From a decision dismissing the opposition, the opposer appeals. Affirmed.

F. M. Phelps and Nelson J. Jewett, both of Washington, D. C., and E. S. Rogers, of Chicago, Ill., for appellant.

Wm. L. Symons, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Trappey applied to the Patent Office to register a trade-mark for tabasco sauce, peppers in vinegar, extract of pepper, and ground pepper, in which occurs the word "Tabasco." He alleged that he had used the mark, in the specific form shown in a drawing, since January, 1912, and that he presents with his application a drawing and five specimens of the mark. There are in the record only a diagram consisting of a large shield, within which is a smaller one bearing the word "Shield," and two specimens on each

of which are several words. In only one appears the word "Tabasco." It is as follows:

McIlhenny Company, claiming the right to the exclusive use of the word "Tabasco" as a trade-mark for pepper sauce, opposed the registration of the mark unless the word "Tabasco" was eliminated from it. The company alleges that it believes that the use of the words "Tabasco Sauce" by Trappey is done in an effort "to commit the Patent Office to an apparent acceptance of the words * * * as a generic name for its possible effect in the suit now pending," wherein the company is contending with Trappey for the exclusive right to use the word "Tabasco" as a trade-mark. If this be not an allegation that the company will suffer damage in the event the opposition is not sustained, there is none.

[1] We decided in McIlhenny v. New Iberia E. of T. P. Co., 34 App. D. C. 430, that the word "Tabasco" was a geographical term, and therefore could not be exclusively appropriated by McIlhenny's Sons in vending pepper sauce. The company claims through the defeated party in that proceeding. We adhere to the decision there rendered.

[2] However, this holding does not prohibit the company from objecting to the registration of the word "Tabasco" for the benefit of another party, because the statute (33 Stat. 726, § 6 [Comp. St. § 9491]) says:

"Any person who believes he would be damaged by the registration of a mark may oppose the same."

It is not necessary that the opposer should show a superior right to the mark. All that is required of him is a showing that he would probably be damaged, if registration was granted. Atlas Underwear Co. v. B. V. D. Co., 48 App. D. C. 425.

[3] If the company did not show this, its opposition was properly dismissed. Howard Co. v. Baldwin Co., 48 App. D. C. 437. As we have said above, the company's only allegation with respect to damages is that the company believes that the application of Trappey is an effort to produce a condition which possibly may affect a suit in which the company and Trappey are adversaries. The company does not allege that any damage would result to it, or even that it believes that damage would result; nor does it state any facts from which damages might be inferred. We think the opposition is fatally defective in this respect.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

ROGERS et al. v. AIKMAN.

(Court of Appeals of District of Columbia. Submitted November 23, 1921. Decided January 3, 1922.)

No. 1454.

Patents ⟸106(2)—Interference count held to read on disclosure, though element was not expressly described.

In interference proceedings, a count for a pneumatic pump, one element of which was an air exhaust valve adapted to be retained and closed by the difference between the pressures in the pump chamber and outside thereof, reads upon the senior applicant's disclosure, which would inform any one skilled in the art that the pressures inside and outside of the chamber were different, and thereby would retain the valve closed, though that was not expressly stated.

Appeal from the Commissioner of Patents.

Interference proceedings between Homer S. Rogers, inventor, John R. Ball, assignee, junior applicant, and Burton S. Aikman, senior applicant. From a decision of the Commissioner of Patents, awarding priority to Aikman, Rogers and Ball appeal. Affirmed.

Frank E. Dennett and E. H. Bottum, both of Milwaukee, Wis., and W. G. Henderson, of Washington, D. C., for appellants.

Chas. A. Brown and John A. Dienner, both of Chicago, Ill., for appellee.

VAN ORSDEL, Associate Justice. This interference relates to an invention of a pneumatic pump, defined in a single count, as follows:

"In a pneumatic pump, the combination with a pump chamber, provided with water inlet and outlet valves and an air exhaust port, of an air exhaust valve adapted to close the exhaust port when water has filled the pump chamber and adapted to be retained closed by the difference between the pressures in the pump chamber and outside thereof, a compressed air valve, a fluid actuated motor for opening the exhaust valve, and means for causing the motor to open the exhaust valve when the water in the pump chamber has been lowered to a predetermined level."

Rogers' application was filed December 1, 1916, on which a patent was granted July 30, 1918. Aikman filed his application September 16, 1915.

It is clear, as found by the tribunals below, that Rogers conceived the invention in May, 1915, but failed to reduce it to practice prior to his filing date. While we are of the opinion that Aikman established a date of conception prior to Rogers' date of May, 1915, we agree with the Commissioner that this is not important, since Rogers has failed to show diligence at the time Aikman constructively reduced to practice by filing his application. On the issue of priority, therefore, the tribunals below are clearly right.

The count in issue is taken from the Rogers patent, and Rogers concedes it will read on the Aikman disclosure, except as to the limitation which calls for:

"An air exhaust valve * * * adapted to be retained closed by the difference between pressures in the pump chamber and outside thereof."

On this point Rogers contends Aikman makes no disclosure of means for holding the air exhaust valve closed by the difference between the pressure in the pump chamber and the air in the exhaust port outside thereof. This contention is disposed of by the Commissioner in a long and able discussion of the operation of the Aikman device, in which he reached the conclusion that—

"The contention on behalf of Rogers that the conclusion thus stated must be founded on conjecture and speculation, because of the failure of Aikman to specifically describe his exhaust valve as held to its seat by the difference in pressure, does not impress me. Aikman's disclosure of the construction and operation of his device is sufficiently clear to enable those skilled in the art to make and use it. It is not fatal to his case that he failed specifically to describe the effect on the operation of his exhaust valve of the difference in pressure within and without his pump chamber, the existence of which difference in pressure is made indisputably clear by what he has described. Those skilled in the art would not need to be told what effect the difference in pressure would have upon the exhaust valve of Aikman, knowing as they would, from the description he has given, that at the particular phase of the operation of his device under discussion a difference of pressure within and without his pump cylinder exists."

We are clearly convinced from a review of the record that Aikman is the prior inventor, and that the count in issue can be read upon his disclosure. Disposing of the case on the merits, the other errors assigned, which relate to the right of Aikman to make the claim, need not be considered.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

OVERMIRE et al. v. FAHRENWALD.

(Court of Appeals of District of Columbia. Submitted November 14, 1921. Decided January 3, 1922.)

No. 1427.

Patents ⊂⊃91(4)—Evidence held not to show conception of invention by junior applicant prior to filing of senior application.

Where the counts in interference were for a utensil for chemical use, or a chemical resistant ware formed of an alloy which had been previously used for other purposes, evidence that the junior applicant had used the alloy before the date of the senior application as a solder, as weights, and as electrodes, does not establish his prior conception of the invention in issue.

Appeal from the Commissioner of Patents.

Interference proceedings between Charles A. Overmire and another, junior applicants, and Frank A. Fahrenwald, senior applicant. From a decision awarding priority to the senior applicant, the junior applicants appeal. Affirmed.

Grafton L. McGill and F. S. Maguire, both of Washington, D. C., for appellants.

Harold E. Smith, of Cleveland, Ohio, for appellee.

VAN ORSDEL, Associate Justice. The issue of this interference is expressed in the following counts:

"1. A utensil for chemical use consisting of an alloy of palladium and one or more of the noble metals of lower melting point in homogeneous solid solution, wherein the palladium forms not less than about 20 atomic per cent. of the whole.

"2. A container for laboratory use, consisting of an alloy of palladium 10 to 40 per cent. and gold 90 to 60 per cent. in homogeneous solid solution.

"3. Chemical apparatus having a working surface consisting of an alloy of palladium and one or more of the noble metals, gold or silver, in homogeneous solid solution, wherein the palladium forms between 10 and 40 per cent. of the whole.

"4. A heat and chemical resistant ware formed of a metal alloy of approximately 80 per cent. gold and 20 per cent. palladium."

The invention is described in the opinion of the Commissioner of Patents as follows:

"The invention covered by the counts is a device variously denominated 'a utensil for chemical use' (count 1), 'a container for laboratory use' (count 2), 'chemical apparatus' (count 3), or 'chemical resistant ware' (count 4), made of an alloy of gold and palladium in proportions of about one of palladium to five of gold or silver."

The use of an alloy of palladium and gold for dental purposes, points of pencil cases, lancets, and for numerous other purposes where strength and elasticity, coupled with the nontarnishing quality, are required, is old in the art. Hence the parties here must be held strictly to the thing found to be patentable—"a utensil for chemical use."

Fahrenwald filed his application July 13, 1916, which constituted a constructive reduction to practice. It is unnecessary to consider any earlier date for him, since his filing date is prior to any date to which Overmire and Flynn can lay claim.

Overmire and Flynn, the junior parties, to sustain their contention of priority, produce testimony to establish a production of a palladium gold alloy in 1913 for use as a solder. But that is not the invention of the issue. There was testimony that, at a date prior to Fahrenwald's filing date, appellants produced a palladium gold alloy for use as weights; but it is shown that such an alloy was old in 1880. They also produced evidence to establish that as early as November 25, 1914, they made an anode and cathode, and that these electrodes were successfully tested. While the evidence as to this test is not convincing to overcome the burden cast upon the appellants, it may be suggested that there are publications shown to be extant which indicate the use of this alloy for electrodes as early as 1911. But, even if it were not old, electrodes are neither "chemical ware" nor "chemical utensils." Hence it is clear that Overmire and Flynn have totally failed to prove reduction to practice, or even conception, of the use of the alloy of the issue for "a utensil for chemical use" prior to Fahrenwald's filing date.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

LEWIS v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted December 6, 1921. Decided January 3, 1922.)

No. 3688.

Vagrancy ⊂=3—Evidence held not to sustain conviction; "vagrant."

A conviction of vagrancy cannot be sustained, where the evidence showed the defendant was regularly employed, since failure to work is an essential element, under Act March 3, 1909, § 1, defining a vagrant as a person leading an idle, immoral, and profligate life, without property and not working, though able to work, even though the evidence did show the defendant was leading an immoral life, or was guilty of another offense.

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

Writ of Error to the Police Court of the District of Columbia.

Lucretia Lewis was convicted in the police court of being a vagrant, and she brings error. Reversed, with directions to dismiss the complaint.

E. C. R. Humphries, of Washington, D. C., for plaintiff in error.

F. H. Stephens and T. G. Walsh, both of Washington, D. C., for the District of Columbia.

ROBB, Associate Justice. This is a writ of error to the police court, where the defendant, plaintiff in error here, was convicted under an information charging her with being "a vagrant, to wit, a person leading an idle, immoral, and profligate life, without property to support herself and able of body to work, and does not work," etc. This phraseology followed the language of the Act of March 3, 1909 (35 Stat. 711).

For the prosecution certain police officers testified that defendant was a woman of ill repute and reputation; that they had seen her loitering and loafing about the streets, in conversation with men, and soliciting men to go with her for purposes of prostitution; that she was employed by one Joe Jones, "who maintains a home at 1220 Six and a Half Place, Northwest, for immoral purposes." For the defendant, Jones testified that she had been employed as his housekeeper, doing his washing, cooking, and general housework, for the preceding year, and was then so employed at a regular weekly salary of $10, with board and lodging. The father and a brother of defendant, who testified from personal knowledge, having frequently visited her place of employment, corroborated Jones, as did three friends of defendant.

The testimony of the police officers, as to the nature of defendant's employment by Jones, amounted to nothing more than suspicion, since none of them pretended to speak from personal knowledge. On the other hand, the testimony on behalf of the defendant was of a conclusive character. That the trial judge so viewed the evidence is apparent from his finding "that, although she [defendant] may have

kept house for the aforesaid Jones at the time, her employment there under those circumstances was not lawful employment within the meaning of the statute." In Fleming v. District of Columbia, 34 App. D. C. 5, the court alluded to the act here involved as follows:

"The person accused, not only must lead an idle, immoral, and profligate life, but must also have no property to support him, and be able to work without doing so. * * * The statute must be enforced according to its plain terms."

To sustain the conviction in the present case it must have appeared that the defendant, although able, did not work, for this was a necessary element under the statute. That she may have been guilty of another offense, and subject to prosecution therefor, is beside the question here, which is: Was defendant guilty of vagrancy under this statute? Having been regularly employed, as the evidence conclusively shows her to have been, she may not be classed as a vagrant in the sense of the statute.

The judgment is reversed, with costs, with directions to dismiss the complaint.

Reversed.

ROSE v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted December 6, 1921. Decided January 3, 1922.)

No. 3690.

Vagrancy ⊂⇒1—Woman having $1,000 in the bank is not a "vagrant."

Under the statute (35 Stat. 711) defining vagrants as persons leading an idle or immoral life, who have no property to support them, and who are able of body to work and do not work, a woman cannot be convicted as a vagrant when she had on deposit to her credit in a bank $1,000, even though the money was the proceeds of prostitution.

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

Writ of Error to the Police Court of the District of Columbia.

Hilda Rose was convicted of being a vagrant, and she brings error. Reversed and remanded.

James A. O'Shea and John I. Sacks, both of Washington, D. C., for plaintiff in error.

F. H. Stephens and T. G. Walsh, both of Washington, D. C., for defendant in error.

SMYTH, Chief Justice. On complaint of the corporation counsel, Hilda Rose was tried, convicted, and sentenced by the police court as a vagrant. The case comes here on a writ of error.

Vagrants are defined in the statute (35 Stat. 711) as:

"Persons leading an idle, immoral, or profligate life who have no property to support them and who are able of body to work and do not work."

There are 18 assignments of error, but we find it necessary to consider only those which challenge the judgment on the ground that it is not supported by sufficient evidence.

It will be noticed that a person guilty of vagrancy must lack property to support himself, he being able of body to work, and does not work. The evidence of the cashier of one of the national banks of the city of Washington established conclusively that at the time of the arrest plaintiff in error had to her credit in his bank $1,000; that the first deposit was made in November, 1920; and that from time to time thereafter deposits were made, so that on the 24th of March, the date on which the complaint against her was filed, her balance was as just indicated. The court ruled that the money in bank was the proceeds of prostitution and "was not property to support herself, as the language is used in the statute."

There was no direct evidence that she had derived this money from prostitution, and we do not think that the circumstances disclosed were sufficient to warrant the inference that she had so derived it. But, even if they were, the money was hers. The bank, through its cashier, admitted that she had the money to her credit on its books. This was enough to establish prima facie her right to it. Having the prima facie right, it was for the District to show that the property was not hers, if it desired to question her title. Only one case cited by counsel touches this point. Wallace v. State, 16 Ala. App. 85, 75 South. 633. The statute there construed placed the burden on the defendant of proving that he had property sufficient for his support. Our statute does not do so. But, even if it did, plaintiff in error has established that she has sufficient property, and nothing has been offered by the District to controvert it. No authority is presented to support the contention that money derived from prostitution, but which is owned and controlled by a defendant, and subject to her disposition, for such purposes as she may desire to serve, does not negative the charge that she is without property to support herself.

We think, therefore, that plaintiff in error was wrongfully convicted. She may have been guilty of some other offense, but not of vagrancy. The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion, defendant in error to pay the costs.

Reversed and remanded.

In re KNUDSEN.

(Court of Appeals of District of Columbia. Submitted November 16, 1921. Decided January 3, 1922.)

No. 1431.

Patents ⟸82—When experiment abandoned, and reasonable diligence not exercised to complete invention, patent properly denied.

Where the applicant's use of nonelastic material for an envelope in which to place meat during smoking was an abandoned experiment, and he had failed to couple his prior conception with reasonable diligence to his completion of the invention, a patent was properly denied.

Appeal from a Decision of the Commissioner of Patents.

Application by Even L. Knudsen for a patent. From a decision rejecting certain claims, the applicant appeals. Affirmed.

L. T. Greist and Wm. N. Cromwell, both of Chicago, Ill., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents rejecting the following claims:

"1. An improved method of treating integral meat pieces, which consists in subjecting the pieces to compressive action in a close-fitting envelope of pervious fabric and subjecting to the action of heat and smoke while so confined, whereby the meat is shaped during smoking and the forming of fissures is prevented.

2. An improved method of treating joint meats, which consists in forcing the pieces into constrictive envelopes of pervious fabric and subjecting to the action of heat and smoke while so confined, whereby the envelope exerts a continuing pressure upon the meat during smoking and thus imparts a permanent set thereto."

Two claims of this application were involved in an interference proceeding, in which count 1 was limited to "a close-fitting jacket of porous elastic material," and count 2 to "an elastic porous jacket of stockinet." In that proceeding priority was denied the applicant here (Knudsen v. Fitzgerald, 48 App. D. C. 236), who now seeks the allowance of less limited, and therefore somewhat broader, claims.

In his specification the applicant clearly pointed out that the meat, while in pickled condition, was to be "incased in bags of fabric, stockinet being particularly adapted for the purpose, the bags being drawn snugly over the piece, so as to closely envelop the same. The yielding nature of the fabric permits the bag to be stretched over the meat, and causes it then to exert inward pressure thereon." Later in the specification it is pointed out that the bags may be lengths "cut from elastic tubing, referred to herein generally rather than specifically as stockinet, and are quite inexpensive, the ends being sewed or tied after the meat is inserted." The applicant further states that "an envelope of canvas or other nonelastic fabric might be employed," and he now contends that this expression entitles him to claims that would dominate the claims he lost in the interference proceeding.

The Commissioner of Patents points out that the testimony in the interference proceeding clearly showed that, long prior to the entry of this applicant into the field, it had been customary to treat hams in substantially the manner attempted to be covered by the appealed claims. The Commissioner further found that, even assuming that these claims are patentably different from the claims of the interference, the evidence in that proceeding showed that applicant's use of nonelastic material was, like his use of the elastic material, an abandoned experiment, and that the applicant "has failed to couple his prior conception with reasonable diligence to his completion of invention." We agree with the Commissioner, and therefore affirm his decision.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

HUNTINGTON v. BROWN.

(Court of Appeals of District of Columbia. Submitted November 14, 1921. Decided January 3, 1922.)

No. 1426.

Patents ⇐91(3)—Priority properly awarded to senior party, when junior party fails to overcome burden.

In an interference proceeding, turning on the question of originality, priority was properly awarded to the senior party, where the junior party failed to overcome the burden imposed on him.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Alfred R. Huntington and Edmund N. Brown. From a decision in favor of Brown, Huntington appeals. Affirmed.

Melville Church, of Washington, D. C., for appellant.

Eugene C. Brown, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This interference relates to an electric reflector heater comprised of a parabolic reflector at the focal point of which and transverse to the axis thereof is mounted an electric heating element.

The invention was made by one of the parties in 1915. Huntington was in the employ of the Majestic Electric Development Company, of which Brown was a director. The case turns solely upon the question of originality. Upon the issue of fact thus involved, priority was awarded to Brown by the Board of Examiners in Chief and by the Commissioner. A careful review of their opinions and of the evidence convinces us that their conclusion was correct. Huntington has failed to overcome the burden imposed upon him as junior party.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

ARKANSAS ANTHRACITE COAL & LAND CO. v. STOKES.

(Circuit Court of Appeals, Eighth Circuit. January 3, 1922. Rehearing Denied March 4, 1922.)

No. 5576.

1. **Appeal and error ⟸1008(1)—Judgment at law not reversed for error in the findings.**
   If an action was wholly triable at law, no reversal would be authorized for any error of fact in the findings of the trial court.
2. **Appeal and error ⟸209(1)—Sufficiency of evidence to sustain findings not open to review, when no request made or exception taken.**
   Where defendant made no request for findings or for any declaration of law in his favor, and saved no other exception and took no other step prior to rendition of the judgment, the question of law as to the sufficiency of the evidence to sustain the findings is not open to review; it being too late, after the rendition of the judgment, to take exception to rulings of the court on the issues tried.
3. **Appeal and error ⟸733—Assignment that there was error in rendering judgment too indefinite for consideration.**
   A general assignment, that there was error in rendering judgment one way or the other, is too indefinite for consideration on appeal.
4. **New trial ⟸6—Denial is within court's discretion.**
   The denial of a motion for a new trial was a matter within the judicial discretion of the District Court.
5. **Frauds, statute of ⟸72(1)—Lessor's oral agreement to waive royalties and convey property not enforceable, unless executed so as to be susceptible of proof.**
   Oral agreements by the lessor under mining leases to waive royalties and convey one of the mines could not be enforced, unless so far executed as to be susceptible of proof, as they involved an interest in real property.
6. **Pleading ⟸8(7)—Allegation that oral agreement had been executed held a conclusion.**
   In an action for royalties under a mining lease, in which defendant set up oral agreements by the lessor to waive royalties and convey one of the mines involved, an allegation that the agreement had been executed by defendants, but not by plaintiff was a mere conclusion.
7. **Frauds, statute of ⟸129(8)—Payment and possession under oral agreements by mine lessor warrants enforcement.**
   Payment and possession pursuant to oral agreements by the lessor under mining leases to waive royalties and convey one of the mines would be sufficient to authorize enforcement, but possession under the leases antedating the agreements alleged would be attributed to the operating privileges.
8. **Account ⟸14—Justified when numerous transactions cannot be practically determined at law, or if remedy at law inadequate.**
   If a suit involves numerous transactions, including debits and credits of a mutual and complicated nature, and cannot be practically determined by a jury, or the remedy at law is inadequate, an accounting is justified.
9. **Appeal and error ⟸1046(1)—Refusal to transfer cause to equity side of court not reversible error.**
   Under Judicial Code, § 274b (Comp. St. § 1251b), authorizing equitable defenses to be interposed in actions at law, and providing that, whether review be sought by writ of error or appeal, the appellate court shall have full power to render such judgment as law and justice shall

require, defendant was not prejudiced by the refusal to formally transfer a case in which equitable defenses were interposed to the equity side of the court, where it was given the same opportunity to produce its evidence and have an adjudication upon it as if the transfer had been made.

10. **Action ⟸22—Action for royalties under leases held properly triable at law.**

An action for the minimum royalties under a mining lease in which defendant set up agreements to waive royalties and convey one of the mines, payments and suspension of mining, due to strikes or other casualty, *held* properly triable at law, when the irrelevant evidence respecting such oral agreements and matters not in issue was eliminated.

11. **Appeal and error ⟸931(1), 1009(1)—Finding in suit in equity presumptively correct, and not disturbed, unless clear.**

Assuming that a case was one in equity and that the facts are open to review, the findings are presumptively correct, and should not be disturbed, unless error clearly appears.

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

Action by Fremont Stokes against the Arkansas Anthracite Coal & Land Company and another. Judgment for plaintiff, and the defendant named brings error. Affirmed.

James B. McDonough, of Ft. Smith, Ark., for plaintiff in error.

Ben Cravens and Ira D. Oglesby, both of Fort Smith, Ark., and George O. Patterson, of Clarksville, Ark., for defendant in error.

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

COTTERAL, District Judge. This action was brought at law by Fremont Stokes to recover royalties upon coal mining leases, alleged to have been made to the Pennsylvania Mining Company, assigned to the defendant Arkansas Anthracite Coal & Land Company, and operated with the other defendant, Fernwood Mining Company. The last-named defendant prevailed in the District Court. A jury was waived, and the cause was tried to the court, with the result that the issues were found generally in plaintiff's favor, and he obtained judgment against the coal and land company for $14,649.39, with interest and costs.

The assignments upon which a reversal is sought are, in substance, that the trial court erred in (1) refusing to transfer the case to the equity docket; (2) awarding royalty with interest to plaintiff, and not deducting therefrom certain payments and credits; (3) failing to enter a decree for a conveyance of mine 1 and a waiver of royalties at mine 2; (4) failing to award the defendant considerations paid for said conveyance and waiver; (5) allowing royalty on occasion of strikes and water in mines; (6) denying motions for a new trial and rehearing.

At the conclusion of the trial the cause was submitted generally to the court. Later the defendants filed a motion to reopen the case for the introduction of further testimony, and this motion, with an amendment thereto, was denied, and they excepted. They made no request for findings, or for any declaration of law in their favor, saved no other

exception, and took no other step prior to rendition of judgment. Thereafter separate motions for a new trial and a rehearing were filed, heard, and overruled.

[1–4] If this action was wholly triable at law, then no reversal could be authorized for any error of fact in the findings of the trial court, and on this record the question of law, as to the sufficiency of the evidence to sustain the findings made, was not saved, and is not open to review. Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; United States v. A., T. & S. F. Ry. Co. (C. C. A.) 270 Fed. 1. After the rendition of judgment, it was too late to take exceptions to rulings of the court on the issues tried; and a general assignment that there was error in rendering judgment one way or the other is too indefinite for our consideration. United States v. A., T. & S. F. Ry. Co., supra; Stoffregen v. Moore (C. C. A.) 271 Fed. 680; Granite Falls Bank v. Keyes, 277 Fed. 796. Furthermore, the ruling on the motion for a new trial was a matter within the judicial discretion of the District Court. Yellow Cab Co. v. Earle, 275 Fed. 928.

In our opinion, these authorities dispose of every specification of error adversely to the plaintiff in error, except the refusal of the District Court to transfer the cause to the equity docket and to sustain the alleged equitable defenses tendered in the answer and amendments. The complaint specified the demands claimed on leases, one of them verbal, by an exhibit of royalties accruing on four tracts and a lesser item for rent. The defendants answered, denying the execution and validity of the verbal lease, the assignments and possession of the leases, and the operation of the mines, alleging that the matters in controversy related to an accounting between the parties and James K. Gearhart, and were wholly cognizable in equity, and that the suit involved innumerable credits, debits, and transactions between them, and praying for a transfer of the cause to equity.

The plaintiff's exhibit was amended to show six items of royalties, one for rent and another for interest. At the trial, nonsuits were taken for the first two and sixth items, and those retained were for (3) minimum royalty on land of plaintiff, Gearhart, and defendant, from March 31, 1915, to December 31, 1918 (less a credit); (4) interest thereon; and (5) minimum royalty, "No. 2 shaft," from March 31, 1914, to December 31, 1918. Those tracts were known as mines 1 and 2, respectively.

The defendants filed an amendment to their answer, in which they again moved for the transfer to equity. They denied owing items 1 and 2, and alleged payment of the royalties by numerous transactions, etc., which required an accounting. They claimed payment of royalty on item 3 (mine 1), by a system of accounting, including credits and debits, beginning prior to 1909, and extending to date, consisting of innumerable items evidenced by oral and written agreements, checks, and letters, not triable in a court of law. As to "No. 2 shaft" (mine 2), the same allegations were adopted, and it was alleged that plaintiff had received all the royalties due him, the matter being determinable only by an accounting, and for a valuable consideration had waived the royalties. Payment of the royalty on item 6 was claimed by means of

innumerable transactions of debit and credit. Further, it was alleged, the defendant agreed, in part orally, to convey his interest in mine 1 to the defendant, in consideration of large payments made during a long period; that the agreement had been executed by said defendant and the operating companies, but not by the plaintiff. The prayer was that a conveyance be required of him, and the cause transferred to and tried in equity.

By a second amendment to the answer the defendants alleged that said agreements to waive royalties and make the conveyance were oral, and were made in January, 1915, and twice later reaffirmed, and they renewed former prayers for relief. They filed another amendment, alleging that the agreement of waiver was oral, and effective until mine 2 was put in operation, and thereafter the royalties were to be payable on coal produced, and the plaintiff expressly waived all royalties at mine 1. The considerations paid therefor were specified, and the former prayers again renewed.

After demurring unsuccessfully to the answer and amendments, the plaintiff filed a reply, whereby he denied the alleged agreements to waive royalties and make a conveyance, and the payment therefor, and challenged the validity of the agreements because not in writing.

[5-7] It is apparent from the pleadings that the plaintiff in error was not entitled to a hearing in equity upon the alleged agreements of waiver and for the conveyance. As they involved an interest in real property (United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844), and were concededly oral, they could not be enforced, unless so far executed as to be susceptible of proof. True, the defendant alleged payment of the consideration and execution of the agreements by the companies, but the latter was only as a mere conclusion. Both payment and possession pursuant to agreement would suffice. 36 Cyc. 654, and citations. But in this case the possession of the defendant antedated the agreements alleged, and was attributable only to the operating privileges. Nevertheless, and doubtless on the theory of execution of the agreements, the trial court received the evidence on both sides concerning them.

[8] The necessary basis for the accounting was that there were numerous transactions, including debits and credits, of a mutual and complicated nature. If here they could not be practically determined by a jury, or the remedy at law was inadequate, then an accounting was justified. Gunn v. Brinkley Car Wks. & Mfg. Co., 66 Fed. 382, 13 C. C. A. 529; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660.

[9] However, we find no reversible error in the refusal to formally transfer the case. Equitable defenses were authorized in this action by section 274b of the Judicial Code (Comp. St. § 1251b). While they should be heard on the equity side of the court, we find the defendant was not prejudiced, as there was the like opportunity to produce its evidence, and have an adjudication upon it, as if the transfer had been made. There was no jury, and no reference suggested or discovery sought. And where the ends of justice have been met, there is no sufficient reason to direct another trial in order to attain the same result.

Furthermore, by the above section the defendant may have a consideration of every defense, upon the writ of error by which the record comes before us.

[10] But we are convinced that there were no such complications that the cause might not have been satisfactorily tried at law and to a jury. On the plaintiff's side, the minimum royalties sued for at both mines were shown by the lease of May 20, 1909. The denial of liability was claimed by agreements and payments, and by suspension of mining due to strikes or other casualty under the terms of the lease, whereby in such case the royalties were not payable, provided all reasonable means were used to avert strikes and make repairs. The oral agreements affecting the leaseholds should have been excluded, and as well transactions pertaining to claims dismissed and other royalties and matters not in issue. There was controversy respecting payments and the object of them, and credits, and the extent of strikes and mine flooding, and diligence to continue mining, although not pleaded by the defendants. Even if at the outset the defenses seemed triable in equity, and they proved not to be so, we hold there could be no meritorious complaint of the trial. By eliminating the irrelevant evidence, we think the case presented was one of contract liability and payment, and as such properly triable at law.

[11] If it be assumed otherwise, and the facts are open to review in this court, then the rule applicable is that the findings assailed are presumptively correct, and should not be disturbed, unless error clearly appears. Lacy v. McCafferty, 215 Fed. 352, 131 C. C. A. 494. We are persuaded no such error was committed, and the conclusion of the trial court has our approval. The judgment is therefore affirmed.

Judge HOOK presided at the hearing of this case and concurred in the result, but died before the opinion was prepared.

ARKANSAS ANTHRACITE COAL & LAND CO. v. STOKES.

(Circuit Court of Appeals, Eighth Circuit. January 3, 1922. Rehearing Denied March 4, 1922.)

No. 5577.

1. **Corporations ⟸155(5)—In action for dividends, defendant may deny plaintiff's title or the declaration of dividends or plead set-off.**

   In an action for dividends alleged to have been declared on corporate stock, defendants may make an issue as to plaintiff's title to the stock or the declaration of dividends, or may plead a set-off or counterclaim against their liability.

2. **Action ⟸24—Action for dividends properly tried at law, notwithstanding allegations of debits and credits with third person, claimed to be the owner.**

   An action against a corporation for dividends alleged to have been declared on stock to which plaintiff asserted title, where defendant alleged title in a third person and that there were many transactions, debits and credits, between it and such third person, necessitating an accounting, was properly tried and determined at law, as the primary issue was

whether plaintiff owned the stock, and, if she did, there was no occasion for an accounting.

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

Action by Mary A. Stokes against the Arkansas Anthracite Coal & Land Company and others. Judgment for plaintiff, and the defendant named brings error. Affirmed.

James B. McDonough, of Ft. Smith, Ark., for plaintiff in error.

Ben Cravens and Ira D. Oglesby, both of Fort Smith, Ark., and George O. Patterson, of Clarksville, Ark., for defendant in error.

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

COTTERAL, District Judge. This is an action at law, in which Mary A. Stokes sued the Arkansas Anthracite Coal & Land Company, the Pennsylvania Mining Company, and James K. Gearhart for annual dividends of 4 per cent. in each of the years 1916 and 1917, upon specified shares of stock in those companies. She alleged that the stock was owned by her and was largely in the hands of Gearhart, and that the said dividends had been declared, but were withheld from her, amounting to $5,232, for which she prayed judgment. There was an amendment, with some further particulars, pending a motion by the defendants.

The defendants answered, denying plaintiff's ownership of the stock, the possession by Gearhart, the declaration of the dividends, and any indebtedness to the plaintiff therefor, and alleging that the matters set forth in the complaint cover a long period; that there are many transactions and debits and credits between them; that a master should be appointed and an accounting had, on which the defendants would not be found indebted to the plaintiff. The prayer was for the transfer of the cause to the equity docket, for the said appointment and accounting, and for a discharge of the defendants.

Both parties sought to further amend the pleadings, but the requests were denied. The defendants, in their application, again moved for the transfer to the equity docket, adding that an accounting of innumerable items, etc., was necessary. Afterward the plaintiff had leave to amend, and alleged ownership of certain shares, and the right by agreement to additional shares of the coal and land company in exchange for stock of both companies, standing in the name of Gearhart, and delivered to them for reissue to her. A further judgment was asked for dividends on said stock in the sum of $2,676. The defendants were then allowed to amend their answer, by adding that the stock issued in the name of the plaintiff was the property of Fremont Stokes, that he owed the companies upon subscriptions for 70 shares of stock, in the sum of $2,100, under an agreement to apply his dividends thereon, and this was done, pursuant to resolution of the directors.

The cause was tried to the court, upon written waiver of a jury. There was no further step or request on either side prior to judg-

ment, the record of which shows that the court found the issues generally for the plaintiff as against the coal and land company, the plaintiff in error, rendered judgment in her favor against that company for $1,834, with interest and costs, and dismissed the action as to the other defendants. Motions for a new trial and a rehearing were presented and overruled, and exceptions saved.

The plaintiff in error complains here, by its assignments, that the District Court erred in (1) overruling the motion for a new trial; (2) rendering judgment for the plaintiff, and not for the defendant; (3) holding the stock in controversy belonged to the plaintiff, instead of Fremont Stokes; (4) refusing to transfer the cause to equity, and to grant plaintiff in error the equitable relief to which it was entitled.

[1, 2] We find no merit in the contention that the cause should have been transferred to the equity docket. The complaint declared at law for dividends upon corporate stock. The defendants were privileged to make an issue as to her title to the stock and the declaration of dividends; also to plead a set-off or counterclaim against their liability. 5 Stand. Ency. Proc. pp. 688, 695. However, there was no claim that the plaintiff was indebted at any time to the defendants. The debt on other stock subscriptions was asserted only on the theory that Fremont Stokes owned the stock upon which the dividends were sought. The primary issue in the case was whether the plaintiff owned that stock. There was considerable evidence which bore upon that issue, but no items of debit or credit were involved as between her and the defendants. The dispute with Fremont Stokes relative to agreements or obligations on his part required no adjustment or consideration and was immaterial to the result, when once her title to the stock was established, as nothing remained but to ascertain the true amount of dividends applicable thereto, from corporate records and proceedings. There was no occasion for an accounting as between the real owner of the stock and the defendants. We therefore hold that the case was properly tried and determined at law.

No other question raised is open to review in this court. We refer, for convenience, to the case just decided, No. 5576, Arkansas Anthracite Coal & Land Co. v. Fremont Stokes, 277 Fed. 625, for the citations and rulings which are applicable, and make clear and necessary the decision that the remaining assignments of error which challenge the findings of the trial court, the rendition of judgment, and the refusal of a new trial are quite untenable in this court.

The judgment of the district court is therefore affirmed.

Judge HOOK presided at the hearing of this case and concurred in the result, but died before the opinion was prepared.

GNERICH et al. v. YELLOWLEY.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3706.

1. **Injunction ⇐114(3)—Commissioner of Internal Revenue is necessary party to a bill to restrain enforcement of restrictions in permit issued by him.**

The Commissioner of Internal Revenue, who was authorized by National Prohibition Act, tit. 2, §§ 1, 2, 4–6, to issue a permit for the manufacture, sale, etc. of intoxicating liquor for other than beverage purposes, is a necessary party to a suit to restrain the enforcement of restrictions as to the quantity of such liquors sold contained in a permit issued by him, and a bill brought against the Acting Prohibition Director alone must be dismissed.

2. **Injunction ⇐22—Bill against acting prohibition director properly dismissed after defendant ceased to be such officer.**

A bill brought against the acting prohibition director to restrain the enforcement of restrictions on the quantity of intoxicating liquors which might be sold contained in a druggist's permit to sell was properly dismissed after the defendant had ceased to be the prohibition director, even if he could be deemed to have been such an agent of the Commissioner of Internal Revenue as to authorize suit against him without joining the Commissioner.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by Waldemar Gnerich and another, copartners doing business under the firm name and style of the B. & S. Drug Company, against E. C. Yellowley, as Acting Prohibition Director in and for the District of California. From a decree dismissing the bill, complainants appeal. Affirmed.

Harry G. McKannay, of San Francisco, Cal., for appellants.

John T. Williams, U. S. Atty., of San Mateo, Cal., and T. J. Sheridan, Asst. U. S. Atty., of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. An addition to the Constitution of the United States made by the adoption of the Eighteenth Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes within the United States and all territory subject to the jurisdiction thereof, and also the importation thereof into or the exportation thereof from the United States and all territories subject to its jurisdiction, and further declares that the Congress and the several states shall have concurrent power to enforce those provisions by appropriate legislation.

Acting under and in pursuance of the power thus conferred upon it by the Constitution, Congress passed on October 28, 1919, an act entitled:

"An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage pur-

poses, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries." 41 Stat. 305.

The decree appealed from dismissed a bill of complaint filed by the appellant drug company on the ground that it did not state facts sufficient to constitute a cause of action against the defendant as acting prohibition director in and for the district of California. After setting forth the jurisdictional facts and the nature of the appellants' business, and the appointment and qualification of the defendant prohibition director, the bill alleges that on January 16, 1920, the federal Prohibition Commissioner and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, published "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of Intoxicating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States," which rules and regulations are still in effect, and that pursuant thereto the complainants on the 29th day of September, 1920, applied for and were granted by the federal Prohibition Commissioner at Washington, on the form prescribed by the regulations, a permit "to use and sell intoxicating liquors for other than beverage purposes," in the following particulars, to wit:

"1. In the manufacture of United States Pharmacopœia and National Formulary preparations unfit for use as a beverage.

"2. In selling in quantities not exceeding one pint, to persons not holding permits to purchase when medicated according to any one of the seven formulæ set forth in section 61 of the aforesaid regulations prescribed by said Treasury Department.

"3. In compounding medicinal preparations on physicians' prescriptions or otherwise medicated according to the standard set forth in paragraph A, section 60, of the aforesaid regulations, prescribed by said Treasury Department, and put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

"4. In selling retail as such to others holding permits which confer authority to purchase and use intoxicating liquors for nonbeverage purposes.

"5. In dispensing as such on physicians' prescriptions given on form 1403 prescribed by the Treasury Department of the United States internal revenue, in quantities not exceeding one pint in ten days to the same person, and for nonbeverage purposes."

The bill further alleges that the complainants were required by the regulations to set forth, and in their application for the permit did set forth, that the kind and the probable maximum quantity of "intoxicating liquors" that they desired to sell or use in their business during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whisky, and 5 gallons of wine and 4½ proof gallons of brandy; that their said application was duly verified and was accompanied by a bond in the form and amount required by the regulations to cover the maximum quantities of intoxicating liquors set forth in the application as desired to be used or sold by them, a copy of which application was annexed to and made a part of the bill. The bill alleges that under date November 26, 1920, the Prohibition Commissioner at Washington issu-

ed to the complainants a permit under and in pursuance of the National Prohibition Act authorizing and permitting them to use and sell intoxicating liquors for other than beverage purposes, in conformity with their said application, "but arbitrarily and without authority of law or regulation, inserted in said permit the restriction that 'this permit is issued for one hundred gallons of distilled spirits and five gallons of wine' for each quarterly period," which permit is also annexed to and made a part of the bill.

The bill alleges that the said permit has not been revoked, and that by virtue of it the complainants, on February 17, 1921, made application to the defendant as prohibition director for the district of California, on the form and in the manner prescribed by the regulations of the Treasury Department, for a permit to purchase one barrel of grain alcohol for the uses set forth in the permit, which application was on the 2d of March, 1921, returned to the complainants by the defendant, for the reason that the purchase of the said barrel of alcohol would allow the complainants to withdraw in excess of 100 gallons of distilled spirits per quarter, as more fully appears from his letter, a copy of which is annexed to and made a part of the bill; that numerous other similar applications of the complainants for permits to purchase alcohol and intoxicating liquors had been likewise disapproved by the defendant upon like grounds, all of which refusals, it is alleged, have resulted in great injury to the complainants in their business of pharmacists, and have prevented them from lawfully pursuing such business in using, dispensing, and selling such alcohol and intoxicating liquors for other than beverage purposes, to their great and irreparable damage.

The bill alleges that the restriction so fixed by the Commissioner in the said permit "is arbitrary, unlawful, unreasonable, and void as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the government of the United States, and is an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of 'intoxicating liquor' for medicinal and nonbeverage purposes, and is a violation of the rights, privileges, and duties conferred upon complainants as pharmacists, under the provisions of said act"; that the said restriction is not necessary to the enforcement of any of the provisions of that act, nor is it authorized by any rule or regulation published by the authority thereof; that because of the said restriction the complainants have been prevented from filling many prescriptions lawfully issued by licensed physicians resident in the southern division of the northern district of California, and issued by them under permits on the form and in the manner prescribed by law.

The prayer of the bill was that the defendant to it show cause why the limit so fixed in the permit issued to complainants should not by him be disregarded pending the final hearing and determination of the cause, and that upon final hearing the defendant be perpetually restrained from enforcing as against the complainants the restrictions complained of.

The constitutional amendment imposes no prohibition upon either the manufacture, sale, or transportation of intoxicating liquor for non-

beverage purposes, nor does it undertake in any way to define what shall constitute intoxicating liquor, but Congress did the latter in its National Prohibition Act, and also enacted numerous most stringent provisions for the giving effect to the constitutional amendment, and in the endeavor to prevent its evasion.

Section 1 of title 2 of the act defines the meaning of the words "person," "commissioner," "application," "permit," and "bond," as used therein, and by the seventh subdivision of that section declares:

"The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this act, and the Commissioner is authorized to make such regulations. Any act authorized to be done by the Commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the Commissioner may be filed with an Assistant Commissioner or other person designated by the Commissioner to receive such records."

Section 4 enumerates various articles therein declared not subject to the provisions of the act if they correspond with certain specified descriptions and limitations, in which event the Commissioner is authorized to issue a permit for their sale. By section 5, however, it is provided that, whenever the Commissioner has reason to believe that any of such articles do not correspond with the descriptions and limitations specified in section 4, he shall make an investigation upon prescribed notice, and, in the event that the manufacturer of such an article fails to show to his satisfaction that the article corresponds to the descriptions and limitations provided in section 4, his permit shall be revoked. And that section concludes with the provision that—

"The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed, and the court may affirm, modify, or reverse the finding of the Commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article."

By section 6 it is declared, among other things, that no one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as therein provided. The life of such permits is prescribed, and it is declared that they shall specify the quantity and kind of liquor to be purchased and the purpose for which it is to be used, power being given the Commissioner to prescribe the form of all such permits and of the applications therefor, and to require bond in such form and amount as he may prescribe, and further as follows:

"No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his state to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the Commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time

when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used."

And section 6 contains this further provision:

"In the event of the refusal by the Commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof."

We think we are precluded from deciding or considering the merits of the case: First, by the fact that the Commissioner of Internal Revenue was not made a party to the suit; and, secondly, by the fact that the defendant acting prohibition officer ceased to be such during its pendency.

[1] It is the Commissioner of Internal Revenue, as will be seen from the provisions of the National Prohibition Act that have been referred to, who is authorized to issue a permit for the manufacture, sale, purchase, transportation, or prescription of any intoxicating liquor, and the bill in the present case expressly alleges that it was the Commissioner who issued the permit upon which the complainants relied, alleging the invalidity of that portion of it restricting the permit to 100 gallons of distilled spirits and 5 gallons of wine; and yet the Commissioner was not made a party to the bill, the very purpose of which was to control his action. That under such circumstances the bill could not be maintained, even conceding that it states facts sufficient to constitute a cause of action in the complainants' favor, is clearly shown by the decision of the Supreme Court in Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621, and cases there cited.

[2] Even if the acting prohibition director, made sole defendant to the bill, could be held as agent of the Commissioner to dispense with the necessity of making the latter a party, that defendant ceased to be such officer pending the suit.

The judgment of dismissal is affirmed.

LOCOMOTIVE STOKER CO. v. MECHANICAL CONST. CO.

(Circuit Court of Appeals, Third Circuit. December 31, 1921. Rehearing Denied February 9, 1922.)

No. 2763.

1. Patents ⊜328—979,849, claims 9–12, for distributing plate for stokers, valid, but not infringed.

Claims 9, 10, 11, and 12 of the Hanna patent, No. 979,849 for a distributing plate for blast feed stokers having an unobstructed central portion and divergent side channels, *held* to involve invention, but not infringed by a tubular device through which the fuel is blown or blasted, and having a slight obstruction or abutment to divert some of the flying coal through side channels or pockets to the rear corners of the firebox.

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

2. Patents ⊜328—1,130,443, claims 1, 2, 3, and 9, for mechanical stoker, not infringed.

Claims 1, 2, 3, and 9 of the Street patent, No. 1,130,443, for a mechanical stoker one element of which is a fuel receptacle below the firing floor, from which the fuel is elevated to a point above the level of the fuel bed, *held* not infringed by a device consisting of a series of screws working within a casing, and having no distinct receptacle, though one casing is below the firing floor.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. S. Thomson, Judge.

Suit by the Mechanical Construction Company against the Locomotive Stoker Company. Decree for plaintiff (274 Fed. 411), and defendant appeals. Reversed in part, and affirmed in part.

Synnestvedt & Lechner, of Philadelphia, Pa., and Gillson & Gillson, of Chicago, Ill. (Paul Synnestvedt, of Philadelphia, Pa., Louis K. Gillson, of Chicago, Ill., and George Gray, of Wilmington, Del., of counsel), for appellant.

J. Snowden Bell, of New York City, and Walter F. Murray, of Cincinnati, Ohio, for appellee.

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

LYNCH, District Judge. The bill of the Mechanical Construction Company alleged infringement on the part of the Locomotive Stoker Company of its Hanna patent, No. 979,849, relating to an improvement in automatic stokers for feeding fuel within the firebox, and having to do only with the distribution of fuel after it has reached the distributor. The Stoker Company's answer attacked the validity of the patent, denied infringement, and by way of counterclaim alleged that the Construction Company had infringed its Street patent, No. 1,130,443, which relates to a mechanical stoker for bringing fuel to the distributor and has nothing to do thereafter with the distribution of fuel in the firebox. The Constrution Company, in answer to the counterclaim, denied infringement and the validity of the Street patent.

The court below sustained the Hanna patent, and found that the Stoker Company had infringed it, and as to the counterclaim found that the Construction Company did not infringe the Stoker Company's Street patent. 274 Fed. 411. Both findings are before us for review.

With Respect to the Bill (Hanna Patent No. 979,849).

[1] The claims of the Hanna patent in suit (9, 10, 11, and 12) read as follows (the italics are ours):

"9. *A distributing plate* for blast feed stokers having *a wide unobstructed central portion, and a* comparatively narrow divergent *channel* at each side below the central portion of the plate and discharging at the side of the plate.

"10. *A distributing plate* for blast feed stokers having *an unobstructed central portion and* divergent *side channels* lying below the central portion of the plate and gradually deepening from the receiving to the discharge end, substantially as specified.

"11. *A distributing plate* for blast feed stokers having *an unobstructed central portion and* divergent *side channels* lying below the central portion of

the plate and turned at their outer ends to a direction approximately at right angles to the longitudinal axis of the plate, substantially as specified.

"12. *A distributing plate* for blast, feed stokers having *an unobstructed central portion and* divergent *side channels* lying below the central portion of the plate, gradually deepening from the receiving to the discharge end and turned at their outer ends to a direction approximately at right angles to the longitudinal axis of the plate, substantially as specified."

Hanna adopted the fan-shaped distributing plate and steam jet of the British patent to Cotten, No. 18,901 of 1895, with their function of spreading fuel in the firebox in forward and lateral directions, and made a substantial improvement by cutting channels in the plate, diverging in curves to the sides, with the function of spreading fuel in a rearward direction. Fuel, when dumped or deposited on this Hanna plate, would be moved forwardly over the unobstructed central portion of the plate, and spread in the forward portions of the firebox by a blast, while other coal, which by the same dumping or depositing process would fall or drop into the divergent side channels lying below the central portion of the plate, would flow through these channels to the rear sides or back corners of the firebox. The learned trial judge, in his opinion, describes the prior art and sets forth his reasons for concluding that the Hanna device was an invention. With his conclusion we concur.

With respect to the question of infringement, however, we are not in agreement. Fuel would not reach the firebox by means of the Hanna device, except by riding over the unobstructed plate *or* by flowing through the side channels. Plate distributors were old in the art, but Hanna's divergent side channel arrangement was a contribution. The device of the Locomotive Stoker Company, which the learned trial judge held to be an infringement of the Hanna patent, is a tubular arrangement, as distinguished from a plate device. This tube is approximately 16 inches long and 10 inches wide.

Fuel is not dumped or deposited and by steam momentum moved forwardly over the bottom of the tube, or across any plate, either obstructed or unobstructed, attached to any part of the tube, but, on the contrary, is blown or blasted *through* the tube and into the firebox. The lower stratum of this blasted fuel, some of which doubtless comes in contact with the bottom of the tube, strikes a slight obstruction or abutment, which is fixed at that end of the tube which protrudes into the firebox. This obstruction is made by raising slightly above the bottom of the tube the forward walls of pockets or channels, very like Hanna's, and is placed there for the *purpose* of stopping and diverting some of the flying coal and causing it to drop, through side channels or pockets, to the rear corners of the firebox, instead of proceeding uninterrupted to the forward parts thereof. The obstruction as described by the patentee of the tube distributor is as follows (the italics are ours):

"A further portion (of the fuel column), the lower portion, meets the obstruction which is attached to the bottom of the tube, and projects above the bottom level. The *lower strata* of the coal therefore drops by gravity, and by rebounding from the wall of the obstruction into the corners of the firebox door on the rear portion of the grates."

This obstruction or abutment runs across the entire outer end of the projected bottom of the tube, and there is a channel or pocket on each side between the end of the tube and the abutment. No fuel can actually be dumped or deposited into these pockets, as in Hanna's, because they are located 16 inches beyond the point of delivery of fuel to the tube distributor, and no fuel enters these pockets except that part of the lower stratum of fuel passing into the tube, which is arrested or deflected by the abutment or obstruction. This obstruction is fixed above the bottom of the tube at an elevation calculated to divert fuel in the quantity required for rearward spreading. These pockets, therefore, do not function in the way the divergent channels of the Hanna patent function. Coal enters the Hanna channels freely, without the assistance of an obstruction, while no coal other than that which is obstructed enters the tube pockets of the defendant's device.

Hanna's device is "a distributing plate * * * having a wide unobstructed central portion, *and* a comparatively narrow divergent channel," a combination of plate and channels; the plate supplying certain parts of the firebox and the channels other parts. The Stoker Company's device is a combination of tube and obstructor. The plates of Cotten and Hanna are discarded. Beyond the pockets there is no plate or "unobstructed central portion"—an element of each claim in suit. In front of the obstructing pockets there is only enough metal to build up and hold the pockets in place. What metal there is, is in no sense akin to a plate, and discloses no function of plate distribution forward and lateral. As we have already pointed out, the Hanna channels and the pockets of the defendant's device, though alike in their purpose, function in different ways. Yet, if they were alike in function, as urged by the plaintiff, they have to do only with fuel distribution rearward. Both devices comprehend fuel distribution to the sides and to the forward end of the firebox. Distribution over these portions of the firebox is effected by mechanism of the defendant without the plate means provided by the Hanna patent, and by means so different from that contemplated by the Hanna patent that, notwithstanding similarity of channels and pockets, infringement is avoided.

For these reasons we think the appellant's device did not infringe the Hanna patent.

As to the Counterclaim (Street Patent No. 1,130,443).

[2] The claims of the Street patent alleged to be infringed are four, to wit:

"1. In a locomotive, the combination with the boiler furnace and its firing door, of a mechanical stoker apparatus mounted on the locomotive and comprising *a fuel receptacle below the firing floor*, an elevator for conveying the fuel from said receptacle to a point above the level of the fuel bed, and means for delivering the fuel therefrom into the furnace.

"2. In a locomotive and tender, the combination with the boiler furnace, of a mechanical stoker apparatus mounted on the locomotive and comprising *a fuel receptacle below the firing floor*, means below said floor for delivering fuel from the tender into said receptacle, an elevator for conveying the fuel from said receptacle to a point above the level of the fuel bed, and means for delivering the fuel therefrom into the furnace.

"3. In a locomotive, the combination with the boiler furnace and its firing door, of a mechanical stoker apparatus mounted on the locomotive and comprising *a fuel receptacle below the firing floor*, an elevator for conveying the fuel from said receptacle to a point above the said door, and a gravity discharge conduit for delivering fuel from said point into the furnace."

"9. In a locomotive, the combination with a boiler furnace having a firing door, of a mechanical stoker apparatus mounted on the locomotive and comprising *a fuel receptacle* located below said door, a tubular casing extending upward from said receptacle to a point above said door, an endless conveyor operating in said casing to raise the fuel from said receptacle, and means for delivering the fuel from the casing above the door into the furnace."

It will be observed that each of the four claims contains as an element "a fuel receptacle below the fire floor." The receptacle is a distinct element of the Street device, and on it the issue of support turns. Coal is deposited into it, so that elevator buckets, passing through, pick up and carry upward some fuel. In order for a bucket system to properly function, there must be a chamber (receptacle) where the fuel is received, and where later the buckets take on the material to be carried. There would always be a residue, perhaps a small residue, lying in the receptacle. This could not be avoided.

The screw device of the Hanna stoker, which is alleged to be an infringement of the Street claims, carries coal or fuel by a series of screws, four in number, each working within a casing, and each taking up the coal transferred to it, and delivering it to the screw in advance. and each casing is cleared of its own coal as fast as the coal is delivered to it. At least one casing is "below the firing floor." There is no distinct receptacle, or relaying chamber, attached to this screw arrangement. And no part of the conveying apparatus itself, it seems to us, should be regarded as a receptacle.

We are therefore in agreement with the court below in holding that the Hanna screw stoker, having neither a distinct receptacle nor any section performing the functions of a receptacle, is not an infringement.

The decree below is reversed, in so far as it held the claims of the Hanna patent in suit infringed, and it is affirmed, in so far as it held the claims of the Street patent in suit not infringed, with costs of appeal to be divided equally between the appellant and appellee.

On Petition for Rehearing.

The following statement appears on page 4 of the petitioner's brief:

"The actual distributors are large, heavy, ugly affairs, that crowded the courtroom, *and tended to soil the new rug therein, and were removed therefrom at the request of this honorable court, at the close of the hearing.* Unfortunately, however, appellant has gone beyond the directions of the court, in that it took possession of both plaintiff's and defendant's exhibits and shipped them to Pittsburgh, leaving in the court's keeping, instead of these actual distributors, a neat little aluminum model, purporting to represent, in reduced size, Defendant's Exhibit D. It appears from the aforesaid excerpt that this is all that this honorable court took into consideration in reversing the trial court, upon the question of infringement. * * * Appellant's leaving this neat little aluminum model of Defendant's Exhibit D, and removing the main offenders, is in keeping with their apparent purpose to relegate Plaintiff's Exhibit 3 to obscurity."

This statement, though probably made in entire belief in its truthfulness, is nevertheless wholly untrue. None of the large, heavy, and ugly

distributors were removed from the courtroom at the close of the hearing, nor were shipped to Pittsburgh until after the case had been decided in conference. All of these large, heavy, and ugly distributors, and all other exhibits in the case, except only that one being the illustrative model of the respondent, were retained in the courtroom just as they were produced at the argument, put aside on a tarpaulin, and there remained until conference. The conference was had, not with the little aluminum models, but by the three judges sitting about, handling, measuring, closely examining, and considering the large, ugly, dirty distributors.

We are of the opinion that the application for rehearing should be denied.

GREAT ATLANTIC & PACIFIC TEA CO. v. GILLESPY et al.

(Circuit Court of Appeals, Fifth Circuit. January 26, 1922.)
No. 3707.

1. **Landlord and tenant ⟸180(4)—Lessor, repairing after partial destruction, liable for difference between rent and rental value for denying lessee possession.**

   Conceding that, on partial destruction of a leased building, rendering it unsuitable for the lessee's business, the lessor was under no obligation to repair, and, on the lessee's election not to surrender the lease, might have required payment of rent without restoring the building or pending repairs, where it undertook to, and did, repair the building, but excluded the lessee from possession, it was liable for the difference between the rental value from the date of the completion of the repairs and the rent from the date of the fire as damages for its breach of contract.

2. **Landlord and tenant ⟸152(5)—Lessee held not under obligation to repair after partial destruction by fire.**

   Under a lease requiring the lessee to surrender possession at the end of the term in like good order as at the commencement of the lease, natural wear and tear excepted, and to make repairs required by the sanitary and other laws of the city, natural wear and tear excepted, but providing that these stipulations should not apply in case of damage or destruction by fire, etc., the lessee was under no obligation to repair in case of partial destruction by fire.

3. **Landlord and tenant ⟸211(1)—Lessee held not to have conditioned election to continue lease, following partial destruction, on abatement of rent during repairs.**

   Under a lease providing for repairs by the lessor, and for an abatement of rent in case of slight damage by fire or otherwise, termination of the lease in case of total destruction, and an option to the lessee to annul the lease or allow it to remain in full force and effect in case of partial destruction rendering the premises unsuitable, where there was such a partial destruction, and the lessee unequivocally elected to continue the lease, a letter subsequently written, repeating such election and requesting prompt repairs, and abatement of rent during their progress, did not make the abatement of rent a condition of its election to continue the lease.

Walker, Circuit Judge, dissenting.

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

Action by the Great Atlantic & Pacific Tea Company against Mortie J. Gillespy, as executor, etc., and others. Judgment for plaintiff for an insufficient amount, and it brings error. Reversed and remanded, with directions.

J. L. Drennen, of Birmingham, Ala., for plaintiff in error.

Edward H. Cabaniss, of Birmingham, Ala., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The plaintiff in error, which was the lessee of a two-story brick store in Birmingham, Ala., brought an action in the United States District Court for the Northern District of Alabama to recover damages for an alleged wrongful eviction by defendants in error, the lessors, about 19 months before the expiration of the term for which the premises had been rented by a written lease. The paragraphs of the lease bearing on the questions raised in this case are the following:

Paragraph 3, last clause: "This lease being terminated, to surrender quiet and peaceable possession of said premises in like good order as at the commencement of said term, natural wear and tear excepted."

Paragraph 4: "It is further agreed and understood that the lessor shall not be required to do any repairs upon the building herein leased, unless so stipulated and agreed upon in writing at the commencement of this lease, nor is the lessor liable for any breakage or getting out of order of any of the water pipes, or water closets or any other plumbing, but on the contrary lessee shall keep the same in such repair as required by the sanitary and other laws of the city of Birmingham, natural wear and tear excepted."

Paragraph 6: "It is further understood and agreed that the lessor reserves the right to make any repairs that may be deemed necessary during the term of this lease."

Paragraph 9: "If the premises be slightly damaged by fire, or otherwise, they shall be promptly repaired by the lessor, and an abatement shall be made from the rent corresponding with the time during which and the extent to which the premises may not be used by the lessee after damage occurring as aforesaid and before repair. In the event of the total destruction of the premises by fire or otherwise this lease shall cease and come to an end, and the lessee shall be liable for rent only up to the time of such destruction. In the event of a partial destruction of the premises such as to render them unsuitable for the business of the lessee, then, at its option, this lease shall cease and come to an end, and the lessee shall be liable for the rent only up to the time of such election to terminate this lease. The lessee shall elect within ten days whether or not it will annul this lease or allow it to remain in full force and effect."

Paragraph 10: "Neither the last stipulation of the third paragraph nor the last stipulation of the fourth paragraph of the within lease shall be construed to have any force or effect whatever in the event of damage to the leased premises or destruction of the same resulting from natural wear and tear, fire, from the elements or from any other cause not within the control of the lessee."

On February 26, 1920, a fire occurred in a building adjoining the rented premises, which caused part of the brick wall of such adjoining building to fall upon the rented storehouse, partially destroying the same, so as to render it unsuitable for the business of the lessee. The lessors at once entered upon and began restoration of the premises. Shortly after this occurred there were conversations between representatives of the lessee and the lessors in regard to the situation, but it was agreed and understood that what was then said should be "without prej-

udice." On March 2, 1920, the lessee sent to the lessors a letter, of which the following is a copy, omitting address and signature:

"Pursuant to the terms and conditions of the lease we have with you, dated July 26, 1919, of the premises occupied by us at No. 2019 Second avenue, Birmingham, Ala., in paragraph 9 of its text, we hereby notify you that it is not our intention to terminate the lease, and that we desire it to remain in full force and effect until the date of expiration of the same."

On March 6, 1920, the lessee addressed and sent to the lessors a letter, of the body of which the following is a copy:

"Pursuant to the terms and conditions of the lease we have with you, dated July 25, 1919, of the premises occupied by us at No. 2019 Second avenue, Birmingham, Ala., in paragraph 9 of its text, we hereby elect not to annul lease, but to allow it to remain in full force and effect, and request prompt repairs of the leased premises, and abatement rent during progress of repairs."

On March 8, 1920, the lessors sent to the lessee a letter, of the body of which the following is a copy:

"We are in receipt of your letter of March 2 and your letter of March 6, 1920, and in reply to same beg to say: The building recently occupied by you, No. 2019 Second avenue, Birmingham, Alabama, is totally destroyed within the meaning of the lease. The building will be replaced in sixty or ninety days, and if you wish to lease same when finished, please act promptly, as we are disposed to give you preference in the matter."

Replying to this letter, the lessee wired the lessors as follows:

"Your letter of March 8 constituted a repudiation of your lease contract; have arranged to lease other premises."

And on March 22, 1920, the lessee sent to the lessors a letter, which, after acknowledging receipt of the letter of the lessors of March 8, and quoting therefrom, proceeded and concluded as follows:

"We hereby deny absolutely that the building at No. 2019 Second avenue, your city, has been totally destroyed, either within the meaning of our lease of these premises, or otherwise, and we have in our possession photographs which show plainly that that is not the case. Moreover, as your letter indicates very plainly that you do not intend to perform the obligations imposed upon you by the terms of the agreement of July 25 last between you and ourselves, whereby you leased the building mentiond to us for a term of two years from the 1st of October, to repair promptly the damage to the structure, and to keep us in possession of the same during the remainder of the term of our lease, upon the basis of us receiving an abatement in our rent during whatever period may elapse from the time when the building was damaged until it is again ready for occupancy, we hereby inform you that we regard your letter as a total repudiation on your part of your obligations under the lease contract referred to. Under these circumstances we propose to take such action in the premises as our interests appear to require, and we hereby notify you that we shall hold you liable for whatever loss or damage we may sustain in consequence of the above-mentioned breach of your contract with us."

The rent payable by the terms of the lease was $350 a month. The market rental value of the rented premises, at the time they were damaged and as they were before the fire, was $600 a month. The lessors had the store repaired at a cost of about $6,200. Soon after March 8, 1920, the lessee rented another store in Birmingham, less available, and

continued its business therein. The restoration of the building was completed during May, 1920. This suit was filed May 28, 1920.

The court held that the contract was breached, but that plaintiff was entitled to recover only nominal damages, because the defendant was under no obligation to repair; that plaintiff was bound for its rental, and that the premises were only rendered valuable by the expenditure of $6,200; that therefore, as the damages to plaintiff, i. e., the difference between $350 per month rental and $600, the value of the restored premises, i. e., $250 per month for the unexpired time, was less than $6,200, the plaintiff had sustained no actual damage, and directed a verdict of one cent in plaintiff's favor.

[1] Defendants concede that, if the contract was broken and plaintiff wrongfully evicted from its term, it could have sued for the restoration of possession and recovered possession of the premises without liability to pay for the improvements thereon, but claim that, having sued for damages for the breach of its contract, it can only recover for the damage sustained by the deprivation of the possession of the premises in their condition after the fire and before the restoration of the building thereon by the plaintiff.

It seems to us that this view is not sound. If it be conceded that defendants were under no obligation to repair, nevertheless they undertook to repair. The question is: Having so repaired, on premises to the possession of which the plaintiff had the right, can they deny to plaintiff such possession from the time of the fire until the end of the term, without paying to the plaintiff that of which they have deprived it; i. e., the use of the premises in the reconstructed building from the date of its completion, subject to the rent for the entire term remaining after the fire?

[2] It is clear that no obligation to repair in the event of fire rested on the lessee. The lease so expressly provided. Even if the lessors were not so obligated, they had reserved the right to enter and make any repairs they deemed necessary during the term of the lease. If it be conceded that, under plaintiff's election, defendants could have required it to pay the rent without restoring the building, or pending repair, it is reasonable to assume that the defendants have been benefited by a prompt restoration of the building and by having it a repaired structure during the current lease for future rentings, rather than by letting it remain to be repaired after the termination of the existing lease. They would in either event have expended the same sum in repairs and have received the same sum from plaintiff as rental during the existing term.

[3] The request of the lessee for an abatement of rent pending repairs was not made a condition to its election to continue the lease. It had so elected unequivocally on March 2d. That it requested prompt repair and abatement of rent in its letter of March 6th was but a statement of what it construed to be the intention of the parties under the lease. The lessors did not question this position in their reply, but contended that the lease was at an end by reason of the alleged total destruction of the building.

It was conceded by the defendants in judicio that the destruction of the demised building was partial within the meaning of the lease, and

the court held that the defendant had breached the contract. The evidence clearly showed that during the larger part of the remainder of the term the premises were valuable for occupancy, there being evidence that they were worth $600 per month; the defendants having elected to enter and repair at once, the direction of the verdict for nominal damages for the plaintiff was error.

The judgment of the District Court is reversed, and the case is remanded, with directions to award a new trial.

WALKER, Circuit Judge (dissenting). In the contingency which arose it was incumbent on the lessee to "elect within ten days whether or not it will annul this lease or allow it to remain in full force and effect." In my opinion the evidence did not show that the lessee elected to allow the lease to remain in full force and effect. If the lessee's letter of March 2d had remained the sole evidence of its choice and action, an election by it to allow the lease to remain in full force and effect would have been shown; but that letter was not the sole evidence of the position taken by the lessee. Before that letter was replied to, the lessee wrote and sent its letter of March 6th, in which its statement of its election not to annul the lease was coupled with the following:

"And request prompt repairs of the leased premises and abatement rent during progress of repairs."

It is not to be supposed that the letter of March 6th would have been written, if the lessee had not intended to modify or qualify the election expressed in its letter of March 2d. That the lessee intended the last-quoted language to be a statement of a condition upon which it made its election not to annul the lease is shown by the following part of its letter of March 22d:

"Moreover, as your letter indicates very plainly that you do not intend to perform the obligations imposed upon you by the terms of the agreement of July 25 last between you and ourselves, whereby you leased the building mentioned to us for a term of two years from the 1st of October, to repair promptly the damage to the structure and to keep us in possession of the same during the remainder of the term of our lease, upon the basis of us receiving an abatement in our rent during whatever period may elapse from the time when the building was damaged until it is again ready for occupancy, we hereby inform you that we regard your letter as a total repudiation on your part of your obligations under the lease contract referred to."

The lease did not give the lessee the right to make its election not to terminate the lease, subject to the condition or qualification that the lessors make the repairs required to restore the partially destroyed building to its former condition and allow an abatement of the rent. The qualified and conditional election made by the lessee was not an election to allow the lease to remain in full force and effect. The lease prescribed the affirmative and unconditional action to be taken by the lessee to keep the lease in full force and effect, in the event of a partial destruction of the leased premises rendering them unsuitable for the lessee's business. I do not think that the evidence showed that the lessee did what, in the contingency that arose, was required to keep the

lease alive. As a termination of the lease left the lessee without right to continue to possess or use the rented premises, it was not entitled to recover damages for the alleged eviction complained of.

It follows that the plaintiff in error, the lessee, is not entitled to a reversal because of the ruling which was excepted to.

PAYNE, Director General of Railroads, v. HAUBERT.

(Circuit Court of Appeals, Sixth Circuit. January 9, 1922.)

No. 3565.

1. **Railroads ⟸344(5)—Petition held to charge negligent speed.**
   The petition in an action against a railroad company for the killing of plaintiff's intestate on a crossing, which alleged that "the accident was caused solely and directly by the negligence of the defendant as herein set forth," followed by an allegation that defendant's train approached the crossing at "a high and dangerous rate of speed," *held* to sufficiently charge that the rate of speed was negligence.
2. **Courts ⟸352—Federal judges not required to conform to state practice in charging jury.**
   Judges of federal courts are not required by the conformity statute (Rev. St. § 914 [Comp. St. § 1537]) to charge a jury before argument on request to conform to a requirement of the state statute.
3. **Courts ⟸406(1)—Judgment not reversible by Circuit Court of Appeals for error in fact.**
   Under Rev. St. § 1011 (Comp. St. § 1672), providing that a judgment shall not be reversed for any error in fact, a Circuit Court of Appeals is without authority to review and reverse a judgment on the weight of the evidence.
4. **Negligence ⟸135—Contributory negligence must be established by preponderance of evidence.**
   The burden of proof is on the defendant to establish the defense of contributory negligence by a preponderance of the evidence, direct or circumstantial.
5. **Negligence ⟸136(30)—Contributory negligence of automobile driver not necessarily imputable to passenger.**
   Conceding that the driver of an automobile in which deceased was riding when struck and killed on a railroad crossing was chargeable with contributory negligence, it does not necessarily follow that deceased herself was so chargeable, nor that the driver's negligence was imputable to her.
6. **Trial ⟸142, 178—Court cannot weigh evidence on motion to direct verdict, and motion must be denied, if different conclusions possible.**
   In disposing of a motion to direct a verdict, the trial court cannot weigh the evidence, but must take that view of the evidence which is most favorable to the party against whom the motion is made, and deny the motion if, from the evidence when thus viewed, fair-minded men might honestly draw different conclusions.

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

Action at law by John Haubert, administrator, against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 259 Fed. 361.

This proceeding in error is prosecuted in this court to reverse the judgment of the United States District Court, Northern District of Ohio, Eastern Division, in an action brought in that court by John Haubert, administrator of the estate of Rose Haubert, deceased, against the Baltimore & Ohio Railroad Company and Walker D. Hines, Director General of Railroads, to recover damages for the death of Rose Haubert, resulting from injuries sustained by her in the collision of an automobile, in which she and her husband, John Haubert, were riding, with a train of the defendant upon a public highway crossing in Stark county, Ohio, on the 17th day of October, 1918.

The plaintiff averred in his petition that the accident occurred without fault or negligence on the part of decedent, but was caused solely and directly by the negligence of the defendant as therein set forth. The defendant, Walker D. Hines, Director General of Railroads, filed an answer to this amended petition admitting that he was the duly appointed, qualified, and acting Director General of Railroads, including the Baltimore & Ohio Railroad, at the time of the accident; that he was in control of and operating said railroad; that a collision occurred on the highway crossing between the automobile and the train on said railroad; and that as a result of that collision Rose Haubert was killed, and denied each and every other allegation in the amended petition. For a second defense he averred that the deceased, Rose Haubert, was guilty of negligence directly and proximately contributing to her death. A third defense averred that plaintiff was the husband of Rose Haubert, and that she and the plaintiff at the time of the accident were engaged in a joint enterprise, and while so engaged, and in furtherance thereof, they and each of them were jointly and severally guilty of negligence directly and proximately contributing to the injury and death of the deceased. The plaintiff filed a reply denying the averments of negligence on the part of Rose Haubert and himself. Upon the issue so joined the jury returned a verdict for the plaintiff in the sum of $15,000. Upon motion for a new trial the court reduced this verdict to $10,000, and rendered judgment thereon for that amount.

J. M. Lessick, of Cleveland, Ohio, for plaintiff in error.

Joseph B. Keenan, of Cleveland, Ohio (Day, Day & Wilkin, of Cleveland, Ohio, and Amerman & Mills, of Canton, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). It is insisted upon the part of the plaintiff in error that the court erred in charging the jury that speed was an issue in the case because, while the petition avers the defendant ran its train over this crossing at a high and dangerous rate of speed, yet it does not specifically charge that this high and dangerous rate of speed was negligence. It is clear, however, that the petition does charge negligence in this respect. That fact seems to be recognized by counsel for plaintiff in error as appears by the following statement on page 3 of his brief:

"And then plaintiff sets forth the negligence of defendant in the language following."

This statement in the brief is followed by the quotation of this paragraph from the petition:

"Plaintiff further says that, as the automobile in which said decedent was riding reached said crossing, the defendant caused one of its locomotives and train of cars to approach said crossing at a high and dangerous rate of speed,

to wit, approximately 60 miles per hour, and passed rapidly over the track of said railroad, and negligently and carelessly omitted, while approaching said crossing, to give any signal, by bell or whistle or otherwise, by reason whereof plaintiff was unaware of its approach, and by reason of said negligence, and without any fault or negligence on the part of said plaintiff, the locomotive struck said automobile in which she was riding, and by direct and proximate cause of said defendant's negligence said Rose Haubert was killed."

This paragraph of the petition above quoted is preceded in the petition by the averment that:

"The accident was caused solely and directly by the negligence of the defendant as herein set forth."

From this it would appear that the pleader intended to charge, and did charge, all the acts stated and described in the paragraph above quoted, as the acts of negligence on the part of the defendant which caused the death of his intestate. Therefore the rate of speed was an issue in the case, and it was proper for the court to charge in reference thereto.

While counsel for the defendant excepted to the charge of the court as to the rate of speed of trains over country public highway crossings, that exception, undoubtedly, is based solely upon the theory that the petition did not in express terms aver that the defendant was negligent in the operation of its trains at a high and dangerous rate of speed over this crossing. The charge of the court clearly and correctly states the rule of law applicable to the speed of trains at country highway crossings, and is not subject to the objection that it presents an issue of fact to the jury not joined by the pleadings.

[2] The Conformity Act (section 914, U. S. Revised Statutes [Comp. St. § 1537]) does not require the court to give instructions to the jury before argument, requested by a party to the suit as provided in section 11447 of the General Code of Ohio. In Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224, it is expressly held that:

"Judges of the federal courts are not controlled in their manner of charging juries by the state regulations. Such part of their judicial action is not within the meaning of section 914 [of the Revised Statutes]." Yates v. Whyel Coke Co., 221 Fed. 603, 137 C. C. A. 327.

It is further insisted upon the part of the plaintiff in error that the court erred in overruling its motion, at the close of all the evidence, for a directed verdict, for the reason that there is no evidence tending to prove that the whistle was not sounded and the bell was not rung, as required by the statute of the state in which this accident occurred. Among other authorities, counsel for plaintiff in error cite the opinion of the District Court in directing a verdict for defendant in the case of Begert v. Payne, which involved substantially the same question presented by the motion of this defendant for a directed verdict. The judgment in that case was recently reviewed, and reversed by this court. 274 Fed. 784. It is therefore unnecessary to repeat here what was said in the opinion in that case by Knappen, Judge, speaking for the court, upon this particular question. For the reasons stated in that opinion, this assignment of error must be overruled.

[3] It is further claimed on behalf of the plaintiff in error that the decedent and the plaintiff, who was driving the car in which decedent was riding at the time of the accident, were each guilty of negligence directly contributing to the injury and death of the decedent. This court has no authority to review and reverse this judgment upon the weight of the evidence. R. S. § 1011 (Comp. St. § 1672). No exceptions were taken to the charge of the court upon this issue. Therefore, if there is any conflict in the evidence tending to prove or disprove contributory negligence, this assignment of error must be overruled.

[4] The burden of proof is upon the defendant to establish the defense of contributory negligence by a preponderance of the evidence. Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403. While contributory negligence must be affirmatively shown, nevertheless it is a fact that may be established, the same as any other fact in the case by any competent and material evidence, either direct or circumstantial.

[5] If it were conceded that the driver of the car in which Rose Haubert was riding at the time of the accident was guilty of contributory negligence, it does not necessarily follow that Rose Haubert herself was guilty of negligence contributing to her injury, or that the negligence of the driver should be imputed to her, nor would the negligence of the driver require the trial court to direct a verdict for the defendant. The trial court properly charged the jury in reference to the question of imputed negligence of a person riding in an automobile either as passenger merely, or engaged in a joint enterprise with the driver. The court also charged that if the driver, who was the husband of the decedent and the plaintiff's administrator in this case, was guilty of negligence, his negligence would not be a defense which would defeat a recovery, but it must be taken into account by the jury in reducing the damages which the plaintiff is entitled to recover; in other words, that if John Haubert himself were guilty of contributory negligence, he would not be entitled to have any sum included in the verdict of the jury for and on his behalf for any damages he may have sustained by reason of the death of his intestate. The verdict of the jury is a general verdict. The presumption obtains that, if the jury found John Haubert guilty of any contributory negligence, it followed the instructions of the court in assessing the damages sustained by other beneficiaries. It further appears from the record that the trial court reduced the verdict of the jury from $15,000 to $10,000. Certainly this is not an excessive sum for the two children of the deceased, even if the husband were to be entirely excluded from participating in this recovery.

The presumption also obtains that the jury, in arriving at its general verdict in favor of the plaintiff, found against the contention of the defendant that the deceased and the driver of the car in which she was riding at the time of the accident were engaged in a joint enterprise, and therefore its verdict must be considered upon the theory only, that she was a passenger in the automobile which was in charge of and driven by her husband. While the death of the plaintiff's intes-

tate precluded the possibility of her testifying as to the care exercised by her, nevertheless, the presumption obtains that she was exercising due care for her own safety. This presumption must be overcome by evidence of a substantial nature before a jury would be warranted in finding that she was in fact guilty of contributory negligence. The evidence tending to prove contributory negligence on the part of the deceased is not so absolute and conclusive in its nature as would require or authorize a trial court to withdraw that question from the jury and direct a verdict for the defendant.

[6] In disposing of a motion to direct a verdict, the trial court cannot weigh the evidence, but must take that view of the evidence which is most favorable to the parties against whom the motion is made, and deny the motion, if the evidence, when thus viewed, will warrant the conclusion that fair-minded men might honestly draw different conclusions therefrom. Leahy v. Railway Co. (C. C. A. 6) 240 Fed. 82, 153 C. C. A. 118. Under the facts and circumstances disclosed by the evidence in this case, the question of contributory negligence on the part of Rose Haubert was clearly a question for the jury.

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

DAVIS, Director General of Railroads, v. PULLEN et al.

(Circuit Court of Appeals, First Circuit. January 6, 1922.)

No. 1527.

1. **Receivers ⇐152—Claims for freight charges held "debts due United States," within priority statute.**

   Claims for the freight charges on goods transported between January 1 and March 21, 1918, by railroads taken over by the government, are "debts due the United States," within Rev. St. § 3466 (Comp. St. § 6372), relative to priority in the payment of such debts, since the government took over the roads as going concerns, including sums due and daily becoming due for transportation furnished.

2. **Receivers ⇐152—Entitled to priority when receiver appointed for corporation afterwards found to be insolvent.**

   Where a receiver was appointed for a corporation on a creditors' bill, alleging solvency, but temporary embarrassment, and the corporation was subsequently found to be insolvent, and was in process of liquidation, debts due the United States were entitled to priority under Rev. St. § 3466 (Comp. St. § 6372), providing for such priority when the debtor is insolvent, and providing that such priority shall extend to voluntary assignments, etc., as well as to cases in which an act of bankruptcy is committed, as this statute, first passed when there was no Bankruptcy Act, cannot be limited to cases of technical statutory bankruptcy under the act of 1898 (Comp. St. §§ 9585–9656).

3. **Receivers ⇐152—Priority statute applies to all debts due the United States.**

   Rev. St. § 3466 (Comp. St. § 6372), providing that in case of insolveney of one indebted to the United States, debts due the United States shall be first satisfied, applies to all debts due the United States, including debts becoming due the United States in connection with the operation of railroads, however unjust it may be to give the United States superior rights

over other creditors when engaged in an industrial and commercial venture.

Appeal from the District Court of the United States for the District of Massachusetts; Charles F. Johnson, Judge.

Creditors' bill, in which a receiver was appointed for the D'Arcy & Sons Company, and in which James C. Davis, Director General of Railroads, sought to have his claims given priority, which was opposed by William L. Pullen, receiver, and others. From an adverse decree, the Director General appeals. Reversed and remanded.

Arthur W. Blackman, of Boston, Mass., for appellant.

H. C. Dunbar, of Boston, Mass., for appellee.

Before BINGHAM and ANDERSON, Circuit Judges, and BROWN, District Judge.

ANDERSON, Circuit Judge. On April 29, 1918, on a so-called creditors' bill, alleging solvency, but temporary embarrassment, a receiver was, with the defendant's assent, appointed to take possession of the assets of the D'Arcy & Sons Company, with general power to carry on the business as a going concern until further order of the court. The bill, although alleging solvency, prayed that the debts might be established and be ordered "to be paid out of the assets of the respondent corporation, or that the assets of the respondent corporation may be equitably applied as the court may direct in satisfaction thereof."

As usual, the attempt through an equity receivership to save the business as a going concern failed; liquidation was found necessary, and certain disputed claims referred to a master. The master found the corporation indebted in the aggregate amount of about $1,400 (details are not here important) for freight transportation furnished on the New York, New Haven & Hartford Railroad, Boston & Albany Railroad, and Boston & Maine Railroad. These claims all, except for a negligible amount, arose between January 1 and March 21, 1918.

The Director General of Railroads contended that these claims were entitled to priority under R. S. § 3466 (Comp. St. § 6372), as debts due the United States.

The master ruled that they were debts due the United States, that the appointment of a receiver did not constitute an act of bankruptcy, and that therefore these claims were not debts due the United States from an insolvent person within the meaning of section 3466. He also found that when the bill was filed, the respondent corporation was and at all times subsequent thereto had been insolvent, in that the aggregate of its property at a fair valuation was not sufficient to pay its debts; that neither the complainant nor the respondent, when the bill was filed, knew that the corporation was insolvent, but believed it to be solvent; and that the receiver was not appointed because of the insolvency of the respondent corporation.

The District Court confirmed both rulings—that the claims constituted debts due the United States, and that they were not entitled to priority.

The case comes here on the appeal of the Director General, contending that the court below erred: (1) In confirming the master's report; (2) in ruling that the defendant had committed no act of bankruptcy; and (3) in denying priority.

[1] 1. It may be doubted whether such assignments of error bring here the ruling as to these claims being debts due the United States. But both counsel have argued the case on the theory that that question is properly here. Under such circumstances, we may as well say that we have no doubt that that ruling of the District Court was correct. In that respect we accord with the view of the Circuit Court of Appeals for the Seventh Circuit in In re Hibner Oil Co., 264 Fed. 667, 14 A. L. R. 629. See also Northern Pacific R. R. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897, where the statutes and proclamations as to federal control of railroads are in large part set forth. Missouri Pacific R. Co. v. Ault, 256 U. S. ——, 41 Sup. Ct. 593, 65 L. Ed. ——.

It seems to us plain that when, in the exercise of the war powers, the government found it necessary to take over the railroads as transportation systems, they were taken over as going concerns, including, of course, sums due and daily becoming due for transportation furnished, as well as the cash and other quick assets absolutely essential for daily use in carrying on an enormous business for the war. Without such quick assets as working capital, until Congress had legislated and provided a revolving fund with an appropriation of $500,000,000, it would have been almost impossible for the President to have operated the railroads as a going business. Compare Northern Pacific Ry. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897; United States v. Kambeitz (D. C.) 256 Fed. 247; Haubert v. B. & O. R. (D. C.) 259 Fed. 361; Biscoe v. Tax Com., 236 Mass. 201, 128 N. E. 16.

[2] 2. A more difficult question is whether the District Court, affirming the master, was correct in holding that these claims, though debts of the United States, were not entitled to priority, because the present proceeding is not a bankruptcy or insolvency proceeding within the meaning of section 3466, which is as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

In effect, the District Court held that, as such appointment of a receiver was not an act of bankruptcy within the meaning of the Bankruptcy Act of 1898, being Comp. St. §§ 9585–9656 (In re William S. Butler & Co., Inc., 207 Fed. 705, 125 C. C. A. 223), the priority statute was not applicable.

In support of this contention, reliance is placed on such cases as Prince v. Bartlett, 8 Cranch, 431, 3 L. Ed. 614, the headnote of which reads:

"In case of insolvency, the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency, manifested by some notorious act of the debtor, pursuant to law."

The same general proposition is more elaborately stated by Chief Justice Shaw in Commonwealth v. Phœnix Bank, 11 Metc. (Mass.) 129, 151:

"It is established by a series of authorities that insolvency alone, incapacity to pay all the debts which the debtor owes, is but one circumstance only to bring the case within the statute. It must be insolvency, accompanied with the circumstance that there has been a general assignment by the voluntary act of the debtor, or a legal bankruptcy or insolvency. It is not sufficient that a debtor is incapable of paying his debts, and that the winding up of his affairs is effected, in whole or in part, by legal proceedings. Under the attachment laws of Massachusetts, the whole of a debtor's property might be attached at the suits of various creditors, and be insufficient to satisfy all his debts. It might be sold and converted into money, in a course of legal proceedings, by the sheriff, and the whole of the money, thus in the custody of the law, be paid out to creditors, and yet the United States can assert no priority."

In Beaston v. Bank, 12 Pet. 102, 9 L. Ed. 1017, decided in 1838, it was held that a prior attachment by a private creditor could not be defeated by a subsequent attachment by the United States. The court said:

"From the language employed in this section, and the construction given to it, from time to time, by this court, these rules are clearly established: First, that no lien was created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and, fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. United States v. Fisher, 2 Cranch, 358; United States v. Hooe, 3 Cranch, 73; Prince v. Bartlett, 8 Cranch, 431; Conard v. Atlantic Insurance Company, 1 Pet. 439; Conard v. Nicoll, 4 Pet. 308; Brent v. Bank of Washington, 10 Pet. 596."

But it does not, we think, follow that the priority statute can be construed as limited to cases of technical statutory bankruptcy under the act of 1898; for when we look into the history of the Priority Act, we find that, when enacted substantially in its present form as early as 1797, there was no Bankruptcy Act. Indeed, the statute in many of its material provisions harks back to the Act of July 31, 1789, c. 5, § 21, 1 Stat. 42, passed by our very first Congress.

Now, as there were no Bankruptcy Acts at that time, we are necessitated to put some sensible construction upon the words "insolvent" and "bankruptcy" as used in this statute.

Compare United States v. Clark, Fed. Cas. No. 14,807, 1 Paine, 629, 640, where it was said by Mr. Justice Thompson:

"There is no difficulty in the construction of the act until we arrive at the last phrase 'legal bankruptcy.' What is 'legal bankruptcy'? In 1797, when the act of Congress was passed, we had no bankrupt law; and therefore these words can have no reference to bankruptcy under a bankrupt law. The words seem in their connection to have reference to the previous cases put in the section, and to point out some legal insolvency or some mode of proceeding by which the property of the debtor is taken out of his hands and to be distributed by others."

Moreover, in Prince v. Bartlett, supra (1814), relied upon by the appellee, the court said:

"At present there is no existing bankrupt law in the United States; but in many of the states provision is made by law for the relief of insolvent debtors. In the act of Congress of the 4th of August, 1790, the word 'insolvency' only is used. In the act lately passed on the same subject the words 'insolvency' and 'bankruptcy' are both adopted and appear to be used as synonymous terms. * * *

"Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law: not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors it would be difficult to ascertain."

Certainly, when a debtor has assented to the appointment of a receiver on a bill which prays that its debts may be established and ordered to be paid out of its assets, and when, on marshaling assets and liabilities, it appears that such debtor is and was at the beginning of the proceedings hopelessly insolvent, it would seem plain that such insolvency was sufficiently notorious to bring the case within the fair meaning of the words bankruptcy and insolvency as used when the priority statute was enacted.

See, also, 1 Kent (14th Ed.) 246 et seq.; Kunzler v. Kohaus, 5 Hill, (N. Y.) 317; Sackett v. Andross, 5 Hill (N. Y.) 327; Conard v. Atlantic Insurance Co., 1 Pet. 386, 7 L. Ed. 189.

See Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513. See, also, the language of Judge Wallace in United States v. Barnes (C. C.) 31 Fed. 705.

There is no doubt that the assets of this corporation, now in custodia legis, are being distributed to its creditors because it is in fact insolvent, and because the proceedings by which it was dispossessed of its property were assented to, if not indirectly invoked, by it. Of course, if it had turned out to be in fact solvent, as it was alleged to be, no question of priority would have arisen. Under such circumstances, the distinction between bankruptcy or insolvency or assignments for the benefit of creditors, on the one side, and equity receivership proceedings on the other side, is for present purposes, apparently immaterial. Generally, in such winding-up proceedings in equity, equity should follow the law. We know of no case in which the property of a debtor has been put in custodia legis, and, being insufficient to meet its debts, is being distributed under legal proceedings to its creditors, in which it has been held that the priority right as to taxes does not obtain.

See Jones v. Arena Publishing Co., 171 Mass. 22, 50 N. E. 15; Waite v. Brewery Co., 176 Mass. 283, 57 N. E. 460; Equitable Trust

Co. v. Kelsey, 209 Mass. 416, 419, 95 N. E. 850, Ann. Cas. 1912B, 750; G. L. Mass. c. 206, § 31.

In Marshall v. New York, 254 U. S. 380, 385, 41 Sup. Ct. 143, 65 L. Ed. —, where the court was dealing with the claim of the state of New York for priority as to taxes, and where the question was as to the right of the state of New York for priority in payment out of the general assets in the hands of a receiver appointed in the federal court, the court, by Mr. Justice Brandeis, said as to such priority:

"The priority is therefore enforceable against the property in the hands of the receiver appointed by a federal court, within the state"—citing Duryea v. Woodworking Co. (C. C.) 133 Fed. 329; Conklin v. U. S. Shipbuilding Co. (C. C.) 148 Fed. 129, 130.

We cannot, therefore, accord with the District Court in holding that the United States is not entitled to priority for taxes and other claims falling plainly within the scope of R. S. § 3466, on the ground that such receivership proceedings are not bankruptcy or insolvency proceedings within the meaning of this section.

Compare Sweet v. Stores Co. (C. C. A.) 262 Fed. 727.

[3] 3. But the receiver contends that even if the freight claims are debts due the United States, and if the receivership proceedings are to be deemed bankruptcy or insolvency proceedings within the meaning of Revised Statutes, § 3466, nevertheless such claims are not debts of the United States within the fair meaning of the priority statute; that the enterprise in which the government, under its war powers, engaged in taking over and operating the railroads, was not an enterprise within the contemplation of Congress when the priority statute was enacted; that under such principles of construction as are exemplified in Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, the priority statute is not to be deemed applicable. See also Cook County Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537; Seaboard Air Line v. United States, decided June 6, 1921, 256 U. S. —, 41 Sup. Ct. 611, 65 L. Ed. —. This argument has weight. There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents. Compare Gould Coupler Co. v. U. S. Shipping Board (D. C.) 261 Fed. 716. But this is for Congress; we have no remedial power.

We cannot regard ourselves at liberty to disregard the plain, inclusive language of this statute as repeatedly construed by the courts. See United States v. National Surety Co., 254 U. S. 73, 75, 41 Sup. Ct. 29, 65 L. Ed. —, where Mr. Justice Brandeis, speaking for a unanimous court, said:

"Section 3466, embodying the common-law rule by which the sovereign has priority over other creditors of an insolvent, United States v. State Bank of North Carolina, 6 Pet. 29, 35, 8 L. Ed. 308, declares that 'the debts due to the United States shall be first satisfied.'"

In Marshall v. New York, 254 U. S. 380, at 383, 41 Sup. Ct. 143, 145, 65 L. Ed. —, the same justice, in dealing with the prerogative right of the state of New York to sovereignty, says:

"This priority arose and exists independently of any statute. The Legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority"—citing Matter of Niederstein, 154 App. Div. (N. Y.) 238, 244–246, 138 N. Y. Supp. 952; Matter of Wesley, 156 App. Div. (N. Y.) 403, 405, 141 N. Y. Supp. 1031.

In Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513, the Supreme Court said concerning this statute:

"This language is general, and it is without qualification.

"The form of the indebtedness is immaterial.

"It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute.

"The debtors may be joint or several, and principals or sureties.

"Here, again, no distinction is made by the statute. All are included. Beaston v. Bank of Delaware, 12 Pet. 134; United States v. Fisher, 2 Cranch, 358."

Compare also the language of Judge Wallace in United States v. Barnes (C. C.) 31 Fed. 705, 707, where he says:

"It is established by many adjudications, in which the meaning and effect of these provisions have been discussed, that such priority extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable; and when the insolvent debtor had made a voluntary general assignment, or committed an act of bankruptcy, that such priority extends to all his estate which comes to the hands of his assignee."

This statute has never been narrowly construed. Rather the contrary. See the language of Mr. Justice Story in United States v. State Bank of North Carolina, 6 Pet. 29, 8 L. Ed. 308, where he said:

"The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

See, also, New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; Richmond v. Bird, 249 U. S. 174, 39 Sup. Ct. 186, 63 L. Ed. 543; Pennsylvania Cement Co. v. Bradley Contracting Co. (D. C.) 274 Fed. 1003; In re Hibner Oil Co. (C. C. A.) 264 Fed. 667, 14 A. L. R. 629.

In the light of these authorities we must hold the statute applicable to all debts due the United States.

The decree of the District Court is reversed, with costs to the appellant, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

WHOLESALE GROCERS' ASS'N OF EL PASO, TEX., et al. v. FEDERAL TRADE COMMISSION.

H. LESINSKY CO. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. January 6, 1922.)

Nos. 3653, 3677.

1. **Trade-marks and trade-names and unfair competition ⟸80½, New, vol. 8A Key-No. Series—One not named in Federal Trade Commission's order against unfair competition not entitled to review thereof.**

Since by the terms of Federal Trade Commission Act, § 5 (Comp. St. § 8836e), only a party required by an order of the Commission to desist from using what is found by the Commission to be an unfair method of competition is given the right to obtain a review of such order by the Circuit Court of Appeals, a wholesale grocers' association was not entitled to maintain a petition to review an order as to unfair competition where not named therein.

2. **Trade-marks and trade-names and unfair competition ⟸80½, New, vol. 8A Key-No. Series—Order of Federal Trade Commission restraining unfair competition sustained by evidence.**

An order by the Federal Trade Commission restraining unfair competition *held* supported by evidence showing concert of action by those petitioning for a review of such order to prevent sales by manufacturers and their agents to a wholesale and retail grocery company of food products and other groceries in wholesale quantities at the prices and on the terms accorded to other wholesalers, and that such concert of action was a result of an agreement to which petitioners and others were parties, and that by such means the grocery company was hindered and prevented from buying as a wholesaler in interstate commerce as it would have done without such opposition.

3. **Trade-marks and trade-names and unfair competition ⟸80½, New, vol. 8A Key-No. Series—Evidence of express agreement unnecessary to sustain order against unfair competition.**

To sustain charges of unfair competition made to the Federal Trade Commission, evidence of express agreements to obstruct or prevent dealings is not necessary, since a conspiracy may be inferred from things actually done by the alleged conspirators, where such things are the natural consequences of an agreement to do them and helped to accomplish a disclosed common purpose.

4. **Trade-marks and trade-names and unfair competition ⟸80½, New, vol. 8A Key-No. Series—Credibility of testimony held for Federal Trade Commission.**

On an application to the Federal Trade Commission for an order restraining unfair competition among wholesalers, the credibility of testimony is for the Commission.

5. **Trade-marks and trade-names and unfair competition ⟸68—Conspiracy by wholesalers to prevent sales by manufacturers to competitor held unfair competition.**

That associated jobbers and wholesalers combined and co-operated with others to keep manufacturers willing to do so from selling their products direct to a wholesale company in competition with them, and by that means prevented such company from competing as a wholesaler on the ground that such company also sold at retail, *held* to constitute unfair methods of competition in commerce, within Federal Trade Commission Act, § 5 (Comp. St. 8836e), as being against the public policy evidenced by the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830).

Petition to Revise Order of Federal Trade Commission, Sitting at Washington, D. C.

Separate petitions by the Wholesale Grocers' Association of El Paso, Tex., and others, and by the H. Lesinsky Company, against the Federal Trade Commission to revise an order. Petitions denied.

A. H. Culwell, of El Paso, Tex., for petitioners Wholesale Grocers' Association of El Paso, Tex., and others.

Otis Beall Kent, of Washington, D. C., for petitioner H. Lesinsky Co.

W. H. Fuller, Chief Counsel, and Marvin Farrington, both of Washington, D. C., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. By separate petitions filed in this court against the Federal Trade Commission by, respectively, the Wholesale Grocers' Association of El Paso, Tex., an unincorporated voluntary association of wholesale grocery firms and corporations doing business in El Paso, Trueba-Zozaya-Seggerman, Inc., Bray & Co., Inc., James A. Dick Company, American Grocery Company (the four parties last named being joined in one petition), the H. Lesinsky Company, W. H. Constable Company, and Dan T. White and John H. Grant, partners doing business under the name of White-Grant Company, a review of an order made by the Federal Trade Commission against the petitioners and others is sought. The respective parties will be referred to as the petitioners and the Commission.

The order complained of was made in a proceeding which was initiated by a written complaint made by the Commission against the petitioners and others, some of the parties so proceeded against being wholesale grocers or jobbers having their principal offices and places of business at El Paso, and others being brokers engaged in the business at El Paso of selling the products of manufacturers of groceries and food products. That complaint contained the following:

"That the Standard Grocery Company is a corporation having its principal place of business at El Paso, in the state of Texas, and also having a place of business at Deming, in the state of New Mexico, and is engaged in the business of buying and selling in wholesale quantities, and in the usual course of wholesale trade, groceries and food products such as are bought and sold generally by persons, firms, and corporations engaged in the business generally known as that of a wholesale grocer; that in the course of its said business the Standard Grocery Company purchases commodities dealt in by it in the various states and territories of the United States, and transports the same through other states and territories to the city of El Paso, in the state of Texas, where such commodities are resold, and there is continuously and has been at all times herein mentioned a constant current of trade and commerce in commodities so purchased by the said Standard Grocery Company between and among the various states and territories of the United States; that the said Standard Grocery Company is in active competition with the respondents named in paragraph 3 hereof."

The parties referred to in the last sentence of the quoted paragraph were the wholesale grocers proceeded against. That complaint charged:

That said wholesale grocers combined and conspired together and with the other parties proceeded against, and with others, "* * * to prevent the said Standard Grocery Company from obtaining commodities dealt in by it from manufacturers and manufacturers' agents, and other usual sources from which a wholesale dealer in groceries must obtain the commodities dealt in by him, and have by boycott and threats of boycott, in many instances, induced manufacturers of grocery products, and the agents of such manufacturers, to refuse to sell their products to the said Standard Grocery Company, and have threatened to withdraw their patronage from any and all manufacturers and manufacturers' agents who sell to the said Standard Grocery Company upon the same terms and conditions usually accorded to buyers and sellers of such commodities in wholesale quantity in said district or who sell to said Standard Grocery Company at the prices regularly charged to dealers in such commodities in said district who buy and sell in wholesale quantities. * * *"

It charged:

That the brokers proceeded against, with the purpose, intent, and effect of stifling and suppressing competition in the sale of grocery products at wholesale, combined and conspired together and with the other parties proceeded against, and with others, "* * * to prevent the said Standard Grocery Company from obtaining the commodities dealt in by it from manufacturers and manufacturers' agents, and other usual sources from which a wholesale dealer in groceries must obtain the commodities dealt in by him, and to prevent manufacturers and manufacturers' agents from selling to said Standard Grocery Company upon the same terms and conditions usually accorded to buyers and sellers of such commodities in wholesale quantity in said district, or from selling to said Standard Grocery Company at the prices regularly charged to dealers in such commodities in said district who buy and sell in wholesale quantities; * * *" that said brokers have permitted said jobbers "* * * to persuade, induce, and compel them by boycott and threats of boycott, to refuse to sell the products manufactured by their respective principals to the said Standard Grocery Company, and to refuse to sell to said Standard Grocery Company upon the same terms and conditions usually accorded to buyers and sellers of such commodities in wholesale quantity in said district, or to sell to said Standard Grocery Company at the prices regularly charged to dealers in such commodities in said district who buy and sell in wholesale quantities."

That complaint further charged:

That each of the parties so proceeded against "* * * has been for a period of two years last past and is now wrongfully and unlawfully hampering and obstructing and attempting to hamper and obstruct the said Standard Grocery Company, by inducing and compelling and attempting to induce and compel manufacturers of grocery products and their agents to refuse to sell to said Standard Grocery Company, in interstate commerce, upon the terms and conditions, and at the prices usually accorded to dealers in said district who buy and sell in wholesale quantities, and have attempted to compel said Standard Grocery Company to pay for the commodities purchased by it prices higher than those charged to other dealers in said district who buy and sell in wholesale quantities."

After that complaint was answered by the petitioners and others, after much evidence had been taken, and after a hearing thereon and argument of counsel, the Commission, on November 9, 1920, made in writing its findings as to the facts and conclusion, such findings of fact including several which, taken together, were to the effect in substance that specified acts and conduct of the petitioners and others were such as were charged in the complaint, the following being the stated conclusion:

"The acts, agreements, understandings, policies, and practices of the respondent jobbers and the respondent brokers, and each and all of them, are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'"

On the same day the Commission made an order of which, except its caption and a recital as to the making of such findings and conclusion, the following is a copy:

"Paragraph 1. It is therefore now ordered that the respondents, F. S. Ainsa Company, M. Ainsa & Sons, Inc., American Grocery Company, Inc., Bray & Company, Inc., the James A. Dick Company, the H. Lesinsky Company, Trueba-Zazaya-Seggerman, Inc., Western Grocery Company, Inc., Dan T. White and John H. Grant, doing business under the name of White-Grant Company, J. W. Lorentzen, doing business under the name of J. W. Lorentzen & Co., H. W. Taylor and H. C. Smith, doing business under the name of Taylor & Smith, John H. McMahon, doing business under the name of John McMahon & Co., W. T. Bush, W. H. Constable Co., Inc., and Sims, Robert & Co., Inc., legal successor to the George H. Griggs Company, and each of them and their officers and agents, forever cease and desist from directly or indirectly:

"(a) Combining and conspiring among themselves to induce, coerce, and compel manufacturers or manufacturers' agents to refuse to sell to the Standard Grocery Company, or to refuse to sell to said Standard Grocery Company upon the terms and at the prices offered at and charged to competitors of said company, or to refuse to sell to others engaged in similar business.

"(b) Carrying on between and among themselves or with others communications having the purpose, tendency, or effect of inducing, coercing, or compelling manufacturers and manufacturers' agents to refuse to deal with or sell to the Standard Grocery Company or others engaged in similar business upon terms agreed upon between such manufacturers or their agents and said company and others.

"(c) Combining and conspiring among themselves or with others, or using any scheme or device whatsoever, to hinder, obstruct, and prevent the Standard Grocery Company or others engaged in similar business from freely purchasing and obtaining in interstate commerce the commodities and products usually handled by it in the course of its business, or from freely competing in interstate commerce with the respondents F. S. Ainsa Company, Inc., M. Ainsa & Sons, Inc., Bray & Company, Inc., the James A. Dick Company, the H. Lesinsky Company, American Grocery Company, Inc., Trueba-Zozaya-Seggerman, Inc., and Western Grocery Company, Inc., or others engaged in similar business.

"(d) Hindering obstructing, or preventing any manufacturer or manufacturers' agent from selling and shipping in interstate commerce to the Standard Grocery Company or others engaged in similar business.

"(e) Combining or conspiring together or with others, or using any schemes or devices whatsoever, to hinder, obstruct, or prevent manufacturers or their agents from dealing with the Standard Grocery Company or others engaged in similar business upon any terms agreed upon by such manufacturers or their agents and said company and others.

"(f) Combining or conspiring among themselves or with others to compel or attempt to compel the Standard Grocery Company or others engaged in similar business to purchase the products and commodities required for its business from or through any competitor of said company or others similarly engaged.

"Paragraph 2. It is further ordered that the respondents F. S. Ainsa Company, Inc., M. Ainsa & Sons, Inc., American Grocery Company, Inc., Bray & Company, Inc., The James A. Dick Company, the H. Lesinsky Company, Trueba-Zozaya-Seggerman, Inc., and Western Grocery Company, Inc., and their officers and agents, forever cease and desist from:

"(a) Combining and conspiring among themselves or with others to boycott, or to threaten to boycott, or to threaten with loss of custom or patronage, any manufacturer engaged in interstate commerce or the agent or representative of such manufacturer for selling or agreeing to sell to the Standard Grocery Company or others engaged in similar business at prices regularly charged competitors of said company or others engaged in similar business.

"Paragraph 3. It is further ordered that the respondents Dan T. White and John H. Grant, doing business under the name of White-Grant Company, J. W. Lorentzen, doing business under the name of J. W. Lorentzen & Co., H. W. Taylor and H. C. Smith, doing business under the name of Taylor & Smith, John H. McMahon, doing business under the name of John McMahon & Co., W. T. Bush, Sims, Robert & Company, Inc., legal successor to the George H. Griggs Company, and W. H. Constable Company, Inc., and their officers and agents forever cease and desist from:

"(a) Combining and conspiring among themselves or with the other respondents herein or with others to hinder, obstruct, or prevent the Standard Grocery Company or others engaged in similar business from freely purchasing and obtaining in interstate commerce the products and commodities dealt in by it in the course of its business, or to induce, coerce, or compel manufacturers, producers, or dealers engaged in interstate commerce to refuse to sell to said Standard Grocery Company or others engaged in similar business."

Five of the petitioners are wholesalers or jobbers named in the first clause of paragraph 1 of the above order. Two of the petitioners are brokers named in the first clause of paragraph 2 of that order.

[1] By the terms of section 5 of the Federal Trade Commission Act (38 St. 717; U. S. Compiled Statutes, § 8836e), only a party required by an order of the Commission to cease and desist from using what is found by the Commission to be an unfair method of competition in interstate or foreign commerce is given the right to obtain a review of such order by this court. The petitioner the Wholesale Grocers' Association of El Paso, Tex., as a separate entity, is not entitled to maintain its petition, as it was not named in the above set out order to cease and desist. That association, the members of which were wholesale grocers or jobbers at El Paso, came into existence in the fall of 1917 at the request of the local representative of the United States Food Administration, for the purpose of discussing and complying with rules and regulations promulgated during the war by the Food Administration and other government agencies having to do with conservation, profiteering, and other matters dealt with by such agencies. The meetings of the association were held informally from time to time in the offices of different members, and were attended more or less regularly by the members, including those who are petitioners in this case. No formal minutes or records of the proceedings of the association were kept. The jobbers so coming together did not confine their discussions to the subjects for dealing with which the association was formed. Among subjects discussed by the jobbers when so brought together was that of manufacturers selling to grocers doing both a wholesale and a retail business; those discussions having special reference to the case of sales by manufacturers to the Standard Grocery Company. It was disclosed that the associated jobbers, without dissent, condemned the practice of some manufacturers in selling to that company on the same terms and conditions as those accorded to such jobbers. The Standard Grocery Company, which was organized in 1916, owned and

operated six retail grocery stores in El Paso, in one of which it conducted for several years a wholesale grocery business, having storage and warehouse facilities therefor in the basements of several of its storehouses. In the fall of 1917 it opened a branch house at Deming, N. M., where it engaged, until about January 1, 1919, exclusively in the business of buying and selling in wholesale quantities groceries and other food products; its purchases and sales, at both El Paso and Deming, including such as were transactions in interstate commerce. It was in active competition at El Paso and Deming with the associated jobbers, both it and such jobbers selling to retail grocers, restaurants, cafés, commissaries of industrial and railway companies, army post exchanges and zone supply offices, civilian branches of the United States government, army hospitals, and other federal and state institutions. Following such discussions and adverse criticisms of the associated jobbers there were numerous instances of it being brought to the attention of manufacturers that sales by them direct to the Standard Grocery Company were objected to by the associated jobbers at El Paso, and that the continuance of such sales would cause those jobbers to withhold patronage from such manufacturers; the means whereby such manufacturers were so advised including letters to them from brokers at El Paso handling their products plainly disclosing that sales of those products direct to the Standard Grocery Company constituted an obstacle to selling those products to the associated jobbers at El Paso, numerous inquiries made by such jobbers of traveling salesmen of manufacturers as to whether their principals sold direct to the Standard Grocery Company, and other incidents indicating that such sales were condemned by the associated jobbers and the brokers at El Paso.

[2] We are of opinion that direct and circumstantial evidence adduced furnished support for the inferences that there was concert of action by the petitioners and others with the object of preventing sales by manufacturers and their agents to the Standard Grocery Company of food products and other groceries in wholesale quantities, at the prices and on the terms accorded to other wholesalers or jobbers similarly situated, that that concert of action was a result and in pursuance of an agreement or understanding to which the petitioners and others were parties, and that by the means indicated sales by manufacturers and their agents to the Standard Grocery Company were hindered or impeded, and that company was prevented from buying as a wholesaler in interstate commerce as it would have done without such opposition by the petitioners and others co-operating with them.

It is contended that the attacked order should be set aside: (1) Because the evidence upon which the Commission acted did not support any of its findings as to the petitioners combining, conspiring, and co-operating as set forth; and (2) because the conduct of the petitioners stated in the findings did not amount to or involve an unfair method of competition in commerce, within the meaning of the provision of section 5 of the Federal Trade Commission Act (38 Stat. 717).

[3, 4] Evidence of an express agreement to obstruct or prevent dealings with the Standard Grocery Company as a legitimate wholesaler or jobber was not necessary to support the charges made. A conspiracy

may be inferred from the things actually done by the alleged conspirators, where those things are the natural consequences of an agreement or understanding to do them, and help to accomplish a disclosed common purpose. Eastern States Lumber Association v. United States, 234 U. S. 600, 612, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. What happened after it was disclosed that the associated jobbers were in accord in condemning sales of their products by manufacturers or their agents to a competitor which was obnoxious because it was a retailer as well as a wholesaler indicated the existence of an agreement or understanding between the petitioners and others to take concerted action to obstruct or prevent the continuance of such sales. As above indicated, we are not of opinion that the order of the Commission is subject to be set aside on the ground that no substantial evidence supporting its findings of fact was adduced. Failure to recognize or concede due probative effect to significant circumstances disclosed is a fault in criticism by counsel of the evidence adduced. Part of that criticism involves the assumption that the Commission was bound to believe testimony relied on to support the conclusion that conduct of one of the petitioners did not have the meaning or effect indicated by a written communication signed by its representative. It was for the Commission to pass on the credibility of that testimony.

Whether the conduct of the petitioners which is the subject of the attacked order to cease and desist comes within the meaning of the provision of the Federal Trade Commission Act declaring unlawful "unfair methods of competition in commerce" is a question of law presented for decision by this court. Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993. That conduct was concerted action having for its object the putting of a ban, within the trade range of the petitioners, upon manufacturers of food products or other groceries supplying their products at jobbers' prices and terms to a dealer doing or endeavoring to do both a wholesale and a retail business; a result of the success of such concerted action being to cut off such wholesale and retail dealer from sources of supply available to dealers whose business is exclusively wholesale. The facts of the instant case are quite similar to those passed on in the case of Eastern States Lumber Association v. United States, supra. The just cited case was an action brought by the United States under the Sherman Anti-Trust Act (26 Stat. 209; Comp. St. §§ 8820–8823, 8827–8830), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber. It was held in that case that the circulation of a so-called official report among members of an association of retail lumber dealers calling attention to actions of listed wholesale lumber dealers in selling direct to consumers tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibition of the Sherman Act. The following are extracts from the opinion rendered in that case:

"True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. * * *

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 440, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

The above-quoted decision is not rendered inapplicable to the facts of the instant case by the circumstances that the object of the concerted action to which the petitioners were parties was to restrict sales by manufacturers of their products to dealers who are exclusively wholesalers, instead of, as in the cited case, concerted action by retailers to prevent wholesalers selling directly to consumers, and that the methods adopted by the petitioners were different from those disclosed in the cited case. The just mentioned differences between the two cases are not material. In legal effect there is no substantial difference between a conspiracy by retailers to prevent wholesalers selling directly to consumers and a conspiracy by wholesalers to prevent manufacturers selling directly to dealers whose business includes both wholesaling and retailing. It well may be inferred that the lawmakers, in using in the Trade Commission Act the words "unfair methods of competition in commerce," intended to include concerted action to eliminate competition, in pursuance of what amounts to a conspiracy in restraint of trade or commerce among the several states, within the meaning of the Sherman Act. Federal Trade Commission v. Gratz, supra. What the associated jobbers severally did went beyond each of them refraining altogether or to a less extent from buying from manufacturers whose products were sold directly to the Standard Grocery Company. They combined and co-operated with others to keep manufacturers willing to do so from selling their products directly to the Standard Grocery Company, and by that means to obstruct or prevent that company from competing as a wholesaler in territory sought to be appropriated by dealers not doing a combined wholesale and retail business. The combining of wholesaling and retailing is not a novelty, and is not unlawful. The success of the concerted action participated in by the petitioners meant the monopolizing of the wholesale grocery business in the El Paso territory by dealers not engaged in retailing.

[5] We are of opinion that the practices forbidden by the attacked order were "unfair methods of competition in commerce," within the meaning of the provision of section 5 of the Federal Trade Commission Act, because, in the circumstances disclosed, they were against the

public policy evidenced by the Sherman Act. Federal Trade Commission v. Gratz, supra; National Harness Mfrs.' Association v. Federal Trade Commission (C. C. A.) 268 Fed. 705.

It follows from the above-stated conclusions that the petitions should be denied; and it is so ordered.

Petitions denied.

ST. LOUIS SMELTING & REFINING CO. v. HENKE.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 2995.

1. **Evidence ⟸113(7)—Crop and sale thereof as evidence of market value of land.**

   In an action for damages to orchard from fumes of smelting plant, evidence of the crop produced and the sale thereof *held* admissible, not as showing the market value of the land itself, but as proving its adaptability to special purpose, in corroboration or support of evidence of market value.

2. **Evidence ⟸544—One assisting expert held not qualified as expert.**

   In action for damages to orchard from fumes of smelting plant, a witness who merely assisted an expert in determining the effect of fumes on the surroundings, and who had no technical training, was not qualified as an expert.

3. **Trial ⟸133(6)—Improper argument of counsel held cured by the action of the court.**

   In an action for damages to orchard from fumes of a smelting plant, argument of counsel that plaintiff was poor and helpless, down and out, broke and ruined, though improper, was not reversible error, where court, on objection, reprimanded counsel by saying that he must not try to prejudice the jury, and in the charge told the jury that it must not be swayed by prejudice, nor go outside of the evidence in determining the facts.

4. **Appeal and error ⟸1067—Refusal to modify instruction as to limitations held, on the record, harmless.**

   Where, in an action for damages to orchard from fumes of smelting plant, there was no evidence that any injury occurred to the orchard before 3 years prior to suit, though plant had been in operation 14 years, and there was evidence that at time injury was first noticed change in plant had occurred and a new chimney built, refusal to modify an instruction on the 5-year statute of limitations, that the invasion of rights of plaintiff began when defendant sent over his property gases which inflicted damages, and, if this occurred prior to the 5-year period preceding commencement of suit, the right of action was barred, by adding the words "irrespective of whether it committed any actual injury" to vegetation or trees on plaintiff's property, was harmless, conceding that the Illinois rule, as charged, was applicable.

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

Action by Peter Henke against the St. Louis Smelting & Refining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William E. Wheeler, of East St. Louis, Ill., for plaintiff in error.

J. M. Bandy, of Granite City, Ill., and Charles D. Clark, for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. In 1904 plaintiff in error constructed, and since has continuously operated, in Madison county, Ill., a large plant for smelting and refining lead and other minerals. In the vicinity of the plant defendant in error long owned 47 acres of land, 30 acres of which were long devoted to orchard purposes. The action of defendant in error, begun March 8, 1918, was for the permanent injury to his land, caused by poisonous emanations from the plant settling upon his land, injuring and destroying his orchard, and, as claimed, causing a great pecuniary damage; his ad damnum being $50,000. The jury found a verdict for $4,000. Each party moved for new trial, which the court denied, and rendered judgment on the verdict. The company prosecutes the writ herein, and relies on four grounds of error, viz.: (1) Admission of evidence as to productivity of the orchard and sales of its product from 1915 to 1920, inclusive; (2) rejection of certain evidence of the expert qualifications of witness C. W. Bartells; (3) improper remarks of counsel in closing argument to the jury; and (4) improper charge of the court on the subject of the application of statute of limitations—the 5-year bar of the statute having been set up in one of the defenses to the action.

[1] 1. From the record, the purpose of the evidence respecting the annual orchard crop and the sales thereof was the bearing this might have on the market value of the land, before and after the alleged infliction of the injury. While the ultimate question doubtless was one of the market value of the land, if it had market value, its adaptability to some special advantageous use may be shown in corroboration or support of evidence of market value, or its unfitness for any beneficial use might be made to appear in support of evidence of a low market value. Crops and prices may be affected by a great variety of conditions other than the alleged injury, but this would go to the evidentiary value of the evidence, rather than to its competency. It is quite evident the jury was not by such evidence beguiled into believing that they had a right to award as damages the testified diminution in the returns from this orchard, or that they did in fact so find, and from consideration of the entire record we cannot conclude that this evidence was employed in any way, except in its bearing on the fair market value of the land at the times in question, for which purpose we do not find its admission was improper.

[2] 2. There was no error in the holding of the court that witness C. W. Bartells did not qualify as an expert. He was not a chemist, and had no experience in that highly technical branch, beyond assisting his brother, G. C. Bartells, in the making of a series of experiments on the emanations from this plant, and their effect upon the surrounding atmosphere, and upon trees and shrubbery. G. C. Bartells had fully qualified as an expert witness, and he testified in detail what was done, and his expert conclusions therein. The witness in question likewise testified to things he and his brother actually did in these experiments. But, apart from these, it does not appear that by occupation, or by study or experience, he was qualified to give opinion evidence.

[3] 3. The remarks complained of, made by counsel in the closing argument, were highly improper and wholly without justification. Counsel referred to his client as being poor and helpless, down and out, broke and ruined. On objection, the court promptly reprimanded counsel by saying he must not try to prejudice the jury. This of itself would warn the jury that such statements are calculated only to prejudice, and therefore improper. We think it fair to assume that, with such a characterization, the jury would be upon its guard against such statements. In the charge the court pointedly told the jury that it must not be swayed by prejudice, nor go outside of the evidence in determining the facts. With the jury thus carefully cautioned, and considering the entire record, we are satisfied that no harm accrued to plaintiff in error through the improper remarks.

[4] 4. The contention of error in the court's charge bearing on the application of the statute of limitations is predicated upon decisions in Illinois to the effect that where, for more than 5 years prior to beginning suit there existed the conditions which might cause the injury complained of, the statute of limitations would run against the action, notwithstanding actual damage did not occur until within the 5-year period. Schlosser v. Sanitary District, 299 Ill. 77, 132 N. E. 291, and cases there cited. If it be assumed that such is the law of this case, we believe the court's charge upon this subject was nevertheless substantially correct, as applied to this record. In the plant as originally constructed, and as conducted down to 1915, the gases passed through a long tunnel, or "trail," and through a series of bags for arresting the solid matter, and thence into the air through a chimney 200 feet high. From the uncontradicted evidence that during the 10 years preceding 1915 no injury accrued to the orchard by reason of emanations from the plant, which was about a mile away, it may reasonably be concluded that, if the jury found as a matter of fact such damage did accrue in 1915 and thereafter, it was through some condition in the plant which did not exist before 1915. There was evidence that such new conditions did first come into existence in 1915. It seems that for a considerable period in 1915 the "trail" was out of order, and was being repaired or replaced, and that about that time there was begun the erection of a new chimney, 400 feet high, through which, in the following year and thereafter, the gases from the plant passed into the air.

It is contended for defendant in error that, with the plant in the condition in which it was prior to 1915, such gases as reached the orchard were not sufficiently charged with the poisonous emanations (sulphur dioxide) to injure the orchard, but that in 1915 the intervening and first occurring condition of the "trail" caused so much more of the poisonous substance to be discharged from the chimney that much more of it reached the orchard, and did the damage, and that thereafter, through the doubling of the height of the chimney through which the gases passed into the air, far more of the gases were carried over the orchard, and that a far greater quantity of sulphur dioxide was thereafter precipitated upon the orchard than had ever been, or would have been in the use of the old chimney under normal circum-

stances. It was contended for plaintiff in error that the height of the new chimney greatly diffused the poison, so that in any event, by the time it fell upon the orchard, if any did so fall, it was practically innocuous. This, however, involved a question of fact, which, so far as concerns this case, the jury's verdict settles.

The court charged the jury that the invasion of the rights of defendant in error began, if and when plaintiff in error sent over his property the gases which inflicted damages, and that, if this occurred prior to the 5-year period preceding commencement of suit, the right of action was barred. Counsel for plaintiff in error requested a modification of the charge, by adding the words, "irrespective of whether it committed any actual injury to the vegetation or the trees upon the plaintiff's property," and the court declined to modify it. Had the plant been constructed, or had the new conditions intervened, but a short time preceding March 8, 1913, which was 5 years before the suit was begun, the requested modification would have been quite material. But with the undisputed evidence showing no injury for all the years next prior to the limitation period, and for 2 years afterwards, but appearing, if at all, immediately following new conditions in the plant during and after 1915, which were not present during the preceding years, we are satisfied that in any event no harm accrued to plaintiff in error through the court's refusal to make the requested modification.

Deeming the errors relied upon insufficient to warrant disturbance of the judgment, it is accordingly affirmed.

In re HOYNE.*

WINSTON v. HOYNE et al.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

Nos. 2903, 2917.

1. Bankruptcy ⇐440—Order dismissing petition to vacate adjudication not reviewable by appeal.

An order dismissing a petition to vacate an adjudication in bankruptcy was not appealable, but reviewable only by petition to review and revise.

2. Bankruptcy ⇐446—Only questions of law considered on petition to revise.

On petition to review and revise an order dismissing a petition to vacate an adjudication in bankruptcy, only questions of law may be considered.

3. Bankruptcy ⇐446—Whether master's report, wholly unsupported by evidence, is reviewable as question of law.

The question whether the report of a master was wholly unsupported by testimony is one of law, reviewable on petition to review and revise.

4. Bankruptcy ⇐446—Facts and inferences favorable to respondents accepted on petition to revise.

On petition to review and revise an order in a bankruptcy proceeding, all the facts and inferences favorable to the respondents must be unqualifiedly accepted.

5. Partnership ⇐55—Finding of no partnership held supported by recitals of relation of debtor and creditor.

A finding that, under an agreement between creditors of a partnership and persons forming a new partnership to take over its business and conduct it under the supervision of a managing committee therein desig-

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 317, 66 L. Ed. —.

nated, no partnership relation existed between the creditors and the other parties was supported by the recitals of the contract, describing the relationship as that of debtor and creditor.

6. **Partnership ⇐55—Finding held warranted that creditors, who under agreement were to be paid net profits, did not become partners.**

Where persons forming a partnership to take over the business of a former partnership, which was badly involved in debt, agreed with creditors of the old partnership that the business would be conducted under the supervision of a managing committee therein designated, and that the net earnings should be applied on the claims of such creditors, finding *held* warranted that the creditors did not thereby become members of the partnership, as respected the rights of other creditors, in view of Partnership Law Ill. (Hurd's Rev. St. 1919, c. 106a), §§ 6, 7, 16, and 47.

7. **Partnership ⇐2—Law of place where contract executed and business conducted governs.**

Whether a contract between creditors of a partnership and persons forming a new partnership to take over the old firm's business created a partnership between the creditors and the other parties was controlled by the Partnership Law of Illinois, where execution of the contract was completed in Chicago and the business of the new firm was to be there conducted.

8. **Partnership ⇐5—Participation in profits evidence of partnership but not conclusive.**

Under Partnership Law Ill. § 7, subd. 4, participation in profits as such tends to establish the existence of a partnership, but is not conclusive.

9. **Partnership ⇐17—Intent to loan money and receive profits in payment may overcome effect of receipt of profits.**

While the intent of the parties to a contract under which the net earnings of a partnership are to be applied on the debts of a former partnership, whose business was taken over, must be gathered from their acts, and not from an unlawful desire to avoid liability, an intent to loan money, to be repaid as fast as the profits permit, may overcome the effect of the receipt by the creditors of the profits of the business.

Petition to Review and Revise Proceedings of, and Appeal from, the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Proceeding by Charles S. Winston to vacate an adjudication in bankruptcy against Eugene M. Hoyne and others. The petition was dismissed, and the petitioner appeals and files a petition to review and revise. Appeal dismissed, and order affirmed.

Carroll J. Lord, of Chicago, Ill., for petitioner, appellant.

John O'Connor, J. J. Healy, E. R. Johnston, T. M. Hoyne, and Henry Jackson Darby, all of Chicago, Ill., for respondents, appellees.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVANS, Circuit Judge. Upon voluntary petition Eugene M. Hoyne and Eugene H. de Bronkhart, as the sole members of the firm of Eugene M. Hoyne & Co., a partnership, together with the partnership, were on April 8, 1920, adjudged bankrupts. On May 7th a petition was filed by Charles S. Winston, praying that the order of adjudication be vacated. This petition, as amended, put in issue the personnel of the copartnership of Eugene M. Hoyne & Co., petitioner alleging that, in addition to the aforementioned partners, there were William R. Moorhouse, Royal C. Vilas, Peter G. Thompson, Frank G. Hoyne, Thomas M. Hoyne, Maclay Hoyne, J. C. McCord, William Franz

Anderson, Ward A. Vilas, T. H. Willis, Henry D. Sturtevant, Daniel J. Schuyler, R. T. Davis, and John D. Cory. Insolvency was denied, with these parties recognized as partners.

Issue was joined and the matter referred to a master to take proofs and report his conclusions and recommendations to the court. Testimony was thereafter taken before the special master, upon which he filed his report, finding that the firm of Eugene M. Hoyne & Co. consisted of Eugene M. Hoyne and Eugene H. de Bronkhart, and recommending that the Winston petition be dismissed, with costs. The master approached the question stating:

"I therefore determine that the hearing should be had on the sole question as to whether there was a partnership relation as claimed."

He further said:

"It would seem that the business was unsuccessful, because none of these obligations were met out of any of the profits; that no profits were made, excepting for a short time, and not very large; and that none of the creditors who signed this agreement were paid anything on their respective claims, either on their original indebtedness or for money they advanced. The bankrupt firm owes unsecured creditors approximately $750,000; secured creditors, $2,600,000. The liabilities of Perry, Price & Co., which are involved in the contract, amount to about $720,000, and the loan by a few of the owners of those claims was about $12,000. The contract under which the firm of Hoyne & Co. took over the old business of Perry, Price & Co. is the basis of the claim that the partnership relation was created thereby and that the new creditors who were created by Hoyne & Co. in running the business are now creditors of all the parties to that contract. Attention is called to the fact that the petitioners allege that they did not know the facts on which they base the partnership till after bankruptcy, so they did not extend their credit based on any thought that anybody except de Bronkhart and Hoyne were liable."

He further said, discussing the issue:

"Are these bankrupts partners as between themselves? The contract in question expressly states that those who are now sought to be charged as partners were merely creditors who postponed their day of payment until profits were earned in carrying on the business."

And in conclusion:

"As first stated, I think the Illinois statute precludes the partnership idea; but aside from that I am of the opinion that the contract does not involve the partnership construction."

This report was approved by the court.

[1-3] Petitioner seeks to review this order dismissing his petition both by appeal and by a petition to review and revise. That the order under consideration is not appealable seems well settled. Brady v. Bernard & Kittinger, 170 Fed. 576, 95 C. C. A. 656; Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109; In re Ives, 113 Fed. 911, 1 C. C. A. 541, B-R Electric & T. Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545; In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123; Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992; Brady v. Bernard & Kittinger, 217 U. S. 595, 30 Sup. Ct. 695, 54 L. Ed. 896; Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347. Petitioner does not urge it in this court. His only way to review the order is by petition to review and revise, and therefore naught but questions of law may be considered. In re Caponigri,

183 Fed. 307, 105 C. C. A. 519; In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248; In re Richards, 96 Fed. 935, 37 C. C. A. 634; Courier-Journal, etc., Co. v. Schæfer-Meyer Brewing Co., 101 Fed. 699, 702, 41 C. C. A. 614; In re Rosser, 101 Fed. 562, 41 C. C. A. 497; Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13. Our examination of the record convinces us that but one question of law is involved, viz. Is the report of the master wholly unsupported by testimony? Such a question is one of law. In re Kuhn, 234 Fed. 277, 148 C. C. A. 179; Good v. Kane, 211 Fed. 956, 128 C. C. A. 454; In re Knosher & Co., 197 Fed. 136, 116 C. C. A. 560; In re Cole, 144 Fed. 392, 75 C. C. A. 330.

[4-6] Counsel for petitioner place much reliance upon the written agreement of the parties, but it is by no means all of the material evidence bearing upon this issue. Several witnesses, some of them parties to the written agreement, testified to facts which throw some light upon the construction which the court must give to the contract. Certainly all the facts and inferences favorable to the respondents must be unqualifiedly accepted under the aforementioned rule of law. The contract, material parts of which are set forth below,[1] instead

[1] This agreement, made at Chicago, Illinois, this ——— day of October, 1918, between Eugene H. de Bronkhart and Eugene M. Hoyne, parties of the first part, and William R. Moorhouse, Royal C. Vilas, Frank G. Hoyne, Thomas M. Hoyne, Maclay Hoyne, J. C. McCord, W. Franz Anderson, Ward A. Vilas, and T. H. Willis, parties of the second part, witnesseth:

Whereas, on and prior to October 24, 1918, Oliver H. Perry, Jr., George V. Price, and Eugene H. de Bronkhart (one of the parties of the first part above named) were copartners and engaged in the brokerage business at No. 105 South LaSalle street, Chicago, Illinois, under the firm name of Perry Price & Co.; and

Whereas, said Oliver H. Perry, Jr., and George V. Price, on and prior to October 24, 1918, had expressed their desire to retire from said firm and to terminate said partnership; and

Whereas, on said October 24, 1918, said parties of the first part entered into a partnership agreement for the purpose of succeeding to, taking over, and continuing the business of said Perry, Price & Co., under the firm name of Eugene M. Hoyne & Co.; and

Whereas, on said October 24, 1918, said Oliver H. Perry, Jr., and George V. Price retired from said firm of Perry, Price & Co., and all of the assets, business, and good will were duly transferred to and taken over by said parties of the first part, copartners, and all of the liabilities of said Perry, Price & Co. were assumed by said parties of the first part, copartners as aforesaid; and

Whereas, said Perry, Price & Co. were, and said parties of the first part, as successors to said Perry, Price & Co., as aforesaid, are, indebted to the parties of the second part in the amounts approximately set opposite their respective names, as shown on the books of account of said Perry, Price & Co., at the close of business on October 15, 1918; and

Whereas, said Perry, Price & Co. were financially embarrassed, and unable to pay and discharge said indebtedness owing to said parties of the second part, or any of the same; and

Whereas, said parties of the first part, successors to said Perry, Price & Co., are financially unable at this time to pay and discharge said indebtedness owing to said parties of the second part, or any part thereof; and

Whereas, the parties of the first and second parts hereto mutually desire that the business of said Perry, Price & Co. be continued by the parties of the first part, copartners as aforesaid, to the end that the parties of the first part may be given an opportunity to pay and discharge said indebtedness out of the net earnings to be realized from the continuation of the business for-

of recognizing the partnership status, describes the relationship of the parties as debtors and creditors. We might therefore from this fact alone, find support for the master's finding. True, the written agreement may not have embodied the true understanding of the

merly conducted by said Perry, Price & Co. and taken over by said parties of the first part as aforesaid:

Now, therefore, the parties of the first and second parts hereto * * * do covenant and agree as follows:

1. The parties of the first part are to continue the business heretofore conducted by the firm of Perry, Price & Co., taken over by them as hereinabove set forth, under the firm name of Eugene M. Hoyne & Co., and agree to devote all of their time and attention to the performance of the covenants herein contained.

2. Messrs. William R. Moorhouse, Royal C. Vilas, and Henry D. Sturtevant are hereby designated and constituted a managing committee of the business of the parties of the first part until the indebtedness owing to said parties of the second part, hereinbefore referred to and set forth, shall have been fully paid, without salary or compensation, however, with full power to supervise and control the said business of the parties of the first part as hereinafter set forth, and with power to designate one of the members of said firm as the manager thereof, and to from time to time appoint, employ, and discharge for and in behalf of the parties of the first part, copartners as aforesaid, any other person as manager of said business, and also to employ and discharge, for and in behalf of said parties of the first part, copartners as aforesaid, such other person or persons as they may elect, until all of said indebtedness owing to the parties of the second part hereinbefore mentioned and set forth shall have been fully paid, at such salaries as said managing committee shall fix and determine, which salaries shall be paid by the parties of the first part as a part of the current expense of their said business; it being understood, however, that the employment of such manager or other person shall cease and determine when and as soon as said indebtedness shall have been fully paid, unless such employment shall be continued beyond said time by said parties of the first part.

3. The parties of the first part shall have the right to carry on, conduct, and manage said business, subject, however, to the supervision and control of said managing committee. The manager appointed or employed as aforesaid shall have the power and authority given or delegated to him by the managing committee, and shall at all times be under the direction of said managing committee, it being understood that in the event of any disagreement between said parties of the first part and said manager or said managing committee concerning the conduct and prosecution of said business, then the determination of said managing committee shall obtain and be final.

6. The first net earnings of the business of the parties of the first part accruing after the date of this agreement shall semiannually, on the 1st days of April and October of each year, be appropriated and applied pro rata to the payment of the loans hereinabove mentioned, aggregating one hundred and twenty-seven thousand dollars ($127,000), with interest thereon at 6 per cent. per annum, payable on said 1st days of April and October, until said loans shall have been fully paid, and no part of said earnings shall be applied to the payment of the indebtedness owing to the parties of the second part hereinbefore mentioned and set forth until the whole of said loans shall have been paid out of said net earnings or otherwise discharged.

7. After said loan, together with interest thereon, shall have been paid out of said net earnings, then said net earnings shall semiannually thereafter, on the 1st days of April and October of each year, until fully paid, be appropriated and applied pro rata to the payment of said indebtedness owing to the parties of the second part hereinbefore mentioned and set forth, with the exception of the indebtedness due Thomas M. Hoyne and Maclay Hoyne; their said indebtedness to be paid after payment of the indebtedness due the other parties of the second part.

parties; it may have been drawn for the purpose of defeating any liability arising out of the partnership relation, and may not have been expressive of the real intent of the parties; or the agreement may not have expressed the entire understanding of the parties. This may be conceded, but it does not derogate from the effect of the document, the recitals of which recognize the relation of debtor and creditor, and which therefore furnish some basis for the master's conclusion.

Certainly the oral testimony tends to support this view. Respondents were creditors of the old brokerage firm of Perry, Price & Co. This firm became badly involved. The creditors were numerous; the assets small. Like others, respondents desired to increase the amount recoverable on their claims. They agreed upon certain conditions not to press them. A change in the name and membership of the firm was one of the conditions imposed. The payment of the claims as fast as their earnings permitted was another condition. Neither the motive that prompted the parties to enter into the agreement nor the contract itself is indicative of a partnership between the debtors and the creditors. These facts may not and do not constitute all of the evidence, nor were they conclusive on the District Court; but they afford material support and rather persuasive reasons for the conclusion which the master reached.

It is urged, however, that notwithstanding these foregoing reasons in support of the findings, the question of the status of the parties is one for the court to determine solely from the contract and that certain provisions make it impossible for us to conclude other than that a general partnership was created. Because the respondents were to receive the net profits, and because they appointed trustees to represent them to insure the payment of the profits on their claims, and such trustees were given, for the purpose, some voice in the affairs of the partnership, it is urged that the partnership extended to the respondents. But is this conclusion unavoidable?

[7, 8] The Uniform Partnership Law of Illinois (Hurd's Rev. St. 1919, c. 106a, §§ 1–44) governs this contract; Chicago being the place where its execution was completed and the same city being the place where the business of the new firm was to be conducted. The Uniform Partnership Act was in force at the date of its execution, and had been for over a year. Limited partnerships for the conduct of a brokerage business were not permitted. Section 3, Limited Partnership Act (Hurd's Rev. St. 1919, c. 106a, § 47). It is true that participation in profits as such is evidence tending to establish the status of partnership between the respondents, but it is not conclusive. Section 7, subd. 4. More significant would participation in profits be, if the evidence showed that the payments were made to partners as such, rather than in the extinguishment of a debt.

The Uniform Partnership Act defines certain tests by which the status of an individual may be determined. Section 6, subd. 1, defines a partnership as:

"An association of two or more persons to carry on as co-owners a business for profit."

Section 7, subd. 1, provides:

"Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons."

Section 16, referred to, deals with a situation where an estoppel has arisen by virtue of statements made by one holding himself out as a partner.

[9] Intent is a factor that may be considered in any finding of fact. True, intent must be gathered from the acts of the parties, and not from an unlawful desire to avoid liability; that is to say, the parties may intend to avoid liability, and may fail to do so because their acts and their contract establish a status from which liability as a partner follows. But if the parties intend to loan money, which is to be repaid as fast as the profits permit, we think the intent may overcome the effect of receipt by the creditors of the profits of the debtor concern.

At least it is evident that a basis, and a substantial one, exists for the finding of the master, and we are therefore not permitted to disturb it. We find no error of law.

The appeal is dismissed. On the petition to review and revise the order is affirmed.

THE ROSEMARY.

TALGE MAHOGANY CO. v. NICKLAS et al.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1922.)

No. 3660.

1. **Shipping ⇐43—Owner not bound by representation of broker as to time for loading, not contained in charter.**

Where a charter party contained no express provision as to the time the vessel was to be at the loading port, and the owner of the vessel, prior to the making of the charter party, was not informed of a telegram sent by a broker stating such time, and the broker was without authority to bind the owner, the charter party was the sole evidence of the obligations incurred by the owner.

2. **Shipping ⇐43—Owner's obligation to charterer complied with, if vessel at loading port without unreasonable delay.**

Where the parties to a charter party, covering a voyage from Secondee or Axim, Africa, contemplated that, before entering on such service, the vessel was to carry a cargo from Gulfport, Miss., to Durban, Africa, and no definite time was fixed for its arrival at Secondee or Axim the shipowner's obligation was complied with if there was no delay which was unreasonable under the circumstances.

3. **Shipping ⇐43—Vessel not guilty of unreasonable delay in arriving at loading port.**

A vessel, which, after unloading at Durban, on the east coast of Africa, was under charter for a voyage from Secondee or Axim, on the west coast, *held* not to have unreasonably delayed its arrival at the loading point by going to Delagoa Bay for a cargo of coal and carrying it to Lobita, and there taking on a cargo to be carried to St. Thome, where it was customary and safer for vessels to go from the east to the west coast with cargo instead of in ballast, and enabled them to make better time, and it would have taken a longer time to get sufficient ballast at Durban than was consumed in going to Delagoa Bay, especially where the charterer was not ready to specify the loading point until the vessel left Lobita.

4. Admiralty ⇐66—Libelant not estopped by claim for dead freight to amend to claim greater amount.

An owner filing a libel against a cargo of logs for dead freight because of misinformation from the charterer as to the weight of the cargo, was not thereby estopped from amending to claim dead freight on a greater tonnage, where the charterer had not changed its condition in any way in reliance on the first claim, and the shipowner thereby obtained no advantage.

5. Shipping ⇐52—Charterer, failing to furnish full cargo, held liable for "dead freight."

A charterer, who agreed to provide and furnish a vessel a full and complete cargo of mahogany logs under and on deck, but who failed to furnish sufficient logs to fill the hold and deck space available for carrying logs, though a full cargo was demanded by the master, was liable for "dead freight," which is the compensation due when the charterer fails to ship the full amount of cargo stipulated for.

[Ed. Note.—For other definitions, see Words and Phrases, Dead Freight.]

6. Shipping ⇐52—Charterer exceeding schedule time to load not entitled to credit for time saved by not loading full cargo.

Where a charter party allowed the charterers 15 days for loading, but, without any fault on the part of the vessel or its owner, 25 days were consumed in delivering and loading the logs furnished, which did not constitute a full cargo, the charterer was not entitled to credit on the dead freight for the time saved by the vessel in consequence of a full and complete cargo not being furnished.

Appeal from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Libel by Charles Nicklas, master of the American schooner Rosemary, against the Talge Mahogany Company, with libel by the Talge Mahogany Company against the schooner Rosemary and others. From an adverse judgment, the Talge Mahogany Company appeals. Affirmed.

Edwin T. Merrick, Ralph J. Schwarz, and William J. Guste, all of New Orleans, La., for appellant.

W. A. White and Hanun Gardner, both of Gulfport, Miss. (White & Ford, of Gulfport, Miss., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. On February 19, 1919, the appellee, Charles Nicklas, master and agent of the American schooner Rosemary, filed a libel against the appellant, Talge Mahogany Company, and 324 mahogany logs, claiming $14,080 for dead freight on 320 tons at the rate stated in the charter of the vessel, $44 per ton, the amount of two days' demurrage, and the amount of an insurance premium paid on freight by the libelant. That libel was amended, as hereinafter stated. On February 21, 1919, the appellant, Talge Mahogany Company, filed its libel against the Rosemary, claiming damages which were attributed to the failure of the vessel to arrive at the port of loading selected by the appellant until several months after the date indicated in a telegram, sent by J. W. Somerville to the ap-

pellant prior to the making of the charter party, which contained the statement, "Vessel should make about June nineteen eighteen loading."

Pursuant to an agreement of the parties, the two cases were consolidated, after the libeled logs had been released with the consent of the appellee. The court rendered a decree dismissing the appellant's libel, disallowing the appellee's claims for demurrage and insurance premium on freight, and awarding the appellee $22,478.95, that sum being the amount of dead freight on 487 tons of mahogany logs at $44 per ton, less the ascertained cost of loading and unloading that amount of mahogany logs, with interest from the date of the completion of the discharge at Gulfport of the Rosemary's cargo. The appellant complains of the dismissal of its libel, and of the amount awarded against it on the appellee's libel, claiming that the award of that amount was not warranted by the pleadings or the evidence.

By the charter party, which was made at Gulfport, Miss., and was dated December 4, 1917, the owner of the Rosemary agreed "on the freighting and chartering of the whole of said vessel (with the exception of the cabin, and necessary room for the crew and storage of provisions, sails, and cables), or sufficient room for the cargo hereinafter mentioned, unto" the appellant "for a voyage from the port of Secondee or Axim, Africa, to Mobile or Gulfport, one port only for loading and chartering, at charterer's option. Orders for loading port to be given when asked for by owners or master." The instrument referred to the Rosemary as "now Mobile, due here Saturday 8th to load for Durban, South Africa," and contained the provision that the charterer "doth engage to provide and furnish said vessel a full and complete cargo of mahogany logs under and on deck, no log to weigh over three (3) tons."

The making of the charter party was the result of telegraphic negotiations between J. W. Somerville, a shipbroker at Gulfport, and the appellant, whose place of business is Indianapolis. The beginning of that correspondence was a telegram from Somerville to the appellant, dated November 23, 1917, and stating:

"Understand you are in the market for tonnage west coast Africa to Gulf with mahogany can probably close with prompt advice new schooner Rosemary capacity about fifteen hundred to sixteen hundred tons dead weight now about to load for South Africa. Wire if interested."

Appellant replied by a telegram of the same date, stating:

"Will consider firm offer Secondee or Axim to Gulfport. State approximate arrival date."

Somerville replied by a telegram of the same date containing the following:

"Vessel should make about June nineteen eighteen loading."

[1] The charter party contained no express provision on the subject of the time when the vessel was to be at the one of the two mentioned loading ports to be chosen by the charterer. The owner of the Rosemary was not, prior to the making of the charter party, informed of the above-mentioned telegrams. Somerville was without authority to

bind the shipowner by a statement as to the time when the vessel should be at the proposed place of loading. The charter party was the sole evidence of the obligations incurred by the owner of the Rosemary. The Addison E. Bullard, 258 Fed. 180, 169 C. C. A. 248.

[2] The terms of the charter party show that it was contemplated by the parties that the vessel, which was chartered to carry a cargo of mahogany logs from Secondee or Axim, Africa, to Mobile or Gulfport, was, before entering upon that service, to carry a cargo from Gulfport to Durban, Africa. As the charter party fixed no definite time for the vessel to be at Secondee or Axim ready to receive the cargo, the shipowner's obligation in that regard was complied with if there was no delay which was unreasonable under the circumstances. Culliford v. Gomila, 128 U. S. 135, 9 Sup. Ct. 50, 32 L. Ed. 381; Lovell v. Davis, 101 U. S. 541, 25 L. Ed. 944.

[3] There was no evidence furnishing any support for a claim that there was any lack of diligence in making the voyage to Durban, which is on the east coast of Africa. The vessel arrived at Durban on June 2, 1918, and finished discharging its cargo about June 18th. The claim is made that there was unreasonable delay as a result of the use made of the vessel after it reached Durban, in that it went to Delagoa Bay, 270 miles north of Durban, for a cargo of coal, which it carried to Lobita, there took on another cargo, which it carried to St. Thome, and went from St. Thome to Secondee; Lobita and St. Thome being places on the west coast of Africa in the route the vessel would have taken in a voyage from Durban to Secondee or Axim. The evidence adduced was such as to support findings to the following effect:

The Rosemary, a sailing vessel, had to have ballast or a cargo to make the voyage from Durban around the Cape of Good Hope to the west coast of Africa. Under the circumstances which existed, it did not lose time by going to Delagoa Bay, there getting a cargo of coal and going loaded to Lobita, and there taking on a cargo to be carried to St. Thome. The vessel could not get a cargo at Durban for a point between that place and Secondee or Axim, which are on the west coast of Africa, about 42 miles apart. It would have taken it a longer time to get sufficient ballast delivered and loaded at Durban than was consumed in going to Delagoa Bay, taking on the cargo of coal, and getting back to a point off the coast opposite Durban. By going loaded with cargo, instead of going light with ballast, in a voyage around the Cape, such as the Rosemary made, a sailing vessel can make the voyage in much less time, as it can keep close to shore when loaded with cargo, and by doing so is enabled to take advantage of favorable currents and winds and to save more than 1,000 miles in distance. It is customary for vessels going around the Cape from the east to the west coast of Africa to go with cargo, instead of in ballast. It is safer to follow that custom, and by doing so the vessel makes better time.

Though the appellant was informed several times of the movements of the Rosemary after it left Delagoa Bay, and on August 8 and September 6, 1918, was asked for instructions as to the place, Secon-

dee or Axim, at which the vessel was to be loaded, it gave no such instructions until September 8th, the day the vessel left Lobita for St. Thome. Appellant's conduct during the time mentioned did not indicate that it then understood or claimed that there was any undue delay in the progress of the vessel, or that the appellant was ready to name the loading port any considerable time before the selection actually was made and notice thereof given. There is nothing in the charter party to indicate that it was contemplated by the parties that the vessel, after discharging its cargo at Durban, was to make the long voyage of more than 3,000 miles from that port to Secondee or Axim without a cargo. We conclude that the evidence did not show that the arrival of the Rosemary at Secondee was unreasonably delayed, and that the court did not err in dismissing the appellant's libel.

[4] The appellee's libel was amended by making its claim for dead freight one on 750 tons at the charter rate, amounting to $30,800, instead of on 320 tons, as claimed in the original libel. It was disclosed that the original libel was filed before the cargo was discharged and weighed at Gulfport, that the claim it made as to dead freight was based on information given by the appellant's agent at Secondee to the effect that the cargo weighed about 1,100 tons, and that when the cargo was weighed after it was unloaded its weight was found to be only 707 tons. The claim for dead freight, as made in both the original and the amended libels, was based on the difference between 1,450 tons, the alleged log-carrying capacity of the vessel, and the number of tons in the cargo; the difference between the two pleadings being in their respective allegations as to the weight of the cargo actually carried and the additional tonnage required to make a full and complete cargo. It has not been claimed that the court was in error in allowing the amendment to be made.

The contention urged is that the appellee, by claiming that he was entitled to the amount of dead freight on 320 tons, estopped himself from thereafter claiming in the same suit that he was entitled to dead freight on a much larger tonnage. The elements necessary to an estoppel are lacking. There is nothing to indicate that, between the date of the filing of the libel and the date of its amendment, the appellant changed its condition in any way in reliance on the appellee claiming dead freight on only 320 tons. The amendment was allowed before the appellee had successfully maintained any claim to dead freight. The appellee got no advantage by claiming less than he was entitled to in consequence of his being misinformed by the appellant as to the weight of the cargo. When the amendment was made, nothing had occurred which stood in the way of the appellee recovering more for dead freight than was claimed in the original libel.

[5] It is not controverted that the evidence showed that the appellant failed to comply with its undertaking "to provide and furnish said vessel a full and complete cargo of mahogany logs under and on deck, no log to weigh over three (3) tons." The appellant's noncompliance with that undertaking entitled the appellee to recover for dead freight, which is the compensation due when the charterer fails

to ship the full amount of cargo stipulated for, unless in some way the appellee has been barred from enforcing that claim. There was evidence to support findings that the logs delivered to the vessel, some of them weighing considerably more than 3 tons, were substantially less than enough to fill the vessel's hold and its deck space which was available for carrying logs, and that the vessel could have carried safely and conveniently, in its hold and on deck, 487 tons of mahogany logs in addition to the cargo it received. The vessel's master demanded of the appellant's agent at Secondee that more logs or other cargo be furnished, which demand was not complied with. That the making of a claim for dead freight was in contemplation before the vessel left Secondee is indicated by the circumstance that the bill of lading there given for the logs shipped, and, without protest, accepted by the appellant's agent at that place, contained the following: "Freight and dead freight to be calculated on the official weight at Gulfport." There is nothing in the record which requires the conclusion that the court was not warranted in basing its award for dead freight on the above-mentioned phase of the evidence as to the number of tons of logs, in addition to what was shipped, required to make the "full and complete cargo of mahogany logs under and on deck" which the charter party obligated the appellant to provide and furnish.

[6] It was contended in argument that the court, in fixing the amount of its award for dead freight, should have allowed a credit for the time saved by the vessel in consequence of its not receiving the quantity of logs required to make the full and complete cargo called for by the charter party. That instrument contained the provision: "There is to be allowed charterers for loading fifteen (15) running days, Sundays and holidays excepted." Twenty-five working days were consumed in delivering and loading the logs furnished, the delivery and loading not being done continuously. Evidence adduced warranted the finding that the failure to complete the loading in the 15 days allowed by the charter party was not due to any fault chargeable against the vessel and its owner. As it was not made to appear that the charterer's failure to ship the amount of cargo stipulated for enabled the vessel to start on its voyage from Secondee sooner than it would have done, if the stipulations in that regard had been complied with, the above-mentioned claim that the vessel got the benefit of a saving of time to which it was not entitled is not well founded.

In our opinion the record does not show any reversible error.

The decree is affirmed.

LAMSON BROS. & CO. v. TURNER.

In re BROWN CONSOL. MILLING CO.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1921.)

No. 5557.

1. **Bankruptcy ⟸467—Findings by referee, approved by court, are not conclusive.**

   Though the findings of the referee, approved by the District Court, with reference to a claim against a bankrupt's estate, are presumptively correct, and should be allowed to stand, unless some obvious error has occurred in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, yet such findings are not conclusive.

2. **Gaming ⟸49(1)—Grain sales contract held lawful on face.**

   Written contracts, given by a grain broker to its customer, confirming a sale or purchase for the customer, requiring the customer to keep on deposit sufficient funds to protect the broker, and stating that the actual receipt and delivery of the property in payment therefor was contemplated, appeared on their face to be lawful contracts, and that presumption could only be overthrown by evidence showing they were wagering contracts.

3. **Gaming ⟸2—Orders to broker, to be executed in Illinois, are governed by the law of that state.**

   Orders given by a Nebraska corporation in Nebraska to an agent for a Chicago brokerage firm, to be executed on the Board of Trade at Chicago, are contracts to be performed in Illinois, so that their legality is to be tested by the law of Illinois.

4. **Gaming ⟸12—Under Illinois law, both parties must intend wager to make contract illegal.**

   Under the law of Illinois, a contract for the sale or purchase of grain for future delivery is not illegal, unless both parties thereto intended that there should be no actual delivery, but that settlement should be made on the basis of market price on the date of delivery.

5. **Gaming ⟸49(3)—Testimony of bankrupt's officer held not to show wagering contract.**

   Testimony by an officer of a bankrupt corporation that he did not intend to receive or deliver any grain on purchases or sales made by him on the Board of Trade, but meant to close out his contracts before delivery was due, though he did intend to perform any obligation incurred, does not show an intention of the bankrupt not to accept delivery when it was due.

6. **Gaming ⟸49(3)—That no deliveries were made is not conclusive that contracts were wagers.**

   The fact that no deliveries of grain had been made under a series of contracts made for the bankrupt by grain brokers is not conclusive that the contracts on which the brokers based their claims against the bankrupt's estate were wagering contracts.

7. **Evidence ⟸134—That other contracts were wagers held immaterial in determining intent.**

   The fact that the contracts of most other customers of a brokerage firm were wagering contracts, in which no actual delivery of the grain was intended, is immaterial in determining the intention of the parties with reference to the contracts on which the claim against the bankrupt's estate was based.

8. Gaming ⟸12—Hedging by milling company is legal.
The practice of hedging by purchase and sale for future delivery by a milling company, which is a dealer and shipper of grain, is common and lawful.

9. Gaming ⟸49(3)—Evidence held not to show customer intended wagering contract.
Evidence on a claim against a bankrupt's estate, filed by grain brokers, *held* not to show that the bankrupt had no intention to make or accept delivery of the grain sold or purchased, so as not to show that the contracts were intended as wagers.

10. Corporations ⟸372—Sales or purchases of grain for future delivery held within powers authorized by charter.
A corporation, authorized by its charter to buy or sell grain, to make contracts of any kind or description, and to do any and all acts that a copartnership or natural person might do, has power to make sales or purchases of grain for future delivery.

Stone, Circuit Judge, dissenting.

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

In the matter of the Brown Consolidated Milling Company, Bankrupt. From a decision of the District Court, allowing in part the claim of Lamson Bros. & Co., against O. F. Turner, as trustee in bankruptcy, and allowing an offset in favor of the trustee against the portion of the claim allowed, claimant appeals. Reversed, with directions to allow the claim as filed, and to disallow the offset.

Francis A. Brogan, of Omaha, Neb. (Alfred G. Ellick, Anan Raymond and John U. Loomis, all of Omaha, Neb., on the brief, for appellant.

Charles E. Abbott, of Fremont, Neb. (John F. Rohn and Edward J. Robins, both of Fremont, Neb., on the brief), for appellee.

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

MUNGER, District Judge. This appeal seeks a review of the action of the court below in disallowing a part of a claim filed against the bankrupt's estate, and in allowing an offset in favor of the estate as against another part of the claim. The bankrupt corporation was engaged in the business of buying, selling, and shipping grain and grain products. Its principal place of business was at Fremont, Neb., where its mill was situated. Fred M. Brown was in the active charge of its business, and was secretary and treasurer of the corporation. The plaintiffs were partners engaged in the grain commission business, having a principal place of business at Chicago, but also having offices at Fremont and Omaha, Neb., in charge of employés who solicited and received orders for dealing in grain, and this partnership will hereafter be referred to as the plaintiff.

The bankrupt shipped to the plaintiff, at various times, many carloads of grain, drawing upon the plaintiff, with bill of lading attached, for the estimated value of the grain. The plaintiff paid these drafts, and the first item of its claim was for overpayments made

above the ascertained value of the shipments. The third item of its claim was for the amount of a promissory note given by the bankrupt for money loaned by the plaintiff. The correctness of these items was conceded by the trustee. The second item of claim was for a balance claimed by plaintiff, as the bankrupt's brokers, for advances made and commissions earned in making purchases and sales for the bankrupt, at its request, upon the Chicago Board of Trade. The trustee asserted that this balance arose from gambling transactions between the bankrupt and the plaintiff. He also asserted a claim of offset against the conceded items due to the plaintiff, alleging that Mr. Brown, purporting to act in the bankrupt's name, had wrongfully used the bankrupt's funds without its consent or knowledge, in payments to the plaintiff of amounts which he had lost in wagering transactions in grain, and asked for an allowance of the amount thus lost. The referee in bankruptcy disallowed the second item of plaintiff's claim, and allowed the offset claimed by the trustee, finding that the bankrupt had engaged through the plaintiff in buying and selling grain upon the Chicago Board of Trade upon "margins."

Upon a petition for review the District Court found the same balances to be due that the referee had found, and that neither the bankrupt nor plaintiff had had any intention, in the disputed transactions, that there should be any delivery of grain, and that these transactions were wagers, but also found that each order given by the bankrupt to the plaintiff's agents was immediately transmitted to the plaintiff at Chicago, and corresponding orders were, by the plaintiff, executed on the floor of the Board of Trade, and that both plaintiff and the brokers with whom they made such corresponding trades intended to carry out these contracts according to the rules of the Board of Trade, and to receive or deliver the grain contracted for, and to make payment therefor, unless the liability should be set off by other transactions, as authorized by the rules, and that plaintiff did make settlement of these contracts.

[1] The effect of these findings is discussed by counsel, and it must be conceded that they are to be taken as presumptively correct, and should be allowed to stand, unless some obvious error has occurred in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but they are not conclusive. Houck v. Christy, 152 Fed. 612, 614, 81 C. C. A. 602; In re Hawks (D. C.) 204 Fed. 309, 312.

The evidence discloses that the bankrupt, acting through Brown, gave a series of orders to the plaintiff's employés in charge of the Fremont and Omaha offices, directing the purchase or sale upon the Chicago Board of Trade of specified quantities of grain for future delivery, and making deposits of money, unless the plaintiff already held a balance of the bankrupt's money in its hands. When such an order was given, it was at once telegraphed to plaintiff by its agents, and the plaintiff at once purchased or sold corresponding amounts of grain in conformity to the bankrupt's order, and a message was sent plaintiff's agents, reporting the execution of the order, and the bankrupt was so informed; but it was also informed that it was subject to confirmation at Chi-

cago. Within a few days a letter of confirmation was sent the bankrupt from the plaintiff at Chicago, containing the details of the transaction, and notifying the bankrupt that it must keep on deposit with plaintiff funds sufficient to protect it against changes in values of the grain, and that in case such funds, in the plaintiff's judgment, became insufficient to give this protection, the bankrupt understood that plaintiff was authorized to dispose of the contract on the open market without further notice. It also stated that the plaintiff reserved the right to substitute other principals with bankrupt, and that all purchases and sales made for the bankrupt were made according to and subject to the rules and customs of the exchange where the trades were made. It also stated that all transactions made by plaintiff for bankrupt's account contemplated the actual receipt and delivery of all the property and payment therefor.

[2] The plaintiff executed all of the bankrupt's orders by making lawful and binding contracts of purchase or sale, and all of these contracts were performed or legally satisfied by the plaintiff. The rules of the Board of Trade allowed delivery, when delivery was due, of warehouse certificates for the requisite amount of grain in Chicago. On its face each of these contracts of the bankrupt appeared to be lawful and this presumption could only be overthrown by evidence showing it to be invalid. Bibb v. Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950, 37 L. Ed. 819; Wilhite v. Houston, 200 Fed. 391, 392, 118 C. C. A. 542; Boyle v. Henning (C. C.) 121 Fed. 376, 380; Browne v. Thorn (C. C. A.) 272 Fed. 950, 952; Gettys v. Newburger (C. C. A.) 272 Fed. 209, 216.

[3, 4] As these orders were given to the plaintiff, as the bankrupt's broker, to be executed upon the Board of Trade at Chicago, the legality of the transactions is governed by the laws of Illinois, and in Illinois such a contract is void only when both parties intend it as a wager, to be settled by the payment of differences, and not by the delivery of grain. Berry v. Chase, 146 Fed. 625, 629, 77 C. C. A. 161; Wilhite v. Houston, 200 Fed. 390, 392, 118 C. C. A. 542; Beal v. Carpenter, 235 Fed. 273, 278, 148 C. C. A. 633; Irwin v. Williar, 110 U. S. 499, 508, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 489, 13 Sup. Ct. 950, 37 L. Ed. 819; Clews v. Jamieson, 182 U. S. 461, 481, 491, 21 Sup. Ct. 845, 45 L. Ed. 1183; Browne v. Thorn (C. C. A.) 272 Fed. 950, 952; Gettys v. Newburger (C. C. A.) 272 Fed. 209, 217, 219.

[5, 6] Mr. Brown, for the bankrupt, testified that he did not intend to receive or deliver any grain on any of these purchases or sales, but he explained this statement by saying that he always meant to close out all of his contracts before delivery was due, by giving an order of sale or purchase that would balance his prior order. He also testified that he intended to perform any obligation incurred. This testimony falls far short of showing an intention of the bankrupt not to accept delivery, when delivery should be due. Rountree v. Smith, 108 U. S. 269, 275, 2 Sup. Ct. 630, 27 L. Ed. 722; Cleage v. Laidley, 149 Fed. 346, 350, 79 C. C. A. 284. The trustee urges that the fact that no grain was either delivered or tendered for delivery demonstrates

that no delivery was intended; but it also appears that no contract was carried through to the time when delivery was required. So this fact is inconclusive. Cleage v. Laidley, supra; Wilhite v. Houston, supra; Kirkpatrick v. Adams (C. C.) 20 Fed. 287.

[7, 8] It is also urged that the contracts of most of the customers of the Fremont and Omaha offices were speculative and resulted in no deliveries, but what others intended and what others did does not determine the question of the bankrupt's intention. Rountree v. Smith, 108 U. S. 269, 276, 2 Sup. Ct. 630, 27 L. Ed. 722; Flowers v. Bush & Witherspoon Co., 254 Fed. 519, 521, 166 C. C. A. 77; Browne v. Thorn (C. C. A.) 272 Fed. 950, 953; Gettys v. Newburger (C. C. A.) 272 Fed. 209, 219. As against these circumstances are the facts that bankrupt was a milling company, known to plaintiff to be a dealer and shipper of grain; that hedging by such dealers is a common and lawful practice (Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 249, 25 Sup. Ct. 637, 49 L. Ed. 1031; Gettys v. Newburger [C. C. A.] 272 Fed. 209, 218); that the contracts appeared to be lawful when made; and that no claim is made that the bankrupt ever notified plaintiff or its agents of any intention not to perform the contracts, if delivery became due, and the bankrupt's manager testified that he intended to fulfill all obligations.

[9] There is but one conclusion to be drawn from these facts, and that is that there was no proof of an intention of the bankrupt, at the time it entered into these contracts, not to accept or make delivery, or to merely make settlement of the differences in prices. But, even if the intention were such as it now asserts, there is no evidence that the plaintiff was aware of such intention, or that it did not intend to make or accept deliveries, and therefore the claim of the trustee that these were gambling contracts cannot be sustained, because of the lack of mutual intention to make wagering transactions. Spring & Co. v. Carpenter, 154 Fed. 487, 488, 83 C. C. A. 327; Parker v. Moore, 115 Fed. 799, 803, 53 C. C. A. 369; Parker & Co. v. Moore (C. C.) 125 Fed. 807, 808; In re Trion Mfg. Co. (D. C.) 214 Fed. 161; Bailey & Graham v. Phillips (C. C.) 159 Fed. 535, 539; Gettys v. Newburger (C. C. A.) 272 Fed. 209, 221.

[10] The trustee also makes the claim that wagering contracts were beyond the corporate powers of the bankrupt. What has been said disposes of this objection, but it may be noted that the making of sales or purchases for future delivery of grain is embraced within the corporate powers of the bankrupt, as its charter authorized it to buy or sell grain, to make contracts of any kind or description, and to do any and all acts that a copartnership or natural person might do.

The conclusions already stated make it unnecessary to discuss other contentions. The decree of the lower court will be reversed, with directions to allow the plaintiff's claim as filed, and disallowing the trustee's claim of set-off.

STONE, Circuit Judge (dissenting). This is an appeal from the disallowance of part of a claim against the bankrupt estate of the Brown Consolidated Milling Company. The claim as filed totaled $7,-

146.52, and was allowed for $2,081.18. It is because of the disallowance of the difference between these sums that this appeal is brought.

The claim consisted of three general items: Of $1,284.49, constituting a balance of account arising out of a shipping account for the purchase and sale of actual grain; $5,191.67, representing a promissory note for $5,000, with accrued interest; and $670.36, a balance of account, alleged by the trustee to have arisen from grain option deals. The first two items were confessed by the trustee. He opposed the last item of $670.36, as arising out of gambling or option dealings. He also sought a reduction of the admitted claim by $4,394.98, contending that the sum of $4,394.98 was a balance due the estate from the sum of $8,925, which had been paid claimant on account of similar dealings. The trustee based his objections upon the grounds that the bankrupt had no charter authority to engage in such gambling transactions, that the official of the bankrupt using its funds therefor had no authority to so do from the stockholders or directors of the bankrupt, that the deals were purely option or gambling transactions, and that such were made in the state of Nebraska, where they were declared by statute to be unlawful.

The findings of fact and conclusions of law of the referee were very meager, but were to the effect that the bankrupt, through its officers, had been engaged with the claimant in illegal grain option deals to the extent contended by the trustee, and, on that ground, disallowed the third item of the claim for $670.36, and allowed a reduction of the admitted claim by $4,394.98, leaving the claim as thus reduced and allowed at $2,081.18. Upon a petition for review, the District Court, being of the opinion that the report of the referee did not sufficiently find the facts to enable the court to determine the same, heard the claim and objections thereto de novo upon the evidence submitted to the referee. The court found that the manager of the bankrupt, "purporting to act in the name of said corporation," had engaged in unlawful grain option transactions with claimant in Nebraska in the particular and to the extent urged by the trustee, and reached the same result as the referee.

There are two points urged by appellant upon the merits: First, that the evidence does not sustain the finding by the referee and trial court that the questioned transactions were gambling deals; second, that, even though they were such, yet the trustee cannot avail himself of that condition. The first point must be examined in the light of the presumption as to the correctness of the finding, which can be overturned only if there is no substantial supporting testimony, or unless obvious error or mistake is indicated. The evidence upon this point was conflicting, but there was very substantial, and even convincing, testimony in support of the finding, and no obvious error or mistake has been discovered.

Another point of fact, claimed by appellant to vitally affect the finding that the deals were gambling transactions, is whether the contracts are to be regarded as made in Nebraska or in Illinois; its contention being that the Illinois law governs, and that that law requires

the unlawful intent not to deliver or accept actual grain shall be shared by both parties, while the Nebraska law makes the intention of one of the parties sufficient. The referee made no specific finding as to where the contracts were made, but found generally that they were gambling transactions, while the trial court went more into detail in its finding, and determined that the contracts were made in Nebraska. There is no necessary conflict in these findings. Besides, the evidence as to what was done in making these contracts does not conflict in essentials. I think that the evidence substantially supports the conclusion that the contract between these parties, which was one of brokerage, was made in Nebraska. The fact that what was to be done under these contracts was to be performed in Illinois does not affect the situs of these contracts. It also seems to me that the case of Lamson Bros. & Co. v. Bane, 206 Fed. 253, 124 C. C. A. 121, 46 L. R. A. (N. S.) 650, decided by this court, determines the situs of this contract to be in Nebraska. I therefore conclude that the finding that these contracts were gambling transactions must stand.

The second contention is that, even though these transactions were gambling contracts, yet the trustee, as to them, stands in the shoes of the bankrupt, and cannot defeat the claim for $670.36, nor offset the counterclaim for $4,394.98. Being a Nebraska contract, the right of recovery for losses would be governed by the law of that state. Lamson Bros. & Co. v. Bane, supra. The Supreme Court of that state, in case of Ives v. Boyce, 85 Neb. 324, 123 N. W. 318, 25 L. R. A. (N. S.) 157, which involved similar wagering dealings, has decided that no recovery can be had, but that the parties will be left as they are. This would conclude this claimant as to the item it claims of $670.36. Also see Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Sprague v. Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679. Supposing, for the moment, that the corporation is subject to the same rule, had it endeavored, by suit, to recover its losses of $4,394.98, would the same rule apply where it would seek to reduce a legitimate claim in suit by setting forth such losses as a counterclaim? It would seem that the rule applies to counterclaims and set-offs. Higgins v. McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764; 20 Cyc. 951, and citations. Therefore the offset of $4,394.98 urged by the trustee cannot be sustained, unless either a trustee in bankruptcy stands in a more favorable position than the bankrupt, or the transactions here involved were not authorized by the bankrupt. If the trustee occupies any such favored position, it must spring from his relation to and representation, in a sense, of the creditors of the bankrupt. A creditor of a gambler, however, is in no better position than the gambler as to recovery of gaming losses.

There remains the contention that these gambling transactions were not authorized by the corporation, and not binding upon it. The charter powers of the bankrupt are set forth in the objections of the trustee to the claim. Such powers, while broad, give no basis for any claim that they authorize the bankrupt to engage in option grain dealings. It would be unbelievable that the state of Nebraska, which prohibits such contracts, would grant the bankrupt a charter right to

enter into them. Nor did the stockholders or directors attempt to grant such authority. Before any of these transactions, the board of directors passed a resolution "that no option deals on grain shall be made without the consent of the majority of the officers of the company." The company had four officers during the time here material. May 13, 1915, there was a change in stockholders and in officers. The substantial evidence is that only two of these officials knew of the option deals before the above date, and then only for a portion of that time, and that only one, the participant, had any knowledge thereof after this date and up to the bankruptcy. Nor could they have discovered the nature of the transactions from the regular books of the company, though they might have done so by going through the letter files. The evidence supports no conclusion that there was any authority from the bankrupt to use its funds in such transactions. Nor could the bankrupt, nor can its trustee, be estopped from presenting this offset, because such winnings as there were came to it and were used by it. The reason is that these transactions are not only ultra vires, but are positively illegal, and no action of the corporation could constitute an estoppel or ratification, so as to make it effective.

I conclude, therefore, that the result reached by the referee and trial court was correct, and should be affirmed.

GRAF v. HOLCOMBE.*

(Circuit Court of Appeals, Eighth Circuit. December 21, 1921.)

No. 5759.

1. **Trial ⟸48—Written statement held admissible, though containing inadmissible matter.**

   In an action by one who exchanged a tract of land for various parcels of defendant's land, for damages for false representations, a typewritten list of defendant's property furnished by him at the time of the trade was admissible in evidence as far as it described defendant's property, even though it included figures representing values that were incompetent, and proper procedure was to admit the paper, with proper instructions.

2. **Appeal and error ⟸930(2)—Presumed that jurors disregarded evidence as directed.**

   The legal presumption is that the jury followed instruction to disregard evidence which had been erroneously received, or had after its receipt become immaterial in the progress of the cause, except in unusual cases, where to indulge such presumption would permit injustice.

3. **Evidence ⟸558(1)—Cross-examination as to amount paid for land held admissible to test opinion as to value.**

   In an action for damages for false representations in exchange of land, where defendant testified as to market value of some property exchanged, and that he had bought and sold five or six pieces in the locality, plaintiff on cross-examination could ask him what he paid for one of the parcels of property exchanged, to test the weight that the jury ought to give to his testimony as an expert as to values.

4. **Exchange of property ⟸8(5)—Measure of damages for false representation.**

   The measure of damages for false representations in exchange of lands is the difference between the reasonable value of what the defrauded

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

*Rehearing denied April 1, 1922.

party parted with and the reasonable value of what he received; and this is true where the defrauded party has placed a certain value upon his property, and has taken a number of parcels of defendant's property at a lump sum, without an agreement as to the value of the respective parcels.

5. Exchange of property ⇐8(1)—Remedies of defrauded party.

Where an exchange of properties is induced by fraudulent representations as to part of a number of parcels of property exchanged by one of the parties, the defrauded party has the same right to a rescission or damages as when fraudulent misrepresentations relate to all the property, and he may rescind, restore what he has received, and recover back what he has parted with, or retain what he has received and recover what he has lost, though an agreed price is placed on the property of the defrauded party and the property of the other party collectively.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by John O. Graf against John H. Holcombe. Judgment for plaintiff, and defendant brings error. Affirmed.

Ralph P. Wilson, of Lincoln, Neb. (Elmer J. Burkett, Henry H. Wilson, and Elmer W. Brown, all of Lincoln, Neb., on the brief), for plaintiff in error.

Clinton Brome, of Omaha, Neb., (William C. Ramsey, of Omaha, Neb., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. This is an action at law by John H. Holcombe against John O. Graf to recover damages for the latter's alleged false representations that deceived the plaintiff and induced him to sell and convey to the defendant his farm of 512 acres in Richardson county, Neb., subject to mortgages of $60,000, for $15,000 cash, a note and a mortgage of the defendant for $7,500, and seven pieces of the property of the defendant, subject to a mortgage on one of them for $1,000, recited in the contract of sale to have been of the value of $37,800, making the amount paid by the defendant in the aggregate $65,300. In his complaint the plaintiff averred that he had been induced to make the sale and convey his land to the defendant by the latter's misrepresentations of the character and value of the property which the defendant agreed to convey and did convey to him. The defendant denied these allegations of false representations, and alleged that he had been deceived and induced to convey his property to the plaintiff by the latter's false representations as to the character of the 512 acres that he conveyed to him, and asked for damages therefor. The plaintiff denied that he had made any such representations. The issues were tried for many days before a jury, which finally returned a verdict for $12,430 in favor of the plaintiff.

The defendant's first complaint of the trial is that the court erred in admitting in evidence a typewritten statement of the property of the defendant and of its value, which the latter agreed to convey and

did convey to the plaintiff. This statement was marked Exhibit 1, and it read in this way:

Exhibit 1.

Description.	
New brick barn	$4,000
Brick store building	4,000
One business lot	1,000
160 acres in Loup county, Neb.	4,800
10 acres near Omaha	6,000
80 acres in Ray county, Mo.	12,000
4 vacant lots in Frederick, Okl.	2,800
6 lots with improvements, Frederick	4,200
Total	$38,800
Incumbrances	1,000
Net valuation	$37,800

The first three pieces of property in this statement, aggregating $9,000 therein, were in Tecumseh, Neb., and are known as the Tecumseh property. The record discloses these facts relevant to the admission of this statement in evidence. Mr. Healy and Mr. Jones were real estate agents, who conducted some business for the defendant Graf. Mr. Healy telephoned the plaintiff to meet him and some one who wished to purchase Mr. Holcombe's farm at Falls City. The plaintiff went there and met Mr. Healy, Mr. Jones, and Mr. Graf. He testified that he had never seen Mr. Graf before, and to these facts:

They went into the country and examined the plaintiff's farm of 512 acres and returned to the hotel at Falls City. In this hotel, after their return they first discussed the prices and the terms of the sale. The plaintiff offered to sell his farm for $250 per acre, the defendant offered him $225, and their minds finally met on $235 per acre as the price of the farm. For this farm Mr. Graf said he would give $15,000 in cash, assume incumbrances on the farm of $60,000, give another mortgage back for $7,000, and give some property which he had that was worth $38,800, with $1,000 incumbrance on it. Mr. Graf had the typewritten list—Exhibit 1—and was using it in showing the plaintiff the property while this conversation was going on. The plaintiff produced this exhibit after this testimony, and in answer to the question by his counsel, "What did he say about the list?" he answered:

"He said that was an accurate and correct list of this property that he owned and proposed to give me as part payment for my farm."

Thereupon the plaintiff's counsel offered the exhibit in evidence. Counsel for the defendant objected to it on the grounds that it was incompetent, irrelevant, immaterial, that no proper foundation was laid for its admission, and specifically to the figures showing the values for the same reasons. The court overruled these objections and the defendant excepted. Thereafter the plaintiff testified that Mr. Graf told him, in the conversation before the contract of sale was made, that if Mr. Holcombe made a sale of the farm it must be made on that day; that he told Mr. Graf that, in taking that scattered lot of property from Southern Oklahoma, near the Texas border, to Northern Nebraska and Omaha and Tecumseh, it would be impossible for

him to make an examination of it in the few hours he had given him; that Mr. Graf replied that, in lieu of the fact that Mr. Holcombe had not had time to make an examination of this scattered property, the list would be sufficient, that the list was a correct description of the properties, and that he would find it correct with reference to the properties and their worth; that Mr. Graf told him that the brick barn was worth $4,000, that the store building was worth $4,000, that the vacant lot was worth $1,000, that he set the value of the 80 acres in Ray county at $12,000, and that the 160 acres in Loup county was worth $4,800.

[1, 2] At the close of the trial the court withdrew from the jury all the evidence of the statements and representations made by the defendant of the value of the respective pieces of property, which were not accompanied with false representations of the character or extent thereof, and then charged them that the—

"law does not regard as a statement of fact ordinarily what is merely a statement of the value of an article, and under the circumstances here I think there is no actionable representation because of any statement that the defendant is claimed to have made as to the value of the Tecumseh property, or of the Loup county farm, or of the Ray county land, or the Oklahoma property, or any other property, that he put in."

In view of the facts which have been recited relevant to the exception to the evidence of Exhibit 1 and the testimony to the statements of the defendant of the value of the property he conveyed to the plaintiff, no prejudicial error was committed in their receipt in evidence: First, because the description of the property in Exhibit 1 was competent evidence when it was offered, and even if the figures representing values were incompetent, the admission of the exhibit could not be lawfully refused on that account, but it should have been admitted and the jury should have been instructed that the figures representing values were not competent evidence and that they should disregard them; and, second, because, by the charge of the court at the close of the trial, this was effectually done, and more clearly and impressively done than if it had been done when the exhibit was received in evidence, by as much as the charge was given when the jury's attention was naturally riveted on the words of the judge, and it was given nearer to the time of their decision of the case than was the admission of the exhibit.

The argument of counsel for the defendant that the judgment below should be reversed on account of the admission of this evidence, because its effect could not have been extracted from the minds of the jury by the charge withdrawing it, has not been overlooked. But the general rule, subject, like most rules, to exceptions in unusual cases, when to follow it would permit or inflict injustice, is, and the legal presumption is, that the jury listened to and followed the direction of the court to disregard evidence which had been erroneously received, or had, after its receipt, become immaterial in the progress of the cause, and there is nothing in this case to warrant its withdrawal from the effect of the rule and its transfer to the exception. Pennsylvania Co. v. Roy, 102 U. S. 451, 458, 26 L. Ed. 141; Hopt v. Utah, 120 U.

S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708; Turner v. American Security & Trust Co., 213 U. S. 257, 267, 29 Sup. Ct. 420, 53 L. Ed. 788.

[3] The second complaint of the trial is that, after Mr. Graf had testified on his direct examination by his counsel to the market value of each of the first three pieces of property listed in the exhibit, called the Tecumseh property, to the effect that they were worth in the aggregate about $7,700, he was asked on his cross-examination when and from whom he acquired this property, and answered that he obtained it perhaps a week or ten days before he dealt with the plaintiff and from the Tecumseh State Bank. He was then asked what he paid the bank for it, and his counsel objected that the question was incompetent, irrelevant, and immaterial, the objection was overruled, his counsel excepted, and the defendant answered, "$2,000." But there was no error here. The defendant had testified in chief that he had bought and sold five or six pieces of property in Johnson county, in which Tecumseh is situated, within six or seven years preceding the trial, that he knew two other buildings in Tecumseh, similar to the buildings first listed in Exhibit 1, and what they had sold for, and that he had an opinion of the market value of that building. The question and answer relative to the amount he paid were competent, because they tested the weight that the jury ought to give to his testimony as an expert as to the value of the property in Tecumseh, and because they constituted competent cross-examination.

The third and last complaint of the defendant is that the court below refused to instruct the jury, as requested by counsel for the defendant, that, as there was no competent evidence of any fraud or actionable misrepresentation concerning the Tecumseh property, they should take and reckon the value of that property in determining the amount paid to the plaintiff by the defendant for the 512 acres, and in measuring the damages to the plaintiff in this case at $9,000, and instructed them, on the other hand, that if they found from evidence submitted to them that the plaintiff had been injured by the false representations of the defendant submitted to them, he was entitled to recover the difference between the reasonable value of what he conveyed to the defendant and the reasonable value of what he received from him.

[4] The action and instruction of the court here seem to have been in strict accord with the rule established by the Supreme Court and this court—that the measure of damages in cases of this character is the difference between the reasonable value of what the defrauded party parted with and the reasonable value of what he received. Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633.

[5] But counsel for the defendant argue that there is this exception to this rule—that where the parties to an exchange of several pieces of property induced by fraudulent representations have agreed upon the value of one piece in the trade concerning which there was no evidence of actionable misrepresentation, the agreed value of that piece must be taken as the real value thereof in measuring the damages, and

that this case falls under this exception. In support of this contention they cite Southern Ice Co. v. Morris, 219 Fed. 551, 135 C. C. A. 319. In that case the plaintiffs priced and valued their property to the defendant at $100,000. The defendant, without questioning this price or value, obtained and exercised an option to buy it at that price for $50,000 in cash and $50,000 in corporate stock at par, by representing to the plaintiffs that that stock was in fact worth par, and the court held that the purchaser was estopped from claiming that the price and value of the seller's property was less than the $100,000 he agreed to pay for it. The decision and opinion in that case might have some weight, if the defendant Graf had accepted and agreed to pay the plaintiff's first price of $250 per acre for Mr. Holcombe's farm, and was now here asserting that it was worth much less, and that he had been fraudulently induced to purchase it at that price by the plaintiff's false representations. But it could have no relevancy or persuasive force in the case under consideration, if such an exception to the established rule of measuring damages as is claimed by counsel existed, and that because the plaintiff never agreed in making the trade here that the Tecumseh property was worth $9,000. The written contract was that the plaintiff should take in part payment for the plaintiff's farm the Tecumseh property, the 160 acres in Loup county, the 10 acres northwest of Benson, the 80 acres in Ray county, and the ten lots in Frederick, subject to an incumbrance of $1,000, at the lump sum of $37,800, and the plaintiff made no agreement as to the value of the respective pieces of property, which together made up that amount. On the other hand, the evidence was that the plaintiff was induced to make this agreement to take this property at $37,800, and was induced to make the entire contract of exchange by the fraudulent misrepresentations of the defendant of the character and extent of some of the pieces of the property other than the Tecumseh property, which he agreed to take with that property for the aggregate sum of $37,800.

Inasmuch as there were fraudulent misrepresentations as to some of this property which the plaintiff agreed to take for this amount, he was entitled to recover the difference between the sum of $37,800 and the reasonable value of the property he agreed to take at that amount, provided that amount did not exceed his loss by the trade, even if the exception to the general rule claimed by the plaintiff's counsel existed. The existence of such an established exception, however, is not conceded. In our opinion, an exchange or an agreement to exchange several pieces of property at estimated or agreed prices, made at one time and performed with convenient speed, as this was, is a single transaction. And when, as in this case, such a transaction was induced by the fraudulent representations as to some, but not as to all, the property, the defrauded party has the same right to a recission of the contract and transaction, or to damages, as when the fraudulent misrepresentations inducing the contract or transaction relate to all the property he takes or agrees to take. He has the option to rescind the contract or exchange, to restore what he has received, and recover back what he has parted with, or to retain what

he has received and recover what he has lost, to recover the difference between the reasonable value of what he parted with and what he received, whether the inducing false representations pertained to a part or to all of the property he took, and there was no error in the charge of the court on this subject.

The judgment below must therefore be affirmed, and it is so ordered.

STONE, Circuit Judge (dissenting). I am unable to agree to the affirmance of this judgment for the reason following: I understand the facts to be that the parties agreed upon the valuation of the equity in the Holcombe farm; that Graf made up this value by a cash payment, a secured note, and eight several pieces of real estate; that each of these pieces of real estate was valued by the parties, and each went in at an agreed valuation. It is true that the total value of the eight pieces was $37,800, but both parties, at the time, understood that such total was reached solely by adding the values placed upon the several tracts and subtracting therefrom an incumbrance upon one of them. The parties understood that each tract was going into the transaction at a definite value, and the deal was consummated upon that basis. Whether such values were true or accurate is immaterial, so long as the parties chose to regard them as such, and so long as neither was induced to accept any such value by the fraud of the other party. Suppose that there was no fraud as to seven pieces of the property, totaling $36,000 in the agreed valuation, but as to the vacant lots in Frederick, valued at $2,800, there was a fraudulent overvaluation of $1,000. In such a hypothetic situation, Holcombe would have gotten seven pieces of property without a taint, and could not say fairly that he had not received exactly what he bargained for. It might well be that any or all of such seven pieces had been valued too high, or too low, but that is not material, since both parties have accepted, agreed upon, and acted upon such valuations. As to the Frederick property, Holcombe would, of course, have the right to have the agreed valuation made whole, since such valuation was the result of fraud. I think he can go no further. If he elects to enforce the contract and recover the damage through fraud, then he can recover only such damage as can be traced to that fraud. In my opinion, the judgment below gave him not only the damage from fraud, but permitted him to have a jury set aside the honest agreed values as to all other tracts, and thus substitute an entirely new basis of values, and therefore an entirely different contract for the one the parties made. I think the case of Southern Ice Co. v. Morris, 219 Fed. 551, 135 C. C. A. 319, more nearly governs this case than any which have been brought to our attention.

EASTMAN KODAK CO. v. BLACKMORE.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)
No. 65.

1. **Monopolies ⟸23—Retail dealer held not entitled to damages.**
No damage can flow from a lawful business or commercial transaction in which a person or corporation had a right to engage, or from the refusal to sell to a retail dealer where such refusal was, as matter of law, wholly within the power and voluntary choice of the seller.

2. **Monopolies ⟸21—Retail dealer participating in unlawful system of business held not entitled to recover damages.**
A retail dealer participating in an unlawful system of doing business cannot, in the absence of coercion, recover damages under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), as amended by Clayton Act, § 4 (Comp. St. § 8835d), permitting recovery by persons injured by violation of anti-trust laws, though he claims that prior injury done in not selling him goods was a continuing injury, and that he had never recuperated from such injury, and that it reflected itself in the amount of business done during the time for which damages were sought.

3. **Courts ⟸406(2)—Circuit Court of Appeals has no power to dismiss complaint.**
The Circuit Court of Appeals in a proceeding in error has no power to dismiss the complaint, but can only order a new trial.

4. **Monopolies ⟸28—Profits made in illegal business during certain period not standard upon which to compare profits of later period.**
In an action by retailer under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), as amended by Clayton Act, § 4 (Comp. St. § 8835d), to recover damages occasioned by a violation of anti-trust laws resulting in decreased profits after the year 1908, based on defendant's refusal to sell goods to plaintiff from 1902 to 1905, profits made by plaintiff and defendant while engaged in an illegal restrictive system from 1899 to 1902 could not be set up as a standard with which to compare the profits of the period after 1908.

5. **Monopolies ⟸28—Profits during one period held no standard for comparison for lost profits in another period, and damages sought too remote.**
In an action under the Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), as amended by the Clayton Act, § 4 (Comp. St. § 8835d), to recover damages for profits lost after the year 1908, arising out of injury done by refusal of defendant to sell goods to plaintiff between 1902 and 1905, profits made by plaintiff from 1899 to 1902, and from 1905 to 1913, at which time plaintiff was in pari delicto, would furnish no standard of comparison, and damages would be too remote and speculative.

6. **Monopolies ⟸21—One participating in violation of anti-trust law not entitled to recover from co-conspirator by reason of small part taken.**
A retail dealer who participated in a conspiracy under the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), and benefited thereby is not entitled to recover damages under section 7 of such act (Comp. St. § 8829) by reason of certain acts of the defendant which he did not initiate, but from which he received benefits, since all participants in a conspiracy are conspirators, whether the part they play is great or small.

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

Action by J. Edward Blackmore against the Eastman Kodak Company. Judgment for plaintiff, and defendant brings error. Reversed.

Writ of error to the District Court for the Southern District of New York to review a judgment for $25,127.30 in favor of defendant in error (hereinafter called plaintiff) against plaintiff in error (hereinafter called defendant).

The action was brought to recover damages under section 7 of the so-called Sherman Anti-Trust Act (Comp. St. § 8829), which now, as amended by the Clayton Act, reads as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Act Oct. 15, 1914, c. 323, § 4, 38 Stat. 731 (Comp. St. § 8835d).

The record is voluminous but the facts may be stated with comparative brevity in view of the grounds upon which decision is based.

The amended complaint alleged and the evidence showed without dispute that defendant had violated the provisions of the so-called Anti-Trust Act of July 2, 1890. On January 20, 1916, the United States District Court for the Western District of New York entered its decree in a suit brought by the United States adjudging that defendant and others had "combined, conspired, and participated in various transactions directly affecting" interstate commerce "in photographic supplies * * * with the purpose and intent of unduly and unreasonably suppressing competition and restraining and monopolizing such trade in violation of the act of July 2, 1890." (D. C.) 230 Fed. 522.

The decree further adjudged that defendant, among other things, had monopolized between 75 and 80 per cent. of such trade, and accordingly had attained and held an illegal monopoly thereof, and that such monopoly was induced "by wrongful contracts with regard to raw paper stock, by preventing the trade from obtaining such stock, by acquiring competing plants, business, and stockhouses, dismantling acquired plants, and restraining the vendors from re-entering the business, by imposing on photographic dealers arbitrary and oppressive terms of sale and other regulations inconsistent with fair and free dealing and arbitrarily enforcing the same through the establishment of a system of espionage and the keeping of records of violations with a view of penalizing dealers, by limiting the number of dealers, and in general by suppressing competition by the foregoing and other means."

Later, in the same year of 1916, plaintiff brought this action, and his amended complaint was verified December 30, 1916. The cause came on for trial and resulted in a verdict in plaintiff's favor for $5,000. After this amount had been trebled and $10,000 had been allowed for attorney's fee, under the provisions of section 7, supra, judgment was entered for the amount above stated.

As early as 1894 plaintiff became a regular customer of defendant. From that time until and including July, 1914, he was continuously engaged, under various trade names, at Newark, N. J., in the business of selling photographic and art supplies and of enlarging, printing, and developing photographs.

Down to November, 1911, as to goods manufactured under secret processes, and down to June, 1913, as to goods covered by letters patent, defendant carried on its business under restricted contracts known as "terms of sale," according to which the goods could be resold only at prices fixed by defendant, while the customer also agreed not to handle goods which competed with those sold to him by defendant.

In June, 1913, defendant finally and completely abandoned the restrictive system, and since that date it is undisputed that the goods manufactured and sold by the defendant have been sold free of any restrictions whatever. The changes in the policy of defendant's methods of doing business were practically coincident with the decisions of the Supreme Court of the United States in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, decided April 3, 1911, and Bauer & Cie. v.

O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, decided May 26, 1913.

As early as January 6, 1897, or in any event December 2, 1897, plaintiff agreed actively to participate in and took the advantages of defendant's restrictive sales system and of the contracts and agreements in furtherance thereof. This sales system impaired free competition in certain goods in which defendant dealt and was designed to keep up the prices at which the retail dealers with whom defendant dealt directly could and would in turn sell to the buying public.

In 1899 defendant suspended plaintiff from its list of customers but on plaintiff's urgent application and request this suspension was lifted, and in September, 1899 (Plaintiff's Exhibit 23A), plaintiff agreed to maintain prices and comply with other regulations of defendant, and on October 2, 1899 (Plaintiff's Exhibit 23), plaintiff signed a contract with defendant agreeing not to handle photographic papers other than those manufactured by the General Aristo Company, which was one of defendant's associated companies. On November 6, 1899, plaintiff was reinstated as one of defendant's dealers under a notification that the restrictive policy would be maintained as theretofore. From October, 1899, until April 24, 1902, plaintiff was active in reporting to defendant alleged violations by other dealers of defendant's "terms of sale," and these reports involved espionage on the part of plaintiff.

By reason of the refusal of plaintiff to cease handling certain competitive goods in violation of the terms of sale, defendant refused to allow plaintiff the conditional credits allowed for compliance with the "terms of sale," and, upon his refusal to pay these deductions, an action was brought by defendant against plaintiff in the New Jersey Supreme Court, which resulted in defendant's favor. Thus in June, 1902, the plaintiff was off defendant's list of customers and did not participate in the restrictive sales system; but after the plaintiff paid the New Jersey judgment he was reinstated on defendant's list in January, 1905, first, however, having disposed of all independent or competitive goods in his hands.

From January, 1905, to and including July, 1914, plaintiff did business with defendant, and defendant sold him goods under restrictive contracts to the extent that the restrictions applied at the various dates. In other words, from January, 1905, until November, 1911, the restrictive features included goods manufactured under secret processes, and until June, 1913, goods covered by letters patent.

On November 15, 1911, defendant addressed a circular letter "To the Trade" (Defendant's Exhibit 18) explaining the Supreme Court decision and stating the following: "We consider this an opportune time to obtain an expression from the trade as to the desirability, from its standpoint, of our continuing our price restriction and exclusive sale policy so far as patented goods are concerned. We are therefore inclosing herewith a post card which we ask that you use in recording your view of the matter. If, as a result of the vote of the trade, we do not find a strong sentiment in favor of a maintenance of these restrictions on patented goods, we shall remove them without delay."

The postal card inclosed was on a printed form with the words "In favor of" and the words "Not in favor of" and blanks for date and signature. Plaintiff signed this card, stating: "We are in favor of a continuance of your price restriction and exclusive sale policy as applied to your patented goods, such as films and kodaks."

From November, 1911, until June, 1913, plaintiff was at liberty to sell secret process goods without restriction and at any price he pleased, and, in respect of the only class of goods in regard to which the restrictive system applied after November 1911—i. e., patented goods—the signed postal card supra is undisputed evidence of plaintiff's active consent that such goods should remain under this restrictive system.

In addition to the foregoing the evidence shows that plaintiff, whenever requested, signed credit memoranda stating, in substance, that plaintiff had complied with all the requirements of defendant's system, and upon signing

such memoranda plaintiff received the benefit of refunds, known as conditional credits. These credit memoranda were not used after January 1, 1908.

The trial court held that plaintiff was barred by the statute of limitations from any recovery prior to October 15, 1908, so that the cause of action, as thus limited, became one for damages from October 15, 1908, to July, 1914.

Under the ruling of the court the damages were to be ascertained by measuring the difference between the actual average net profits which plaintiff claimed to have made between October 15, 1908, and July, 1914, and the average net profits which plaintiff claimed to have made during the period prior to the time when he was excluded from defendant's list of customers in 1902. This period antecedent to 1902 was thus taken as the standard of comparison, and testimony was received as to sales and profits during that period upon the theory that the jury could ascertain as a fact the damages which plaintiff had suffered by the comparison above stated.

In addition to the foregoing, the only acts of any consequence which plaintiff in his pleading or testimony claims, even by inference, have caused him injury were those connected with the acquisition by defendant of various properties consisting either of letters patent or secret processes which carried with them the exclusive right to make and to sell certain goods theretofore made and sold by competitors of defendant or the stock control of certain corporations which were alleged to have been competitors of defendant and the acquisition of which control brought with it the exclusive right to make certain products.

The record is barren of any proof showing specifically any damage which resulted to plaintiff by virtue of these acquisitions, and substantially all of the goods the exclusive right to make which was obtained by defendant in pursuance of its monopolistic effort (except photographic plates) were as soon as acquired added to the "terms of sale," and hence thereafter acquiesced in and agreed to by the plaintiff.

At the end of the plaintiff's case and of the whole case defendant duly moved to dismiss the complaint, and at the end of the case also moved for a directed verdict on the ground, inter alia, that there was no cause of action. These motions were denied. Exceptions were duly taken, and defendant has now brought this writ of error.

Hubbell, Taylor, Goodwin & Moser, of Rochester, N. Y. (Frank L. Crawford, of New York City, and Clarence P. Moser, of Rochester, N. Y., of counsel), for plaintiff in error.

John B. Johnston, of New York City (Terence Farley, Frederick A. Card, and Frank I. Tierney, all of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MAYER. Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). From the foregoing outline it is apparent that during the period of 1908 to June, 1913, plaintiff acquiesced and actively participated in defendant's so-called restrictive sales system. After June, 1913, the system was abandoned, and therefore from that date until July, 1914, plaintiff was not under restrictions and could deal with defendant, on the one hand, in the free relation of customer with seller, and, on the other, with the public with the privilege and right of selling defendant's goods at such prices as he pleased.

From 1899 until he was dropped by defendant in 1902 plaintiff also acquiesced and actively participated in defendant's restrictive system. During this period he gained such advantages as accrued from the

price-fixing system and from the exclusion of those dealers, who, unlike plaintiff, would not accede to this method of doing business.

The theory of plaintiff is that defendant wrongfully refused to sell goods to plaintiff during the period from 1902 to 1905; that the injury thus done was a continuing injury for which the plaintiff may now recover damages for the period from 1908 to 1914, for the reason that plaintiff never recuperated from the injury done to his business from 1902 to 1905, and that injury reflected itself in the amount of business done by plaintiff from 1908 to 1914, and consequently in the diminution of net profits during that period.

The trial judge held and plaintiff now urges that prior to the decisions in Dr. Miles Medical Co. v. Park & Sons Co., supra, and Bauer & Cie. v. O'Donnell, supra, defendant's restrictive sales system was lawful. This was upon the theory that the Supreme Court had so held and had not held the practice unlawful until it handed down its opinions in the two cases just referred to.

[1] If this premise were to be adopted, it must necessarily follow that, if the business system now complained of was lawful in 1902, then defendant was entirely within its rights and acting lawfully when it refused in 1902 to deal further with plaintiff. In other words, if in 1902 defendant had the right to refuse to sell goods or trade with a person who would not sign or otherwise participate in its "terms of sale" system, then obviously it could choose or exclude customers at will. Upon this theory we think it is plain that no damage can flow from a lawful business or commercial transaction in which a person or corporation had a right to engage or from the refusal to sell to a person where such refusal was, as matter of law, wholly within the power and voluntary choice of the seller or dealer.

[2] If, on the other hand, it be assumed (and we find it unnecessary to decide this point) that defendant's restrictive system was at all times here concerned unlawful, then the question is whether a participant in an unlawful system of doing business can, as matter of law, recover damages while at the same time participating in the unlawful system. As applied to the facts of this case, the question is whether plaintiff, as a participant after 1908, will be permitted to recover damages alleged to have been suffered during that period when during that very period for which he seeks redress he was an active wrongdoer, if defendant was a wrongdoer.

The rule is tersely stated by Gray, J., in Hall v. Corcoran, 107 Mass. 251, 253 (9 Am. Rep. 30) as follows:

> "The general principle is undoubted that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part."

In Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, plaintiff in an action at law sought to recover from defendant in a situation which may be regarded as the converse of that at bar.

"Stated shortly," said Mr. Justice Harlan, "the present case is this:

"The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law."

In Bluefield S. S. Co. v. United Fruit Co., 243 Fed. 1, especially at pages 13 et seq. and 19, 155 C. C. A. 531, the court pointed out, in effect, that one who is in pari delicto in cases, such as that at bar, cannot recover, and the same principle is discussed in Victor Talking Mach. Co. v. Kemeny (C. C. A.) 271 Fed. 810, 816. See, also, McMullen v. Hoffman, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, and Cooley on Torts (3d Ed. 1906) vol. 1, pp. 254–261. Further citation is unnecessary because of the many cases cited in the cases referred to supra.

The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of doing business after 1908 and took such advantages as sprang therefrom, he may nevertheless recover damages caused, as he claims, during the period when he and defendant were both wrongdoers. With this proposition we are unable to agree.

[3, 4] As we have no power to dismiss the complaint, and a new trial must be ordered, in accordance with Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, it may be well to call attention to another question presented upon this review. If plaintiff and defendant were engaged in an illegal restrictive system from 1899 to 1902, obviously that period cannot be set up as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in Victor Talking Machine Co. v. Kemeny, supra, at pages 818 and 819.

If, on the other hand, the business from 1899 to 1902 be deemed lawful, then the question of a standard of comparison does not arise, because, as above pointed out, upon that hypothesis, the refusal of defendant to do business with plaintiff from 1902 to 1905 was lawful.

[5] There was no evidence of coercion in its legal acceptation, and thus the evidence was complete that plaintiff was in pari delicto, if defendant's business from 1899 to 1902 and from 1905 to June, 1913, be regarded as unlawful. From June, 1913, to July, 1914, there were

concededly no restrictions upon plaintiff, and therefore defendant's business so far as concerned plaintiff was lawful, but for that period plaintiff could not have recovered upon any theory that his net profits were decreased as the result of the suspension from 1902 to 1905 for the reason: First, that there is no standard of comparison; and, secondly, that, in any event, the damages would have been too remote and speculative. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98, 99, 49 C. C. A. 244.

The views as to the law of coercion and participation in wrongful acts expressed supra were no different, in substance, than those stated by the learned trial judge, but the point of departure is illustrated by the following excerpt from his charge. After explaining, in effect, that defendant had not coerced plaintiff, in the legal sense of that term, and after charging as to the legal effect of the voluntary participation of plaintiff in the restrictive sales system, the judge, as indicating the view entertained by him during the trial, continued:

"The law, as I say, is that so far as you may find that Mr. Blackmore consented to the terms of sale covering such of the articles as you may believe he did consent to, if any, then he cannot recover any damages by reason of any loss he may have suffered from the imposition of those terms of sale as to such articles.

"Now, of course, this, as I have said, does not apply to acts other than the terms of sale; for there is no contention that Mr. Blackmore consented to anything if he consented to anything at all except the terms of sale. If there were other acts that caused him injury than those represented by the terms of sale, then these matters that I have spoken of with reference to consent have no application to such matters, because his consent is limited to the system represented by the terms of sale, and, if he suffered damage from any acts of the defendant other than the terms of sale, the question of consent would have no application."

The only "other acts" which need be considered are those which consisted in the acquisition by defendant of letters patent, secret processes, and stock control of other corporations carrying the exclusive right to make certain products. The record contains a long list of articles added from time to time to the "terms of sale" by virtue of these acquisitions. Certain photographic plates (Seed, standard, and dry plates) were not included in the regular terms of sale, but some of them appear on a discount sheet dated April 1, 1906, which set forth certain restrictions as to price. The plaintiff, however, accepted discounts on these plates under the terms mentioned in the discount sheet.

In brief, assuming that what defendant did in conjunction with others amounted to a conspiracy under the act, and that defendant succeeded in obtaining a monopoly contrary to the act, plaintiff at all times derived the advantages and accepted the benefits which flowed from that conspiracy and that monopoly.

[6] It is fundamental that in the same conspiracy all participants are conspirators, whether the part they play be great or small. They cannot receive some of the fruits and then be held blameless for other acts which they may not have initiated but whose benefits they have received. On the evidence in this case, we are unable to find any act of defendant or of plaintiff which, as matter of law, separates them

from each other as participants in the same conspiracy and which frees plaintiff from being in pari delicto with defendant.

We are of opinion, therefore, that the court should have dismissed the complaint in response to motions duly made.

Judgment reversed.

McDOUGAL et al. v. BLACK PANTHER OIL & GAS CO. et al.

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

No. 5580.

1. **Attorney and client ⟸176—May make any contract regarding compensation, notwithstanding statute providing for attorney's lien.**

   Statute giving attorneys a lien for compensation does not preclude the parties from making any contract they may see fit regarding the compensation.

2. **Attorney and client ⟸186—Attorney may waive benefits of statute providing for lien.**

   A statute providing for an attorney's lien is solely for the protection of the attorney, and he may waive the benefits of the statute, but cannot be deprived thereof without his consent.

3. **Attorney and client ⟸186—Attorneys, by suing third persons on their contract with client to pay attorneys compensation, waived statutory lien.**

   Attorneys, by bringing suit on client's contract with third parties, requiring third parties to pay attorney's fees, accepted the contract and waived the right to the lien provided for by the statute.

4. **Attorney and client ⟸150—Client's contract with adverse claimants, requiring them to pay attorney's fee, held to obligate them to pay merely reasonable compensation.**

   Contract between client and adverse claimants to land, to whom client had quitclaimed for specified amount in settlement of the controversy, whereby adverse claimants agreed to settle with client's attorney for amount to which attorney was entitled, under contract with client giving attorney 50 per cent. of the property recovered by client, did not entitle attorney to recover from adverse claimants one-half of the value of the amount in controversy, but merely to reasonable compensation for services performed under Rev. Laws Okl. 1910, § 249, providing for payment of reasonable compensation on compromise by client without notice to the attorney.

5. **Attorney and client ⟸140—Results accomplished by attorney a material element in the value of legal services.**

   The results accomplished by an attorney for his client constitute a material element in the value of the legal services.

6. **Attorney and client ⟸131—Compensation recoverable under ccontract not stipulating amount governed by statute in effect at time contract was made.**

   Client's agreement with adverse claimants to land, made in settlement of controversy, requiring adverse claimants to pay attorney's compensation, without specifying the amount to be paid, made before amendment of 1919 (Laws 1919, c. 22) to Rev. Laws Okl. 1910, § 249, providing for payment to attorney of reasonable compensation on client's compromise without notice to attorney, did not entitle attorney to compensation under the amendment, though it took effect before submission of the case in attorney's action for compensation on such contract; the statute as in effect when contract was made being applicable.

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7. Attorney and client ⇐140—Court expert on value of legal services.
In action involving issues as to what constitutes reasonable compensation for legal services, the Circuit Court of Appeals, as well as the trial court, may be considered experts on the value of legal services.

8. Attorney and client ⇐189—Client's adversaries, who had agreed to pay attorney's fee in settlement of controversy, held not estopped to dispute client's claim as to amount of attorney's compensation.
In attorney's action against third parties, to whom client had quitclaimed land in settlement of controversy, in which third parties had agreed to pay attorney's compensation, the third parties were not estopped from denying the validity of client's claim on issue as to the amount of compensation for the services rendered.

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

Suit by the United States against Bessie Wildcat and others, in which D. A. McDougal and the Black Panther Oil & Gas Company and others intervene. From the judgment rendered, D. A. McDougal and others appeal. Decree, in so far as it affects appellants, reversed, and cause remanded, with instructions.

See, also, 273 Fed. 113.

Ephriam H. Foster, of Muskogee, Okl., and L. O. Lytle, of Sapulpa, Okl. (D. A. McDougal, Sam T. Allen and W. C. Hodges, all of Sapulpa, Okl., and Edward R. Jones, of Muskogee, Okl., on the brief), for appellants.

C. B. Stuart, of Oklahoma City, Okl., for appellees.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. This is an appeal from a decree against D. A. McDougal and others, upon an intervention in the action of the United States v. Bessie Wildcat et al.

The main case was a suit by the United States to cancel the allotment to Barney Thlocco, a Creek Indian, of a certain parcel of land. The land in question had become very valuable, because of the discovery of large quantities of gas and oil therein. Pending the suit, and to prevent these minerals from being drained from this property by development of nearby property, the court appointed a receiver, leased this land, and collected and holds a royalty therefrom which has accumulated more than $1,000,000. Thlocco being dead, this suit was against his supposed heirs and others. The richness of the stake attracted more than 100 interveners, each claiming some title to the property.

The main suit resulted in dismissal of the bill for cancellation, but the court retained jurisdiction to determine who were the heirs of Thlocco, and therefore entitled to the land and the royalties in the possession of its receivers.

Among the horde of interveners was Jackson R. Dunzy, who claimed to be sole heir of Thlocco. Appellants were the counsel for Dunzy in such intervention. Pending this intervention, appellees (Black Panther Oil & Gas Company, J. Coody Johnson, and Thomas Kelly), who were parties to the suit and intervention, settled with Dunzy by

buying from him, and receiving his deed for, all of his right, title, and interest in the subject of litigation. They paid him therefor $1,500.

The Dunzy intervention was filed May 17, 1918. The above settlement and deed were on July 13, 1918. On August 5, 1918, was filed the intervention of McDougal and others, which is now on appeal. This intervention is as follows: That Dunzy was the sole heir of Thlocco, and entitled to the land and funds in question; that Dunzy had employed McDougal, Lytle, Allen, and Hodges, practicing attorneys at law, to legally enforce his said title and rights; that he had contracted to pay them therefor one-half of all property, real and personal, which should be recovered in said action; that subsequently the above attorneys agreed with the other interveners and appellants, Jones and Foster, to divide said fee in consideration of legal services to be rendered by Jones and Foster; that by virtue of the Dunzy contract, and in accordance with the statutes of Oklahoma, interveners acquired a lien upon said real and personal property to the extent of one-half thereof, which lien was in full force at the time of the occurrences hereinafter set forth; that interveners proceeded to prepare and file an intervention for Dunzy, prepared to prosecute his claims thereunder, and in all ways complied with their contract with him; that J. Coody Johnson and Thomas Kelly, as agents for the defendant Black Panther Oil & Gas Company, in pursuance of a general policy to acquire opposing interests, on July 13, 1918, without the knowledge or consent of these interveners, procured from Dunzy a conveyance of all of his interests in the above land and funds; that prior to such conveyance Johnson and Kelly had full knowledge of the terms of the contract between Dunzy and interveners; that Dunzy refused to execute such conveyance, except upon condition that his grantees would assume his obligation to interveners and to pay them 50 per centum of said real and personal property as a part consideration for said conveyance; that thereupon Johnson, as the agent of Kelly and of the Black Panther Oil & Gas Company, made a written contract with Dunzy to assume his obligations to interveners under his contract with them; that said contract between Johnson and Dunzy was made for the benefit of interveners; that they elect to ratify and accept such contract; that the procurement and acceptance of the conveyance from Dunzy estop Johnson, Kelly, and the company from questioning the title of Dunzy; that, if such estoppel be absent, they are prepared to establish such title. The substance of the prayer is for one-half of the title to the land and one-half of the funds accumulated and prospective.

The company, November 11, 1918, answered the Dunzy intervention, denying the title of Dunzy, and claiming title in its lessors. It also claimed that Dunzy, through the above conveyance, had quieted its title. It, Johnson, and Kelly answered the McDougal intervention, the same date, denying title in Dunzy, demanding proof of the contract of employment between Dunzy and appellants, denying the lien, denying any interest of appellants to the land or funds, denying that Johnson or Kelly were agents of the company, admitting the contract between Dunzy and Johnson, but denying it was made for the company or for Kelly, or had been ratified by either, alleging that the

only arrangement between the company and Johnson or Kelly was that the company would not interfere with the endeavors of those two to quiet title in themselves, upon condition that such parties would protect its lease to the mineral rights in the land, admitting that Johnson had paid Dunzy $1,500 and made the contract claimed, but alleging that such payment and contract were not because of any title in Dunzy, whose claim was false, but to avoid the expense and annoyance of litigating such false claim, and deny all effect to the Johnson-Dunzy contract.

The court considered all interventions together, and on May 10, 1919, delivered an opinion reviewing the issues and evidence and stating its conclusions. A decree, containing findings of facts, was filed, in line with the opinion, on June 19, 1919. As to Dunzy, the court found that he had no interest in the title to the land or to any funds. In the opinion the court stated the issues as to this intervention as follows:

"The intervention of McDougal et al. was submitted to the court on two propositions:

"(1) A contract between Dunzy and the Black Panther Oil & Gas Company, made at the time of the conveyance by the former to the latter, by which contract the Black Panther Oil & Gas Company agreed to settle with the attorneys of Dunzy for their fee under their contract with him.

"(2) That Dunzy was the nearest of kin to Barney Thlocco through the line above stated, and therefore the heir entitled to the allotment under the Creek laws.

"Testimony on the second proposition was introduced by McDougal et al., as stated in oral argument and in their brief, simply to show the merits and good faith of the Dunzy claim. The interveners McDougal et al. rely for their recovery on the contract made for their benefit between Dunzy and the Black Panther Oil & Gas Company."

In discussing this intervention the court said:

"Counsel for these interveners contend that the meaning of this agreement (between Johnson and Dunzy) is that the Black Panther Oil & Gas Company concedes that Dunzy is the sole heir of Barney Thlocco, and that it hereby agrees to pay to his attorneys one-half of the value of the property in controversy. This view cannot be accepted. The testimony in behalf of Dunzy does not sustain his claim that he is next of kin under the Creek law. The agreement of J. Coody Johnson as the agent of the Black Panther Oil & Gas Company is a promise for the benefit of the interveners, McDougal et al. They now rely upon that promise, and not upon any statute of the state of Oklahoma. There is no contention that fraud was practiced upon Dunzy. He had the legal right to compromise his claim. Said interveners made their contract with him subject to that right."

The conclusion of the court is expressed thus:

"The interveners McDougal et al. are therefore entitled to 50 per cent. of the amount received by Dunzy in settlement of his claim. He received $1,500. The interveners, therefore, are entitled to $750."

The finding in the decree regarding this intervention was as follows:

"The court further finds that the firm of D. A. McDougal, L. O. Lytle, Sam Allen, W. C. Hodges, E. R. Jones, and E. H. Foster are entitled to the sum of $750, which is a charge against the Black Panther Oil & Gas Company, and they are hereby given judgment against the Black Panther Oil & Gas Company for said sum of money, and, when * * * the said D. A. Mc-

Dougal, L. O. Lytle, Sam Allen, W. C. Hodges, E. R. Jones and E. H. Foster have received the said $750 they shall be and are hereby barred from any further claim against Martha Jackson, Saber Jackson, or the Black Panther Oil & Gas Company."

The contract between Dunzy and McDougal et al. for legal services was not introduced in evidence; the testimony being that it had been lost before the hearing. The intervention pleads that Dunzy "agreed to pay them as their fee for their services, and for securing the desired relief one-half of all property, real and personal, which should be recovered in said action." The testimony on this point was that "for our services as attorneys in representing Jackson R. Dunzy we were to have and receive an undivided one-half of any money or land recovered in connection with the litigation. * * * The contract was contingent upon recovery." The contract was silent as to compensation in case of compromise or settlement by the client.

The contract between Dunzy and Johnson at the time Dunzy settled his claim is as follows:

"State of Oklahoma, Hughes County—ss.:

"Know all men by these presents, that I, J. Coody Johnson, representing Thomas Kelly in the matter of settling with the claimants to the estate of Barney Thlocco, now pending in the United States Court for the Eastern District of Oklahoma, at Muskogee, wherein the United States is plaintiff and Bessie Wildcat et al. are defendants, have in the matter of Jackson R. Dunzy (one of the defendants) agreed to settle with his attorney for his 50 per cent. of the contract entered into by said J. R. Dunzy and his attorney for the recovery of his portion of said estate, and that the sum of $1,500 this day paid J. R. Dunzy will not in any way be considered a part of his attorney's fees.

"In witness whereof, I have this 13th day of July, 1918, set my hand.

"[Signed] J. Coody Johnson."

At all times here involved there were statutes in Oklahoma providing for an attorney's lien, preserving it in case of settlement, and defining the measure for ascertaining the amount due the attorney, where the fee was contingent, and where the case was settled without his knowledge. Appellants contend, first, that they are entitled to recover under the Johnson contract, which was made for their benefit, an amount equal to 50 per centum of the value of the land and funds involved; second, that, at any rate, they are entitled to recover under the state statutes, and that the statute applicable is that enacted in 1919, which authorizes recovery for the above 50 per centum.

[1-3] It is true, as contended by appellants, that the statute is not an exclusive measure of recovery under circumstances such as here present, but that the interested parties may make any contract they may see fit regarding such compensation. The benefits of the statute are solely for the protection of the attorney, and he may therefore waive them or bargain them away. He cannot be deprived of them without his consent. An action under the statute would lie, if there had been no such contract at all. The Johnson contract is so far beneficial to appellants, and was so intended to be by the parties thereto, that it could be accepted by and enforced by them. They have expressly accepted it. This constitutes a waiver of the statutory rights. This intervention is based solely upon that contract. It may be that the results to appellants under the contract or under the statute would

be identical; but, when they accepted the contract and claimed its benefits, they likewise assumed its burdens and must be bound by all of its terms. What, then, are the terms of the contract upon which they sue?

[4] Appellants construe the contract as an express promise to pay 50 per centum of the value of the amount in controversy. We do not so read it. The intent of the contract is clearly expressed. It is that Dunzy should have $1,500 clean and clear of any claim to any part thereof from his attorneys, and that Johnson should secure this to him by assuming any legal claim they might have. This obligation Johnson undertook for his principals, this obligation was accepted by appellants, and this measures the rights and liabilities of the parties.

The contract itself does not define, in dollars, the precise limits of this obligation. This must be sought outside, and is to be found in the contract of employment, in the law governing such contracts existing at the time the obligation was assumed by Johnson, and in the other governing circumstances present. The contract of employment provided that appellants should share equally with Dunzy in any recovery he might secure. The governing law in existence at the time both of these contracts were made was section 249, Rev. Stat. Okl., 1910, which is as follows:

"249. *Compromise Without Notice to Attorney.* Should the party to any action or proposed action, whose interest is adverse to the client contracting with an attorney, settle or compromise the cause of action or claim wherein is involved any lien, as mentioned in the preceding sections hereof, without a satisfaction of the attorney's claim, such adverse party shall thereupon become liable to such attorney for the fee due him or to become due him under his contract of employment, to the extent of reasonable compensation for all services performed by him in connection with said action or contemplated suit. After judgment in any court of record, the attorney's lien herein provided for may be made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment."

This statute recognizes the right of settlement by the parties without notice to the attorneys, but protects the attorneys, "to the extent of a reasonable compensation for all services performed." Appellants claim that this statute is not applicable, because, after submission of this case, but before decree, that statute was amended by the act of 1919 (Laws 1919, c. 22). They base this claim upon the assertion that such statutes are purely remedial, and do not affect the rights of the parties. But this amendment was more than remedial; it established an entirely different basis of right and liability. Where the 1910 statute provided for a liability for a "reasonable compensation for all servces performed," the amendment substituted—

"a reasonable amount for not only the services actually rendered by such attorney, but for a sum, which it might be reasonably supposed, would have been earned by him, had he been permitted to complete his contract, and been successful in the action, and such attorney in order to recover need not establish that his client, if the case has [had] gone to trial, would have been successful in the action, but the fact of settlement shall be sufficient without other proof to establish that the party making the settlement was liable in the action. Should the contract be for a contingent fee and specify the amount for which action is to be filed, then the lien and cause of action, as aforesaid shall be for the amount contracted for, if fixed at a definite sum of money or

for the percentage of the amount or property sued for as mentioned in said contract where the fee is fixed on a percentage basis, not exceeding thirty-three and one-third per cent. of the amount sued on where the settlement is before a verdict or judgment."

[5-7] The basis of liability to an attorney, on the part of an adverse party who settles the controversy without notice to the attorney, is very different in these two statutes. The law recognizes that the results accomplished by an attorney for his client constitute a material element in the value of the legal services. 6 Corp. Juris, 752, note; Trimble v. K. C., etc., R. Co., 201 Mo. 372, 100 S. W. 7; Berry v. Davis, 34 Iowa, 594; Rutland v. Cobb, 32 La. Ann. 857. This 1919 statute introduces this important element, and treats the services as being entirely successful. In most cases this element would very materially increase the measure of compensation of the attorney. A litigant might be eager to settle a case and pay the attorney a reasonable compensation for the services he had rendered up to the date of settlement, but would not consider a settlement obligating him to pay such compensation on a basis of the complete success, in the litigation, of the opposing party. We cannot interpret this contract as being made on any basis other than the liability existing at the time the settlement was made. Therefore the 1910 statute must govern. As said above, that statute provides for reasonable compensation for services rendered up to that time. What amount would here constitute such reasonable compensation is a matter of fact.

Appellees claim that there is no evidence on that subject. We think otherwise. This court, as well as the trial court, may be considered experts upon the value of legal services. 6 Corp. Juris, 763, note 24, and citations. We have in the record sufficient testimony upon which to exercise that expert knowledge. The record reveals the character and importance of the litigation and the pleadings prepared by appellants. It also reveals that appellees, with knowledge that Dunzy had agreed to give one-half of the recovery to appellants, contracted to pay him $1,500 for his interest and to assume the compensation of his attorney. Therefore appellees cannot well claim that appellants' half interest was not worth, at that time, as much as they paid Dunzy for his half. There is no evidence indicating a greater value. The facts that the settlement was made at the inception of this Dunzy litigation, and that the court found the Dunzy claim unfounded, are circumstances strongly tending to forbid such greater value. We therefore think that the evidence sufficiently shows the value of these services to be $1,500.

[8] Appellants contend that appellees, because of their settlement with Dunzy, are estopped to deny the validity of the Dunzy claim. The law favors settlement of litigation, and the Oklahoma statute recognized this right of settlement, and protected the attorney up to the value of his services actually rendered. It was that obligation which appellees assumed, and they have been here sued upon that assumed obligation. Therefore the validity of Dunzy's claim is immaterial to the controversy now before the court. As was said in Oklahoma Coal Co. v. Hays (Okl.) 176 Pac. 931:

"The measure of liability under section 249 is different from that under chapter 4, Session Laws 1909, in that the recovery by the attorney is limited

to reasonable compensation for the services actually rendered, and the liability of the adverse litigant who compromises the suit or proposed action does not depend upon the amount due, or to become due in the event the litigation is prosecuted to a final determination, but the clear intent of the section is that liability attaches upon the compromise of the cause of action to the extent of a reasonable compensation for the services performed, and it was not necessary for plaintiff to show that his client would have recovered in the original proceeding. When he showed the contract of employment, the commencement of the proceedings, claim of lien, and the settlement and dismissal thereof, facts were presented which fixed a liability upon defendant, leaving only for consideration the amount which plaintiff was entitled to recover."

This reasoning also disposes of the claimed errors in the introduction of evidence concerning the Dunzy claim.

As to the continuance of the attorney lien given by the state statute, we think that, when appellants elected to sue upon the Johnson contract, they waived their statutory rights and remedies. This is true, even though that contract, as to amount of recovery, may have adopted the statutory standard.

The decree, in so far as it concerns these interveners, will be reversed, and the cause remanded, with instructions to enter a decree in favor of appellants and against appellees in the sum of $1,500 and their costs.

THOMAS, Sheriff, etc., et al. v. KANSAS CITY SOUTHERN RY. CO. et al.

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

No. 5489.

1. **Appeal and error ⟸175—Contentions not within issues not considered.**
   Contentions not within the issues made by the pleadings cannot be considered on appeal.
2. **Statutes ⟸47—Description of drainage district boundary line held sufficiently definite.**
   Acts Ark. 1915, p. 747, § 1, as amended by Acts 1917, p. 348, § 1, defining a portion of the boundary line of a drainage district as "thence north to the line of the hills which is entirely above overflow; thence northwesterly, following said line of said hills," etc., *held* sufficiently definite; "the line of the hills * * * entirely above overflow" clearly meaning the overflow line along the southern slope, and not that on the other side of the hills.
3. **Drains ⟸71—Traffic benefits held sufficient to authorize assessment of railroad property.**
   Traffic benefits resulting from the haul of increased croppage on lands within a drainage district, because of overflow protection, are sufficient to authorize assessment of railroad property for improvements within such district, though there were no direct benefits, by way of protecting the company's right of way from overflow.
4. **Drains ⟸67—Assessment for local improvements cannot stand, if palpably arbitrary or discriminatory.**
   While the Legislature has a wide discretion in declaring the existence and amount of benefits from local improvements, such benefits must be estimated on contiguous property according to some standard which will probably produce approximately correct results, and an assessment cannot stand, if palpably arbitrary or discriminatory.

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5. Constitutional law ⇐233—Drains ⇐67—Assessment against railroad property in drainage district held so discriminatory and arbitrary as to deny equal protection.

Where a railroad, in a drainage district comprising 12,000 acres, owned only 40.43 acres and 3.61 miles of track, along the extreme west and northwest boundaries, constructed mostly on high fills and a trestle above overflow, an assessment of half the cost of the improvement, which would increase land values at least $250,000, was so palpably discriminatory and arbitrary as to deny equal protection of the laws.

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

Suit by the Kansas City Southern Railway Company and another against Will F. Thomas, Sheriff and Collector, etc., and others. Decree for plaintiffs, and defendants appeal. Affirmed.

James D. Head, of Texarkana, Ark., for appellants.

James B. McDonough, of Ft. Smith, Ark., for appellees.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. This is a complaint by the Kansas City Southern Railway Company and the Texarkana & Ft. Smith Railway Company against Little River drainage and levee district No. 1 (of Sevier county, Ark.), Will F. Thomas (sheriff and collector of Sevier county), E. W. Beeson, G. A. Henry, and Frank Ethridge (directors of the above district). The purpose of the action is to enjoin the collection of certain assessments made against the property of the railway companies located within the district. The assessments were for drainage and levee purposes of the district. The district was created by an act of the Legislature of Arkansas. Upon final hearing a permanent injunction was decreed, from which the defendants appeal.

The court found all issues and contentions adverse to complainants, except one, and partially as to another. The court held, as to the first one, that a higher rate of taxation was imposed upon the railways than upon other property owners, by reason of the fact that, while other owners were taxed upon the basis of the assessed value of land lying within the district, the railways were taxed, in addition, upon the value of their franchises and other intangibles. In reaching this conclusion the court felt bound by the decision of this court in Bush v. Branson, 248 Fed. 377, 160 C. C. A. 387. As to the other, the court held that there were no direct benefits to the property of the railways, except such as might arise from increase of traffic through increased production upon the lands protected by the district. Appellants contest these two conclusions, contending that the franchise value is not taxed, and that there were other and direct benefits to the railways. The court correctly construed and applied the above decision of this court in the Bush Case, but since the decree in this case the Supreme Court has reversed this court in the Bush Case (251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215) on this point. Therefore the ground upon which the court based its decree is insufficient.

[1] Appellees contend, however, that there were other sufficient grounds for the injunction decree, and that this court is not bound by the findings of the trial court adverse to them, but should anew examine those grounds, and, if any are found to be sufficient, should uphold the decree. They contend (a) that the district is illegal and void, because of being uncertain and indefinite in the definition of its boundaries; (b) that the district is void, and the assessments illegal, because there are no directors therefor designated by the act of 1917; (c) that both the acts of 1915 and 1917 forming the district are invalid, because no notice nor opportunity for hearing was afforded the owners of land included therein; (d) that the land of appellees is in no manner benefited; (e) that the assessments are wholely arbitrary, unjust, illegal, and void; (f) that, as to appellees, the above two acts are an arbitrary abuse of the taxing power, amounting to confiscation of appellees' property; (g) that the assessments were made without notice to appellees. Of the above contentions, three—(b), (c), and (g)—are not within the issues made by the pleadings, and therefore cannot be considered.

[2] The contention that the boundary line of the district is uncertain and indefinite refers only to the northern line of the district. The legislative act of 1915 (Act 186, § 1) fixed this line from the northeast corner of the district as "west to the line where the lands subject to overflow join the hills or highlands." Appellees expressly admit that this would have established "a definite and fixed line," which "could easily be laid out." The amendatory act of 1917 (Act 79, § 1), however, continued the northern part of the east line of the district, and defined that portion of the boundary and the northern line as "thence north to the line of the hills, which is entirely above overflow; thence northwesterly, following said line of said hills, to the north line of section 2, township 10 south, range 32 west; thence west to Little river." The claim of appellees is that the description "north to the line of hills" designated no point, because there was no line of hills, and that the further description, requiring the north line to "follow said line of said hills," designated no line at all, or any basis for determining any line, because the "line of said hills" might mean any of several things, including the foot of the hills on either side, or the crest of the hills. The evidence abundantly establishes, and appellees' counsel admit, that there was a rise in ground northerly or northeasterly. This would sufficiently identify what the Legislature meant by "hills." The point designated as the northeastern corner of the district, as the point where the eastern line extended north would reach the hills where they were "entirely above overflow," was ascertainable from this description, and was therefore sufficiently definite.

As to that part of the description defining the course of the northerly line, the requirement is that it should follow "said line of said hills." The "said line" is "the line of the hills, which is entirely above overflow." There is no doubt that this meant the overflow line along the southern slope of the hills. The purpose of the act was to protect lands subject to overflow, and to place the burden of that protection upon the lands so benefited, and no interpretation of the language

used is justified, nor can any reasonable doubt be entertained, which would place the line at the overflow line on the other side of the hills. Appellees argue that the uncertainty of the description is established by the facts that this line of hills is broken in several places by streams, and that the engineers, in laying this northerly line of the district, did not follow these breaks northerly along the overflow line, but struck directly across these small valleys. This action of the engineers might be pertinent to the inquiry as to whether they had properly followed or laid down the line described in the act, but it is no evidence of any uncertainty in the description in the act. We think the description sufficiently definite.

[3] The contention that appellees' land was not benefited is of more substance. The court found that there were no direct benefits by way of protecting the rights of way of appellees from overflow by flood waters, but found that there would be resulting traffic benefits through haul of the increased croppage on the lands within the district because of overflow protection. It also determined that such traffic benefit was sufficient to authorize assessment, citing St. Louis & San Francisco Railroad Co. v. Bridge District, 113 Ark. 496, 168 S. W. 1066. The Supreme Court of the United States has expressly decided this traffic benefit as one to be taken in account, when it said in the case of Bush v. Branson, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215:

"To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads."

The evidence is that at present only about 10 per cent. of the acreage within the district is tilled or tillable because of water, but that the wild land is rich, and would be cultivated, if protected from overflow; that appellees were the only railroads serving this locality. There is the further consideration, upheld in the Bush Case, 251 U. S. 182, at page 190, 40 Sup. Ct. 113, 64 L. Ed. 215, that the Legislature, by inclusion of appellees' property within the district, has declared that it is benefited. Under the Bush opinion, in the Supreme Court, this would tend to establish the existence of traffic benefits, such as would justify assessment for district purposes.

[4] There remains the contention that the assessment of benefits made is arbitrary, unjust, illegal, and void. This is based on the claim that the basis of assessment is such as to result in the property of appellees bearing more than one-half of the burden of the improvements, while such property is in no wise benefited thereby. In view of what has been said above, it is clear that appellees are benefited; but this does not preclude them from claiming that the amount, or relative proportion, of assessment made is void. While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such "benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results." Kansas City Southern Ry. Co. v. Road Improvement Dist., 256 U. S. —, 41 Sup. Ct.

604, 65 L. Ed. ——, decided by the Supreme Court of the United States, June 6, 1921. Such assessment cannot stand, if it is "palpably arbitrary," or if it is palpably discriminatory. Kansas City Southern Ry. Co. v. Road Improvement Dist., supra; Houck v. Little River Drainage Dist., 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523, 526, 1239). Therefore the test of law to be applied to the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory.

[5] The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the Legislature here took them to be identical carries no more force than if some other basis of value had been selected. Examining the evidence, the result is as follows: The district is purely rural. It comprises (as amended by the act of 1917) approximately 12,000 acres. About 10 per centum of this acreage is now cultivated; the balance being rich wild land, untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from $8 to $40 per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle, and is above overflow. The only benefit to appellees from this improvement would be through increased traffic, because of any increased shipments resulting from greater cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000 to $75,000. The property of appellees would pay about half of this cost.

The showing thus made reveals this result, to wit: That the cost of an expensive improvement, which will increase the value of about 12,000 acres of land at least a quarter of a million dollars, is to be half paid by appellees, which have within a rural locality 3.61 miles of track, and which are benefited by a problematical increase of traffic through the greater production from the above benefited acreage. The following statement in the opinion in Kansas City Southern Ry. Co.

v. Road Improvement Dist., supra, seems directly applicable to these facts:

"It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The facts of this case clearly reveal an instance of a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law," such as is condemned in the cases cited above.

The decree must be and is affirmed.

NEW AMSTERDAM CASUALTY CO. v. IOWA STATE BANK.

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

No. 5667.

1. **Insurance ⟸425—Policy held not to cover robbery from vault already open.**

   A policy insuring against loss by robbery from within the general inclosure reserved for the use of officers or employees, from an officer while transferring money from a vault outside the inclosure to the inclosure, or by compelling an officer to unlock or open the safe or vault, does not cover money taken by robbers from the safe or vault which had been previously opened preparatory to taking the money to the inclosure for the day's business, since the inclosure within the first clause cannot, in view of the second clause, include the vault.

2. **Courts ⟸96(1)—Decision of Court of Appeals for another circuit should be followed unless different conclusions required.**

   The decision of the Court of Appeals for another circuit upon the exact question is ordinarily followed unless there are other circumstances requiring a different conclusion.

3. **Insurance ⟸425—Clause specifying amount of insurance against certain risks held not to enlarge provisions defining loss.**

   Where a theft insurance policy had specifically defined the causes of loss insured against, a subsequent clause stating that the insurance attached in the amount of $20,000 to loss by robbery does not make the policy cover all loss by robbery, since that clause was made merely to limit the amount insured as to each hazard.

4. **Insurance ⟸645(3)—Iowa statute does not prevent defense under general denial that loss was not covered.**

   Code Iowa 1897, §§ 3626, 3628, providing that an answer to an allegation of performance of all conditions precedent is not sufficient if it controverts by mere contradictions, but that it must specifically state the facts relied on, and section 3621, requiring a party who claims a right founded on an exception to state such exception particularly, do not preclude insurer whose answer was in effect a general denial from relying on the claim that the loss was not one covered by the policy.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by the Iowa State Bank against the New Amsterdam Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Oscar Strauss, of Des Moines, Iowa (Brockett, Strauss & Blake, of Des Moines, Iowa, on the brief), for plaintiff in error.

Charles Hutchinson, of Des Moines, Iowa (Clark, Byers & Hutchinson, of Des Moines, Iowa, on the brief), for defendant in error.

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

MUNGER, District Judge. Whether or not the facts admitted or shown in this case justified a directed verdict in favor of the plaintiff bank is the question presented. By means of a robbery, the bank lost a large amount of money and securities taken from the unlocked safe kept within an unlocked vault. This action was brought upon an insurance policy which had been issued to the bank by the plaintiff in error. The insurer agreed to indemnify the bank:

"A. For all loss of money and securities in consequence of the felonious abstraction of the same during the day or night from the safe or safes (or from the vault, if contents of same are specifically insured) after said safe or safes or vaults have been duly closed and locked, described in said schedule, while located in said banking room, also described in said schedule, hereinafter called the premises, by any person or persons after forcible entry into such safe or safes or vault, or by any accomplice of such person or persons. In the event that the said safe or safes or vault are not locked by time lock, the company shall not be liable for loss of said money and securities feloniously abstracted therefrom unless said forcible entry is made therein by the use of tools, explosives, chemicals, or electricity directly thereupon.

"B. For all loss by damage to said money and securities and to said safe or safes or vault described in said schedule, or to the premises, or to the office furniture and fixtures therein, caused by such person or persons while making or attempting to make such entry into said premises, vault, safe, or safes.

"C. For all loss by robbery (commonly known as 'holdup') of money and securities: (1) From within the banking inclosure reserved for the use of the officers or office employés of the assured, while at least one officer or office employé of the assured is present and regularly at work in the premises: (2) From an officer or office employé of the assured while transferring the same during the assured's regular office hours, either way between the said banking inclosures and any safe or vault described in the schedule as located in the premises, outside of the said inclosures: (3) from within that part of the safe or safes or vault insured hereunder, caused by robbers during the day or night, by compelling under the threat of personal violence an officer or employé of the assured to unlock and open the safe or safes or vault."

The bank occupied a rectangular room fronting on Locust street in Des Moines, Iowa. A door opened into it from the street, and led into the portion of the room known as the lobby, or the portion of it commonly used by the public in transacting business with the officers and employés. The lobby was a little longer than half the length of the banking room. Opposite this lobby was: First, an office room containing several desks usually occupied by the chief officers of the bank, and separated from the lobby by a gate and a counter;

and, second, three latticed wire enclosures, commonly called cages, in which the tellers and others worked. These cages faced the lobby and had the usual wicket gates in front, and they opened in the rear into a narrow passageway leading from the office in front, and passing in the rear of the cages to the rear portion of the banking room. In this rear portion was a counter and partition adjoining the last cage and which separated the lobby from the room. There was also a vault in which there was a safe and a money chest. Near the vault a small room was partitioned off and used as a lavatory. The vault had a door upon which there was a combination and a time lock, and the chest door had a combination lock. The robbers were admitted to the lobby on the statement that they wished to deposit some money. It was a little before the regular time for opening the bank, but the assistant cashier and two other employés were already at work. The time lock on the safe had yielded and the cashier had worked the combination lock and opened the safe and had also opened the chest and had taken to the cages a portion of the money and securities to be kept there for ready use. The robbers suddenly confronted the employés with drawn revolvers and forced them to march behind the cages into the rear room and vault and then into the lavatory, where they were locked in. The robbers took a large amount of money from the safe, some from the chest, and some from the trays in the cages, and escaped by way of the door into the street. Upon these facts, is the loss covered by the policy of insurance? No particular question is made as to the money taken from the cages, but the amount so taken is not shown. The question that is argued is the liability for the money taken from the safe or chest within the vault.

[1] The language of clause C (1), which has been quoted, is relied upon by the insured as indemnifying it against this loss, as it interprets the word "inclosure" in the clause defining a robbery "from within the banking inclosure reserved for the use of the officers or office employés of the assured" to mean all that part of the banking room, except the lobby used by the bank's customers. In this view the vault is considered as a part of the inclosure. The first clause of paragraph C, if it stood alone, might be thus construed, but such a construction makes the following clause of this policy lead to an absurd result. The words "the premises" in that clause had already been defined in clause A as the banking room described in the schedule, and the schedule defined the location of the building at 603 Locust street in Des Moines, Iowa. Clause C (2) therefore has the same effect as if it read as follows:

"From an officer or office employé of the assured while transferring money or securities, during the assured's regular office hours, either way between the portions of the banking room (including the vault) which were not occupied by the lobby and any safe or vault which is described in the schedule as located in the banking room at 603 Locust street, and is also located in the lobby."

There was no safe nor vault located in the lobby, and such a location for a bank's safe or vault is unusual and perhaps unknown, and would be exceedingly inconvenient as well as dangerous to the safe-

ty of its contents while being transferred to and from it. This construction also impairs the ordinary meaning and scope of the words used in clause C (3) because if clause C (1) insured against any robbery from within the vault, or the safe or chest within the vault provided one or more of the bank's officers or office employés was present and regularly at work, it was needless to add in clause C (3) a more particular description of one kind of such robbery—that is, a robbery by compelling an officer or employé, at some time when an officer or employé was present and regularly at work, to unlock and open the safe or safes or vault.

[2] In construing a policy of insurance containing the same provisions which have been quoted, the Court of Appeals for the Fifth Circuit in the case of Franklin State Bank v. Maryland Casualty Co., 256 Fed. 356, 359, 361, 167 C. C. A. 526, decided, upon full consideration, that the insurance covers losses from safes by robbery only when an officer or employé is forcibly compelled to unlock and open it. The same court in the case of Mer Rouge State Bank v. Employers' Assur. Co., 270 Fed. 567, held that such insurance covered a robbery of securities from an unlocked safe provided the safe was within a locked vault, when the bank officer was forcibly compelled to unlock the vault. The decision of a Court of Appeals for another circuit upon the exact question is ordinarily followed, unless there are exceptional circumstances requiring a different conclusion. Bright v. State of Arkansas, 249 Fed. 950, 952, 162 C. C. A. 148; United States v. F. A. Marsily & Co., 165 Fed. 186, 187, 91 C. C. A. 220; Conant v. Kinney (C. C.) 162 Fed. 581; Kinney v. Conant, 166 Fed. 720, 721, 92 C. C. A. 410; Erie R. Co. v. Russell, 183 Fed. 722, 725, 106 C. C. A. 160. The difficulties arising from a contrary decision, which have been heretofore referred to, have led to concurrence with the conclusion announced in the case of Franklin State Bank v. Maryland Casualty Co.

[3] The policy in suit, after stating the liability of the insurer, as has been stated, made the liability subject to certain special agreements, and then stated that "the insurance provided by this policy" attached specifically:

"(a) In amount of $20,000 to money and securities in safe No. 1. * * * (e) In amount of $20,000 to loss by robbery (commonly known as 'holdup')."

The insured claims that this was insurance against the loss of money and securities from the safe, whether locked or unlocked, but this ignores the fact that it was only the insurance provided by the policy, and which had been defined and limited as heretofore stated, which attached to the losses thus specially singled out. This specification was made in order to define and limit the amount insured as to each of these classes of hazards, but was not made to contradict or qualify the terms and limitations of the risks covered in prior portions of the policy.

[4] The insured also claims that sections 3626 and 3628 of the Iowa Code of 1897, which state that a defendant's answer to a plaintiff's pleading averring the performance of all conditions precedent in a contract sued upon is not sufficient if it controverts such obligations

by mere contradictions, but that the defendant must specifically state the facts relied upon, and that section 3621, which provides that, if a party claims a right founded on an exception of any kind, he shall state such exception particularly in his pleading, prevent the insurer from relying on any of the special agreements or conditions in this policy, because the answer was in effect a general denial. The answer did not rely upon the failure of the insured to perform any condition precedent, nor did it claim any right founded upon an exception, but claimed that the policy of insurance as pleaded by the insured did not cover a risk arising from the facts which have been stated, and a general denial properly controverted the insured's allegation, that it had sustained loss by robbery from within the banking inclosure.

The court should have directed a verdict in favor of the insurer as to the liability for money and securities taken from within the vault, safe and chest.

The judgment will be reversed, and a new trial ordered.

STONE, Circuit Judge (dissenting). It is here urged that the loss was not within the terms of the bond. The loss occurred just before bank opening time in the morning. The robbers, under pretense of desiring to make a deposit, gained admission to the building while three officers or employés were transferring funds from a safe in a vault to the tellers' cages and were otherwise preparing for the day's business. The robbers, with pistols, intimidated the bank employés and robbed the safe. The safe was in a vault which opened into the inclosure reserved for employés and officers. The policy covered robbery (by hold-up) of money and securities:

"(1) From within the banking inclosure reserved for the use of the officers or office employés of the assured, while at least one officer or office employé of the assured is present and regularly at work in the premises; (2) from an officer or office employé of the assured while transferring the same during the assured's regular office hours, either way between the said banking inclosures and any safe or vault described in the schedule as located in the premises outside of the said inclosures; (3) from within that part of the safe or safes or vault insured hereunder, caused by robbers during the day or night, by compelling under threat of personal violence an officer or employé of the assured to unlock and open the safe or safes or vault."

It is claimed that the safe, being in the vault, was not "within the banking inclosure" as used in above quotation; that the employés were not "regularly at work in the premises," and that the policy does not cover robbery from an unlocked safe.

I think the vault was clearly within the meaning of "banking enclosure reserved for the use of officers or office employés of the Assured." It was a place opening only into that portion from which the public was excluded and in which the officers and employés worked and it was used by them in the ordinary work of the bank. The safe being within the vault was therefore within the "banking inclosure."

I think there is no merit to the second point as the employés were regularly at work just before banking hours doing those things necessary and usual in preparation for the business of the day.

The third contention seems unsound to me. The provision as to loss within the banking inclosure naturally covers all money and securities within that inclosure, and I find no limitation, within that clause or elsewhere in the bond, which would except money or securities within that inclosure because they were in an open safe therein. The case of Franklin State Bank v. Maryland Casualty Co. (5th Cir.) 256 Fed. 356, 167 C. C. A. 526, is squarely to the contrary, but it is neither controlling nor convincing. There was no such binding obligation on the trial court to follow the Franklin Bank decision that its failure to do so was reversible error.

I think the judgment should be affirmed.

THE WAR POINTER.
THE STORTIND.

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

No. 1886.

1. **Collision ⇐50—Vessel whose position was in rear of convoy held overtaking vessel.**

   A vessel, which had started in the rear of a large convoy, and which at the time of the collision had come nearly, if not quite, abeam of a vessel ahead, was an overtaking vessel, bound to observe the course of the other, and to keep away from it, and her lookout was under the duty to keep the other vessel under vigilant observation for every appearance of unsafe approach.

2. **Collision ⇐77—Lookout of an overtaking vessel held at fault for failing to keep close observation.**

   The lookout of an overtaking vessel in a large convoy, which was proceeding at night without lights, *held* at fault for failing to keep under close observation another vessel of the convoy, which was being overtaken, so that no warning of the close approach of the vessels was given in time to avoid the collision.

3. **Collision ⇐54—Both vessels held at fault in attempt to pass in convoy.**

   Where a large number of vessels were traveling at night, without lights, in a convoy in which each had been assigned its place and given the same course and speed, it was a fault for a vessel in the rear to attempt to pass a vessel ahead, except for cogent and special reasons, and the vessel ahead *held* at fault for deviation of her course from that fixed for the convoy.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel in admiralty by R. Erichsen, as master of the Norwegian steamer Stortind, against the British steamship War Pointer with cross-libel by Arthur W. Melling, as master and claimant of the British steamer War Pointer, against the Stortind. From a decree against the War Pointer for all the damages resulting from the collision (264 Fed. 1013), the master and claimant of that vessel appeals. Decree modified, to charge both vessels equally with the loss.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Edward R. Baird, Jr., of Norfolk, Va., and Warner C. Payne, of New York City (Duncan & Mount, of New York City, and Baird, White & Lanning, of Norfolk, Va., on the brief), for appellee.

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

WOODS, Circuit Judge. On July 5, 1918, a convoy of about 30 ships sailed in a formation of nine columns from Cape Henry for European ports. The steamer Stortind, 300 feet long, 40 feet beam, net register 2,667 tons, was the last ship in the seventh column. The steamer War Pointer, 413 feet long, 52 feet beam, net register 3,201 tons, was the last ship in the fifth column. About 12:05 midnight on July 6th, about 50 miles out, the two vessels collided. Upon evidence taken entirely by deposition in the libel of the Stortind and cross-libel of the War Pointer, the District Court held the latter vessel solely responsible and charged her with the entire loss.

The master of the War Pointer testified that at midnight the Stortind was sailing on apparently parallel course about four points on his starboard bow; that without signal the Stortind suddenly changed her course to port and came upon the War Pointer so rapidly that stopping her engines and changing her helm were ineffectual to prevent collision. Every other officer of the War Pointer sworn testified to this sudden and reckless change of course by the Stortind, some of them saying she was only 250 to 300 feet from the War Pointer at the time.

The master and every officer of the Stortind who was a witness testified that the War Pointer, overtaking the Stortind on an apparently parallel course, at 12 o'clock, was about abeam on the Stortind's port side, about 100 fathoms distant; that the War Pointer in that position suddenly changed her course and ran into the Stortind, despite every effort of the Stortind to get out of the way. Thus the officers of each vessel account for the collision by attributing to the other vessel a sudden, reckless and useless change of course, when the disastrous result ought to have been apparent. If the testimony of the officers of one ship had no more corroboration than that of the officers of the other, it would be hardly possible for two lines of evidence to result in more complete cancellation. Acceptance of one in preference to the other without corroboration would be basing a judicial decree on little more than conjecture that the testimony of the officers of one ship, attributing to the officers of the other recklessness and stupidity, is more probable than like testimony on the other side. Difficult as is the explanation of the collision, we must try to find it in the testimony of disinterested witnesses and the admissions of the officers of both vessels.

[1] Capt. Hart, master of the steamer Potomac, one of the vessels of the convoy, testified that the War Pointer was astern of all the ships and that he thought she was acting as a stern cruiser. This testimony is in a degree confirmed by the evidence of the master of the War Pointer that he was acting as second vice commodore of the convoy. On this testimony we find that the War Pointer, having start-

ed behind the other ships of the convoy, must have been at the time of the collision an overtaking vessel, nearly, if not quite, abeam of the Stortind. As an overtaking vessel she was bound to observe the course of the Stortind and keep away from it. To this end her lookout was under the duty to keep the Stortind under vigilant observation for every appearance of unsafe approach. This duty was the more imperative, because the vessels in the convoy were sailing without lights and necessarily near each other.

[2] The lookout on the War Pointer testified that just before the collision he thought the Stortind was only two of her lengths distant, and he asked the lookout relieving him if she was not getting rather close. Yet neither lookout made any report, or made any effort to warn the officer in charge, or did anything to prevent the collision. Possibly it was then too late to avert it; but the burden was on the War Pointer to show that this neglect of the lookouts did not contribute to the accident. The Patchogue, 250 Fed. 850, 163 C. C. A. 164; The Transfer, 243 Fed. 174, 156 C. C. A. 40. This court has applied the rule in The Brandon (C. C. A.) 273 Fed. 176, filed April 2, 1921.

[3] Another fault of the War Pointer was in attempting to pass the Stortind. To prevent collision, the place of each vessel and the course and speed of all were fixed by order. While the orders as to these matters could not be carried out with absolute accuracy, a vessel placed behind all others should not have attempted to pass any other, except for cogent and special reasons; and no reason appears. On the testimony of the master of the Potomac and that of its own lookout, the War Pointer must be held at fault.

Did any fault as to the course of either vessel contribute to the collision? It is hardly credible that either vessel suddenly changed her course towards the other in the face of the obvious danger of collision. The night was calm, but dark, and the vessels, though visible, were without lights. Accustomed to navigation at night by observation of lights on other vessels rather than of the vessels themselves, the officers of each ship were doubtless somewhat in doubt, if not confused, as to the distance and course of the other The reasonable conclusion deduced from the evidence is that by error in the navigation of one of the vessels they got on converging courses a short time before the accident, and got too near each other before the officers of either realized the proximity. The important inquiry is: What vessel was responsible for the change to a converging course? The testimony of the officers of the War Pointer was that the course prescribed for the convoy and sailed by their ship was east by south. The disinterested witness Tamlin, third officer of the British Baron, another vessel of the convoy, testified specifically from his log that the course ordered was east one-quarter south. The memorandum produced by Hart, master of the Potomac, showed the course actually made by his vessel was east standard. This testimony clearly shows that Erichsen, master of the Stortind, erred in making the surprising statement that no course was ordered, except to steer after the leading vessel. He testified that he was actually steering east by north, standard compass.

The evidence recited is convincing that the course actually ordered was a little south of east. Doubtless it was necessary for each ship to vary slightly the course from time to time in following the ship ahead or keeping out of the way of other ships. But we can find no reason for the Stortind sailing east by north, instead of the prescribed course east by south, or east one-quarter south. There is no dispute that there was a ship about a quarter of a mile ahead with a stern light. The evidence does not warrant the conclusion that this was the leading cruiser, which was probably much farther ahead. On the contrary, the evidence of the officers of both vessels was to the effect that the stern light was that of a steamer in the convoy. The position of the vessel and all the circumstances support the uncontradicted testimony of the third officer of the War Pointer that it was an oil steamer, which had been in the sixth column between the War Pointer and the Stortind, and had passed beyond them.

According to the testimony of the master of the Stortind, when he came out of the chart room two or three minutes before the collision, he saw this stern light one point on the starboard bow. Since the tank steamer was between the Stortind and War Pointer, and on port side of the Stortind, the light would have been on the port bow, unless the Stortind had changed her course at some time before the collision. If the light had been on the leading cruiser, whose station was near the center in advance of the convoy and on the port side of the Stortind, the appearance of the light on the starboard bow of the Stortind would be no less strong evidence that she had changed her course to port. The photographs of the vessels taken after the collision tend strongly to support the conclusion that the Stortind ran into the War Pointer. The conclusion follows that the Stortind was guilty of altering her course toward the War Pointer without notice, while the War Pointer was in sight on a parallel course, and that the change was one of the immediate causes of the accident.

The facts do not sustain criticism of the navigation of either vessel after the emergency arose. The case is one of unusual difficulty, and we can only announce the conclusions which seem to us required by the weight of the evidence. We find both vessels were at fault, and the decree will be modified, to charge them equally with the resulting loss.

Modified.

MILLER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1921.)
No. 1899.

1. **Bankruptcy ⇐140(3)—Borrowed money should have been scheduled and turned over to trustee, notwithstanding agreement with lender as to use.**
Where a bankrupt had borrowed money on a mortgage, and agreed in writing with the lender that it would be used to build a house on the mortgaged land, but there was no agreement to hold it as trustee for the

lender, the lender had no claim to the money until he exhausted the land covered by his mortgage, and it was the duty of the bankrupt to include it in his schedule and turn it over to the trustee in bankruptcy.

2. **Bankruptcy ⊜496—Conspiracy ⊜48—On trial for conspiracy to conceal assets, and aiding and abetting, evidence held to make question for the jury.**

On the trial of a bankrupt's attorney for conspiring with the bankrupt to conceal his assets from the trustee, and for aiding and abetting the bankrupt to conceal his assets, evidence *held* sufficient to justify the court's refusal to direct a verdict of acquittal.

3. **Criminal law ⊜478(2)—Witness properly permitted to express opinion as to handwriting.**

A witness, who testified that he had had some occasion to examine handwritings, and had made some study of it, and sometimes had been called on to make comparisons of different handwritings, *held* properly permitted to express an opinion that an alleged change in a deposit slip was in defendant's handwriting.

4. **Criminal law ⊜155—Prosecution for conspiracy not barred, when overt acts committed within the period of limitation.**

Conceding that the limitation of one year prescribed in the bankruptcy statute is applicable to a conspiracy to commit an offense created by that statute, the prosecution was not barred, where there was evidence of overt acts within 12 months before the finding of the indictment.

5. **Conspiracy ⊜40—Conspirator remains such until some affirmative act of withdrawal.**

One who enters into an unlawful conspiracy is held to remain in it until he does some affirmative act of withdrawal.

6. **Conspiracy ⊜40—Denial of existence of conspiracy did not constitute withdrawal therefrom.**

The testimony of a bankrupt's attorney before the referee in bankruptcy, in which he denied the existence of a conspiracy to conceal assets from the bankrupt, was not a withdrawal from the conspiracy.

7. **Criminal law ⊜493—Where testimony of witness showed essential facts, his opinion that there was no conspiracy did not prevent conviction.**

Where a bankrupt testified to every fact necessary to convict him and his attorney of conspiracy to conceal assets, his expressed opinion that what was done did not constitute concealment and conspiracy did not prevent a conviction of the attorney.

8. **Criminal law ⊜815(5)—Instruction as to effect of action on honest advice of counsel properly refused.**

On the trial of a bankrupt's attorney for conspiracy to conceal assets, an instruction that action of the bankrupt on the advice of counsel honestly given would exonerate him and defeat the charge of conspiracy was properly refused, because it did not express the additional requisite that the bankrupt must have honestly taken the advice and acted upon it.

9. **Conspiracy ⊜38—Criminal law ⊜32—Advice of counsel not generally a defense; advice of counsel and good faith held a defense.**

As a general rule, advice of counsel is no excuse for violation of the law; but where the question is one of intent, as in the case of a conspiracy, the advice and good faith of the defendant is a defense to be considered by the jury.

10. **Criminal law ⊜829(1)—Not error to refuse to repeat instructions already given.**

Where the court had already given an instruction included in the requests submitted by defendant, it was not error to refuse to repeat it.

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11. Criminal law ⇐814(5)—Instruction properly refused as inapplicable, in prosecution for conspiracy with bankrupt to conceal assets, etc.

On a trial for conspiring with a bankrupt to conceal assets from the trustee, and for aiding and abetting the concealment, an instruction that the undisputed evidence showed the trustee had knowledge of the funds charged to have been concealed, and that no discharge had been granted, and that under such facts the indictment must fall and the verdict be not guilty, was properly refused as being inapplicable, where the trustee denied knowledge that the bankrupt was the owner of the fund, and there was no evidence to the contrary.

12. Criminal law ⇐622(2), 968(1)—Conspirators may be separately tried, and judgment need not be arrested until second defendant is tried.

One of two defendants charged with conspiracy may be separately tried, and the judgment need not be arrested until the other is tried.

13. Conspiracy ⇐23—Conspirator cannot be convicted, if other conspirator acquitted or indictment nol. pros'd.

If one of two defendants charged with conspiracy is acquitted, the other must also be acquitted; and if the charge against one be nol. pros'd, the other cannot afterwards be convicted.

In Error to the District Court of the United States for the Western District of South Carolina, at Rock Hill; Henry H. Watkins, Judge.

A. H. Miller was convicted of conspiracy to conceal a bankrupt's assets, and aiding, abetting, and counseling the commission of the offense of concealment, and he brings error. Affirmed.

The witness John T. Roddey testified that he had had some occasion to examine handwritings; that he had not had a great deal of experience, and had not given much attention to the matter, and had had no experience of examining handwritings, except for his own satisfaction; that for his own satisfaction he had studied books on the subject, and read two or three articles; that he looked into the subject enough to enable him to identify different handwritings; that he did not consider himself an expert, but might be called an expert, but not of the first class; that he could identify handwritings as well as the ordinary man, and probably a little better; and that sometimes, when he happened to be around the bank he would be called on to make comparisons of different handwritings.

Defendant requested an instruction that the undisputed evidence showed that the trustee in bankruptcy had knowledge of the funds charged to have been concealed before his appointment and subsequent thereto, and that no discharge had been granted the bankrupt, and that under such fact the indictment must fall and the verdict be not guilty.

John Gary Evans, of Spartanburg, S. C., and P. A. Bonham, of Greenville, S. C. (C. C. Wyche, of Spartanburg, S. C., on the brief), for plaintiff in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (J. E. Marshall, Asst. U. S. Atty., of Greenville, S. C., on the brief), for the United States.

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

WOODS, Circuit Judge. The first count of the indictment, found October 16, 1920, charges M. L. Hayes and A. H. Miller with conspiracy knowingly and fraudulently to conceal from the trustee of the bankrupt, Hayes, $2,500 in money, the property of Hayes. The specific overt acts charged were the concealment by Hayes, the delivery of the

money by Hayes, and its reception by Miller with the fraudulent intention of both to convert it to their own use, and the giving of false testimony by Miller before the referee in bankruptcy with respect to the transaction. The second count charges the bankrupt, Hayes, with fraudulent concealment of the money from the trustee, and Miller with aiding, abetting, and counseling him in the commission of the crime.

Miller was tried separately and convicted on both counts. Error is assigned in the refusal to direct a verdict of acquittal, in the admission of testimony, in the instructions to the jury, and in refusal to arrest the judgment. Hayes was used as a witness by the government, and Miller testified on his own behalf. On vital points their testimony was in direct conflict.

[1, 2] Miller was the attorney who made out and filed Hayes' petition in bankruptcy on September 2, 1919. As to the source of the fund, Hayes testified that before the bankruptcy he borrowed about $6,000 from one Cudd on his bond and mortgage, and deposited the money in the First National Bank of Gaffney. He agreed in writing with Cudd that the money should be used in building a house, and the account was kept in the name of "M. L. Hayes, Trustee." No written agreement with Cudd was introduced, and there is nothing to show that Cudd retained any control of the fund, or that Hayes had agreed to hold it as trustee for Cudd. Assuming that Hayes had made a valid promise to expend the money in the building of a house on the mortgaged land, the house, if built, would have been his property, subject to the mortgage. It was obvious, when bankruptcy intervened, that the money was the property of Hayes, and that Cudd would have no claim to it, in law or equity, until he had exhausted the land covered by his mortgage. The duty of Hayes to include it in his schedule and turn it over to the trustee in bankruptcy was therefore perfectly clear to the most ordinary understanding. The testimony of Hayes is undisputed that there was no special reason for depositing the money as trustee, that he considered the money his, and that he used it as he pleased. The proof was that Cudd has never made any claim to the money.

Hayes gives this account of the dealings of himself and Miller:

"I employed Mr. A. H. Miller as my attorney when I went into bankruptcy. I talked the matter over on Sunday before I filed the petition in bankruptcy. At that time I had less than $3,000 in the First National Bank. I did not make return of this money in my schedule. Mr. Miller asked me what money I had. I told him what I had, and how I came in possession of it, and he said it would not be necessary to give that in my schedule. At that time my wife was sick in the hospital, and I needed some money to pay her bills and expenses, and that is why I did not give it in. I was advised by Mr. Miller not to. He advised me to give him the money, and I did. I turned over to him $2,500. I gave it to him by check. Mr. Miller assisted me to go into bankruptcy. He was to take the money, and give it to me along as I needed it to pay expenses and my wife's hospital bills. I asked him what he would charge me, and he said, 'Well, I will make that satisfactory with you.' I suppose that was to come out of the $2,500."

Hayes further testified that Miller had paid him for his own use about $700 of the fund, still holding about $1,800, which he had refused to pay over. Miller met this testimony by his statement that he had cashed the check for $2,500 for Hayes, and paid him the money,

before he knew of his insolvency or contemplated bankruptcy; that he did not put the money in the schedule, because Hayes told him it was a trust fund belonging to his wife; that he had none of it in his possession; that the money paid to Hayes from time to time after the bankruptcy was money put in his hands by the father of Hayes for the purpose of aiding his son in his difficulties.

On the issues thus made the government relied for corroboration of Hayes on letters from Miller to Hayes, deposit slip taken by Miller in his own name for the $2,500 check of Hayes, and evidence tending to show that this slip was turned over to Hayes by Miller after he had changed it so as to read, "Deposited by A. C. Miller for M. L. Hayes," and had written at the bottom of it, "not subject to check except by M. L. Hayes," and inconsistencies in the testimony of Miller on the trial and at the hearing before the referee in bankruptcy. This statement is sufficient to show that there was no error in refusing to direct a verdict of acquittal for failure of evidence.

[3] The opinion of John T. Roddey that the alleged change in the deposit slip above set out was in the handwriting of Miller was properly admitted. Benedict v. Flanigan, 18 S. C. 506, 44 Am. Rep. 583; State v. Ezekiel, 33 S. C. 115, 11 S. E. 635; Tower v. Whip (W. Va.) 63 L. R. A. 937, note; Miller v. Shoe Co., 89 S. C. 530, 534, 72 S. E. 397, Ann. Cas. 1913B, 106.

[4-6] The statute of limitations afforded no ground for direction of a verdict, even if the limitation of one year prescribed in the bankrupt statute be considered applicable to a conspiracy to commit an offense created by that statute. The offense of conspiracy was not completed, and therefore was not indictable until the commission of an overt act, and the statute did not begin to run until the last overt act done while the conspiracy was in existence. Brown v. Elliott, 225 U. S. 392, 401, 32 Sup. Ct. 812, 56 L. Ed. 1136. If the conspiracy was formed, as the jury found it was, there was evidence of overt acts within 12 months before the finding of the indictment. When the unlawful agreement is proved, one who enters into it is held to remain in until he does some affirmative act of withdrawal. Hyde v. U. S., 225 U. S. 347, 369, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The testimony of Miller before the referee was not a withdrawal from the conspiracy, but a denial of its existence. If, however, it had been a withdrawal, the conspiracy, if it ever existed, was then complete, and the indictment was within the statutory period.

[7] It is insisted there could be no finding of a conspiracy on the testimony of Hayes although corroborated, because he testified that he had never concealed his assets from the trustee in bankruptcy, and had never conspired to do so. Hayes had testified to every fact necessary to convict him and Miller of the offense charged, and his opinion that this did not constitute concealment and conspiracy, of course, was not controlling. He testified to facts which constituted the offense, and thereby admitted his guilt.

The District Judge instructed the jury explicitly that, although one is presumed to intend the natural consequences of his act, yet that they could not convict (1) if the fund received by Miller from Hayes was not the property of Hayes, but of his wife, or some one else; or (2) if

Miller believed it to be the property of some one else, although it was in fact the property of Hayes. Since Miller was the attorney of Hayes, this instruction meant that, if Miller honestly advised Hayes to turn over the fund to him, and not to the trustee, he could not be convicted. The additional instruction was given that advice of counsel may be considered on the issue of intent of Hayes, the other alleged conspirator.

[8, 9] The request to charge that action of Hayes on the advice of counsel honestly given would completely exonerate and eliminate Hayes, and thus defeat the charge of conspiracy, was properly refused, if for no other reason, because it did not express the additional requisite that Hayes must honestly have taken the advice and acted upon it. The general rule is that advice of counsel is no excuse for violation of law. 8 R. C. L. 123; 16 C. J. 85. But where the question, as in this case, is one of intent, the advice and the good faith of the defendant is a defense to be considered by the jury. 12 Cyc. 156, and citations; State v. O'Neill, 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691; Williamson v. U. S., 207 U. S. 425, 453, 28 Sup. Ct. 163, 52 L. Ed. 278. The jury was so instructed.

[10] The instruction was given that, if the fund involved was held by Hayes in trust for another, it was not a part of the bankrupt estate, and the defendant could not be convicted. There was no error in refusing to repeat the instruction in the requests submitted on the subject.

[11] The trustee denied knowledge that the bankrupt was the owner of the fund, and there was no evidence to the contrary. The request on that subject was therefore inapplicable.

[12, 13] The last error assigned is the refusal of the court to arrest or suspend judgment, on the ground that conviction of one of two defendants charged with conspiracy could not be the basis of judgment against him while the charge against the other was undisposed of. One of two defendants charged with conspiracy may be separately tried. If one is acquitted, the other must be acquitted also, since he cannot commit the offense alone; and if the charge against one be nol. pros'd the other cannot afterwards be convicted, because there is no pending charge against two. State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476; Feder v. U. S., 257 Fed. 694, 696, 168 C. C. A. 644, 5 A. L. R. 370.

The rule that each of two persons charged with conspiracy may be tried separately negatives the proposition that judgment on the conviction of one must be arrested until the other is tried. What would be the effect of a future acquittal of Hayes, or a nol. pros. of the indictment as to him, it is not our province at this time to decide.

Affirmed.

MARESCA et al. v. UNITED STATES.

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

No. 190.

1. **Criminal law ⟸1208(2)—Trial judge invested with sole discretion as to sentences.**
   Federal District Judge who imposed sentences in criminal prosecutions was invested with sole discretion, within the limits fixed by the statute, of determining the extent of the punishment to be inflicted.
2. **Criminal law ⟸1092(9)—No extension of term after expiration.**
   An order of the federal District Court extending time for filing bill of exceptions is invalid where made after term has expired.
3. **Criminal law ⟸1090(1)—Right to bill of exceptions in criminal case in federal court statutory.**
   The right to a bill of exceptions in a criminal case in the federal court is statutory.
4. **Time ⟸10(8)—Bill of exceptions must be filed before end of term expiring on holiday.**
   Bill of exceptions in a criminal case in federal court cannot be signed or filed on the day after the last day of a term of the District Court which falls on Sunday or a legal holiday.
5. **Time ⟸10(1)—When Sunday is excluded.**
   Where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days when it exceeds seven, but, if it is less than seven, Sunday must be excluded, and the same rule applies where holidays intervene.
6. **Criminal law ⟸322—United States ⟸26—President may exercise powers through heads of departments, and it is presumed that he authorized act by department head required of the President.**
   The President of the United States may exercise through heads of departments the powers vested in him, and it must be presumed as a matter of law that the Secretary of the Treasury in approving a regulation promulgated by the Commissioner of Internal Revenue under Revenue Act Aug. 10, 1917, § 15 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛l), did so by direction of the President.
7. **Intoxicating liquors ⟸132—Volstead Act did not modify or repeal War Prohibition Act.**
   The Volstead Act of October 28, 1919, did not in any way modify or repeal the provisions of the War Prohibition Act of November 21, 1918, in view of title 1, § 7, of the former.
8. **Statutes ⟸64(2)—Invalidity of section of Food Control Act held not to render another section invalid.**
   If parts of a statute are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will alone be rejected, and hence section 15 of the Lever Act of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛l), providing that certain foods should not be used in the production of distilled spirits, is not unconstitutional, because section 4 (section 3115⅛ff), known as the price-fixing section, is invalid.
9. **Criminal law ⟸15—Repeal of statute before conviction a bar to further proceedings.**
   Where a statute which defines a crime and provides the punishment to be imposed upon the offender is repealed before judgment, and there is no proper saving clause, the repeal constitutes a complete bar to all further proceedings.

10. Statutes ⟸159, 171—Repeal and suspension from subsequent repugnant legislation must be inferred from necessity.

The repeal and suspension of statutes are distinct matters, the suspension being limited in time and the repeal unlimited in time, but the suspension of a statute, like its repeal, may be express, as when declared in direct terms, or implied, when it is inferred from subsequent repugnant legislation, and, when not expressed, but only implied, must be inferred from necessity, and there must be such a conflict between the old and new statutes that the two cannot stand together, and then only to the extent of the repugnance.

11. Intoxicating liquors ⟸132—Lever Act and War Prohibition Act held inconsistent in part and latter repealed part of former.

Every offense committed under Lever Act, § 15 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛*l*), was punishable under the War Prohibition Act, and with a lesser penalty, and to that extent the two acts were inconsistent, and the latter act superseded or repealed section 15 of the former, and this would be also true if the latter act increased the penalty.

12. Conspiracy ⟸43(6)—Count charging conspiracy to sell distilled spirits held good.

A count charging that defendants conspired to use and sell for beverage purposes a large quantity of distilled spirits manufactured from food, etc., and did make sales between July 1, 1919, and November 15, 1919, *held* good as charging an offense under the War Prohibition Act.

13. Criminal law ⟸1090(8)—Evidence not considered in absence of bill of exceptions.

In the absence of a bill of exceptions properly in the record, federal Circuit Court of Appeals can know nothing as to what the evidence shows.

14. Intoxicating liquors ⟸134—Pure alcohol "distilled spirits" within War Prohibition Act; "beverage purposes."

A sale of pure alcohol between July 1, 1919, and November 15, 1919, to be used in a saloon in the course of its business, would constitute the sale of "distilled spirits" for "beverage purposes" within the meaning of the War Prohibition Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Distilled Spirits; Second Series, For Beverage Purposes.]

15. Indictment and information ⟸108—Insertion of repealed statute held immaterial.

An indictment charging the unlawful sale on November 15, 1919, of distilled spirits for beverage purposes "contrary to the form of the statute of the United States in such case made and provided (Act of August 10, 1917)" could state an offense under the War Prohibition Act, notwithstanding that the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛*l*–3115⅛r), which the district attorney had in mind and inserted in the parenthesis, was superseded and repealed.

16. Indictment and information ⟸108—Statute relied on need not be alleged.

It is unnecessary to allege in an indictment the particular statute which has been violated.

17. Indictment and information ⟸119—Intoxicating liquors ⟸215—Indictment held to allege violation of War Prohibition Act, though containing elements of offense under Lever Act.

A count of an indictment charging that defendants did unlawfully, willfully, and knowingly sell for beverage purposes distilled spirits on November 15, 1919, stated an offense under the War Prohibition Act, although it contained the further allegation that such spirits were manufactured from certain food materials after September 9, 1917, the district attorney having the superseded Lever Act (Comp. St. 1918, Comp. St.

Ann. Supp. 1919, §§ 3115⅛e-3115⅛kk, 3115⅛l-3115⅛r) in mind, as the latter allegation should be regarded as surplusage.

18. **Indictment and information ⟸119—Unnecessary averments disregarded.**
Unnecessary averments in an indictment may be disregarded as surplusage.

19. **Intoxicating liquors ⟸222—Allegation that sale was for beverage purposes equivalent to allegation that it was not for export.**
An allegation in indictment that sale of distilled spirits was for beverage purposes was a sufficient allegation to charge a violation of the War Prohibition Act, without adding in terms that it was not for export.

20. **Criminal law ⟸1144(13, 14)—Indictment and information ⟸202(5)—Objection that indictment does not negative defense comes too late after verdict; presumed that jury was properly instructed under defective indictment and that evidence was sufficient.**
Objection after verdict in a prosecution under the War Prohibition Act that count did not negative the fact that sale of distilled spirits was not for export was too late, and it must be assumed that the jury was properly instructed, and that the evidence showed that the sale was not for export; no bill of exceptions being properly in the record.

21. **Internal revenue ⟸12—No tax on liquor withdrawn for beverage purposes.**
There was no tax of $6.40 per gallon on liquor withdrawn "for beverage purposes" on November 12 and 15, 1919, under Act Feb. 24, 1919, § 600 (Comp. St. Ann. Supp. 1919, § 5986e), at which time the War Prohibition Act prohibited sales for beverage purposes.

22. **Criminal law ⟸1144(13, 14)—In absence of bill of exceptions, presumed that evidence was sufficient and instructions correct.**
In the absence of a bill of exceptions, a verdict of guilty on charge that distilled spirits were removed from a distillery warehouse on which tax had not been paid under Act Feb. 24, 1919, § 600 (Comp. St. Ann. Supp. 1919, § 5986e), imposing a tax of $2.20 per gallon unless withdrawn for beverage purposes, in which case it was liable to pay a tax of $6.40 on each gallon, will not be disturbed, though at the time it was sold and withdrawn the War Prohibition Act was in effect and prohibited sale for beverage purposes, since it must be presumed that the court below correctly charged the jury that only the tax of $2.20 was payable on liquor withdrawn and sold at that time, and that there was evidence to support the verdict.

23. **Internal revenue ⟸12—Tax on liquor held not remitted during war prohibition.**
Act Feb. 24, 1919, § 600 (Comp. St. Ann. Supp. 1919, § 5986e), imposing a tax of $2.20 on each proof gallon of whisky withdrawn from distillery warehouse, unless withdrawn for beverage purposes, in which case it was liable to pay a tax of $6.40, did not intend to remit the tax of $2.20 while the War Prohibition Act was in force.

24. **Internal revenue ⟸39, 40—Statute taxing liquors to be construed with statute declaring penalty for nonpayment.**
Act Feb. 24, 1919, § 600 (Comp. St. Ann. Supp. 1919, § 5986e), imposing a tax on intoxicating liquors withdrawn from distillery warehouse, and Rev. St. § 3296 (Comp. St. § 6038), must be read together to determine whether removal of certain liquor from distillery warehouse on November 15, 1919, without payment of tax constituted a criminal offense.

25. **Internal revenue ⟸2—Statute referred to in Volstead Act remained in force until going into effect of such act.**
Rev. St. 3296 (Comp. St. § 6038), under which penalty would be found for removal of intoxicating liquors from distillery warehouse without payment of tax provided by Act Feb. 24, 1919, § 600 (Comp. St. Ann.

Supp. 1919, § 5986e), was in force, so far as the Volstead Act was concerned, between the passage of such act and its going into effect.

26. Internal revenue ⟸2—War Prohibition Act did not repeal section necessary to prosecute for nonpayment of tax on liquor removed from warehouse.

The War Prohibition Act did not repeal Rev. St. § 3296 (Comp. St. § 6038), which provided a penalty for removal of intoxicating liquors from distillery warehouse without payment of tax provided by Act Feb. 24, 1919, § 600 (Comp. St. Ann. Supp. 1919, § 5986e).

27. Internal revenue ⟸2—Wholesale dealer of intoxicating liquors held subject to special tax during war prohibition.

The War Prohibition Act did not repeal Act Feb. 8, 1875, § 16 (Comp. St. § 5966), which required the payment of tax for carrying on the business of wholesale liquor dealer; it still being lawful to sell liquor for all but beverage purposes.

28. Indictment and information ⟸203—Reversal of conviction on counts based on repealed statute no reason for reversing conviction on valid counts.

The fact that certain counts of an indictment are held bad because based upon a repealed or superseded statute is no reason for reversing conviction on good counts.

Manton, Circuit Judge, dissenting.

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

Henry F. Maresca and others were convicted under an indictment charging them with a violation of the provisions of various acts of Congress respecting distilled spirits, and bring error. Reversed as to certain counts, and affirmed as to others.

See, also, 266 Fed. 713. Certiorari denied 256 U. S. ——, 42 Sup. Ct. 183, 66 L. Ed. ——.

This cause comes here on writ of error to the District Court for the Southern District of New York.

The defendants were tried upon an indictment which was filed on February 10, 1920, and which charged them with a violation of the provisions of various acts of Congress respecting distilled spirits. The trial was commenced on June 10, 1920. The jury returned the verdict on June 24, 1920. Sentences were imposed on July 2, 1920.

The Promotion Sales Company, Inc., the Herba Products Company, and the Gramatan Company, Inc., all named in the indictment, were corporations organized under the laws of the state of New York. The government entered a nolle prosequi and dismissed the indictment as to the Promotion Sales Company. That company appears to have been a holding company, and it acted as a sales agent for the other companies. The Herba Products Company manufactured flavoring extracts, mints, lozenges, and other varieties of candy. The Gramatan Company manufactured the Gramatan hair tonic and the Quo Vadis hair tonic. The defendant Maresca was the president and sole owner of the Herba Products Company. Rubino was the president of the Gramatan Company. De Angelis was the treasurer of the latter company as well as a stockholder therein. Lipari, who was jointly indicted, was a shipping clerk and was acquitted by the jury. The remaining defendants were convicted.

The indictment originally contained 11 counts, but counts 2, 4, 5, 7, and 8 were dismissed by the court before the case was submitted to the jury. The convictions were on each of the remaining counts, 1, 3, 6, 9, 10, and 11.

Count 1 of the indictment charged a conspiracy to sell distilled spirits for

beverage purposes in violation of the War Prohibition Act and of the Lever Act. Section 37, U. S. C. C.

Count 3 charged an unlawful sale for beverage purposes of distilled spirits made from food products after September 9, 1917. Act Aug. 10, 1917. This is the Lever Act, 40 St. at L. 276.

Count 6 charged the removal of distilled spirits on which the tax had not been paid to a place other than a distillery warehouse in violation of Rev. St. § 3296.

Count 9 charged a similar offense.

Count 10 charged the sale of distilled spirits for beverage purposes, and not for export. Act Nov. 21, 1918. This is the War Prohibition Act. 40 St. at L. 1045.

Count 11 charged the carrying on the business of a wholesale liquor dealer without having paid the special tax in violation of section 16, Act Feb. 8, 1875. 18 St. at L. 307.

No demurrer, motion to quash, or other plea was filed, and no motion for a bill of particulars was made. But after the jury had been impaneled and sworn counsel for defendants moved to dismiss the indictment on the ground that it failed to charge the commission of a crime. The motion to dismiss was granted as to counts hereinbefore specified and denied as to the others. The defendants were convicted on each of the counts not dismissed.

The sentences imposed were as follows:

Henry F. Maresca sentenced to two years and $5,000 on count 1; one year and $1,000 on counts 3 and 10; two years and $5,000 on count 6; two years and $5,000 on count 9, two years and $1,000 on count 11—sentence on each count to begin from the same date.

Giovanni Rubino sentenced to 20 months and $5,000 on count 1; one year and $1,000 on counts 3 and 10; 20 months and $5,000 on count 6; 20 months and $1,000 on count 11—sentence on each count to begin from the same date.

Charles De Angelis sentenced to 15 months and $5,000 on count 1; one year and $1,000 on counts 3 and 10; 15 months and $5,000 on count 6; 15 months and $5,000 on count 9; 15 months and $1,000 on count 11—sentence on each count to begin from the same date.

Gramatan Company, Inc., sentenced to pay a fine of $5,000 on count 1; $1,000 on counts 3 and 10; $5,000 on count 6; $5,000 on count 9; $1,000 on count 11.

Herba Products Company sentenced to pay a fine of $5,000 on count 1; $1,000 on counts 3 and 10; $5,000 on count 6; $5,000 on count 9; $1,000 on count 11.

Place of confinement to be in the United States Penitentiary, Atlanta, Ga.

The total amount of the fines imposed aggregate $85,000.

John J. Curtin and Elijah N. Zoline, both of New York City, for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This case is one of considerable importance not only to the defendants, because of the severe sentences imposed, but to the government, because of the questions raised as to the construction to be given to certain acts of Congress for the violation of which the defendants have been convicted. The District Judge who imposed the sentences was, of course, invested with sole discretion, without the limits fixed by the statutes, of determining the extent of the punishments to be inflicted, and in the discharge of that duty he was well aware that sentences

should be imposed which are sufficiently severe to cause the laws of the United States to be obeyed. The question which this court is to determine is as to the validity of the indictment and of the sentences imposed.

We are presented with a document marked "Bill of Exceptions." It appears to have been signed and filed on December 20, 1920. As the judgments of the court were entered on July 2, 1920, the term of the District Court expired with September 30, 1920, under rule 5, automatically extending the term 90 days after the entry of final judgment. Defendants rely on an oral statement, which is before us only because incorporated in the so-called bill of exceptions, which was made by the District Judge from the bench on July 2, 1920, and which was as follows:

"I will extend it [the term] until November 1st; and I am quite sure if it becomes necessary, I will have the power to grant an additional extension."

[2] No minute or docket entry was made of the remark, and no order was signed by the judge until November 3, 1920, when, over the government's objection, an order was signed purporting to extend the term to December 8th. This order was filed on November 4th, and on November 29th a further order again extending the term was signed extending the term to January 5, 1921. There is authority for holding that an oral statement extending the time for filing a bill of exceptions is not of any binding force unless entered in the docket. Barstow v. Marsh, 4 Gray (Mass.) 165; Doherty v. Lincoln, 114 Mass. 362; Klein v. State, 157 Ind. 146, 60 N. E. 1036. But for the purpose of the argument we will assume, without deciding, that the oral order extending the term to November 1st was valid. In that case the second order of November 3d, extending the term to December 8th would be invalid, as was the order of November 29th, as the term had expired when the extension on November 3d was granted. It is said, however, that the District Judge in his original and oral extension of the term said: "I will extend it until November 1st; that is four months." Where time is defined by a particular date as well as by the number of days, and the two are inconsistent, it is very doubtful at the best whether the number of days named can overcome the particular date specified. But if they be given controlling effect, and we do not decide that they are entitled to it, the term would be extended to and including November 2, 1920. Then, as November 2d, being election day, was a legal holiday, it is urged that this would give an additional day, and therefore made the order signed on Monday, November 3d, valid; counsel insisting that it is well settled that, if the last day for settling and filing a bill of exceptions falls on a Sunday or on a holiday, the bill may be settled on the following day. And our attention is called to the following cases: Bacon v. State, 22 Fla. 46; Harris v. Atlanta, 62 Ga. 290; Evans & Hollinger v. Chicago, etc., R. R. Co., 76 Mo. App. 468; Cash v. Penix, 11 Mo. App. 597; Enck v. Gerding, 63 Ohio St. 175, 57 N. E. 1083—in which it has been so decided.

In Siegelschiffer v. Penn Mutual Life Ins. Co., 248 Fed. 226, 160 C. C. A. 304, this court held, in computing the time within which an appeal or writ of error can be taken or sued out after entry of judgment, that if the last day of the six months' period falls on Sunday, the act cannot be lawfully done on Monday. In so holding we followed a like decision of the Circuit Court of Appeals in the Eighth Circuit (Johnson v. Meyers, 54 Fed. 417, 4 C. C. A. 399), and one by the Circuit Court of Appeals in the Ninth Circuit (Meyer v. Hot Springs Imp. Co., 169 Fed. 628, 95 C. C. A. 156).

[3] A bill of exceptions was unknown to the early common law. 4 Chitty, Gen. Pr. 2. It was introduced by the Statute of Westminster II (13 Edw. I) Stat. 1, c. 31, A. D. 1285. It is plainly common law in the United States, but in both countries has been held not to extend to criminal causes. Reg. v. Alleyne, 4 Ell. & B. 186; Vane's Case, 6 How. St. Tr. 119, 130, 131; Reg. v. Jelly, 10 Cox, Crim. Cas. 553; People v. Holbrook, 13 Johns. (N. Y.) 90; Ex Parte Barker, 7 Cow. (N. Y.) 143; Ned v. State, 7 Port. (Ala.) 187. And see Bishop's New Cr. Proced. (2d Ed.) § 1265. The right to such a bill in a criminal case in the federal courts is statutory. And, as we pointed out in Buessel v. United States, 258 Fed. 811, 816, 170 C. C. A. 105, when Congress authorized the proceedings in a criminal case to be reviewed upon a writ of error, it thereby sanctioned the use of a bill of exceptions in that connection, for a bill of exceptions is the method by which the proceedings at the trial which otherwise would not be in the record are made a part of it and so reviewed. And we also pointed out in the Buessel Case that bills of exceptions in the federal courts are not governed by the conformity statute, directing that the practice, pleadings, and forms and modes of proceeding in a District Court shall conform to those in the courts of the state in which the District Court sits.

[4] We see no reason why the rule this court applied in determining the time within which an appeal or a writ of error can be sued out should not be also applied in determining the time within which the bill of exceptions can be signed and filed. The right to the bill of exceptions, in a criminal case in the federal courts, like the right to the writ of error, comes from the statute, and not from any rule of the court, and we know of no reason why it is not governed by the same principles in ascertaining the time within which it is to be signed. If, when the last day falls on Sunday or on a legal holiday, the appeal or writ of error cannot be filed on the next day under the like circumstances, the bill of exceptions cannot be signed or filed on the next day. It must follow that, whether the court below extended the term, as the government contends, to November 1st, or whether it extended it four months and to November 2d, which fell on a legal holiday, in either event the subsequent extension of the term not made until the following day came too late, and the bill of exceptions thereafter signed must be disregarded. Blisse v. United States (C. C. A.) 263 Fed. 961; Anderson v. United States (C. C. A.) 269 Fed. 65.

[5] We may add, however, to what has already been said, that in 38 Cyc. 332, 333, it is correctly laid down as the general rule that,

"Where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days, when it exceeds seven; if it is less than seven, Sunday must be excluded," and that the same rule applies where holidays intervene. So in Lewis' Sutherland on Statutory Construction (2d Ed.) vol. 1, § 188, p. 335, it is said that—

"In the absence of a positive written law excluding Sundays from a period of days prescribed for any purpose, they are counted, even though the period ends on Sundays. Where a period less than a week is prescribed by statute, it has sometimes been held that an intervening Sunday should not be counted, nor if it be the last day of the period." "This," the writer says, "appears to be the settled rule in Massachusetts. It is not universally adhered to as to periods of more than one or two days, subject to this qualification: Where the last day is Sunday, any act required by statute to be done within the period must be done before that day. For such acts the period practically ends on the preceding day."

The subject in connection with a bill of exceptions was carefully considered in American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909, it being held that, if the last day for signing a bill of exceptions falls on Sunday, it cannot be signed on Monday, the period for settling the bill in that state being in excess of seven days. The court declared:

"We can see no valid reason for excluding the last Sunday and including the others. The general rule, subject to but few exceptions, is that statutory time of over seven days cannot be extended because the last day falls on Sunday."

After stating the general rule to which attention has been already called the court added:

"There are but few exceptions to the general rule laid down above. There are cases which may seem to be [the contrary], but a careful examination of the most of them will show that, when Sundays are excluded from the computation of time of more than a week, it is because of the language of the statute, or because the days referred to are such as the courts find exclude Sundays."

See, also, Cartwright v. Liberty Telephone Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249; Geneva Cooperage Co. v. Brown, 124 Ky. 16, 98 S. W. 279, 124 Am. St. Rep. 388; Kelly v. Independent Pub. Co., 45 Mont. 127, 122 Pac. 735, 38 L. R. A. (N. S.) 1160, Ann. Cas. 1913D, 1063; Hanover Ins. Co. v. Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25; Cunningham v. Mahan, 112 Mass. 58; State v. Harris, 121 Mo. 445, 26 S. W. 558; State v. Seaton, 106 Mo. 198, 17 S. W. 169.

We are not at liberty, therefore, there being no bill of exceptions here, to consider the various assignments of error relating to the admission and rejection of evidence, and to comments which are alleged to have been improperly made by the District Judge during the trial, as well as those relating to alleged erroneous instructions given to the jury in the charge and the refusal to give instructions requested. Neither are we at liberty to inquire concerning an alleged unlawful search and seizure of certain books and papers or the character of the distilled spirits involved about which we can know absolutely nothing.

In passing upon the validity of the indictment and of the sentences imposed we must consider certain acts of Congress. Those particularly to be considered are the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛*l*–3115⅛r), the War Prohibition Act (40 Stat. 1045), and to some extent the National Prohibition Act (41 Stat. 305). It will be necessary also to refer in the course of this opinion to certain sections of the Revised Statutes dealing with revenue matters.

The Lever Act of August 10, 1917 (40 U. S. St. at L. c. 53, p. 276), otherwise known as the National Defense Act, became effective after September 8, 1917. It did not in express terms prohibit the sale of distilled spirits or the use of such spirits for beverage purposes. It was concerned with the production of such liquors from certain food materials. Section 15 of the act (section 3115⅛*l*) provided that after 30 days from the date of the approval of the act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes. But it also provided that under such rules, regulations, and bonds as the President might prescribe such materials might be used in the production of distilled spirits exclusively for other than beverage purposes. And any person who willfully violated the provisions of the section or any rule or regulation made under it was subject to a fine not exceeding $5,000, or to imprisonment for not more than two years, or both. Thereafter, acting under section 15 of the act, the following regulations were promulgated:

"(3) The manufacture of distilled spirits from foods, fruits, food materials, or feeds for beverage purposes is prohibited after September 8, 1917.

"All persons are forbidden to use any distilled spirits manufactured after September 8, 1917, from foods, fruits, food materials, or feeds in manufacturing or preparing beverages or to sell any such spirits for beverage purposes. * * *"

[6] The regulation was promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. Importance is attached, by counsel for defendants, to the fact that the President himself did not make or proclaim the regulation, and that it does not appear that he authorized either of the officials named to exercise the power delegated to him. The law is established that the President may exercise through the heads of departments the powers vested in him. He speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Wilcox v. Jackson Ex dem. McConnel, 13 Pet. 498, 10 L. Ed. 264; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915. And it must be presumed as matter of law that the Secretary of the Treasury, acting over his own signature, does so by direction of the President. In United States v. Fletcher, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. Ed. 378, the President was required to act in the matter in controversy in a judicial capacity under the Articles of War in approving a report of a court-martial, and it appeared that the Secretary of War had acted in the matter over his own signature. The court held that it must be presumed that he acted by direction of the President in so doing. And in Porter v. Coble, 246 Fed. 244, 249, 158 C. C. A. 404, a postmaster who had been removed from office by the Postmaster General claimed

that the power of removal was in the President, and that there was nothing to show that the man had been removed by the President or that the Postmaster General had ever been authorized by the President to make the removal. It was held that it must be presumed that the Postmaster General in ordering the removal acted by direction of the President. So it may be that the act of the Secretary of the Treasury in promulgating the regulation was the act of the President in the matter under consideration.

The War Prohibition Act of November 21, 1918 (40 St. at L. c. 212, p. 1046), provided that after June 30, 1919, until the conclusion of the war and thereafter until the termination of demobilization, the date of which was to be determined and proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits, and that during said time no distilled spirits held in bond should be removed therefrom for beverage purposes except for export. And it provided that after May 1, 1919, no specified food products should be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. It also prohibited the importation into the United States of distilled, malt, vinous, or other intoxicating liquors during the continuance of the war and period of demobilization.

[7] The National Prohibition Act of October 28, 1919, otherwise known as the Volstead Act, 41 U. S. St. at L. p. 305, prohibited the manufacture and sale of intoxicating liquors. The violation of this act is not charged in the indictment, and we call attention to section 7 of title 1 of the act which declares that "none of the provisions of this act shall be construed to repeal any of the provisions of the War Prohibition Act." We may therefore disregard any suggestion that the Volstead Act operated in any way to modify or repeal the provisions of the War Prohibition Act. Titles 1 and 3 of the Volstead Act and certain sections of title 2 became effective on October 28, 1919, although certain other sections of title 2 did not go into effect until one year from and after the date when the Eighteenth Amendment of the Constitution went into effect, which was on January 29, 1920.

[8] Counsel for defendants claim that the Lever Act is unconstitutional. They found that claim upon the fact that the Supreme Court in United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. ——, 14 A. L. R. 1045, held that section 4 of the act was invalid. That section is known as the price-fixing section. But that section is in no way involved in the case now before us; neither is any other section of the act except section 15. The two sections are absolutely independent of each other. And the law is well settled that, if the parts of a statute are wholly independent of each other, as they are here, that which is constitutional may stand, while that which is unconstitutional will alone be rejected. Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Spraigue v. Thompson, 118 U. S. 90, 95, 6 Sup. Ct. 988, 30 L. Ed. 115; Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. We have no doubt that section 15 is constitutional.

[9] But counsel also urged upon us that section 15 was impliedly repealed and superseded by the War Prohibition Act and the National Prohibition Act. The question raised is important, as it is, of course, the law that, where a statute which defines a crime and provides the punishment to be imposed upon the offender is repealed before judgment, and there is no proper saving clause, the repeal constitutes a complete bar to all further proceedings. Wharton's Crim. Law (11th Ed.) vol. 1, § 413.

[10] Did the War Prohibition Act make a tabula rasa of the preexisting section 15 of the Lever Act? The repeal and the suspension of statutes are distinct matters. The suspension of a statute is limited in time, and is not a repeal which is unlimited in time. The suspension of a statute, like its repeal, may be express, as when declared in direct terms, or implied, when it is inferred from subsequent repugnant legislation. But suspension and repeal alike, when not express, but only implied, must be inferred from necessity. There must be such a conflict between the old and new statutes that the two cannot stand together. The intention to suspend or repeal will not be presumed unless the inconsistency is unavoidable and only to the extent of the repugnance. Lewis' Sutherland on Statutory Construction, vol. 1 (2d Ed.) § 247, p. 464.

Laws are presumed to be passed with deliberation, and it is a reasonable presumption that the lawmaking body does not intend to effect so important a measure as the repeal of a law without expressing an intention to do so. It is said in Maxwell on Interpretation of Statutes (6th Ed. London) 296, that—

"Such an interpretation [repeal by implication] is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

The two acts must stand in so far as they involve no inconsistency. And repeals by implication are not favored either in England (West Ham v. Fourth City Building Society, [1892] 1 Q. B. 654) or in the United States (United States v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 44 L. Ed. 1130). But in both countries alike it is well-established law that one statute may repeal or suspend another statute on the same subject, although it contains no words of express repeal. A later statute repeals by implication an earlier enactment when the two are clearly inconsistent with each other. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153. And in Bishop on Statutory Crimes, § 160, it is correctly laid down that, where a newly enacted statute covers the whole ground occupied by a prior one or by the common law, it repeals such law by implication, if the two are irreconcilably in conflict.

It appears that the elements of the offense punishable under section 15 of the Lever Act and regulation 3 (assuming for the purposes of the argument that regulation 3 was promulgated in accordance with law) are (1) A sale of distilled spirits (2) for beverage purposes, (3) the distilled spirits having been manufactured from food materials subsequent to September 9, 1917. On the other hand, the elements of the offense punishable under the War Prohibition Act are (1) a sale of distilled spirits (2) for beverage purposes, and (3) not for export. Both

acts prohibited the manufacture from certain food products of liquors for beverage purposes.

The punishment for a violation of the Lever Act was a possible $5,000 fine and imprisonment for two years; while under the War Prohibition Act it was a possible $1,000 fine and imprisonment for one year.

[11] Every offense committed under the Lever Act was punishable under the War Prohibition Act and with a lesser penalty. To that extent the two acts were inconsistent, and in our opinion the War Prohibition Act superseded or repealed section 15 of the Lever Act. There cannot be two different penalties for the same offense. The rule is well settled that, where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and repeals the former, and this whether the penalty is increased or diminished. Rex v. Cator, 4 Burr, 2026, 98 Eng. Rep. 56; United States v. One Bay Horse, etc. (D. C.) 128 Fed. 207; State v. Whitworth, 8 Port. (Ala.) 434. Bishop on Statutory Crimes, § 168, and Maxwell on the Interpretation of Statutes (6th Ed. London, 1920) states, where the punishment or penalty imposed in an earlier statute is altered in degree, but not in kind, the provision in the later statute is considered as superseding the earlier one. There can be no difficulty, therefore, in holding that as to acts committed after the War Prohibition Act took effect the penalty imposed for an act which violated both statutes could only be imposed under the provisions of the later act.

That the War Prohibition Act was constitutional when enacted was decided in Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194. That it was not repealed by the National Prohibition Act we have already pointed out. And that it was not repealed by the Eighteenth Amendment was decided likewise in Hamilton v. Kentucky Distilleries Co., supra. By that amendment it was expressly provided that the prohibition thereby imposed was to become effective after one year from its ratification, and ratification was proclaimed on January 29, 1919. 40 Stat. 1941. The contention was that in postponing the effective date of prohibition the amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace and impliedly removed the existing restriction imposed by the War-Time Prohibition Act. The Supreme Court, however, held the claim untenable.

The effect of these various acts in working an implied repeal of certain revenue legislation of the government will be considered in a subsequent portion of the opinion.

We come now to a consideration of the indictment and to the action of the court in imposing sentence thereunder.

[12] The first count charged that the defendants conspired and agreed together to violate section 15 of the act of Congress of August 10, 1917, known as the Lever Act, and the act of November 21, 1918, known as the War Prohibition Act, and the rules and regulations made thereunder, and that they conspired to use and sell for beverage pur-

poses a large quantity of distilled spirits manufactured from foods, fruits, food materials and feeds after September 9, 1917, and to sell for beverage purposes, and not for export, large quantities of distilled spirits, and that it was a part of the conspiracy that the defendants should purchase such distilled spirits for the ostensible purpose of using it as an ingredient in the manufacture of hair tonic and flavoring extracts, but with the true object and purpose of using and selling such distilled spirits for beverage purposes. Six overt acts are alleged and they can be found in the margin.[1] The dates of the alleged overt acts are laid between July 1, 1919, and November 15, 1919, and it is to be observed that all the days on which the overt acts occurred were after the date when the War Prohibition Act went into effect, and made it unlawful to sell for beverage purposes any distilled spirits or to remove any such spirits from bond for beverage purposes except for export. And the act which the count alleges the defendants conspired to commit, "viz. to sell for beverage purposes, and not for export," distilled spirits, constituted a plain violation of the War Prohibition Act, and the count must be held good.

[1] "(1) And to effect the objects of the said conspiracy, Giovanni Rubino, between the date of July 1, 1919, and November 15, 1919, at the Southern district of New York and within the jurisdiction of this court, did sign applications for permission to withdraw 254 barrels containing 24,106.96 proof gallons of distilled spirits, for sale and use for other than beverage purposes.

"(2) And further to effect the objects of the said conspiracy, the Gramatan Company, Inc., between the date of July 1, 1919, and November 15, 1919, at the Southern district of New York and within the jurisdiction of this court, did receive 254 barrels containing 24,106.96 proof gallons of distilled spirits.

"(3) And further to effect the objects of the said conspiracy, Giovanni Rubino, on November 14, 1919, at the Southern district of New York and within the jurisdiction of this court, did sign an application for permission to withdraw from the American Distributing Company, Inc., wholesale dealers in nonbeverage alcohol, 10 barrels of distilled spirits.

"(4) And further to effect the objects of the said conspiracy, the Gramatan Company, Inc., and Louis Lipari, on November 14, 1919, at the Southern district of New York and within the jurisdiction of this court, received 10 barrels of distilled spirits.

"(5) And further to effect the objects of the said conspiracy, Louis Lipari, on November 14, 1919, at the Southern district of New York, and within the jurisdiction of this court, did deliver 5 barrels of distilled spirits, to a person whose name is to the grand jurors unknown.

"(6) And further to effect the objects of the said conspiracy, Giovanni Rubino, on November 15, 1919, at the Southern district of New York and within the jurisdiction of this court, did sell for cash to a person whose name is to the grand jurors unknown 1,000 gallons of distilled spirits designated as Quo Vadis, 1,000 gallons of distilled spirits designated as essence of peppermint, 500 gallons of distilled spirits designated as essence of wintergreen, and 500 gallons of distilled spirits designated as essence of clove, and did then and there cause an entry to be made in the books of the Promotion Sales Company, Inc., indicating sales for cash of 1,000 gallons of Quo Vadis at $4,000. 1,000 gallons of essence of peppermint at $16,000, 500 gallons of essence of wintergreen at $8,000, and 500 gallons of essence of clove at $8,000—

"Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (section 37, U. S. C. C.)."

[13, 14] But it is said that the term "distilled spirits," used in count 1, may mean either pure alcohol or anything which has been prepared as a beverage or by way of mixture making it palatable for beverage purposes. And we are told that the War Prohibition Act, the National Prohibition Act, and the Eighteenth Amendment all aim only at the sale of such "distilled spirits" as are fit for human consumption as a beverage. Then we are informed that the evidence shows conclusively that the distilled spirits sold to the defendants were of nonbeverage quality, being pure alcohol which could not be drunk; that therefore the defendants neither bought nor sold "distilled spirits" within the new meaning of that term, that is to say "as a beverage or for beverage purposes" within the meaning of the War Prohibition Act. To all of this it is enough to say, there being no bill of exceptions in the case, that this court knows nothing and can know nothing as to what the evidence shows was the character of the "distilled spirits" which the defendants bought or sold. The count uses the language of the War Prohibition Act which declares it "shall be unlawful to sell for beverage purposes any distilled spirits." And it declares that any person who violates any of the provisions of the act shall be punished in the manner specified therein. We may be permitted to add, although the question is not before us for decision, that even if it properly appeared to this court that the defendants bought and sold pure alcohol and delivered it to a saloon to be used by it in the course of its business, the majority, as at present informed, would have no difficulty in holding that the thing sold was "distilled spirits," and that it was sold for "beverage purposes" within the meaning of the Prohibition Act. To hold otherwise would seem to us to violate the plain intention of the act and to constitute a total disregard of the language used.

The sentences imposed under this count were imposed under the provisions of section 37 of the Criminal Code (Comp. St. § 10201), which authorizes each of the parties found guilty of conspiracy to be fined not more than $10,000, or imprisoned not more than two years, or both. In this case the sentences must be held good, not being in excess of the statutory limit.

The second count was dismissed by the court before the case was submitted to the jury, and therefore is not now before us.

[15, 16] The third and tenth counts may be considered together as each charges an unlawful sale of distilled spirits for beverage purposes. Count 3 charged that on November 15, 1919, the defendants did unlawfully, willfully, and knowingly sell for beverage purposes a quantity of distilled spirits, to wit, 24,106.96 gallons, and the said distilled spirits were manufactured from foods, fruits, food materials, and feeds after September 9, 1917, as the defendants then and there well knew, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Act Aug. 10, 1917). It is evident that the pleader in drawing count 3 had the Lever Act in mind. For reasons already stated, the Lever Act was not in existence on November 15, 1919, having been superseded by the War Prohibition Act. But in the opinion of the court the count is not bad because of the words at the

end of the count "(Act of August 10, 1917)." The count itself does not expressly allege that the unlawful sale was made in violation of the Lever Act, or of the "Act of August 10, 1917."

In Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 94 (42 L. Ed. 509), the court declared that it was wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made were embraced by some statute in force; that the indorsement on the margin of the indictment constituted no part of the indictment and did not add to or weaken the legal force of its averments.

"We must," said the court, "look to the indictment itself, and, if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

As was said in United States v. Nixon, 235 U. S. 231, 235, 35 Sup. Ct. 49, 50 (59 L. Ed. 207), the important fact is that the indictment alleges that an act was done contrary to the form of the statute in such case made and provided, and "what was that statute and on what statute the indictment was founded was to be determined as a matter of law from the facts therein charged." In the Nixon Case, as in the Williams Case, the court held the reference to the statute was no part of the indictment. See, to the same effect, Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, decided by this court; United States v. Wood (D. C.) 168 Fed. 438; United States v. Freidericks (D. C.) 273 Fed. 188. In the Nixon Case the entries on the back and in the caption of the indictment described it as being for violation of a certain statute, which was inapplicable, and the court declared that this did not invalidate the indictment, but that it was for the court to say whether there was any statute in existence which made the facts charged a crime; "an indictment must set out facts and not the law," and the indorsements constituted no part of the indictment. In the absence of an allegation in the count that the unlawful act charged constituted a violation of a specific statute, the mere indorsement in parentheses at the end of the count is in the opinion of the majority of the court of no greater significance than the same words would have if they had been indorsed on the margin of the indictment or on the back of the indictment or in the caption of the indictment. In all these cases the indorsement indicates the intention of the pleader to rest the indictment upon the statute named, but that intention cannot nullify the indictment or in any wise conclude the government if there is some other statute which can sustain it. For many years it has been the practice in the Southern district in drawing indictments to do what was done in drawing this count, but the practice is an unfortunate one, as it is quite unnecessary to allege the particular statute which has been violated.

[17] The essential facts alleged in count 3, viz. that the defendants did unlawfully, willfully and knowingly sell for beverage purposes distilled spirits on November 15, 1919, is the allegation of an act made criminal by the War Prohibition Act, which was in force on that date. Therefore the count is good. The allegation that the distilled spirits were manufactured from certain food materials after Sep-

tember 9, 1917, is to be regarded, in the opinion of the majority, as mere surplusage; it being immaterial under the War Prohibition Act when the spirits were distilled. The language of the War Prohibition Act is:

"That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization * * * it shall be unlawful to sell for beverage purposes any distilled spirits. * * *"

[18-20] The law is well established that unnecessary averments in an indictment may be disregarded as surplusage. Wharton's Cr. Procedure, vol. 1 (10th Ed.) § 200. And if it be said that under the War Prohibition Act a sale might be made for export and that the count does not negative the fact that the sale was not for export, we think the allegation that the sale was for beverage purposes is in itself a sufficient allegation, without adding the words that it was not for export. But, if mistaken in this, the objection comes too late after verdict, and we should assume that the jury was properly instructed, and that the evidence showed the sale was not for export. The sale for beverage purposes on the day named was a crime under the laws of the United States, being prohibited by the War Prohibition Act, and defendants could not have been misled or prejudiced in any way by the language of the count.

One of the members of the court, however, holds that the third count is expressly under the Lever Act, so that the allegation that the distilled spirits were made from food products after September 9, 1917, is material and necessary, and that it was to this charge that the defendants pleaded not guilty, and he thinks the finding that the Lever Act is impliedly repealed by the War Prohibition Act is no ground for treating the count as filed under the latter act. He thinks that there was no mistake or misunderstanding upon the part of any one, and the defendants have prevailed upon the precise issue proposed by the government. Another member of the court, while thinking the count good, thinks the conviction under it bad. The writer, however, thinks both the count and the sentence under it good, but the majority think the sentence under the count bad.

Count 10 charges a similar unlawful sale, alleging, however, that it occurred on November 15, 1919, and that it was not for export, and that the quantity sold was 24,106.96 proof gallons. At the end of the count occur the words "(Act of November 21, 1918)." There can be no doubt as to the validity of count 10, and, as it charged an unlawful sale, and as the sentences imposed under both counts were single and did not exceed the punishment authorized under the War Prohibition Act, the sentence imposed under count 10 is affirmed, while that imposed under count 3 is reversed.

Counts 4 and 5 having been dismissed by the District Judge, are not before us.

[21, 22] The sixth and ninth counts both involved an alleged violation of the same sections of the revenue laws, and they may therefore be considered together. Each of the counts charges that the defendants did unlawfully, willfully, knowingly, and feloniously remove and aid and abet in the removal of distilled spirits on which

the tax had not been paid to a place other than the distillery warehouse provided by law, contrary to section 3296 of the Revised Statutes of the United States (Comp. St. § 6038), which reads as follows:

"Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

That section, if in force on the dates specified in the counts, made it a criminal offense for any one to remove distilled spirits on which the tax had not been paid. Act Feb. 24, 1919, § 600 (40 St. at L. c. 10, p. 1105 [Comp. St. Ann. Supp. 1919, § 5986e]), imposed a tax of $2.20 on each proof gallon withdrawn unless withdrawn for beverage purposes, in which case it was liable to pay a tax of $6.40 on each gallon. The only difference in counts 6 and 9 is that the former count charges the removal on November 15, 1919, of 960.47 proof gallons, while the latter charges the removal on November 12, 1919, of 971.08 proof gallons. To constitute the crime charged and to sustain the conviction under these counts it must appear that on the dates named the law imposed a tax on the liquors withdrawn which had not been paid. On the dates named in the counts the act of February 24, 1919, was in force. Subdivision (a) of section 600 imposed a tax of $6.40 on each proof gallon of distilled spirits "if withdrawn for beverage purposes," but subdivision (b) of the same section (section 5986f) provided that the tax imposed by subdivision (a) on distilled spirits intended for beverage purposes should not be due or payable on such spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which, pursuant to any act of Congress or proclamation of the President of the United States, "cannot be lawfully sold or removed from any such warehouse during the period of prohibition fixed by such act or proclamation." As on November 12 and November 15, 1919, it was not lawful to sell for beverage purposes, such sales being absolutely prohibited by the War Prohibition Act, which also declared that no distilled spirits held in bond should be removed therefrom for beverage purposes, there was no tax then to be paid on liquors withdrawn "for beverage purposes" without payment of the tax. It does not therefore conclusively establish the invalidity of the counts if it should be conceded, and we do concede it, that no tax was at that time payable on liquors withdrawn "for beverage purposes." And, as said, that was not the charge contained in the counts. The charge was that liquor had been withdrawn without payment of the tax, without specifying the purpose for which the withdrawal was made. And, as the liquor was subject to a tax of $2.20 on each proof gallon withdrawn during the period specified (when not withdrawn for beverage purposes), the counts

were not necessarily bad, and after verdict and in the absence of a bill of exceptions we think the verdict of guilty on these counts might be sustained under section 3296, if in force. It might be assumed in that situation that the court below correctly charged the jury on the subject, and that there was evidence to support the verdict. See Wilson v. United States, decided by this court (C. C. A.) 275 Fed. 307.

[23, 24] That the act of February 24, 1919, imposes a tax of $2.20 on all distilled spirits not excepted by the language, and that it was not intended that that particular tax should be remitted while the War Prohibition Act was in force, is made about as plain as Congress could make it; for, when it imposed by the act of February 24th two kinds of taxes and declared that one of them, the tax imposed on distilled spirits intended for beverage purposes, should not be due or payable during the period of prohibition, and failed to make a like declaration as to the other, it left no reason for arguing that it intended that both taxes should be suspended during the period of prohibition. "Expressio unius est exclusio alterius." Moreover, it is to be noted that the act of February 24th was passed, not prior to but the year after the War Prohibition Act was adopted. At the time named in the counts there was a tax due. The real question is whether section 3296 was in force at the time involved and made the acts complained of in the counts a crime, or whether it had been impliedly repealed. Before considering that question attention may be called to the fact that it may be said that, while the act of February 24th provided for a tax of $2.20 per gallon, the tax is a debt and involves nothing more, as the act provides no penalty. But the penalty was already provided in section 3296, which, if not repealed, was existing law, and therefore did not need to be re-enacted. The act of February 24th and section 3296 of the Revised Statutes, if unrepealed, must be read together. If section 3296 remains unrepealed, it declares the penalty to be imposed upon any person violating its provision.

[25] We come then to the question whether section 3296 was in force at the time when the defendants are charged in counts 6 and 9 with having committed the offense named therein. In Reed v. Thurmond (C. C. A.) 269 Fed. 252 (November, 1920), the Circuit Court of Appeals for the Fourth Circuit had a case before it involving section 3296, and that court held, reversing the court below on a ground not advanced or considered therein, that the Volstead Act had repealed that section.

"To our minds," said the court, "the Volstead Act, in its entire scope and purpose, is plainly inconsistent with the scheme of revenue protection embodied in the Revised Statutes and in the section under review."

The court declared that offenses committed under the Volstead Act and since it went into effect are punishable only under that act. Volstead Act, tit. 2, § 3, declared that no person on or after the date when the Eighteenth Amendment goes into effect should manufacture, sell, etc., except as authorized by the act. And as the amendment referred to did not go into effect until January 29, 1920, one year after ratification was announced, the Volstead Act had not repealed section

3296 on the dates named in counts 6 and 9. It is also to be observed that Reed v. Thurmond, supra, was decided a year and a half before the Supreme Court decided United States v. Yuginovich, 256 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, in which case that court used the following language:

"That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished we have no question."

Then it said:

"We agree with the court below that, while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision * * * made in the Volstead Act."

What the defendants in that case were charged with was that they unlawfully engaged in the business of distillers without paying the tax imposed for engaging in that business. And the Supreme Court said it did not think Congress intended to preserve the penalties provided in section 3257 in addition to those provided in the Volstead Act.

The question presented in the case now before us is a different one. The Volstead Act is not before us so far as counts 6 and 9 are concerned for the reason that the act complained of in those counts was committed in November, 1919, and prohibition under Volstead Act, tit. 2, § 3, did not become effective, as declared expressly therein, until one year after the ratification of the Eighteenth Amendment, or on January 29, 1920. Moreover, section 35 of title 2 of the Volstead Act declared:

"Nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing law."

And this section also did not become effective until January 29, 1920. As the Volstead Act was not in effect on the dates charged in the counts, it is not important as respects these counts that it was in effect and even had repealed section 3296 prior to the trial and sentences of the defendants; the right to impose sentence for offenses previously committed having been saved by the provision in section 35 of title 2 of the act above quoted.

[26] The question before us then is whether we can say that Congress by the War Prohibition Act intended a repeal of section 3296. It is to be observed that the War Prohibition Act was a far less comprehensive act than the Volstead Act, and was intended to be a temporary, and not a permanent, statute, and it by no means follows that because the Volstead Act repealed section 3257 the War Prohibition Act repealed section 3296. And this court thinks it did not. If Congress intended by the War Prohibition Act to repeal section 3296, it reversed a policy which had been in effect since 1868 (15 Stat. 140), and remitted a criminal liability of a fine of not more than $5,000 and of imprisonment for not more than 3 years, retaining simply the civil liability in an action of debt for the recovery of the amount of the unpaid tax. We find it difficult to believe that a Congress which clear-

ly indicated its determination to suppress by the most severe measures what it regarded as the evil and harmful traffic in distilled spirits when used for beverage purposes intended to relieve all persons who sought to evade the payment of the tax from a criminal liability which had been imposed by law on such offenders during a period of 50 years. It may have intended that the act should have that effect, but, if it did have that intention, the court fails to discover wherein and whereby it indicated it.

Our attention has been called to a number of cases in which it has been decided that the Volstead Act has worked an implied repeal of certain revenue legislation. But the court is not aware of a single decision which has gone as far as we are asked to go in this case and hold that the War Prohibition Act repealed section 3296.[2] And in United States v. Turner (D. C.) 266 Fed. 248, in an opinion in which the subject was reviewed at some length, which cannot be said of most of the contrary decisions, the court passed on section 3296 and held that the Volstead Act itself did not repeal it. In the recent case of United States v. Fredericks (D. C.) 273 Fed. 188, a similar conclusion was reached by Judge Rellstab in a very carefully considered and able opinion.

This court holds that section 3296 was not repealed by the War Prohibition Act, and that counts 6 and 9 are good and the sentences imposed thereunder are valid.

The eleventh count, like the sixth and ninth counts, previously considered, related to a violation of the Revenue Laws, but to a different section of those laws. It charged that on November 15, 1919, the defendants carried on the business of a wholesale liquor dealer without having paid the special tax as required by law. At the end of this count was indorsed "(section 3281, U. S. R. S.)." Section 3281 (Comp. St. § 6021) prohibited the carrying on of the business of a distiller without payment of the special tax required by law. The applicable statute would have been more correctly cited as section 16 of the act of February 8, 1875 (Comp. St. § 5966) which was supplementary to R. S. 3281. So long as the law was in force one could not engage in the business of a wholesale liquor dealer without taking out a license and paying a special tax of $100, and, if he engaged in the business without doing so, he committed an offense for which he could be fined not less than $100 nor more than $5,000, and be imprisoned not less than 30 days nor more than 2 years. The mistaken reference to the section of the Revised Statutes indorsed at the end of the count cannot affect its validity for reasons heretofore stated in connection

[2] The following are cases in which the Volstead Act has been held to repeal certain revenue legislation: United States v. Windham (D. C.) 264 Fed. 376; United States v. Puhac (D. C.) 268 Fed. 392; United States v. Stafoff (D. C.) 268 Fed. 417; The Goodhope (D. C.) 268 Fed. 694; United States v. Fortman (D. C.) 268 Fed. 873. And in the following cases it was held not to repeal it: United States v. Sohm (D. C.) 265 Fed. 910; United States v. One Essex Touring Automobile (D. C.) 266 Fed. 138; United States v. Turner (D. C.) 266 Fed. 249; United States v. Farhart (D. C.) 269 Fed. 33; Violette v. Walsh (D. C.) 272 Fed. 1014.

with what was said concerning a similar question under the third count, and which the court deems applicable to the eleventh count.

[27] The question presented under count eleven relates to a different section of the revenue legislation from that discussed under counts 6 and 9. Under counts 6 and 9 the tax involved is on all distilled spirits, and the business of manufacturing all spirits is not unlawful. Under count 11 the tax involved relates to the business of a wholesale liquor dealer, and the business of a wholesale liquor dealer is not unlawful under the War Prohibition Act, which only prohibits sales for beverage purposes, but does not prohibit sales for other purposes. This court therefore holds count 11 good, and not impliedly superseded by the War Prohibition Act. At the time laid in the count, November 15, 1919, the War Prohibition Act was in force. Under that act the retail and wholesale business in distilled spirits was not absolutely prohibited, although it was made "unlawful to sell for beverage purposes any distilled spirits," and the Act made also unlawful "the manufacture or production" of intoxicating liquors for beverage purposes. It might be argued that, if Congress had made the whole business of selling distilled spirits unlawful, it could not at the same time have intended to keep in force a law which declared that one should not engage in the business thus made unlawful without having paid a special tax. To prohibit absolutely the manufacture and sale and at the same time require one to pay a special tax for engaging in the prohibited business might be thought to be inconsistent. In United States v. Ketchum (C. C. A.) 270 Fed. 416, the Court of Appeals for the Eighth Circuit said:

"To absolutely prohibit the manufacture and sale of spirituous liquors, and then to send persons engaged in such business to the penitentiary because they had not paid a tax on the spirits distilled, involves such a contradiction of purpose that there would seem to be no escape from the conclusion that the law requiring the payment of a tax is inconsistent beyond all reasonable doubt with the act."

In the Ketchum Case the court was referring to the National Prohibition Act. And in United States v. Yuginovich, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided on June 1, 1921, the defendants were charged, among other things, with an attempt to defraud the United States of the tax on distilled spirits under section 3257, and with a violation of section 3281 of the Revised Statutes in carrying on the business of a distiller without giving the required bond. The Supreme Court held the provisions cited had been repealed by implication. But, granting that the National Prohibition Act worked a repeal of the provision in section 3281 which made it an offense to carry on the business of distilling without giving a bond, it does not follow that the War Prohibition Act repealed section 16 of the act of February 8, 1875, which required the payment of a tax for carrying on the business of a wholesale liquor dealer, upon which count 11 of the indictment is based.

The National Prohibition Act is entitled:

"An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage

purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the develpment of fuel, dye, and other lawful industries."

As its title indicates, it is a comprehensive statute relating to the entire subject of distilled spirits. It embraces three titles and as printed covers some 18 pages of the United States Statutes at Large. The War Prohibition Act, on the other hand, is entitled:

"An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, 1919, the purposes of the act entitled 'An act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products' and for other purposes."

The part relating to prohibition of the liquor traffic is merely a part of the first section of that act, and covers a single page of the Statutes at Large. As the title of the act indicates, and a comparison with the National Prohibition Act makes clear, it is not a comprehensive statute dealing with the entire subject of distilled spirits. The War Prohibition Act in itself simply prohibited the manufacture and sale of distilled spirits for beverage purposes. It provided, however, that the Commissioner of Internal Revenue might prescribe rules and regulations subject to the approval of the Secretary of the Treasury in regard to the manufacture and sale of distilled spirits and their removal when held in bond after June 3, 1919, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. It seems to us that the act itself, prohibiting merely the sale for beverage purposes, cannot be regarded as working an implied repeal of prior legislation requiring a tax to be paid by the wholesalers; it still being lawful to sell for all purposes except for beverage purposes. If the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, prescribed under the act any valid rules and regulations which deprived the manufacturers or wholesalers of the right to sell for other than beverage purposes, our attention has not been called to the fact.

Whether the National Prohibition Act is to be construed as an implied repeal of the revenue provision involved is not before us in this case. If that act works an implied repeal, about which we express no opinion, it is because of certain sections of the act in title 2, which provisions did not become operative until after the date when the Eighteenth Amendment went into effect. But the act complained of in count 11, which is alleged to have been committed on November 15, 1919, which was prior to the date when that amendment took effect, is not affected by the National Prohibition Act; it being expressly provided therein, as before stated, that it should not "relieve any one from any liability, civil or criminal, heretofore or hereafter incurred under existing law."

[28] The fact that certain of the counts have been held bad because based upon a repealed or superseded statute can constitute no reason for reversing the judgments as to the valid counts. Selvester v. United States, 170 U. S. 262, 267, 18 Sup. Ct. 580, 42 L. Ed. 1029; Williams

v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37.

Judgments of conviction and sentences under the first, sixth, ninth, tenth, and eleventh counts are affirmed.

Judgments and sentences under the third count are reversed.

MANTON, Circuit Judge (dissenting). The indictment here has eleven counts. Counts 2, 4, 5, 7, and 8 were dismissed by the court, and the defendants were each convicted upon the remaining counts, Nos. 1, 3, 6, 9, 10, and 11. Count 1 charges a conspiracy to sell distilled spirits for beverage purposes in violation of the War Prohibition and the Lever Acts. Count 3 is for a violation of section 15 of the act of Congress of August 10, 1917 (Lever Act), for the selling, for beverage purposes, of distilled spirits made from food products. The sixth count is for violation of section 3296 of the Revised Statutes (title 37), removal of distilled spirits on which the tax had not been paid from a place other than a distillery warehouse. The ninth count is for a similar offense, except as to another quantity of distilled spirits. The tenth count is a violation of the act of Congress of November 21, 1918 (War Prohibition Act, 40 Stat. 1045), for selling distilled spirits for beverage purposes, and not for export. And the eleventh count is for violation of section 16 of the act of February 8, 1875 (18 Stat. 307), for carrying on the business of a wholesale liquor dealer without having paid the special tax. The evidence discloses that the distilled spirits was alcohol of 190 proof. The individual plaintiffs in error were each sentenced to various terms under these convictions, and it was ordered that the sentences run concurrently. The plaintiff in error Maresca was the president and sole owner of the Herba Products Company, Rubino was the president of the Gramatan Company, Inc., and De Angelis was a stockholder of the Gramatan Company, Inc., and its treasurer. The Herba Products Company was a domestic corporation, as was the Gramatan Company, Inc., and the Promotion Sales Company. It was through the medium of these corporations that the individual plaintiffs in error conducted a business for the manufacture and sale of flavoring extracts, hair tonic, and candy. Their factory was located at No. 138 Prince street, in the city of New York. The office of the Promotion Sales Company was at No. 1482 Broadway. On the door of the office there were names of each of the corporate plaintiffs in error. Concededly they carried on a legitimate business of manufacturing hair tonic. It appears that alcohol was used in the manufacture of the Gramatan hair tonic; the formula calling for 5 per cent. alcohol. This was their sole requirement for alcohol. A permit was granted to the Gramatan Company, Inc., for the withdrawal of alcohol, pursuant to the acts of Congress on September 2, 1919, for use only in making hair tonic and flavoring extracts. A bond was given in a sum inadequate in amount for the withdrawals of the barrels of alcohol which the record shows the corporate companies used during the period. On November 14, 1919, the plaintiffs in error were detected delivering two barrels of 190 proof alcohol at a saloon at No. 424 Mulberry street, Newark, N. J., with

three additional barrels on the truck. The government officers seized the alcohol and the truck. Investigation revealed that the tax paid was at the rate of $2.20 per gallon, the nonbeverage rate, and that the beverage rate was $4.20. The identification marks on the barrels, including the serial numbers, the nonbeverage tax stamps, and the nonbeverage caution label were found to have been removed by green paint. It was possible to trace these five barrels as part of the lot purchased by one of the plaintiffs in error on behalf of the Gramatan Company, Inc., from wholesale liquor dealers in New York City. There is other evidence, of a circumstantial character, which traced the ownership of the alcohol to the plaintiffs in error, and the sale thereof by the plaintiffs in error. The government's claim is that the permit was obtained by the plaintiffs in error for use by the Gramatan Company Inc., and used by that company, not for withdrawing alcohol for the manufacture of hair tonic and flavoring extracts, but, in point of fact, for the purpose of disposing of the alcohol for beverage purposes. The books of the Gramatan Company, Inc., show large withdrawals of barrels of alcohol between the period of August and November 17, 1919, and the claim is that the alcohol purchased and withdrawn on these permits was not necessary to the manufacture of hair tonic containing 5 per cent. alcohol, nor, indeed, could it have been used by the plaintiffs in error in their legitimate business.

After the conviction the plaintiffs in error sued out this writ of error. This bill of exceptions, which was signed and filed on December 20, 1920, is attacked by the defendant in error for the reason that it was not prepared and filed within the term. The judgment of the court was entered on July 2, 1920. The term of the District Court expired September 30, 1920, 90 days after the entry of final judgment. On July 2, 1920, after sentence was imposed, the court said:

"I will extend it (the term) until November 1st; that is four months, and I am quite sure, if it becomes necessary, I will have the power to grant an additional extension."

No minute or docket entry was made of the judge's remarks, and no order was ever signed until November 3, 1920, when, over the government's objection, an order was signed extending the term until December 8th. This order was procured on an affidavit which was filed November 3d, in which affidavit it was stated that the term had been extended until November 3d. The order was filed November 4th. On November 29, 1920, a further order extending the term was granted. The contention is that the term expired September 30th pursuant to rule 5, and that all subsequent orders are void and of no effect. The claim is that the order granting time to file a bill after the term must be made during the term, and that there must be a record entry showing that fact at the time the leave is granted, and that the mere recital in the bill of exceptions of an extension granted is not sufficient. The contention is that November 2d was election day, and that, if a four months' extension was granted, the period ended on and with November 2, 1920, and that the subsequent order extending the term, granted on November 3d, is void.

The majority of the court are of the view that this bill of exceptions was not signed and filed within the time under the circumstances above disclosed. Serious questions of error are presented by this record as errors committed at the trial, which may well warrant a new trial. I do not agree with the view of the majority of the court that there is no valid bill of exceptions, but, in the view that I take of this case, it is not necessary for me to discuss the sufficiency of the bill of exceptions and whether or not the same was signed and filed within the time granted by the court below. I think the indictment is defective and shall proceed to state my reasons.

The first count of the indictment alleges a conspiracy to violate both the Lever Act (40 Stat. 276) and the War Prohibition Act (40 Stat. 1045). It is alleged that this violation of law occurred between the 1st of July and the 15th of November, 1919. The Lever Act became effective August 10, 1917. Titles 1 and 3, and sections 1, 27, 37, 38 of title 2 of the National Prohibition Law (Volstead Act) became effective on October 28, 1919. The other sections of title 2 took effect and were enforced when the Eighteenth Amendment of the Constitution of the United States became effective. The first count of the indictment charges that the plaintiffs in error, both corporate and individual—

"did conspire and agree together and with said divers other persons to violate section 15 of the act of Congress approved August 10, 1917, and the act of November 21, 1918, and the rules and regulations made thereunder, in that at the time and place aforesaid they did conspire and agree together to use and to sell for beverage purposes a large quantity of distilled spirits manufactured from foods, fruits, food materials, and feeds after September 9, 1917, and to sell for beverage purposes, and not for export, large quantities of distilled spirits; and it was a part of the conspiracy that the individual defendants and corporate defendants should purchase such distilled spirits for the ostensible purpose of using it as an ingredient in the manufacture of hair tonic and flavoring extracts, but with the true object and purpose of using and selling such distilled spirits for beverage purposes."

As a charge in furtherance of this conspiracy six overt acts are set forth. In substance it is charged that on November 14 and 15, 1919, the plaintiffs in error, individual and corporate, did various acts such as obtaining a permit, physically obtaining certain barrels of distilled spirits, and delivering five barrels to persons unknown to the grand jury for other than nonbeverage purposes.

The Lever Act was intended to conserve the food supply of the country, while the War Prohibition Act was intended to conserve, in addition, the man power of the country. Under the Lever Act, provision was made for the Commissioner of Internal Revenue to inaugurate and enforce regulations. It was provided by regulation of February 6, 1919, that the manufacture of distilled spirits from foods, fruits, food materials, or feeds for beverage purposes is prohibited after September 8, 1917. The charges of the third count of the indictment are that the plaintiffs in error withdrew alcohol on permits duly issued for alcohol already manufactured ostensibly for nonbeverage purposes, and used and sold such alcohol for beverage purposes. And count 1 charges that the plaintiffs in error conspired to "use and to sell for beverage purposes a large quantity of distilled spirits," claiming a violation of the Lever Act. This is not a charge that the plaintiffs

in error manufactured or prepared beverages and used alcohol for that purpose, or that they thereafter sold the beverages thus manufactured or prepared by them or conspired to do so. This charge is not a violation of the regulations of the manufacture and use of food materials. The Lever Act prohibits only the use of food materials therein specified in the production of distilled spirits for beverage purposes. It in no way prohibits the sale of intoxicating liquors. But the government, to bring the case within the Lever Act, relies upon certain regulations promulgated on February 7, 1917, by the Commissioner of Internal Revenue as such regulations were approved by the Secretary of the Treasury. They are as follows:

"All persons are forbidden to use any distilled spirits manufactured after September 8, 1917, from foods, fruits, food materials or feeds, in manufacturing or preparing beverages or feed, and provided they were made from such materials after September 8, 1917. All persons are forbidden to use any distilled spirits manufactured after September 8, 1917, from foods, fruits, food materials or feeds, in manufacturing or preparing beverages, or to sell any such spirits for beverage purposes."

While the President was authorized to make regulations to enforce by the Lever Act, it was not permissible for the Department of the Treasury, acting for the President, to make or proclaim regulations which were beyond the powers delegated by the Congress to the President in the Lever Act. United States v. Wiltberger, 18 U. S. (5 Wheat.) 76, 5 L. Ed. 37; U. S. v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. Ed. 676. Regulation must not transgress the statute. Waite v. Macy, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892; U. S. v. Antikamnia Chemical Co., 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. 419, Ann. Cas. 1915A, 49.

By comparing section 1 of the War-Time Prohibition Act (effective November 21, 1918) with section 15 of the Lever Act, it will be observed that in the former act the use of food products for the manufacture of beverages was forbidden, and the act went further and prohibited altogether the sale of any and all intoxicating liquors for beverages purposes. It is clear that this impliedly repealed the Lever Act. U. S. v. Yuginovich, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided June 1, 1921. Therefore count 3 does not charge a crime. Nor does count 1 state a criminal offense in charging a conspiracy to violate the Lever Act.

Title 1 of the National Prohibition Act of October 28, 1919, was effective during the period the conspiracy is charged to have existed and during which the overt acts in furtherance of the conspiracy were committed. It provides for the enforcement of the war prohibition, and it will be noted that the period when it is alleged in the indictment this conspiracy existed in part was after the effective date of the National Prohibition Act (Volstead Act), to wit, from October 28 to November 15, 1919. The acts which are charged to be the overt acts in the furtherance of this conspiracy are alleged to have occurred on the 14th and 15th of November. The National Prohibition Act repealed by implication all preceding revenue provisions because it prohibited the manufacture or sale or removal from warehouses, except for export, of distilled spirits so that laws providing taxes in connec-

tion with such sale or removal are necessarily repealed. U. S. v. Yuginovich, supra, decided June 1, 1921.

In the Yuginovich Case the charge was a violation of section 3257 of the Revised Statutes, unlawfully engaging in the business of distillers within the intent and meaning of the internal revenue laws of the United States, and in defrauding and attempting to defraud the United States of the tax on spirits. It was charged that the plaintiffs in error failed to provide with the requirements of section 3279 of the United States Revised Statutes (Comp. St. § 6019) in exhibiting a sign, as the statute requires, and with section 3281 of the United States Revised Statutes, in carrying on the business of distilling within the intent and meaning of the Revised Statutes of the United States without giving the bond required by law; further, a violation of section 3282 of the Revised Statutes (section 6022) in unlawfully making a mash fit for distillation in a building not a distillery duly authorized by law. The Supreme Court sustained the ruling of the lower court which held that the National Prohibition Act repealed by implication the provisions of the internal revenue laws relating to operation of distilleries. The court said:

"The question remains concerning the applicability of section 3257, involving the right to punish for attempting to defraud the United States of a tax. Did Congress intend to punish such violation of law by imposing the old penalty denounced in section 3257 or as provided in the new and special provision enacted in the Volstead Act?

"It is the contention of the government that section 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes: * * * 'Nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.'

"It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty. The concluding phrase of section 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and in view of the provisions of the Volstead Act intended to make that amendment effective.

"Having in mind those principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the general language used at the close of section 35 evidences the intention of Congress to inflict for such an offense the punishment provided in section 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under section 35, enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. Moreover, the concluding words of the first paragraph of section 35, as to all the offenses charged, must be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquors for beverage purposes, or property designed for the manufacture of such liquor, and providing for its destruction. We agree with the court below that, while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its con-

stitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision for punishment made in the Volstead Act."

Where the later act covers the whole subject of the earlier act and embraces new provisions and indicates an attempt to substitute for an earlier act the later—as well as a lesser term of punishment—it prescribes the only rule in respect thereto. It operates as a repeal of all former statutes relating to the subject-matter even if the former acts are not in all respects repugnant to the new statute. U. S. v. Yuginovich, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided June 1, 1921; U. S. v. Tynen, 78 U. S. 88, 20 L. Ed. 153; Tracy v. Tuffly, 134 U. S. 206, 10 Sup. Ct. 527, 33 L. Ed. 879; Reed v. Thurmond (C. C. A.) 269 Fed. 252.

A single act of a conspiracy may charge a violation of two or more laws of the United States, and not be duplicitous. Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; U. S. v. McKinley (C. C.) 127 Fed. 170; U. S. v. Howard (D. C.) 132 Fed. 325. Still, to constitute a good indictment under section 37, it must be charged that the conspiracy was to do some acts made a crime by the laws of the United States, and it must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen the object of the conspiracy was a crime against the United States. The conspiracy or agreement and the doing of some act in furtherance of it make up the offense. The indictment must state with reasonable certainty the acts intended to be effected and carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was a crime, well defined, against the United States.

It is apparent to me that the pleader on the first count had in mind principally the violation of the Lever Act (and the regulations made thereunder), and not the War Prohibition Act. The gravamen of the offense is that the plaintiffs in error used and sold the alcohol manufactured after September 9, 1917, the date fixed by the regulations referred to. Count 1 does not describe the kind of liquor the plaintiffs in error conspired to use and sell. It is referred to, however, as distilled spirits. What is prohibited by the War Prohibition Act is defined. By it Congress intended to prohibit the manufacture, sale, and transportation for beverage purposes of any and every kind of intoxicating liquor within the United States. The liquor must be fit for use for beverage purposes. It cannot be that alcohol which is not converted into beverage form and then offered for sale or sold is forbidden by the War Prohibition Act. There is no charge in the indictment, nor does the evidence show, that any or either of the plaintiffs in error had converted the alcohol into form or shape fit for beverage purposes, and that they intended to offer or did offer the same for sale for beverage purposes, and thus come within the prohibition of section 1 of the War Prohibition Act. As was said in Commonwealth v. Morgan, 149 Mass. 314, 21 N. E. 369:

"It is a matter of common knowledge that alcohol is the intoxicating element in intoxicating liquor, that pure alcohol is not used as a beverage, and

that all intoxicating liquors that are so used contain alcohol mingled with other things, particularly with water. Whisky is alcohol mixed with water and other elements, of which the alcohol alone is intoxicating."

And by the Circuit Court of Appeals in the Eighth Circuit in Allen v. Liquid Carbonic Co., 170 Fed. 315, 95 C. C. A. 11:

"The court below found that the extracts were never manufactured, used, or sold by the company as a beverage, and that they could not be drunk as a beverage in their original and full strength becuse of the strength of the flavoring principle, but were susceptible of use only in imparting flavor to drink or food intended for human consumption. We think the testimony supports this finding of the court and that these extracts are not spurious imitations or compound liquor, within the meaning of section 3244 of the Revised Statutes (U. S. Comp. St. 1901, p. 2096). * * *

"As already indicated, we think this finding is supported by the testimony, and that these extracts are not beverages or liquor, within the meaning of the section of the statute above referred to."

See Commonwealth v. Mandeville, 142 Mass. 469, 8 N. E. 327; Arkansas v. Witt, 39 Ark. 216.

In the court's charge the jury was advised that the offense of count 1 was a conspiracy to violate the Lever Act as well as the Prohibition Act.

Alcohol is a principle in fermenting and distilling liquors. The Century Dictionary defines it as "the chief constituent of fusel oil, a product of fermentation in distilleries, which is contained in crude spirit"; and it is further defined as "a liquid, ethyl hydroxid, $C_2 H_5 OH$, formed by the fermentation of aqueous sugar solutions, usually prepared from starch by the action of malt." Webster defines it as "in the class of analogous hydroxides of organic radicals, including common or ethyl alcohol, methyl or wood alcohol."

Congress in the National Prohibition Act (title 3), which was effective on October 28, 1919, specifically legislated as to the manufacture, warehousing, sale and use of alcohol. Therefore the sale of alcohol as charged in count 10, and in so far as it may be charged in count 1, did not violate the War Prohibition Act. It was not a beverage. Title 3, § 1, provides:

"When used in this title—the term 'alcohol' means that substance known as ethyl alcohol, hydrated oxide or ethyl, or spirit of wine, from whatever source or whatever processes produced."

Section 19 provides that all prior statutes relating to alcohol as defined in this title, are hereby repealed in so far as they are inconsistent with the provisions of this title.

Its use and sale is regulated by title 3. The conditions and scheme of its use and sale are comprehensive. I think this repealed the War Prohibition Act in so far as it affected the use and sale of alcohol, whether considered in the popular sense of distilled spirits or in the more accurate terms of the various known kinds of alcohol. U. S. v. Yuginovich, supra.

Counts 6, 9 and 11 are charges of violation of the revenue statutes. These alleged offenses were committed on November 14 and 15, 1919. They are bad because of the implied repeal of the revenue statutes by the National Prohibition Law.

For these reasons the allegations of the indictment are insufficient to charge a violation of the criminal statutes, and the judgment should be reversed.

PACIFIC STATES ELECTRIC CO. v. WRIGHT.

(Circuit Court of Appeals, Ninth Circuit January 9, 1922.)

No. 3715.

1. **Patents ⟸173—Improvement on electric cooking apparatus held not pioneer invention.**

   A patent for an electric cooking apparatus, which combined in different form elements previously well-known in the art, and the specification for which expressly declared it was an improvement on the prior art, does not embody a pioneer invention, so as to be entitled to a generic claim.

2. **Patents ⟸226—Device substantially differentiated does not infringe.**

   If the device embodied in the patent can be substantially differentiated from defendant's device, the charge of infringement is not sustained.

3. **Patents ⟸236—Transformation of parts effecting substantially different operation avoids infringement.**

   Though a change in the relative position of the parts of a machine does not avoid infringement, where the parts perform the same respective functions after the change as before, the change of those positions which changes the functions of the several parts, so as to give the machine a substantially different mode of operation, does avoid infringement, though the ultimate result remains the same.

4. **Patents ⟸46—Claim for combination must disclose operative combination.**

   A claim for combination, to be valid, must be for an operative combination, so that there cannot be eliminated therefrom an element without which the device would not operate.

5. **Patents ⟸328—1,214,486, claims 5 to 9, for electrical cooking device, held not infringed.**

   The Wright patent No. 1,214,486, claims 5 to 9, for electric cooking apparatus, *held* not infringed by a device effecting substantially the same result, but without using one element of the claims which, according to the declaration of the patentee, was one of the principal parts of his invention.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit for infringement of patent by William D. Wright against the Pacific States Electric Company. Decree for complainant, and defendant appeals. Reversed and remanded, with directions to dismiss the bill.

Raymond Ives Blakeslee, of Los Angeles, Cal., and John P. Bartlett, of New York City, for appellant.

Frederick S. Lyon and Leonard S. Lyon, both of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee is the patentee of letters patent 1,214,486, issued January 30, 1917, for "electric cooking apparatus," stating in his specification that his invention relates to improvements in electric heating apparatus, more particularly to be used for grilling and waffle baking purposes, but which may be also used for any purpose of the ordinary electrically heated stove, and which may be folded up so as to occupy a small space when not in use, and which provides a large heating surface when unfolded. One of the objects of the invention, as declared in the specification, was:

"To provide a device of the kind that may be quickly converted from one use to a different use, as from a waffle iron to a grill, or to a device providing a large heating surface when required."

And the specification declared the principal parts of the invention to be:

"The base or grill member *a* (shown upon the drawings accompanying the specification), the lower waffle member *b*, and the upper waffle member *c*."

After stating that the waffle member *b* is preferably made of aluminum, and may be of any shape desired, but that the patentee's preferred construction is an oblong rectangular shape, the specification proceeds to describe at length both of the waffle members and their connection, as also the wires for the electrical heating and the insulating material, and concludes the specification with the statement:

"Although I have described my improvements with considerable detail and with respect to certain particular forms of my invention, I do not desire to be limited to such details since many changes and modifications may well be made without departing from the spirit and scope of my invention in its broadest aspect."

The first five claims related to and covered the grill member of the invention and are not for consideration, since it was only the last four claims which were adjudged by the court below to have been infringed by the appellant. Those claims are as follows:

"6. In a device of the class described, a pair of casings pivotally connected together, a waffle member provided with an aluminum baking surface mounted in each of said casings so that each of said aluminum baking surfaces covers the upper edge of one of said casings, and means mounted in said casings between said casings and said waffle members for electrically heating said waffle members.

"7. In a device of the class described, a pair of casings pivotally connected together, a waffle member provided with aluminum baking surfaces mounted in each of said casings so that their surfaces extend past the edges of said casings, means mounted in said casings between said casings and said waffle members for electrically heating said waffle members, consisting of an electrical heating element adjacent said waffle member and a nonconducting element spacing said electrical heating element from said casing.

"8. In a device of the class described, a pair of box-shaped casings pivotally connected together so as to fold one upon the other, a waffle member mounted in each of said casings provided with outwardly extending flanges extending past the edges of said casing, whereby said waffle members are supported on the edge of said casing and spaced apart from the bottom thereof, and electrical means mounted in the space between said waffle member and said casing for heating said waffle member.

"9. In a device of the class described, a pair of box-shaped casings pivotally connected together so as to fold one upon the other, a waffle member mounted in each of said casings provided with outwardly extending flanges extending

past the edges of said casing, whereby said waffle members are supported on the edge of said casing and spaced apart from the bottom thereof, electrical means mounted in the space between said waffle member and said casing for heating said waffle member, consisting of an electrical heating element adjacent said waffle member and a nonconducting element spacing said electrical heating element from said casing."

[1] There is no doubt that a pioneer inventor is entitled to a generic claim, but the record in the present case affords, in our opinion, no ground for the contention that the appellee occupies any such position. The various patents introduced in evidence show that various forms of electrical cooking apparatus were well known in the prior art, as was also aluminum as a cooking surface, and electrically heated waffle irons hinged together had also been made and publicly sold. What the appellee did was to improve upon the prior art, and, as has been shown, that was what he expressly declared in his specification.

[2] We therefore think the court below was quite right in its conclusion that the claims in question should receive a narrow construction, and the patent be limited to the precise device therein described. And it is well settled law that, if the device embodied in the appellant's patent can be substantially differentiated from that of the appellee, the charge of infringement cannot be maintained. Eaid et al. v. Twohy Bros. et al., 230 Fed. 444, 447, 144 C. C. A. 586; and cases there cited. See, also, Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 926, 161 C. C. A. 37; Stebler v. Porterville Citrus Ass'n, 248 Fed. 927, 930, 161 C. C. A. 45.

[3] It is apparent from a comparison of the devices of the appellant and appellee that they both produce the same result. The real question is: Do they do so by substantially the same means? And we repeat what we said under like circumstances in Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. at page 926, 161 C. C. A. 44:

"It is needless to cite the numerous cases in support of the law clearly stated in section 348 of Walker on Patents, the substance of which is that changing the relative position of the parts of a machine does not avert infringement, where the parts transformed perform the same respective functions after the change as before, but that such change does do so where the changing of those positions so changes the functions of the parts that the machine acquires a substantially different mode of operation, even though the ultimate result remains the same."

[4] Both the drawings and the specifications of the appellee's device show that both its lower and its upper waffle members are separately pivotally connected with its base or grill member, which three parts the patentee, as has been shown, expressly declares to be the principal parts of his invention. It is plain, therefore, that to eliminate either one of those parts is, as is said for the appellant, to destroy not only the structure but the law of operation of the device of the appellee. That a claim for a combination to be valid must be for an operative combination is clear. F. F. Slocomb & Co., Inc., v. Layman Machine Co. (D. C.) 227 Fed. 94, 104; Id., 230 Fed. 1021, 144 C. C. A. 286; M'Caslin v. Link Belt Machinery Co. (C. C.) 139 Fed. 393; Id., 147 Fed. 243, 77 C. C. A. 385.

In Wilson & Willard Mfg. Co. v. Union Tool Co., 249 Fed. 729, 731, 161 C. C. A. 639, 641, this court said:

"To make one mechanical device the equivalent of another, it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation."

[5] The waffle members of the appellant's device being directly pivoted together, its mode of operation is necessarily substantially different from that of the device of the appellee, and the base or grill of the latter, constituting, according to the express declaration of the patentee, one of the principal parts of his invention, has no corresponding element in the device of the appellant.

It is apparent, we think, that the two devices are substantially unlike, and, accordingly, the decree must be reversed, and the case remanded, with directions to the court below to dismiss the bill, at complainant's cost.

So ordered.

BOSTWICK v. TURNER CONST. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 6, 1922.)

No. 3738.

Depositaries ⇐4—Decree adjudging construction contract void did not justify depositary of fund guarantying performance in paying fund to owner.

Where a contract between a construction company and a terminal company provided that 15 per cent. of value of work and material should be paid by the terminal company to a bank to hold as a guaranty of performance by the construction company, a decree in a suit by the construction company on the contract, merely adjudging it void, and not passing on the rights to the guaranty fund, *held* not to justify the bank in paying the deposit to the terminal company.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Bill by William M. Bostwick, Jr., against the Turner Construction Company and others, to enjoin prosecution of a suit at law. Suit removed to the federal court, motion for remand overruled, a temporary injunction denied, and complainant appeals. Affirmed.

Maynard Ramsey, of Jacksonville, Fla., for appellant.

J. T. G. Crawford, F. P. Fleming, and Sam R. Marks, all of Jacksonville, Fla., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. To a bill of complaint filed in September, 1913, by the Turner Construction Company against the Union Terminal Company and others, to recover a judgment upon a contract for the construction of a building for said Terminal Company and to enforce a lien upon said building, said Terminal Company filed an answer, alleging that said Construction Company, being a foreign corporation, had failed to comply with the statutes of Florida requiring the procuring of a license by such foreign corporation before doing

business in the state, rendering all contracts of such corporation not so complying void. A decree was rendered in said case, holding said contract to be null and void, and dismissing said bill. Upon an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, said decree was reversed, upon the ground that after entering into said contract said Construction Company had duly complied with the law of Florida, and that a new contract had been thereafter entered into for the construction of said building, which had adopted the terms of the previous contract.

By an agreement of December 3, 1912, it was stipulated that 15 per cent. of the value of the work performed and materials furnished should be retained as a guaranty for the faithful performance of said contract by the Construction Company until 30 days after completion of said contract of construction, said 15 per cent. to be deposited in the joint names of the Construction Company and the Terminal Company with the Barnett National Bank of Jacksonville, Fla. During the progress of the bill in equity filed to enforce said lien a second suit in equity was filed in said United States District Court by the Construction Company against the same defendants, seeking to recover as on a quantum meruit for the construction of said building, and to enforce said lien. When said appeal was taken (February 27, 1915) from the decree dismissing said first bill in equity, this second suit was stayed pending the decision on said appeal.

On December 4, 1914, said Terminal Company notified said bank of the decree of said District Court, dated September 2, 1914, holding said construction contract to be null and void, and demanded of said Construction Company payment of said sums deposited with said bank under the agreement of December 3, 1912. The bank declined to make said payment unless and until the Terminal Company should give it security to hold it harmless by reason of said payment being improperly made. Whereupon, on the 22d of December, 1914, the Terminal Company, with William M. Bostwick, Jr., as its surety, executed to the Barnett National Bank its bond, in the sum of $40,000, conditioned to save, defend, keep harmless, and indemnify said bank against all losses, charges, damages, attorney's fees, expenses, suits, judgments, and decrees, which it might sustain, or be put to, because of having paid to said Terminal Company the amounts on deposit, to wit, $20,219.98. Said bond also contained a provision that, if any suit should be brought against said bank, a copy thereof should be mailed to said Bostwick, and he should be permitted to defend the same in the name of the bank, but without expense to it.

By subsequent proceedings in the suit in equity first filed by the Construction Company a decree was rendered adjudging the amount due, and by proceedings further had in said case it was finally decreed that the Construction Company was entitled to the said sum of $20,219.98, being the amount deposited with the Barnett National Bank under said deposit agreement above mentioned, and the Construction Company and the Terminal Company were ordered to join in a check to the Construction Company on said Barnett National Bank for the payment of said money, which was done. Upon presentation of said

check the bank refused to pay the same, upon the grounds that it had paid said money previously to the Terminal Company at a time when said decree holding said construction contract to be null and void, and dismissing the bill to recover thereon, remained unappealed from.

Thereafter, in March, 1918, said Construction Company brought its action at law, in the United States District Court for the Southern District of Florida, against said bank to recover said sum. Said bank defended said action, pleading that it was discharged by the payment of said money to said Terminal Company at a time when said decree of September 2, 1914, was in full force and effect and unappealed from. These pleas were upon demurrer held bad by the court and stricken. Thereupon William M. Bostwick, Jr., surety on said bond above mentioned, filed a bill in equity in the circuit court of Duval county, Fla., setting up the foregoing facts, and praying that the court enjoin said Construction Company, temporarily and permanently, from further prosecuting said suit at law. Said suit was removed into said United States District Court, and a motion to remand the same having been made and argued at the same time with a motion for a temporary injunction, the motion to remand was overruled, and the temporary injunction denied. An appeal is prosecuted to this court from the order denying the temporary injunction.

The sole question made and argued in this case is that Bostwick became surety on the bond given by the Terminal Company to the bank, relying upon the decree of September 2, 1914, which decree, at the time he became such surety, had not been appealed from, although the six months within which such appeal could be taken had not expired. That decree adjudged solely that the construction contract was void because, at the time it was originally made, the Construction Company had not qualified under the law of Florida to do business in said state, and refused to recognize the contract as subsequently remade by a new contract after said Construction Company had so qualified. No question was raised, and nothing was decided, as to the status of the 15 per cent. which had been earned under said contract and had been already paid into the bank to the joint order of the Construction Compand and the Terminal Company.

The very reason for giving the bond was that the bank was not willing to rely upon the decree of September 2, 1914, as determining the right to said fund, and the contract as surety was entered into in order to protect the bank, if for any reason thereafter said decree should not be held to have disposed of said funds. This is quite a different case from that of the purchaser at a judicial sale had under a decree, which has not been superseded, and which is therefore operative, and where the selling officer is carrying out the express mandate of the decree. There the purchaser at such sale, even though the decree is subsequently reversed, takes title. Davis v. Gaines, 104 U. S. 386, 26 L. Ed. 757. Here there was no provision of the decree disposing of this fund. Here the bank declined to act upon said decree, and the express contract of the surety was to indemnify the bank for the payment of said fund, in the event it should be afterwards found that it was not disposed of by said decree. Clearly this contemplated a possible reversal of the decree, as well as that rights existed in the fund which were not dis-

posed of by the decree. We think, therefore, that the decision of the court in holding that the decree, when reversed, furnished no protection to the bank or its surety, is without error, and that the court did not err in striking the defenses in said suit at law, and in holding in this case that no right exists in Bostwick to an injunction. Thomas v. Town of Lansing (C. C.) 14 Fed. 618; Phelps v. Elliott (C. C.) 35 Fed. 455; 17 R. C. L. 1042; Clarey v. Marshall's Heirs, 4 Dana (Ky.) 95.

The bond on which Bostwick was surety contained a provision that, in event suit was brought against the bank for said funds, the bank would at once notify Bostwick, who could defend the same in the name of the bank at his expense. There is no allegation that Bostwick has not been notified of the suit at law. In the absence of averments to the contrary, it is fair to assume that this is the case, in which event Bostwick has the same opportunity of presenting the matters now set up in the bill as a defense thereto, and would be bound by the rulings and judgment of the court in the case at law. Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Tootle v. Coleman, 107 Fed. 41, 45, 48, 46 C. C. A. 132, 57 L. R. A. 120. This would be a sufficient ground on which to deny the injunction sought.

As, however, the parties have fully argued the question whether the facts constitute a defense to the bank, or release Bostwick from his obligation as surety, and as we conclude that they do not, we prefer to rest the decision on this ground.

The decree of the District Court is affirmed.

SICHOFSKY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3708.

1. **War ⇐33—Act regulating entry of aliens during war held not inoperative at date of sentence.**

   Act May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), authorizing the President, when the United States is at war, to impose additional restrictions and prohibitions on the entry of aliens into the United States, had not become inoperative, where, at the time sentence was imposed on defendant, no treaty of peace had been made, the declaration of war had not been repealed, and American troops were still on German soil.

2. **War ⇐4—Act regulating entry of aliens during war held based on power to regulate immigration, as well as war powers.**

   Act May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), authorizing the President, when the United States is at war, to impose additional restrictions and prohibitions on the entry of aliens into the United States, was supported by the power of Congress to regulate the entry of aliens, as well as by the war powers of Congress.

3. **War ⇐4—Act authorizing President to impose additional restrictions on entry of aliens during war not repealed by later act.**

   Act May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), authorizing the President, when the United States was at war,

to impose additional restrictions and prohibitions on the entry of aliens, was not repealed by Act Nov. 10, 1919, covering the same subject, and providing that it should go into effect when Act May 22, 1918, should cease to be operative, and continue in force until March 4, 1921; Act May 22, 1918, not having ceased to be operative.

4. War ⟸4—Entry in violation of executive order held within saving clause of repealing statute.

Under Act May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), authorizing the President to impose additional restrictions and prohibitions on the entry of aliens, and prescribing the punishment for violations of the provisions of that act, or of any proclamation of the President promulgated, or of any permit, rule, or regulation issued, thereunder, defendant's entry without a proper passport required by an executive order thereunder was within the saving clause of the Joint Resolution of March 3, 1921, declaring certain war-time acts, regulations, and prohibitions terminated, but providing that this should not exempt from prosecution or relieve from punishment for offenses committed in violation of the acts repealed.

5. Criminal law ⟸102—Jurisdiction of offender not lost by short stays of execution, and by permitting trial in another court.

The District Court did not lose jurisdiction of an offender by granting a stay of execution for 15 days after conviction and sentence, and permitting him to be tried for another offense in a state court, or by granting other short stays on defendant's application, or with his consent.

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

Albert Sichofsky, also known as Abram Sichofsky, was convicted of an offense, and he appeals. Affirmed.

For opinion below, see 273 Fed. 694.

John S. Cooper, Lewis D. Collings and George H. Shreve, all of Los Angeles, Cal., for appellant.

Robert O'Connor, U. S. Atty., and Mark L. Herron, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant was sentenced in the court below upon his plea of guilty to an indictment which charged that on August 23, 1920, when the United States was at war with the Imperial German government, he did—

"knowingly, willfully, unlawfully, and feloniously enter and attempt to enter the United States from a foreign country, to wit, through the republic of Mexico, without a passport duly viséd in accordance with the terms of section 31 of the Executive Order of August 8, 1918, issued in pursuance of the Act of Congress approved May 22, 1918, 40 stat. 559."

The appellant appeals from the order of the court below, discharging the writ of habeas corpus and remanding him to the custody of the United States marshal, to abide the judgment of the court upon the indictment and his plea of guilty thereto.

[1, 2] It is contended that the indictment fails to charge a public offense, for the reason that the war ceased on November 11, 1918, and therewith ceased necessity for the law under which the appellant

was indicted; that the act of May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 7628e–7628h), being expressly limited in its terms to the period when the United States was at war, had become inoperative at the time when the appellant entered the United States. To this we cannot assent. At the time when sentence was imposed upon the appellant, the United States had made no treaty of peace with Germany, nor had Congress repealed the declaration of war. American troops still remained on German soil. Not only was the United States technically at war with the German Empire, but no status had been established in the negotiations between the two countries from which it could be held, as it was held in Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194, that, the reason for the statute having ceased, the statute itself ceased. The act under review in the Hamilton Case was based upon "the power to make all laws which shall be necessary and proper for the carrying into effect the war powers expressly granted." The act under which the appellant was sentenced is broader in its scope, in that in enacting it Congress exercised not only war powers, but a power independent thereof, the power to regulate the entry of aliens into the United States.

[3] It is contended that the statute was repealed by implication by the act of November 10, 1919 (41 Stat. 353), which act, it is said, covers the same subject, and by its own terms was to continue in force only "until and including the 4th day of March, 1921." But the act of November 10, 1919, contained the further provision that it should go into effect "upon the date when the provisions of the act of Congress approved the 22d day of May, 1918, * * * shall cease to be operative." The act of November 10, 1919, never did go into effect, for, as we have seen, the provisions of the act of May 22, 1918, did not cease to be operative.

[4] It is contended further that the act of May 22, 1918, was repealed by the joint resolution of March 3, 1921, § 3115, whereby certain war-time acts, resolutions, and prohibitions were declared terminated. But the resolution so referred to contains the following saving clause:

"Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any act heretofore repealed or which may be committed while it remains in force as herein provided."

As to the saving clause the appellant argues that it covers only offenses committed in violation of the express terms of the acts referred to, and that it is not sufficiently broad to include offenses committed in violation of the executive order or proclamation issued under authority of the act of May 22, 1918. We do not assent to this narrow view of the effect of the saving clause. The act of May 22, 1918, provided in terms that, if the President should find that the public safety required it, he might impose such additional restrictions and prohibitions upon the departure of persons from and their entry into the United States. Section 3 of the act (section 7628g) provides for punishment for violation "of the provisions of this act, or of any * * *

proclamation of the President promulgated, or of any permit, rule or regulation issued thereunder."

[5] It is argued that the District Court lost jurisdiction of the appellant by virtue of the order which it made, after his conviction and sentence, permitting him to be tried in a state court for the crime of grand larceny. The facts were that the court below made an order staying the execution of the appellant's sentence for a period of 15 days, and directing that the marshal take the appellant to the courtroom of the superior court of Los Angeles county, State of California, at such times as the appellant's presence in the proceedings there pending against him under said indictment in that court should be required, and that the marshal keep the appellant in his custody for the purposes stated in the order. Pursuant to that order the appellant was taken to the superior court of Los Angeles county, and was there tried, convicted, and sentenced. Upon the application of the appellant, or with his consent, further stays were granted, and at the time of the hearing on the writ in the court below, he was still in the custody of the United States marshal in the county jail at Los Angeles. There was no point of time, therefore, at which the jurisdiction of the appellant was lost by the court below. It was lost neither by the brief stays of execution, nor by permitting the appellant to be tried in the state court. Whether the state court acquired jurisdiction is a question we need not consider. In the cases cited by the appellant there is nothing which leads to a different conclusion. United States v. Wilson (C. C.) 46 Fed. 748; Miner v. United States, 244 Fed. 422, 157 C. C. A. 48, 3 A. L. R. 995; Ex parte United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355.

The judgment is affirmed.

CHANG SIM et al. v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3696.

1. **Evidence ⟸366(5)—Board of special inquiry properly considered copy of report of a board of special inquiry filed with collector of another port.**

On application by a Chinaman for admission to the United States as a foreign-born son of a citizen, board of special inquiry had a right to receive and consider a sufficiently authenticated copy of a report of a board of special inquiry sitting at Manila, where each page was impressed with the seal of the Philippine customs office and appeared to be a regular official finding and report of a special board of immigration officials appointed by the collector, and was received and filed by the immigration authorities at San Francisco and credited as an official record by the Department of Labor, and was acted on by the executive branch of the government.

2. **Witnesses ⟸271(3)—Report of board of special inquiry held admissible as proper foundation for cross-examination.**

On application by Chinese to be admitted as citizens, as foreign-born children of a citizen, a report of a board of special inquiry held some years before was admissible as proper foundation for cross-examination

of the alleged father, who was testifying as a witness, and with whom the report had to do, even though such report was not properly authenticated.

3. **Aliens ⊂=32(8)—Evidence held to sustain finding that applicants for admission were not sons of citizen.**

Evidence *held* to sustain decision of immigration officials that Chinese applicants for admission to the United States were not foreign-born sons of a citizen.

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

Habeas corpus proceeding by Chang Sim and another against Edward White, as Commissioner of Immigration for the Port of San Francisco, after their deportation was ordered. From an order denying the petition, petitioners appeal. Affirmed.

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

John T. Williams, U. S. Atty., of San Mateo, Cal., and Ben F. Geis, Asst. U. S. Atty., of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Appellants, Chang Sim and Chang Yet, seek admission to the United States, asserting that they are citizens, foreign-born sons of Waitong, whose citizenship is conceded. After hearings before a board of special inquiry admission was denied, and thereafter the Secretary of Labor dismissed their appeal, and deportation was ordered. To petition for writ of habeas corpus, filed in the District Court, demurrer was sustained, and from an order denying the petition appeal was taken.

The immigration records filed by stipulation disclose that Chang Sim arrived in San Francisco July 24, 1919, and applied for entry as the son of Waitong. Affidavits by Waitong and another Chinaman were filed in support of the applicant's affidavit. To the affidavit of Waitong there were attached photographs of himself and Chang Sim. By agreement Waitong, the alleged father, testified before an inspector, and the evidence with a report thereon was afterwards considered by the special board. Chang Sim appeared in person before a board of special inquiry. In due course in September, 1919, further examination of Waitong was had, and again Chang Sim was personally examined by the board. The cause for the further examination was the desire to gain information concerning an indorsement on the back of Waitong's naturalization certificate, which showed that as a citizen of the United States he had landed at Manila on the steamer Tean on June 22, 1906, and was accompanied by wife and family; also to inquire into the records of the alleged landing of Waitong at Honolulu in 1898 or 1899. Pending the gathering of the additional evidence, the applicant was paroled. The necessary information was received, and the board, not being satisfied that the applicant was the son of Waitong, deferred action "to allow the production of any additional evidence desired bearing on the relationship claimed." Counsel for applicant were notified, but no further evidence was produced, and on the ground that the relation-

ship claimed did not exist the applicant was held not entitled to enter.

Chan Yet, the other appellant, arrived at San Francisco November 30, 1919, and filed an affidavit of Waitong, together with appended photographs of himself and Waitong, and also affidavits of Wong Sing Chong and Chang Sim, applicant's alleged brother. Testimony was taken and several adjournments were had by the board of special inquiry to allow additional evidence of the claimed relationship of father and son. Counsel for applicant wrote that he had no further evidence, whereupon the board decided to exclude the applicant.

Appeals in both cases were taken, briefs in behalf of applicants were filed with the Secretary of Labor at Washington, and in a carefully prepared memorandum the record and other evidence was analyzed, and the conclusion reached that the status of the applicants was not established "to a degree sufficiently convincing to justify their admission as American citizens."

[1, 2] It is urged that the board of special inquiry had no right to receive or consider a copy of a report of a board of special inquiry at Manila, dated June 25, 1906, for the reason that there is lack of authentication of the report. Copy of the report is attached to an original letter addressed to the commissioner of immigration at San Francisco, and signed by the collector of customs at Manila, stating that he inclosed a copy of the complete record of the investigation into Chang Waitong's landing in Manila in 1906. Each page of the copy has been impressed by the seal of the Philippine customs office, and the document appears to be a regular official finding and report of a special board of immigration officials, appointed by the collector to inquire into a number of cases of Chinese passengers who arrived in Manila on the ship Tean on June 22, 1906. The documents were received and filed by the immigration authorities at San Francisco, and were credited as official records by the Department of Labor. Having become part of the official records of the case as acted upon by the executive branch of the government, we think they were sufficiently authenticated to be considered by the courts as part of the record in the case. But, however that may be, the report was shown the witness, and became admissible as proper foundation under rules for cross-examination in this way:

Included among the papers forwarded from Manila was the record of naturalization of Waitong, based upon citizenship in the Hawaiian kingdom, dated July 19, 1892. Upon the certificate there was a notation that Waitong landed in Manila with wife and family. Inasmuch as Waitong testified in 1919, before the board which examined into the cases of the present applicants, that in June, 1906, he was a passenger on the Tean from Hong Kong to Manila, and landed at Manila on June 22 of that year, as a citizen of the United States, and that he had gone to Manila on the Tean without any member of his family, it was entirely proper to show to him the notation on the back of his certificate of naturalization, which he obtained in Hawaii, and to ask what he had to say about the apparent inconsistency.

Waitong's explanation was that when he was going to Manila he made the acquaintance of three actresses who were on the ship, and without his knowledge or consent they claimed that he was husband and

father; that he did not wish to embarrass them by denying such relationship, and allowed the deception to pass; that he made no statement before the Manila board that the women were related to him, but was in the room when they told the inspector of their relationship; that he said nothing, as he did not want to make trouble for them; that he had no recollection of the names of the women, and signed no papers claiming that the women were connected with him; that the women were entitled to admission as actresses, but he feared they might be delayed until they were investigated, and for that reason they wished to appear as wife and daughters. There was no attempt by Waitong to deny that he entered Manila as a citizen of the United States, knowing that he was allowed to enter as accompanied by his wife and daughters.

[3] If there were nothing else in the case, we should not feel warranted in disturbing the conclusions of the executive authorities, in 1920, that Waitong was not entitled to be believed in his statements as to the paternity of the appellants. But there is more. Waitong now says that the photograph of Chan Yet, attached to his affidavit made in 1914 in the case of Chang Sim, was a mistake; that he trusted the matter to a Chinese lawyer, who said he would put the right photograph on the paper, but that the lawyer made a mistake, and put a wrong photograph, and gave the birthday of the second son, instead of the first. The conclusion of the authorities that Waitong had knowledge of this alleged mistake from the time it occurred is sustained and affords further ground for not believing his statement that he was the father of applicants. There were also discordant statements as to the ages of the appellants, which together with all the other evidence, was ample to sustain the decision of the immigration officials.

Appellants had a fair hearing, were represented by counsel, had every opportunity to produce witnesses, and have failed to show any abuse of discretion on the part of the executive officers, or error on the part of the District Court.

The order appealed from is affirmed.

WRIGHT et al. v. UNITED STATES ex rel. RED JACKET CONSOL. COAL & COKE CO.

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

No. 1918.

Appeal and error ⇐1170(1)—Failure to put injunction order in evidence in prosecution for contempt held not reversible error.

In prosecution for contempt of court for violation of an injunction order against persuading or compelling employees to leave their employment, where defendants in their answer admitted that the injunction order had been issued, and on their motion the particular portion on which trial was to be had was designated, failure to put the injunction order in evidence, where not called to the attention of the trial court, was not reversible error, under Act Feb. 26, 1919, forbidding reversal for errors not affecting substantial rights.

⇐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 Southern District of West Virginia, at Charleston; Charles A. Woods and Edmund Waddill, Jr., Judges.

Bill by the United States for injunction, on the relation of the Red Jacket Consolidated Coal & Coke Company, against John L. Lewis and others, wherein injunction was granted. Thereafter Henry Wright, Joe Smith, Ade Clark, Will Moore, and John Patrick were convicted of contempt of court in violating said injunction, and they bring error. Affirmed.

Charles J. Van Fleet, of Charleston, W. Va. (Harold W. Houston, of Charleston, W. Va., on the brief), for plaintiffs in error.

Barnes Gillespie, of Tazewell, Va. (B. Randolph Bias, of Williamson, W. Va., and Greever, Gillespie & Divine, of Tazewell, Va., on the brief), for defendant in error.

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

ROSE, District Judge. On the 20th of October, 1920, the court below in the case of the Red Jacket Consolidated Coal & Coke Company v. John L. Lewis, president, and 48 other named officers, members, agents, and representatives of the United Mine Workers of America, issued an injunction, by the sixth paragraph of which, the defendants, their officers, agents, employees and attorneys, were restrained from—

"compelling or inducing, or attempting to compel or induce, by persuasion, threats, intimidation or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees under their contracts of employment, or from compelling or attempting to compel by false representation, threats, intimidations or abusive or violent language, or other unlawful means, any person desiring to seek employment in plaintiff's mines and works from so accepting employment therein."

On the 27th of the succeeding January the plaintiff, in an intervening petition, supported by affidavits, called the attention of the court to alleged breaches of the injunction by a number of persons, including the plaintiffs in error herein. It was alleged that the persons accused were among the defendants named in the original order of injunction, or were members, employees or servants of the United Mine Workers of America, in active concert or participation with such defendants, and that subsequent to the issue of the injunction, and with full notice and knowledge of it, they willfully, knowingly, and maliciously disobeyed and violated it in certain respects, as specifically set forth.

The court held that the petition charged the commission of a criminal contempt, and thereafter all proceedings now under review were entitled in the name of the United States of America ex rel. the original plaintiff, versus the individuals charged with the contempt. The court entered an order requiring each of the accused in the contempt proceedings to appear before the court below at Huntington, on a day named therein, to show cause why they should not be punished for their contempt, and the marshal was directed to serve a copy of such order

and of the petition and affidavits upon each of the accused. The time for appearing and answering was subsequently extended, so that the answer was not actually filed until the 6th of April, 1921.

All the plaintiffs in error filed a joint answer, and by it they admitted the filing of the bill in the original case and the entry of the injunction and decree. The suggestion now made that the particular plaintiffs in error did not unite in this admission has no justification, either in the form or the language of the answer. They each and every one denied, however, that they had violated the injunction. The court was of opinion that the answer did not sufficiently purge the alleged contempt, and set down the matter for trial on the 22d of April. As it appeared that some of the acts charged were, if committed, crimes against the laws of West Virginia, the attendance of a jury was ordered on that day.

At the time set, all the defendants pleaded "not guilty," and asked the court to compel the plaintiff to designate more specifically those sections of the long injunction order which they were said to have violated. The court thereupon ruled that the issue to be tried by the jury was whether the defendants, or any of them, had violated that part of the injunction order heretofore quoted by doing any act or thing set out in the intervening petition, of such a character as to be construed as a criminal offense under any of the statutes of the United States, or under the laws of the state of West Virginia. A jury was thereupon impaneled and sworn. The government offered evidence tending to show, and which, if believed, did show that the plaintiffs in error, and each of them, were members of the United Mine Workers of America, and for the purpose of compelling various individuals named in the intervening petition, and who were in the employ of the original plaintiff in the injunction suit, to leave such service, had threatened, intimidated, abused, assaulted, and beaten such persons, all in flat defiance of the terms of the injunction. The plaintiffs in error offered no testimony. They asked no instructions other than that the court should direct a verdict of "not guilty."

The jury convicted the plaintiffs in error, the prosecution having either been abandoned or a verdict of "not guilty" returned as to all the other persons accused. The motion for a new trial was refused, and the plaintiffs in error were each sentenced to two months in the Mingo county jail. The assignments of error are three: (1) That the court refused to direct a verdict of not guilty. (2) That it overruled the motion for a new trial. (3) That it entered a judgment upon the verdict.

That the refusal of a motion for a new trial is not reviewable upon appeal, except under very peculiar circumstances not alleged here to exist, is too well established to require citation of authority. There is no error apparent upon the record which would have sustained a motion in arrest of judgment, if any had been made, as apparently none was.

It follows that the only matter open for consideration here is whether the court below should have directed a verdict for the plaintiffs in error. The bill of exceptions does not disclose that the attention of the court below was called to any reasons which would justify the grant-

ing of such motion, and no claim is made that any were in fact set up. It is said, however, that it should have been granted, because the injunction order was not formally put in the evidence before the jury. It was itself the basis of the prosecution. The defendants in their answer admitted that it had been issued. It was upon their motion that the particular portion of it, upon which the trial was to be had, was designated. In short, it was the basis of the whole proceeding. Every one concerned knew all about it, and there was not a shadow of controversy as to it.

The act of Congress providing for jury trials in certain classes of contempt cases (Comp. St. § 1245b) was intended to give the defendants the right to have the real issues in dispute tried by the country. No one wanted to incumber the proceedings with all the technicalities which flourished at the Old Bailey 150 years ago. Nor is there anything more of substance in the contention of the plaintiffs in error that there was not sufficient evidence to show that they knew of the existence of the injunction before they committed the acts charged against them, or that they were acting in concert and participation with the originally named defendants, their officers, agents and servants. The evidence showed that all the plaintiffs in error were members of the union. One of them was a defendant named in the original bill, and the others were acting in co-operation with him. Moreover such objections as these, especially that the injunction order had not been properly proved, should have been called to the attention of the court below before the jury retired. If this had been done, the court could, in its discretion, and indeed should, have permitted the reopening of the case to admit the formal proof of the fact, about which no one had any doubt. Omissions which could have been corrected, and doubtless would have been, had the attention of the court been called to them in time, do not constitute grounds for reversal. This was or should always have been true, and since the Act of February 26, 1919, 40 Stat. 1181, there can be no question about it.

Affirmed.

COHEN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. September 8, 1921. Rehearing Denied November 14, 1921.)

No. 2864.

1. Receiving stolen goods ⇐7(5)—Indictment held to sufficiently describe property and allege ownership.

Indictment charging that defendant had possession of 13 bundles of hides, of specified value, which had been stolen from a railroad car bearing specified initials and number, and which had constituted a part of an interstate shipment of freight, which, at the time so stolen, was in possession of the President of the United States, by and through the Director General of Railroads, *held* sufficient as against contention that property was not described and that ownership was not alleged.

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

2. **Receiving stolen goods ⟸9(1)—Whether defendant knew goods found in his possession to have been stolen held for jury.**
In prosecution for having possession of goods stolen from railroad while constituting a part of an interstate shipment, with the intent to convert goods to own use, whether defendant knew goods to have been stolen *held* for the jury.

3. **Receiving stolen goods ⟸9(1)—Whether defendant had possession of goods stolen from railroad while constituting a part of interstate shipment held for jury.**
In prosecution for having possession of goods stolen from railroad while constituting a part of an interstate shipment, with the intent to convert goods to own use, a question of whether the goods were in defendant's possession *held* for the jury.

4. **Criminal law ⟸1038(1), 1056(1)—Defendant cannot complain of instructions, in absence of objections and exceptions.**
Defendant cannot complain on writ of error that erroneous instructions were given, where no objections were made and no exceptions were preserved to any part of the instructions.

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

Sam Cohen was convicted of having in possession stolen goods, with the intent to convert goods to his own use, and he brings error. Affirmed.

Certiorari denied 256 U. S. ——, 42 Sup. Ct. 183, 66 L. Ed. ——.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

McCawley Baird, of East St. Louis, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is a writ of error to reverse a judgment of conviction against plaintiff in error under the fourth count of an indictment, which count is as follows:

"And the said grand jurors aforesaid, on their oaths aforesaid, do further present that Sam Cohen, * * * on, to wit, the 6th day of October, in the year of our Lord one thousand nine hundred nineteen, in the county of St. Clair, in the state of Illinois, in the Eastern district aforesaid, and within the jurisdiction of said court, did then and there unlawfully and feloniously have in their possession a large quantity of hides, to wit, thirteen bundles of hides, then and there of the value of, to wit, six hundred ($600.00) dollars, with the unlawful and felonious intent then and there in them, the said Sam Cohen, * * * to convert said hides to their own use, which said hides had lately theretofore been unlawfully and feloniously taken, stolen, and carried away from a certain railroad car bearing the initials and number, to wit, G. T. 102881, and which said hides, at the time they were so stolen as aforesaid, then and there constituted a part of an interstate shipment of freight consigned and in transit in interstate commerce from St. Louis, in the state of Missouri, to Cincinnati, in the state of Ohio, and which said hides and railroad cars, at the time the said hides were stolen as aforesaid, were in the possession of the President of the United States, by and through the Director General of Railroads, they, the said Sam Cohen, * * * at the time of so having said hides in their possession, then and there well knowing the same to have been stolen, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

[1] 1. It is urged against the sufficiency of the indictment that the property in question is not described, and that its ownership is not alleged. The description of the thing charged to have been in defendant's possession was not just 13 bundles of hides, but is that on October 6, 1919, Cohen had in his possession 13 bundles of hides, of the value of $600, in the county of St. Clair, lately theretofore taken from a certain railroad car bearing the initials and number G. T. 102881, and which constituted a part of an interstate shipment of freight, consigned and in transit in interstate commerce from St. Louis, in the state of Missouri, to Cincinnati, in the state of Ohio, in the possession of the President of the United States. Upon the question of ownership:

"The rule is that specific ownership must be alleged and proved; but a special property, such as that of a bailee, carrier, or the like, in goods stolen is sufficient for purposes of an indictment, say for larceny; * * * and in this respect there is no difference in principle between the offense of larceny and that of receiving stolen goods." "Presumably the owner of the station held an interest in the goods and chattels which was sufficient for all purposes of the indictment." Kasle v. United States, 233 Fed. 878, 883, 147 C. C. A. 552, 557 (6th Cir.).

See, also, Morris v. United States, 229 Fed. 516, 520, 143 C. C. A. 584 (8th Cir.); Fleck v. United States (C. C. A.) 265 Fed. 617 (8th Cir.); Grandi v. United States (C. C. A.) 262 Fed. 123 (6th Cir.).

From the evidence in the record and quoted in the brief of plaintiff in error, it is perfectly clear that there is no dispute whatever as to the identity of the hides, or as to where they came from, and that plaintiff in error was in no way surprised nor embarrassed in his defense.

[2, 3] 2. It is complained that there was lack of evidence to sustain the charge in the indictment. The testimony of the defendant himself indicates that he dealt with the hides without ever having examined them, and that an examination would have disclosed that they did not come from the country, as he says Bates told him they did, but that they came from a shipper of hides in St. Louis. It also indicates, from what he says was his repeated inquiry as to whether they had been stolen or not, that he knew or had reason to believe that they were stolen, or at least that they came to him under very suspicious circumstances. There is also testimony in the record that he bought the hides, but, instead of having them unloaded at his office in East St. Louis, he sent them, under the direction of the boy, to a commission house in St. Louis. From the time that he bought the hides, if he did buy them, they were wholly under his direction and control and in his possession, if the evidence was true. It is not necessary, in order that one may have possession, that he shall have the things in his hands or that he shall touch them. It is sufficient if they are in the possession of some one over whom he has for the time being direction and control. There is evidence in the record that plaintiff in error made different and contradictory statements about the purchase of the goods. Upon the whole record, it was a question for the jury as to whether he knew that the goods had been stolen, and also as to whether they were in his possession. Chass v. United States, 258 Fed. 911, 169 C. C. A. 631 (3rd Cir.).

[4] 3. It is urged that erroneous instructions were given. No objection was made, and no exception was preserved, to any part of the instructions. Plaintiff in error, therefore, has no standing in this court as to any such assignment. After quoting a portion of the instruction objected to, counsel in their brief say:

"If one is able to understand this part of the charge, he must conclude that the trial court proceeded upon some notion of conspiracy."

And again, in quoting a portion of the charge, they say:

"Again, the court gave to the jury this additional and inexplicable part of his charge."

If this is taken to mean, as counsel evidently intended it should be, that the instruction complained of could be neither understood nor explained, it is difficult to see how it could have in any way contributed to the conviction of the defendant.

There were two questions before the jury on the fourth count—one the question of possession; the other the question of knowledge as to whether the hides had been stolen. There were three other counts in the indictment, each involving, as in the fourth count, seven other defendants. The first charge was that of feloniously breaking into a railroad car; the second, feloniously entering the car; the third, stealing and carrying away from the car the hides in question; and the instructions covered all of these counts and all the defendants. We are unable to discover any theory, from a reading of the whole charge, upon which the jury could have been misled to the injury of the plaintiff in error. The jury seems to have been fairly and fully instructed upon all material points.

The judgment is affirmed.

ST. LOUIS BANK EQUIPMENT & FIXTURE CO. v. BANK OF ROLLING FORK.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1922.)

No. 3792.

1. Sales ⇐388—Charge as to effect of concealment of existing strike at time of execution of contract held within pleadings.

Where the declaration was founded on a contract for the manufacture and installation of bank fixtures within a stated period, which contained a provision extending the period if the work was delayed by strikes, the plea alleged that more than the allotted period had elapsed after the taking of the measurements for the fixtures and before the plaintiff offered to make delivery, and evidence was admitted without objection that there was a strike at plaintiff's factory when the contract was made, of which fact defendant was not informed, a charge that, if plaintiff was guilty of fraud in concealing the existence of the strike, it could not rely on that provision of the contract, was not objectionable, as outside the issues made by the pleadings.

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

2. Trial ⇐105(1)—Court can comment on evidence admitted without objection.

Where evidence as to an issue was admitted on both sides without objection, it was proper for the court to comment on the evidence in its charge, since, even if the pleadings were not sufficient to raise the issue, they could have been made so by amendment and Code Miss. 1906, § 808, prohibits reversal of a judgment after verdict for insufficient pleading.

3. Sales ⇐388—Charge that concealment at time of execution of existing strike prevented reliance thereon as excuse held correct.

In an action for defendant's refusal to accept bank fixtures contracted for, because not completed within the time required, where plaintiff relied on a cause extending the time in event of strike, and defendant testified the strike was in existence when the contract was made, and was fraudulently concealed by plaintiff's agent from defendant, a charge that, if plaintiff had reason to believe that the strike then in existence would prevent performance of the contract within the time specified, it was its duty to communicate that fact to defendant, and if it failed to do so it was guilty of fraud, and could not rely on the strike clause, was correct.

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action by the St. Louis Bank Equipment & Fixture Company against the Bank of Rolling Fork. Judgment for defendant, and plaintiff brings error. Affirmed.

R. B. Campbell of Greenville, Miss., for plaintiff in error.

T. C. Catchings, of Vicksburg, Miss. (W. H. Clements, of Rolling Fork, Miss., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff (plaintiff in error here) brought suit to recover for losses incurred by reason of defendant's alleged breach of contract. July 28, 1920, plaintiff agreed to manufacture and install certain bank fixtures and equipment in defendant's bank building at a specified price, which defendant agreed to pay. The contract was in writing, and attached to it were plans and specifications of the materials to be furnished and the work to be done. It was, among other things, provided that, unless otherwise agreed, plaintiff should prepare and furnish any necessary measurements, and that the work under the contract should be completed by the plaintiff within four months from the delivery to and approval by defendant of such measurements, but that if the plaintiff should be delayed by reason of strikes, or other causes not necessary to recite, the time fixed for the completion of the contract should be extended for a period equal to the time so lost.

Plaintiff alleged the existence of a strike by its workmen at the time the contract was made, and that it was thereby delayed in taking measurements, and preparing and forwarding plans to defendant, until October 25, 1920, but that it could and would have fully performed the contract within less than four months thereafter, and was prevented from doing so by the refusal of defendant to accept performance. The action was defended upon the plea that plaintiff failed to manufacture

and install the fixtures and equipment within the time limited by the contract.

The evidence on behalf of the plaintiff was to the effect that its agent took measurements of the bank building, and that they were approved by the defendant at or before the execution of the contract; that, almost immediately thereafter, the plaintiff made contracts with others for the manufacture of portions of the fixtures and equipment according to these measurements; that it furnished to the defendant blueprints of the measurements on the date alleged in the declaration, but that the defendant failed to return the same and refused to accept the fixtures and equipment, or to allow them to be installed, or to pay for the same. It was shown on cross-examination of plaintiff's witness that the measurements in question could have been prepared by a draughtsman within a day or two.

The president of the defendant bank testified that the contract would never have been entered into unless there had included in it a provision requiring the work to be completed within four months from its date; that he was assured by the company's agent, who signed the contract, that the fixtures and equipment would be furnished within less time; that the agent of the company then and there drew the plans and specifications, and he indorsed his approval thereon; that, in reliance upon the assurances of plaintiff's agent, alterations were made in the bank building, the old fixtures taken out, but reinstalled because of the delay in furnishing the new equipment; and that the bank was not informed of the existence of the strike in plaintiff's factory until the receipt of a letter from it, dated December 6, 1920.

The case was submitted to the jury, and resulted in a verdict for the defendant, and judgment was entered accordingly. The only error assigned is upon the following instruction:

"Now, with regard to the strike, if you believe from the evidence that, at the time this contract was entered into, the plaintiff was suffering or undergoing in its shop or place of business in St. Louis a strike, which it then knew or had reason to believe would prevent it from complying with this contract within the time provided, it was the duty of the plaintiff to communicate that fact to the defendant; and, if it failed to do it, then you may find that the plaintiff was guilty of fraud in concealing that fact, and disregard that provision of the contract entirely."

[1, 2] It is contended that the charge of the court complained of is not within the issues raised by the pleadings. We think the contention is untenable. The declaration alleges that the plaintiff could have completed the contract within four months after taking measurements; but was delayed in that work by the strike; and the plea alleges that more than four months elapsed after the taking of the measurements before the plaintiff offered to make delivery. It became a question of when the measurements were actually taken under the contract, and the submission of that question to the jury is not assigned as error. The plaintiff offered evidence to justify the extension of the date of completion for three months on account of the strike, while the defendant's evidence tended to show that measurements were made at the time the contract was executed. The evidence upon each side was admitted without objection, and it was therefore proper for the court

to comment upon it in its charge to the jury. If the pleadings were not sufficient they could doubtless have been made so by amendment. Section 808, Mississippi Code of 1906, provides that a judgment shall not be stayed or reversed, after verdict, for any insufficient pleading, or for omitting the averment of any matter without proving which the jury ought not to have given such verdict.

[3] We are of opinion that the charge was not erroneous under the facts of this case. According to the defendant's evidence, it was induced to sign the contract upon the belief that the material would be furnished and installed within four months, and that there was not then existing any cause which would prevent that from being done. Under these circumstances, it became the duty of plaintiff's agent to disclose the fact that a strike was then in existence. Moreover, it is not made to appear that any time, much less any particular length of time, was lost on account of the strike. It is not contended that plaintiff's draftsman was prevented from preparing blueprints because of the strike. Under the evidence, the jury could well have reached the conclusion that blueprints, showing measurements differing in no way from those already in plaintiff's possession, were sent, not because of any necessity, but merely to serve as a means of securing additional time within which to complete the contract.

The judgment is affirmed.

ROWAN v. UNITED STATES.*

(Circuit Court of Appeals, Seventh Circuit. October 4, 1921. Rehearing Denied November 14, 1921.)

No. 2958.

1. **Criminal law ⟸351(3)—Evidence of flight not inadmissible, as too remote.**
   Where defendant was indicted on May 1st, arraigned on May 4th, and his trial set for June 8th, evidence that, some time before the date set for trial, he fled to Canada, was not inadmissible, as too remote from the time of his arrest and indictment to have any bearing on his guilt.

2. **Criminal law ⟸351(3)—Evidence of flight admissible in prosecution for using mails to defraud.**
   The admissibility of evidence of flight is not limited to homicide cases, and such evidence was admissible in a prosecution for using the mails in aid of a fraudulent scheme, since its probative value is to indicate a consciousness of guilt.

3. **Criminal law ⟸351(3)—Admissibility of evidence of flight not dependent on whether other evidence is direct or circumstantial.**
   Where the witness is eligible, his testimony not privileged, and the subject-matter not excluded by law, admissibility of evidence of flight, like other matters, depends on whether it has or lacks probative value in support or denial of an issue, and not on the fact that the other evidence may be direct, circumstantial, or mixed.

4. **Post office ⟸35—Issue on trial for using mails to defraud is whether defendant thought he was making honest offer, which could only be judged by what he did.**
   On a trial for using the mails in aid of a scheme to defraud, by selling rabbits and guinea pigs at $5 a pair, and buying back their progeny from customers at $2.50 a pair, the issue for the jury to determine was whether

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⟸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. —.

defendant believed he was making an honest business offer, though in fact incapable of performance, and this could only be judged by how he dealt with his customers, and what he did with the money received.

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

Charles H. Rowan was convicted of using the mails to defraud, and he brings error. Affirmed.

Ray J. Cannon and A. W. Richter, both of Milwaukee, Wis., for plaintiff in error.

H. A. Sawyer and David A. Sondel, both of Milwaukee, Wis., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error, defendant below, was convicted of using the mails to defraud.

Complaint is made of the following instruction and of the admission of the evidence therein mentioned:

"Evidence has been received tending to show that defendant fled the country after his arrest and shortly before the trial of the case. This evidence is by no means conclusive against defendant. It may be considered along with all the other evidence upon the question of defendant's guilt. Unexplained, it may be considered by you as some proof of defendant's guilt; but I warn you against the danger of indulging in speculative or conjectural inferences against defendant by reason of this fact. It should be considered in connection with all other testimony."

Defendant was indicted on May 1, 1920, and was arraigned on May 4. He pleaded not guilty, and was admitted to bail. Trial was set for June 8, 1920. When the case was called, defendant failed to appear. At his trial in December, 1920, the government proved that some time between May 4 and June 8 defendant fled to Canada; that Canada instituted deportation proceedings against him; that in resisting deportation defendant testified that he was a British subject, but later in the proceedings admitted that he was an American citizen; that he was deported; and that at the receiving end of the international line he fell into the hands of the marshal, who returned him to Milwaukee for trial. Defendant neither denied nor explained his flight.

If the evidence was admissible, the instruction was in our judgment correct and eminently fair.

That the ruling on admissibility was right is clearly settled, we believe, by Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, and Bird v. United States, 187 U. S. 131, 23 Sup. Ct. 42, 47 L. Ed. 100, both homicide cases; but nevertheless we will state and answer defendant's contentions.

[1] 1. Defendant's flight was no part of the things done in the commission of the alleged offense, and his insistence is that it was too remote from the time of his indictment and arrest to have any bearing on his guilt. Elapsed time was much shorter than in the Bird Case; and circumstances of a flight go to weight rather than admissibility.

[2] 2. Counsel earnestly assert that "evidence of flight is permitted in homicide cases based on circumstantial evidence, but not in cases of

other crimes." In Betts v. United States, 132 Fed. 228, 65 C. C. A. 452 (1st C. C. A.), which was a prosecution for using the mails in aid of a fraudulent scheme, the alleged limitation was not observed. Flight's probative value is to indicate a consciousness of guilt. Can no defendant, except one accused of murder, have a consciousness of guilt?

[3] 3. That evidence of flight is never admissible "in cases where the proof of the crime consists of direct evidence" is the most persistent urge, and decisions and text-writers are cited in support, notably 8 R. C. L. 192, and Trapp v. New Mexico, 225 Fed. 968, 141 C. C. A. 28, (8th C. C. A.).

If every element of a crime is supported by direct evidence, then evidence of flight to escape arrest or avoid trial is not admissible? But if every element of a crime is supported only by circumstantial evidence, then evidence of flight is admissible? And this must inevitably be so, even if the circumstantial evidence case is stronger than the direct evidence case? If some elements of a crime are supported by direct evidence, and other elements only by circumstantial evidence, then evidence of flight is not admissible as to those elements supported by direct evidence, but is admissible as to those elements supported only by circumstantial evidence? If any element is shown by circumstantial evidence, then the government's case may be buttressed by other circumstances, including the circumstance of flight? But if any element is shown by direct evidence, then neither flight nor any other circumstance is admissible to buttress the government's case, although the defendant by going to trial is denying his guilt? If the government has direct evidence of the commission of a crime then there is an irrebuttable presumption that the defendant has no consciousness of guilt? But if the government has only circumstantial evidence, then the defendant may have a consciousness of guilt and evidence of flight is admissible as tending to prove it? Without further pursuing the consequences, we perceive no way to avoid the reduction to absurdity, except by holding that, the witness being eligible, and his testimony not being privileged, and the subject-matter not being excluded by law, admissibility of flight or of other matter depends on whether it has or lacks probative value in support or denial of an issue, and not on the fact that the other evidence in the case may be direct or circumstantial or mixed.

[4] But defendant is mistaken in his premise that the case against him was made by direct evidence. That defendant, acting as "the National Food and Fur Association," used the mails in distributing identified circular letters was not controverted. So the issue which the jury had to determine was what was in defendant's mind. Did he believe he was making an honest business offer, though it was one which in fact was incapable of performance? Was he, as well as those who dealt with him, deceived by his brilliant idea of selling rabbits and guinea pigs at $5 a pair, and buying back from his customers the progeny at $2.50 a pair in unending streams increasing at geometric ratio? What was in his mind could, of course, only be judged by how he dealt with his customers, and what he did with the incoming flood of money. And so in the Trapp or any other homicide case, in which self-defense

is the only controverted issue. When the identity of the deceased and the fact of his death at the hands of the defendant are agreed upon by both sides, the only inquiry remaining for the jury to solve is what was in the defendant's mind. He testifies that the situation immediately preceding the homicide led him to believe that, unless he instantly killed his opponent, he was in imminent danger of losing his own life. Does the government's evidence convince the jury beyond a reasonable doubt that the defendant had no such belief, but that, on the contrary, his mind was filled with a murderous intent? On that, the only issue being tried, what evidence, outside of confessions, could the government have but circumstantial?

The judgment is affirmed.

REDMOND v. BUCKEYE COTTON OIL CO.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1921.)

No. 3779.

Nuisance ⊂=33—Decree enjoining operation of delinting plant, but permitting operation with improvements, justified.

A decree enjoining operation of a cotton delinting plant as a nuisance as it was operated, but permitting its operation, provided improvements were made, such as would prevent the escape of dust, lint, or other débris upon the premises of complainant, *held* sustained by the evidence.

Appeal from the District Court of the United States, for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Suit in equity by S. D. Redmond against the Buckeye Cotton Oil Company. From the decree, complainant appeals. Affirmed.

Virgil Howie, of Jackson, Miss., for appellant.

William H. Watkins, of Jackson, Miss., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On July 19, 1920, S. D. Redmond (hereinafter styled plaintiff) filed a bill in equity in the chancery court of the First district of Hinds county, Miss., against the Buckeye Cotton Oil Company, a citizen of Ohio, to restrain the operation of a delinting plant owned and operated by the defendant and located on property adjoining that owned by plaintiff in the city of Jackson, Miss., alleging that the said delinting plant constituted a continuing nuisance by reason of a large amount of dirt, dust, lint, and water thrown out therefrom over complainant's property, thereby causing his tenants to vacate; that said nuisance impaired the health and endangered the life of complainant's tenants, greatly damaged the property, and inflicted great and irreparable damage and loss. Said bill further sought to restrain the continuance of an alleged blocking of Hoskins street, which it was alleged ran through the defendant's property, and which defendant had completely obstructed by building fences and different houses across the same. It also sought to recover $1,000 damages.

On petition of defendant said cause was removed into the United States District Court for the Southern District of Mississippi, at Jackson, Miss., and defendant filed an answer, denying all of the material allegations of complainant's petition, and alleging, further, that plaintiff had a complete remedy at law. On May 20, 1920, plaintiff had filed in said United States District Court, on the law side thereof, an action against said defendant Cotton Oil Company to recover damages for the erection of said delinting plant and for other alleged illegal acts, which complaint was subsequently amended.

On the 9th day of May, 1921, by consent of the parties, it was ordered in said equity cause that said two suits should be united and treated as one cause—

"and that a final decree will be rendered in this case which will include and dispose of all the claims and demands on behalf of plaintiff contained in said action at law."

The consolidated case was thereupon tried on the equity side of the court upon all issues therein, and resulted in a decree by which the defendant was perpetually enjoined from operating its delinting plant—

"so as to allow any dirt, dust, lint, cotton seed hulls, water, or other débris or matter to escape from its mill or delinting plant on to the property of plaintiff's, or to fly on to, or to fall on or upon, or to be blown on or upon, or to be carried in any way by any agency of defendant from its said mill or delinting plant on to or upon, the property of plaintiff, to the injury of plaintiff or of his tenants; that is to say, that the defendant is perpetually enjoined from operating its said delinting plant unless and until it shall make material improvements in the operation thereof, so as to appreciably reduce the nuisance shown to exist under prior conditions."

The court also awarded $750 for the damages claimed in the law and equity causes, and refused the other or further relief sought in the bill in equity, to wit, that respecting the removal of buildings from Hoskins street and the opening thereof.

Plaintiff appeals to this court, and assigns error in said decree in not restraining defendant from further operating its mill and delinting plant at all; (2) in awarding only $750 damages; (3) in not ordering and decreeing the removal of defendant's buildings from Hoskins street; (4) in not ordering defendant to remove all débris and material from the paths of natural drainage on its property, and in not opening up the paths of natural drainage according to the copy of a plat of survey known as the Jackson compromise; (5) also the court erred in not restraining defendant from throwing out decayed vegetable and animal matter on its premises which might render residence in the neighborhood of said property uncomfortable, unpleasant, or undesirable; (6) in failing to render separate and distinct judgments in the law and equity causes.

The testimony was voluminous, and there was a conflict of testimony on all material points in the case. In addition to the testimony, the District Judge trying the case inspected the premises and was entirely familiar with their physical location and condition.

We think that the decree granted by the chancellor in the case was fully warranted by the evidence. He fully enjoins the opera-

tion of the delinting plant until material improvements are made in its operation, so as to appreciably reduce the nuisance existing, and, unless they are made, the injunction is to be perpetual. Clearly, if an operation of this plant should be attempted without such improvements as would relieve the nuisance which the court has found to exist, the plaintiff could, by proper proceedings to enforce the decree, bring the matter to the attention of the court and have proper relief. It cannot be said that under the evidence in the case the chancellor was constrained to hold that an irremediable nuisance existed, and to absolutely and perpetually enjoin the operation of the plant under all circumstances. The decree enjoins immediately the operation as it exists, and the plant cannot be operated unless the nuisance is so reduced as to render the further operation legitimate.

As to the failure to enjoin the placing of deleterious matter upon the premises of the defendant, or the closing of natural drainage, there was sufficient evidence to warrant the chancellor in holding that no such condition then existed in regard to either of such matters, nor was there shown any such likelihood of their future existence, which would require the rendering of the decree prayed.

So far as an injunction was sought to require the opening of Hoskins street, where it ran through the property owned by the defendant, it is sufficient to say that these obstructions have existed for a long time without any complaint on the part of plaintiff in regard thereto, and that, even if the proof sufficiently showed that a street had existed through defendant's property, its use had been abandoned for so long that it would certainly have been inequitable to require the removal of buildings of considerable value, some of which had been there for many years. Again, it appears that the city council of Jackson had vacated said street south of the north wall of the hull house of the Cotton Oil Company, so that no public street existed at the time of the decree, and the defendant was the owner of all of the property on both sides of the portion of the street vacated. We therefore think that the chancellor did not err in refusing the injunction prayed for in this behalf.

The consent order consolidating the two cases expressly provided that the final decree should be entered in the equity cause, which would include and dispose of the claims and demands made in the action at law. It was therefore not error in the court to refuse the entry of two judgments.

As to the amount of damages rendered, the evidence was conflicting in regard thereto. There was considerable conflict as to the true rental value of plaintiff's premises, and as to what amount had been lost in the way of rents because of the matters set up in the plaintiff's pleadings. The plaintiff had instituted several actions against the defendant prior to this time, and had been awarded different sums as damages therein. This court is of the opinion that the evidence in the case is not such as to justify it in disturbing the amount of damages found by the judge of the court below, who tried the case, heard many of the witnesses, and viewed the premises.

The decree of the court below is affirmed.

STANDARD STOKER CO., Inc., v. BREWSTER.

(Circuit Court of Appeals, Seventh Circuit. September 8, 1921. Rehearing Denied November 15, 1921.)

No. 2911.

Patents ⊂=214—Inadvertent delay in payment of royalty held not to warrant cancellation of license contract.

Under a license contract for use of an invention, providing that it might be canceled by the licensor for failure to make payment of royalties as agreed upon, and at the times specified, where the licensee had expended a large sum and three years' time in perfecting the invention before it was commercially successful, and had invested $1,000,000 in the undertaking, the licensor *held* not entitled to cancel the contract because, through inadvertence, and not intentionally, a payment of royalty was delayed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Standard Stoker Company, Inc., against Morris B. Brewster. Decree for defendant, and complainant appeals. Reversed.

Frank Parker Davis, of Chicago, Ill., for appellant.

W. H. Lippencott, for appellee.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is an appeal to test the correctness of a decree of the District Court, dismissing the bill of appellant, hereinafter known as the Stoker Company, filed June 2, 1919, against appellee, hereinafter known as Brewster, to procure the reinstatement of a license contract canceled by Brewster because of failure to pay royalties.

On February 18, 1905, Brewster made a contract with the N. L. Hayden Manufacturing Company. The Hayden interest passed through several hands and finally came to the Stoker Company in 1912. There were frequent controversies, none of which seems to have been finally disposed of, but, as the only provision in the contract for its cancellation is that "in the event of a failure * * * to make payment of royalties as herein agreed upon and at the times herein specified," we do not deem it necessary to consider the merits of those controversies.

The contract, after providing for a royalty of $25 per stoker on the only kind made, contained the following:

"The payment of said royalties shall be made to said first party on the 1st days of March, June, September, and December, respectively, of each year during the life of this contract, or within ten days after said dates; the amount of such payments shall be based upon written statements setting forth the sales for the previous three months' business, said statements to be submitted to said first party by said second party on the respective dates above mentioned, and to be made from properly kept accounts of the said second party, which said accounts shall at all times be open to the inspection of the first party or his duly authorized representatives.

"It is further understood and agreed that during the first year of this contract, beginning with March 1, 1905, the minimum amount of the royalty, or sum in lieu of royalty, to be paid said first party, shall not be less than $200, and during the second year, the sum thus paid said first party shall not be less than $400; during each succeeding year of this contract, the minimum amount of royalty, or sum paid in lieu of royalty, shall not be less than $1,000, the deficiency, if any, to be due and payable at the end of each year respectively."

The contract was taken over by the Stoker Company through an arrangement with Brewster. Nothing had been done up to that time. In 1912 the stoker was tried out, but would not work until after it was redesigned by the Stoker Company's engineer. Those experiments cost $20,000. By March, 1915, 19 stokers had been built, and about $100,000 had been expended, but the business was not on a paying basis. Brewster's letter of July, 1913, shows that there were still serious difficulties to be experimented with before the stoker could be made a commercial success. Up to the time of the cancellation of the contract on January 10, 1919, the Stoker Company had invested a million dollars in the undertaking. During the years 1913, 1914, and 1915 the royalties did not equal $1,000, and at the end of each year, before March 1st, $1,000 was paid in a lump sum.

The report of April 5, 1916, showed that from March 1, 1915, to March, 1, 1916, 43 stokers were sold, making the royalty exceed the minimum by $75, which was paid on that date. Some fault was found with the vouchers, because they said payments were "in full," and Brewster returned them. On April 3, the Stoker Company wrote Brewster:

"We have been paying the $1,000 minimum fee annually, which was as we understood you desired it. * * * From your letter we observe you now prefer this $1,000 * * * paid quarterly. That there may be no misunderstanding upon this point, you will please confirm what we now understand to be your wishes."

No attention whatever was paid to that request, but a long letter was written on April 10, 1916, about other matters. Quarterly payments, of $250 each, were made May 27, September 1, and December 5, 1916, and March 10, 1917, and on March 15, 1917, an additional $75 was paid, covering all stokers sold to March 1. The next year, March 1, 1917, to March 1, 1918, quarterly payments were made June 5, September 17, and November 21, 1917, and March 2, 1918. On March 7, 1918, an additional $1,000, covering all royalties over the minimum, was paid. In 1918 quarterly payments were made June 10 and September 4.

On September 12, 1918, Brewster wrote:

"There is nothing in the contract that justifies you in assuming that there may be a minimum amount of royalty due at the end of a quarter, a balance to be held over. The reference to a minimum payment is simply that at the end of each quarter there is due me $250, even though your sales have not exceeded 10 in number."

Because of illness of the manager and absence of other officers that letter was not promptly answered. On September 23, 1918, $1,675 was sent. On November 29, 1918, $1,450 was sent. The report of

December 2, 1918, showed 107 stokers sold and check for $425 sent on December 10. In the letter it was said that 90 went to the government, and that payment would be made in due course. On the advice of his attorney, Brewster returned that check, and asked them to send check for the 107 stokers. On January 7, the $425 check was returned to Brewster, and one for $2,250 was also sent. Through some misadventure that letter was addressed to Brewster at 1716 *East* 103d street, instead of 1716 *West* 103d street. There was no such number east, and, though delayed, the letter reached Brewster on January 14, 1919; but it had arrived in Chicago on the 9th of January. On January 10, 1919, Brewster wrote the letter of cancellation.

We are of the opinion that there was no willful or intentional delay in making remittance. The method of payment was changed at least twice, and when the Stoker Company asked for a verification of a stated method Brewster ignored the request. Until the business got large, and war conditions made the Stoker Company short on man power, payments were made in advance of specified dates. Carey, the manager, also fell sick.

We are also of opinion that neither party correctly construed the contract as to payment of royalties. Reports should have been rendered on the 1st day of each March, June, September, and December, showing all stokers sold during the preceding three months, and on or before the 10th day of each of said months $25 should have been paid for each stoker sold during that period. If at the end of the year (third year and after) $1,000 had not been paid, then enough should have been paid at the end of each year to make the minimum for the year $1,000. Brewster was not entitled to quarterly payments of $250, regardless of the stokers sold, nor was the Stoker Company entitled to withhold until the end of the year all over $250 per quarter. To permit the cancellation of the contract to stand would be under all the circumstances inequitable and unjust.

The decree of the District Court is reversed, with directions to enter a decree in harmony with this opinion.

PRYOR v. WARE CONST. CO.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1921. Rehearing Denied February 14, 1922.)

No. 5565.

Master and servant ⇐301(1)—Railroad construction contractor held not liable for damages to railroad's property by negligence of work train employee under railroad's control.

Under a contract with a receiver for a railroad company for the doing of construction work on the line, which provided that the contractor should pay all damages to the receiver's property and gave the receiver control over the method of using the main line in doing the work, where he required that no work train should go on the main line unless in charge of a pilot and such pilot was employed, paid, and controlled by him, though the contractor was charged with the expense, the con-

tractor *held* not liable to the receiver for damage to a freight train in a collision caused by the negligence of the pilot.

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

On intervention by the Ware Construction Company in receivership proceedings against the Wabash Railroad Company. From a decree in favor of intervener, Edward B. Pryor, receiver, appeals. Affirmed.

Homer Hall, of St. Louis, Mo. (N. S. Brown and Hall & Minnis, all of St. Louis, Mo., on the brief), for appellant.

Robert E. Collins, of St. Louis, Mo., for appellee.

Before STONE, Circuit Judge, and TRIEBER, District Judge.

STONE, Circuit Judge. While the Wabash Railroad Company was in the control of Edward B. Pryor, as receiver, a contract was made with the Ware Construction Company for certain construction work along the tracks and right of way. This action is an intervention filed in the receivership proceedings by the contractor for a balance due under the contract. It is admitted that the balance of $1,631.97 claimed is due, but payment is resisted on the basis of a counterclaim for the same amount alleged to be due under the contract. Both the master and the trial court denied the counterclaim, and a decree resulted in favor of the contractor for the above amount, with interest. The receiver brings this appeal from that decree.

The allegations upon which the counterclaim is based are that the contract provided that the contractor should pay all damage to the property of the receiver arising from doing the work thereunder, whether caused by it or not; that because of the negligence of employees of the contractor certain property of the receiver was damaged, to the amount here involved, in a collision between a freight train belonging to the receiver and a work train belonging to the contractor. The defense to this counterclaim was that the contract did not cover damage of this character or damage resulting from the fault or negligence of the receiver, and that this was caused by the negligence of employees of the receiver.

The master found that the contract did not cover losses from negligence of the receiver, and that this loss was caused by the negligence of the engineer operating the freight train of the receiver. The court did not discuss the contract. It approved the finding as to the negligence of the engineer, on the theory that the evidence thereof was conflicting and uncertain, and should be governed by the legal presumption of correctness, being the finding of a master. It further found that the "primary cause" of the collision was the negligence of the pilot of the work train, and that he was the employee of the receiver.

Appellant here contends that the contract provides payment to appellant of "all" damage to his property, even though caused by the negligence of appellant's employee; that this court is not bound by the findings of the master, nor of the trial court, but itself should examine the evidence; that certain evidence bearing on the negligence

of the freight engineer was erroneously admitted; that there was no evidence justifying a finding that such engineer was negligent; that the evidence is conclusive that the pilot was the employee of appellee; that the evidence establishes the negligence of the engineer of the work train. The portions of the contract having any bearing upon the matter now before the court are as follows:

"The contractor shall and will provide all tools, appliances, etc., and perform all labor for the completion of embankment for new main and side tracks in the manner covered by the specifications attached and made a part hereof."

"The contractor assumes all responsibility for any loss or damage that may happen to said work or to the materials therefor, or for any injury to his workmen or to the public or to any individual, or for any damage to the receivers' or other parties' adjoining property."

"The contractor must arrange his work so that there will be no interference or delay in any manner with the train service of the company, and he will be responsible for any damage to the company's property caused by his acts or those of his employees. The contractor may use the main line for making the new embankment, except, of course, through that portion where the change of line is made. Whenever the work is liable to affect the movement or safety of trains, the method of doing such work must first be submitted for approval, without which it shall not be commenced or prosecuted. If such detention or interference to train service as the chief engineer shall consider unnecessary or unreasonable shall occur, the company reserves the right to complete the work at the expense of the contractor, after giving him written notice."

We find no obligation therein upon appellee to pay any damages caused by the negligence of the receiver. Appellee is required to pay all damages occasioned by its own employees. The further inquiry is therefore as to which employees caused the collision and the resulting damage. The collision occurred on the main line, between a work train of appellee and a freight train of appellant. Without determining how far we should be bound by the findings of the master and of the trial court upon these matters of fact, we have examined the evidence in detail and base our conclusions thereon. Under the contract provision giving the receiver control over the method of using the main line in the prosecution of the construction work, the receiver required that no work train should go upon the main line unless in control of a pilot. This pilot was a conductor in the employ of the receiver. He was designated, paid, and subject to control and discharge by the receiver, and not by the contractor. The amount paid him, while in this service, was charged against the contractor by the receiver. He operated under train orders issued by the receiver, in so far as the periods he could occupy the main line with the work trains. The work trains, while on the main line, were under his control and direction. He was assisted by one or two brakemen, who were employees and under the control of the receiver, and assigned by him to this work. The pilot and these brakemen had keys to the switches connecting the main line with the side or spur tracks of the contractor. No one connected with the contractor had keys to these switches. The above outlined facts are clearly established. They, in turn, establish, with equal clarity, the legal proposition that the pilot, while operating the work trains

on the main line, was the employee of the receiver, and in no sense the employee of the contractor. The fact that the contractor reimbursed the receiver for the wages of the pilot in no way disturbs the legal relation which arises from the facts of the rights to employ, discharge, and control the pilot.

While there is some evidence that the engineer of the freight train may have been negligent, we need not determine that matter, nor the admissibility of evidence as to such negligence. The evidence sufficiently establishes the negligence of the pilot. Nor is this conclusion affected by the claim that the engineer of the work train was negligent. He was acting under the control of the pilot in being where he was on the main line when the collision occurred.

The decree below was fully sustained by the law and the evidence, and it must be and is affirmed.

HOVLEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1922.)

No. 3726.

Indictment and information ⇐125(4)—Prostitution ⇐3—Indictment held to sufficiently charge single offense under Mann Act.

Under Mann White Slave Act, § 5 (Comp. St. § 8816), the District Court had jurisdiction of a prosecution under an indictment charging, in a single count, procuring transportation for a woman in interstate commerce for immoral purposes, and procuring a ticket to be used by her for transportation from Chicago to Los Angeles for such purposes, though the first clause did not state where or in what district he procured such transportation; such indictment charging a single transaction and being sufficient to charge an offense.

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

Peter B. Hovley was convicted of violating the Mann White Slave Act, and he brings error. Affirmed.

Theodore Stensland, of San Diego, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal., and Hugh L. Dickson, Asst. U. S. Atty., of San Bernardino, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was charged by an indictment, filed April 30, 1920, with violating the act commonly known as the "Mann White Slave Act" (Comp. St. §§ 8812–8819). The charging part of the indictment reads as follows:

"That Peter B. Hovley, whose full and true name other than as herein stated is to the grand jurors unknown, late of the Southern division of the Southern district of California, did, on or about the 13th day of February, A. D. 1920, knowingly, willfully, unlawfully and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in

transporting in interstate commerce a certain woman, to wit, Barbara Phillip, now Barbara Staalduynen, for the purpose of debauchery and for an immoral purpose, and with the intent and purpose to entice and induce the said Barbara Phillip, now Barbara Staalduynen, to give herself up to debauchery and to engage in an immoral practice, and did then and there procure and obtain, and caused to be procured and obtained, and aid and assist in procuring and obtaining a certain railroad ticket to be used by said Barbara Phillip, now Barbara Staalduynen, in interstate commerce, and in the transportation of the said Barbara Phillip, now Barbara Staalduynen, from the city of Chicago, in the state of Illinois, to the city of Los Angeles, in the state of California, for an immoral purpose, and with the intent and purpose then and there on the part of the said Peter B. Hovley to cause, entice, and compel her, the said Barbara Phillip, now Barbara Staalduynen, to give herself up to debauchery and to an immoral practice, to wit, to have sexual intercourse with and to be the mistress of the said defendant, Peter B. Hovley; the said Peter B. Hovley not being then and there the husband of the said Barbara Phillip, now Barbara Staalduynen."

The indictment contains but a single count. On this indictment appellant was arraigned in the United States District Court for the Southern District of California, Southern Division, on the 10th day of May, 1920, and pleaded not guilty thereto. Thereafter, on the 11th day of February, 1921, appellant withdrew his plea of not guilty and entered his plea of guilty of the offense charged in the indictment. On the 7th day of March, 1921, upon his plea of guilty, judgment was rendered against the appellant, and he was sentenced to imprisonment in the Orange county jail for the period of one year and to pay a fine in the sum of $1,000. On the 26th day of July, 1921, after several consecutive stays of execution of the sentence of imprisonment, the appellant entered upon the execution of said sentence. From this judgment appellant prosecutes this writ of error.

It is contended by the appellant that it does not appear by said indictment that the United States District Court for the Southern District of California had jurisdiction over the transactions referred to in said indictment. Section 5 of the Act of June 25, 1910, known as the Mann White Slave Act (36 Stat. 826 [Comp. St. § 8816]), reads as follows:

"That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in * * * which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, * * * contrary to the provisions of any of said sections."

In support of this contention of lack of jurisdiction appellant separates the allegations of the single count of the indictment into two distinct clauses, upon the ground that it charges two distinct transactions. In the first clause he places the charge of procuring transportation for Barbara Phillip in interstate commerce for the purpose of debauchery, etc. In the second clause he places the charge of procuring a railroad ticket to be used by Barbara Phillip for her transportation in interstate commerce from the city of Chicago, in the state of Illinois, to the city of Los Angeles, California, for the purpose of debauchery, etc. The claim is then made that the first clause does not state where or in what district he procured the transportation in interstate commerce for said Barbara Phillip, but it is charged in

the first clause that he procured the transportation of said Barbara Phillip in interstate commerce, and in the second clause it is charged that "then and there" appellant procured and obtained a certain railroad ticket for transportation of the said Barbara Phillip in interstate commerce from the city of Chicago, in the state of Illinois, to the city of Los Angeles, state of California. Manifestly there is here charged but a single transaction, namely, the procuring of transportation in interstate commerce of Barbara Phillip for the purpose of debauchery, etc., and for that purpose he "then and there" procured a railroad ticket for said Barbara Phillip from Chicago, in the state of Illinois, to the city of Los Angeles, in the state of California, thus fixing the time and place of the act charged against the appellant in transporting and causing to be transportated in interstate commerce the said Barbara Phillip for the purpose of debauchery, etc.

It is also contended that the facts stated in the indictment are not sufficient to constitute an offense, for the reason that it is not alleged that the procuring and obtaining of a railroad ticket was the act whereby Barbara Phillip was transported in interstate commerce. The analysis of the language of the indictment already made sufficiently answers this objection. The indictment informed the appellant sufficiently to put him on notice of the offense of which he was charged, and his arraignment and plea of guilty was an acknowledgment that it was sufficient, and that he was not in doubt as to the essential elements of the charge. The plea of guilty and the punishment imposed thereon would be a bar to any further prosecution under the statute upon any state of facts alleged in this indictment.

The judgment of the District Court is affirmed.

MARLOW v. PAGANINI.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1922. Rehearing Denied February 20, 1922.)

No. 3629.

Insurance ⇐587—Where insured failed to obtain indorsement of change of beneficiary, insurance passed to his estate.

Where insured was unable to procure an indorsement of a change of beneficiary on a policy made payable to his executors, administrators, or assigns, it being pledged as security for a debt, and never gave written notice to the company of any change of beneficiary, as required by the policy, the insurance became the property of his estate on his death, subject to the rights of the pledgee or his assignee, though the latter thereafter paid pledgee the sum due, procured the policy and presented it to the company for such indorsement.

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

Bill of interpleader by the New York Life Insurance Company against Charles Paganini, as administrator of the estate of David K.

Marlow, deceased, and Herta Marlow. Decree for the administrator, and Herta Marlow appeals. Affirmed.

Statement of claim by defendant Herta Marlow alleged that Miss Jennie Heppner, on or about October 1, 1919, assigned her right in the policy in question to said defendant, and that on October 20, 1919, defendant Herta Marlow purchased from Ben Janwitz all his claim against David K. Marlow, deceased, and that he delivered to her the policy held by him as collateral security, and that said defendant claimed as assignee of Miss Heppner, or as the assignee of Ben Janwitz, or as the assignee of both.

Ernest K. Little, of San Francisco, Cal. (Otto A. Samuels, of New York City, of counsel), for appellant.

Walton C. Webb and C. F. Reindollar, both of San Francisco. Cal., for appellee.

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

ROSS, Circuit Judge. The policy of insurance here in question was issued upon the life of David K. Marlow May 29, 1917, and was made payable to the "executors, administrators, or assigns of the insured, or to the duly designated beneficiary (with the right on the part of the insured to change the beneficiary in the manner provided in section 6)."

Section 6 provides as follows:

"*Change of Beneficiary.*—The insured may at any time and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary must be made by written notice to the company at its home office accompanied by the policy for indorsement of the change thereon by the company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate to and take effect as of the date the insured signed said written notice of change whether the insured be living at the time of such indorsement or not."

The provision of the policy relating to the assignment thereof is as follows:

"*Assignment.*—Any assignment of this policy must be made in duplicate and one copy filed with the company at its home office. The company assumes no responsibility for the validity of any assignment."

The home office of the company is in the city of New York. The insured having died May 30, 1919, and conflicting claims to the insurance having been made, the insurance company paid the amount into court, and the appellant and the appellee, as administrator of the estate of the deceased, were required to interplead and litigate their respective claims.

The conceded facts show that on the 18th of March, 1918, the insured filed at the San Francisco branch of the company a direction that the beneficiary be changed to Miss Jennie Heppner, at which time, and continuously thereafter until subsequent to the death of the insured, the policy was in the possession of one Janwitz, in the city of San Francisco, as security for certain moneys due him from the insured, for which reason the insured was unable to surrender the policy or to procure the indorsement of the change of the beneficiary on it. The

record further shows that, although the insured lived for more than one year thereafter, he neither delivered to the company at its home office the policy for indorsement thereon of any change of beneficiary thereunder, nor did he give any written notice to the company at its home office of any change of such beneficiary, nor, so far as the record shows, did he ever make any attempt so to do, and no such indorsement was ever made upon the policy by the company.

It is, we think, not necessary to consider whether the pledge of the policy to Janwitz was or was not in effect an assignment of it, but it admits of no doubt that it conferred upon the pledgee an interest in the policy and the right to hold it until his debt was paid, as against the insured and any beneficiary that might be legally named by him. It is manifest from the facts stated that no change in the beneficiary had been effected at the time of the insured's death May 30, 1919.

Subsequent to that event, the record further shows, the appellant paid the sum for which the policy was being held as a pledge, got the policy, and presented it to the company at its home office for indorsement of the change of beneficiary thereon. No such indorsement thereon, if then made, would have been of any effect, for the obvious reason that upon the death of the insured the amount of the insurance became the property of the estate of the deceased. See Abbott v. Supreme Colony United, etc., 190 Mass. 67, 76 N. E. 234; French v. Provident Savings Life Assurance Society, 205 Mass. 424, 91 N. E. 577; McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; De Silva v. Supreme Council, 109 Cal. 373, 42 Pac. 32; Tillman v. John Hancock Life Insurance Co., 27 App. Div. 392, 50 N. Y. Supp. 470.

We must therefore affirm the decree of the court below in favor of the administrator of the estate, subject to the rights of the assignee of the pledge.

So ordered.

NISHIMURA v. MANSFIELD, Immigration Inspector.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1921.)

No. 5637.

Aliens ⟸54—Order of deportation held sustained by evidence.

Evidence *held* to sustain an order for deportation of an alien under Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), on the ground that he returned to and entered the United States after he had been deported as having been connected with the business of prostitution.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Habeas Corpus by Eyitaro Nishimura against William R. Mansfield, Inspector in Charge of the Immigration Bureau at Denver, Colo. From an order denying the writ, petitioner appeals. Affirmed.

Charles A. Irwin and Charles E. Friend, both of Denver, Colo., for appellant.

J. Foster Symes, U. S. Atty., and Otto Bock, Asst. U. S. Atty., both of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. This is an appeal from an order of Judge Lewis of the District Court of Colorado denying the petition of the appellant for a writ of habeas corpus. The order appealed from reads as follows:

"On presentation of the petition for the writ Charles E. Friend, Esq., appeared as counsel for petitioner and Otto Bock, Esq., Assistant United States District Attorney, appeared for the respondent. And thereupon the petition and exhibits thereto attached were read and considered, and therefrom I reach the conclusion that the petitioner is not entitled to the writ, and order that it do not issue."

There was no testimony taken before the District Judge. The order was made upon the petition and exhibits thereto attached. There are three exhibits referred to in the petition and made a part of it. Exhibit A is the warrant of John W. Abercombie, acting Secretary of Labor, dated February 11, 1920, commanding appellee W. R. Mansfield, Inspector in Charge, to take appellant into custody, upon the following charge:

"That he returned to and entered the United States after having been arrested and deported as a person having been connected with the business of prostitution, and that he entered without inspection by means of false and misleading statements," in violation of the Immigration Act of February 5, 1917.

The warrant further commanded the appellee to grant to petitioner a hearing to enable him to show cause why he should not be deported in conformity with the law. Exhibit B is stated in the petition to contain all of the evidence at the hearing had in conformity with the direction contained in the warrant. Exhibit C is stated in the petition to be a warrant of deportation under which appellant was taken into custody on the 25th day of June, 1920.

One of the grounds set up by appellant in his petition was a plea of res adjudicata to the effect that he had on December 24, 1919, been discharged on habeas corpus by Judge Riner after an arrest on a warrant containing the same charge as set out in Exhibit A. That warrant does not appear in the record. The necessary inquiry upon that plea was whether the facts on which the charge in Exhibit A was based were the same as the facts on which the warrant was based in the habeas corpus proceeding before Judge Riner. In Exhibit B, which purports to be the record of the hearing upon the warrant, Exhibit A, there appears the following statement by the attorney for appellant:

"A copy of the testimony adduced at the last hearing, this copy having been made from the copy furnished us by the inspector in charge, is hereby introduced, and marked Defendant's Exhibit C by the inspector."

This Exhibit C does not appear in the record. It is not the same as Exhibit C referred to in the petition. It is therefore impossible for us to determine whether the facts brought out in the first hearing are the same as those set out in Exhibit B which purports to state the testimony taken at the second hearing. The record does not, therefore, sustain the plea of res adjudicata.

Exhibit B shows: (1) That under the warrant of deportation dated January 11, 1915, Shigetake Asakura, an alien, was deported as having been connected with the business of prostitution. (2) That in execution of that warrant he was placed on a steamer at San Francisco and that he sailed away on that steamer. (3) That the petitioner, Eyitaro Nishimura, was shown to be the same person as Shigetake Asakura.

The warrant contained two charges. The first charge was clearly sustained by the testimony. The facts proven made applicable that clause of section 19 of the Act of Congress approved February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), which reads as follows:

"Any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The second charge in the warrant to the effect that petitioner had entered the United States without inspection by means of false and misleading statements, was not proven. Upon the first charge, however, the proof was ample.

Upon the record as presented here, the order of the District Court must be affirmed. It is so ordered.

PEOPLE'S DEVELOPMENT CO. v. SOUTHERN PAC. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3673.

Public lands ⇐117—Railroad grant; patent conclusive of nonmineral character.

Act July 27, 1866, making a grant of lands to the Southern Pacific Railroad Company, excluded mineral lands, but intended that the character of the lands should be determined by the Interior Department before issuance of patents, and after a patent has issued thereunder it must be accepted, when collaterally attacked, as conclusively showing the nonmineral character of the land and the regularity of the proceedings precedent to its issue.

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

Suit in equity by the People's Development Company against the Southern Pacific Company and others. Decree for defendants, and complainant appeals. Affirmed.

T. C. West and Powell & Dow, all of San Francisco, Cal., for appellant.

G. V. Shoup, W. M. Singer, and Frank Thunen, all of San Francisco, Cal., and Johnston & Jones, of Fresno, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from a decree dismissing a complaint wherein plaintiff sought to quiet title to certain lands claimed by and included in patent to defendant railroad corporation. The complaint alleges:

That in June, 1909, the lands described were public lands open for exploration and location; that certain qualified citizens located the lands as mining claims, and in 1911 conveyed their rights to plaintiff corporation; that by act of Congress approved July 27, 1866 (14 Stat. 292), and joint resolution of Congress approved June 28, 1870 (16 Stat. 382), the United States granted to the appellee all odd-numbered sections of public lands not mineral to the amount of 20 alternate sections per mile on each side of said railroad, but specifically excluded from the operation of the act and patent issued under the grant all lands which should thereafter be found to be mineral in character except coal and iron lands; that in accordance with the act and resolution referred to patent issued on July 10, 1894, expressly reserving all mineral lands therein contained, except coal and iron lands; that no title legal or equitable passed for the mineral lands in question; that prior to issuance of patent the lands were known to be mineral, and not subject to disposition by the United States, except under the mining laws; and that no official examination and no determination of their character was made or approved by the United States.

These allegations are followed by charges that the appellee railroad company has by force and threats prevented appellant from securing and maintaining peaceable possession of the mining claims, and that appellees have never filed mineral locations, but have extracted valuable minerals from the lands. Appellant disavows any attempted attack on the patent issued to the railroad company, and defines its suit as an effort to "clarify title to the mineral lands which were excepted and excluded by the act from the grant" to the railroad company, and which appellant argues were retained by the United States, but titles to which lands have been "unsettled" by the decision in Burke v. Southern Pacific R. Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, "which erroneously decreed reserved mineral lands to be in the Southern Pacific Railroad Company."

In the facts to which the law must be applied we do not perceive any material distinction between the present case and Burke v. Southern Pacific Co., supra, and clearly the same questions of law are involved. As in the Burke Case the suit is one where rights claimed under a patent are challenged by a party whose claim to the land has been initiated years after the date of the patent. In its discussion of the questions involved the Supreme Court carefully considered the meaning and scope of the act making a land grant to the Southern Pacific Railroad Company, and after making special analysis of sections 3 and 4

to ascertain the nature, extent, conditions, and limitations of the grant made, decided that the act of July 27, 1866, did not include, but excluded, mineral lands, and that the act intended that the character of the lands should be determined by the Interior Department, and that as that department determined, patents should issue. It was also decided that, after a patent has issued under the grant, it must be accepted, in a suit where the attack is collateral, as conclusively showing the nonmineral character of the land included in the patent and of the regularity of the proceedings which have resulted in its issue, and furthermore that the granting act contemplated that patents issued by the United States should unconditionally pass title.

The chief purpose of the joint resolution of June 28, 1870, was referred to as "to sanction a route which the Secretary of the Interior had disapproved." It is argued that the Supreme Court overlooked the adjustment act of March 3, 1887 (24 Stat. 556 [Comp. St. § 4895–4900]). But that act does not affect rights of claims made in the Burke Case, or such as are made herein.

Appellant devotes the greater part of its brief to an endeavor to demonstrate that the Supreme Court erred in its reasoning and conclusions in the Burke Case; but, as the decision in that case is directly applicable and controlling upon this court, our duty is to harmonize our decision herein with the doctrine announced by the Supreme Court, and this we do by affirming the decree of the lower court.

Affirmed.

GRANITE FALLS BANK v. KEYES.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1921.)

No. 5598.

1. **Appeal and error ⟸1054(1)—Admission of opinion evidence not prejudicial in trial to court.**

   Admission of the opinion of a witness on a legal question *held* not prejudicial in a trial to the court.

2. **Appeal and error ⟸237(6)—Limitation of review on trial to court.**

   On trial of an action at law to the court, where no finding or ruling was asked on the conclusion of the evidence, assignments that the court erred in directing judgment for one party and in not directing judgment for the other present no question for review under Rev. St. § 700 (Comp. St. § 1668).

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

Action at law by Paul C. Keyes, receiver of the First National Bank of Clarkfield, Minn., against the Granite Falls Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

Bert O. Loe, of Granite Falls, Minn., for plaintiff in error.

J. N. Johnson, of Canby, Minn., for defendant in error.

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

PER CURIAM. Paul C. Keyes, as receiver of the First National Bank of Clarkfield, Minn., brought this action in the court below against the Granite Falls Bank, plaintiff in error, to recover certain sums of money which it is alleged in his complaint were had and received by the Granite Falls Bank for the use and benefit of the said First National Bank of Clarkfield. The parties by stipulation in the court below waived a jury, and the case was tried to the court. Plaintiff had judgment, and the defendant Granite Falls Bank has brought the case to this court by writ of error.

The material facts of the case are these: One Piersol, who was the cashier of the Clarkfield bank, conducted the business of the bank without any real or effective supervision by the board of directors. For many years he had misapplied and embezzled the funds of the bank and by various devices had successfully covered up and concealed his defalcations until just prior to the appointment of the plaintiff as receiver by the Comptroller of the Currency in October, 1917.

Piersol, in his individual capacity and for his own use, borrowed money from the defendant bank. At a time when by his speculations he had misappropriated and embezzled a large part of the funds of the Clarkfield bank of which he was cashier, and was by reason of such misappropriations indebted to said bank in a very large amount, in his official capacity as cashier he drew cashier's checks against the funds of the Clarkfield bank to the order of officers of the defendant bank, and delivered the checks to such officers to be applied in payment of his personal indebtedness to the defendant, the Granite Falls Bank. The defendant bank presented the checks in due course to the Clarkfield bank for payment. They were paid by Piersol, the cashier, or by some officer of the bank acting under his direction, and the money so received applied by the defendant bank in payment of the personal indebtedness of Piersol to it.

[1] During the progress of the trial a witness was permitted to answer a question to which counsel for the defendant had interposed the objection that it called for "an opinion on a question of law." This ruling is assigned as error and is presented as a ground for a reversal of the judgment.

Without setting out the question and answer to which the objection was interposed, we conceive that, inasmuch as the cause was being tried to the court, no prejudice could have possibly resulted to the defendant by the answer of a layman to a question which called for an opinion on a question of law. The bare statement of the objection is sufficient to show its lack of merit.

[2] The only other assignments of error in the record are that:

"The court erred in directing judgment in favor of the plaintiff," and "The court erred in failing to direct judgment in favor of the defendant."

At the conclusion of the trial the plaintiff in error did not request of the trial court any declaration of law in its favor, or in any manner ask for or secure any ruling of the trial court to which the assignments above quoted might be applied.

These assignments present nothing for review, as the decisions of this court abundantly establish. Gartner v. Hays (C. C. A.) 272 Fed. 896; McClay v. Fleming (C. C. A.) 271 Fed. 472; Northrup Nat. Bank v. Title Guaranty & Surety Co. (C. C. A.) 271 Fed. 952; Chicago Bonding & Ins. Co. v. City of Pittsburg, Kan. (C. C. A.) 271 Fed. 678; Stoffregen v. Moore (C. C. A.) 271 Fed. 680; Liberty Oil Co. v. Condon Nat. Bank (C. C. A.) 271 Fed. 928; United States v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 270 Fed. 1; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Mason v. United States, 219 Fed. 547, 135 C. C. A. 315.

The judgment is affirmed.

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

PENNSYLVANIA R. CO. v. JAMES McWILLIAMS TOWING LINE.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 64.

1. **Collision ⇐68—Rule of liability of drifting boat for damage stated.**
   A vessel drifting from her moorings is liable for damages consequent thereon, unless she can affirmatively show that the drifting was the result of an inevitable accident or vis major, which human skill and precaution and the proper display of nautical skill could not have prevented.
2. **Collision ⇐115—Tug's owner liable, where moored barges went adrift because additional boat hung on flotilla.**
   It was the duty of a tug master, when another boat was added to a flotilla of moored barges, to see that the lines were sufficient to hold the whole flotilla, and where the barges broke away and drifted against libelant's barges, because another boat was hung up outside the flotilla, the tug's owner was liable.

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

Libel filed by the Pennsylvania Railroad Company against the James McWilliams Towing Line. Decree for libelant. Respondent appeals. Affirmed.

Herbert Green, of New York City, for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This suit is in personam to recover damages sustained by the appellee's barges P. R. R. No. 428 and P. R. R. No. 217, resulting from a collision with appellant's barge Blue Girl in the East River on December 15, 1916. The barge No. 217 was moored, bow in, alongside the pier at the foot of Corlear street, East River. The No. 428 was moored outside of the No. 217. Both projected into the

river. They were of the same length. On this day, the wind was light to moderate, with snow falling, and the tide was ebb. In the afternoon, about 1 o'clock, the Blue Girl was with some other boats drifting down the East River, and the Blue Girl collided with the No. 217, and in turn set her adrift, causing the damage. At the time of the collision, the appellant's tug, the James McWilliams, with another tug, was working around the drifting flotilla. Previous thereto, the Blue Girl and other boats were moored in one flotilla on the south side of an old pier at Newtown creek. The James McWilliams arrived at Newtown creek, having in tow a canal boat with a cargo of about 300 tons, with which she hung up to the flotilla already moored there. She then went further up the creek for the purpose of picking up other boats to make up a new tow. About half an hour after hanging up the canal boat, the McWilliams noticed that the flotilla had gone adrift. It followed the drifting flotilla, and, assisted by the tug Bully, endeavored to get the boats under control, but before succeeding, the Blue Girl collided as aforementioned. The pier where the flotilla was moored was old and dilapidated. It was after the loaded canal boat was hung to the flotilla by the McWilliams that the lines on one of the barges, the Blue Mountain, which was moored next to the pier, gave way and caused the drift. It was found that the lines of the Blue Mountain were intact after it had broken adrift.

While the Blue Girl was not owned by the corporation sued herein, she was owned by the owner of the tug McWilliams, and it appears in point of fact that the same individuals are interested and shareholders of each company, and upon the trial counsel stipulated that whatever responsibility rested upon the Blue Girl as a drifting boat would be assumed by the appellant. This concession eliminates the question of responsibility and places the same upon the appellant.

[1, 2] A vessel drifting from her moorings is held liable for damages consequent thereon, unless she can affirmatively show that the drifting was the result of inevitable accident or vis major, which human skill and precaution and the proper display of nautical skill could not have prevented. The Louisiana, 3 Wall. (70 U. S.) 164, 18 L. Ed. 85; Wm. Guinan Howard, 252 Fed. 85, 164 C. C. A. 197; Bradley v. Sullivan, 209 Fed. 833, 126 C. C. A. 557. The James McWilliams was owned by the appellant and it was this tug that hung up the canal boat outside of the flotilla moored at this old pier at Newtown creek, just before the flotilla broke away. If it was this that caused the drifting, the appellant is liable. The May McGuirl, 256 Fed. 20, 167 C. C. A. 292. It was the duty of the tug master to look after the lines when additional weight was put on the moored tow. The drifting of the flotilla under the circumstances presumptively established neglect on the part of the appellant, and we think the evidence offered in behalf of the appellant does not overcome this presumption of negligence. The colliding vessel, the Blue Girl, has not shown affirmatively that the drifting was the result of inevitable accident or vis major. It was the duty of the tug master, as each barge or flotilla of barges was made fast, to see that they were sufficiently made fast to hold the whole flotilla, and, when another boat was added, it was the duty of the tug

master to see that the fastenings were sufficient to hold the then complete flotilla. The breaking away at the time in question was due to the hanging up of the additional boat to the flotilla by the tug James McWilliams, and we think that the libel sufficiently charges the McWilliams with having set the flotilla adrift.

The decree is affirmed.

THE M. S. ELLIOTT.
MONROE v. HERNANDE et al.

(Circuit Court of Appeals, Fourth Circuit. December 28, 1921.)

No. 1909.

Seamen ⇐21—Right to wages held forfeited by "desertion."

On a libel for seamen's wages, evidence *held* to show that libelants were deserters from the ship, and had forfeited their wages under Rev. St. § 4596, as amended (Comp. St. § 8380); "desertion" being a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.

[Ed. Note.—For other definitions. see Words and Phrases, First and Second Series, Desertion (in Maritime Law).]

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

Libel by Jose Hernande and others against James P. Monroe, as master of the steamship M. S. Elliott. Decree for libelants, and respondent appeals. Reversed and remanded, with instructions to dismiss.

George L. Buist, of Charleston, S. C., and L. De Grove Potter, of New York City (Kirlin, Woolsey, Campbell, Hickok & Keating, of New York City, and Buist & Buist, of Charleston, S. C., on the brief), for appellant.

Harry Simonhoff, of Charleston, S. C., for appellees.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

KNAPP, Circuit Judge. In this suit for seamen's wages the master set up the defense of desertion. The facts appear to be these: On the 28th of April, 1921, at the port of New York, the crew of the steamship M. S. Elliott signed for coastwise service thereon in various capacities for a period "not exceeding 12 calendar months." Shortly afterwards the ship proceeded to Texas City, Tex., and from that port to the port of Charleston, S. C., where she arrived on the morning of the 11th of May. A seaman's strike was in progress, and while the ship was docking a motorboat came along, manned by strikers, who had some conversation with the crew, though what passed between them does not clearly appear. During that day, however, at different times, most of the men left the ship, taking their belongings with them. On the following day 16 of them brought this libel to recover the full wages earned by them up to that time, on the ground that they had

demanded payment of one-half the wages then due them, as provided in section 4530 of the Revised Statutes, as amended June 5, 1920 (41 Stat. 1006), and that such demand had been refused.

The trial court found that 2 of the libelants, upon arrival of the ship at Charleston, had demanded half wages and been refused, and were therefore entitled to full wages, under the terms of the amended section. As to the others the finding was as follows:

"No sufficient demand on the captain for half wages is proven on behalf of any other libelant. It does appear in the testimony that all the libelants, on the day of the arrival of the ship at the Port of Charleston, left the ship without leave and without sufficient reason, and have not returned for service. Under the circumstances of the case, it does not appear to the court that it calls for the enforcement upon them of the penalty of desertion as provided by section 4596 of the Revised Statutes, as amended; but it is a case falling under the second division, where they left the vessel without leave and without sufficient reason, and they therefore should forfeit each two days' pay."

The decree entered accordingly refers to an agreement with certain of the libelants and therefore includes but 10 of them, to each of whom is awarded half pay, less a deduction of $3 for absence. As to only 6 of the 10, named in the notice, this appeal is taken, and the sole question here is whether these 6 were guilty of desertion.

Without citing other authorities, we may accept the definition of desertion, quoted with approval in The Italier, 257 Fed. 712, 714, 168 C. C. A. 662, 664, as "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." The trial court found, on testimony wholly convincing, that none of the 6 had demanded half pay, that all of them left the ship without leave and without sufficient reason, and that they had not returned for service; and we find no evidence that they intended to return. On the contrary, the circumstances under which they left, taking their belongings with them, indicate unmistakably, as we think, that they deliberately and purposely abandoned the service which they had agreed to perform. In point of fact, none of them did return, or offer to return, or show the slightest disposition to return. Only 2 of the 6 were witnesses at the trial; both of them admitted that they left the ship with the intention of not returning, and nothing appears from which a different intention on the part of the other four can be inferred. In short, there is no testimony which disputes or discredits the statement of the master that the men told him they were leaving permanently, although he admonished them not to do so and warned them of the consequences. We are of opinion that they must be deemed deserters. The Nigretia, 255 Fed. 56, 166 C. C. A. 384; The Italier, 257 Fed. 713, 168 C. C. A. 662.

As the penalty for desertion is the "forfeiture * * * of all or any part of the wages or emoluments which he has then earned" (Revised Statutes, § 4596, as amended [Comp. St. § 8380]), the decree will be reversed, and the cause remanded, with instructions to dismiss the libel as to the 6 libelants named in the notice of appeal.

Reversed.

WALDRON v. PAYNE, Director General of Railroads.

(Circuit Court of Appeals, Fourth Circuit. December 28, 1921.)

No. 1928.

1. **Railroads ⇐278(2)—Shipper's employee not required to examine brakes on car furnished.**

   The failure of a colliery employee to examine the brakes on a car before loading it, as instructed by his employer, though such examination would have revealed the defect therein, and the danger to him of using the car, did not prevent a recovery against the carrier furnishing the car with the defective brake to the employer, as the carrier could not impose the duty of examination and inspection on the person to whom it furnished the car or his employee.

2. **Railroads ⇐275(4)—Liable for injury to employee of shipper from defective car.**

   Where there was no emergency, and no external force preventing a carrier from performing its duty to inspect and furnish a reasonably safe brake on a car furnished a colliery company, whose employee was injured in using the car, such duty would not be affected by its lack of ability and capacity to have all its cars inspected.

3. **Railroads ⇐282(4)—Evidence as to condition of car after accident admissible.**

   In an action against a carrier for injuries sustained by a colliery employee from a defective brake on the car which he was loading, evidence as to the condition of the brake after the accident was properly admitted, where it was not a necessary inference that such condition was due to collision with another car after the accident.

In Error to the District Court of the United States for the Southern District of West Virginia, at Bluefield; Edmund Waddill, Jr., Judge.

Action by Earl Waldron against John Barton Payne, Director General of Railroads, as Agent. Judgment for defendant, and plaintiff brings error. Reversed.

G. W. Howard, of Welch, W. Va., and Joseph M. Sanders, of Bluefield, W. Va., for plaintiff in error.

F. M. Rivinius, of Philadelphia, Pa., and Graham Sale and J. Randolph Tucker, both of Welch, W. Va., for defendant in error.

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

WOODS, Circuit Judge. The plaintiff, an employee of the Solvay Collieries Company, sued the Director General of Railroads for loss of his arm in the operation of a coal car, on the ground that the injury was due to a defective brake on the car. The car was furnished by the Director General of Railroads to the Solvay Collieries Company. After the first trial this court reversed the judgment for error of the District Court in directing a verdict for the defendant. On the second trial the jury again returned a verdict for the defendant, and the case is here on error assigned in the exclusion of testimony and in the instructions to the jury.

[1] There is little dispute as to the facts, which are fully set out in the former opinion. 266 Fed. 196. It was therein held that a carrier

could not exempt itself from liability for injury to an employee of the person to whom it furnished a car, due to its negligence in furnishing a defective car, by imposing the duty of examination or inspection on the person to whom it had furnished the car or his employee. Contrary to this statement of the law the District Judge, in the following instruction, placed the duty of examination of the car on the plaintiff:

"The court instructs the jury that if you believe from the evidence in this case that the plaintiff had been instructed to examine the brakes on all cars before loading them at this tipple and to drop through the cars with bad brakes unless there was a shortage of cars, and that there was no shortage of cars on the day in question, and if you further believe that the plaintiff failed to make such an examination of the cars, and that such an examination as was covered in his instructions would have revealed to the plaintiff the alleged defect in the brakes and the danger to him in using the car, then you must find for the defendant."

[2] The following instruction was also erroneous:

"The court instructs the jury that, in determining what is a reasonable inspection of the brakes, the jury can consider the nature and kind of work done by the defendant, and his ability and capacity to have the cars inspected. The defendant in this case owed to the public the duty to carry on the business of a common carrier, and it was not his duty to have any method or system of inspection that would materially interfere with or prevent the performance of his public duty, even though such another method might have discovered any defect in said brake, if the jury believed there was a defect."

There was no emergency, and no external force which prevented the performance of the defendant's duty to inspect and to furnish a reasonably safe brake. This duty is imposed on all railroads and cannot be affected by pleading the lack of ability or capacity to perform it.

[3] The District Judge struck out the testimony of two witnesses as to the condition of the brake after the accident. It may be that the defective condition found by these witnesses was due to the collision of the car with another car after the accident, but that was not a necessary inference. The evidence was competent to go to the jury for what it was worth. The nature of the defect and the probable effect of the collision were matters to be determined by the jury.

Reversed.

BUTTS v. GOODYEAR TIRE & RUBBER CO. et al.
In re COLORADO CENTRAL MINES CO.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1921.)

No. 5738.

Bankruptcy ⇐105(1)—Order granting injunction modified.

An order of a court of bankruptcy, which, though refusing an injunction restraining respondent from prosecuting a suit in a state court against the bankrupt to establish his title to certain mining ground and a mill and machinery thereon, enjoined him from interfering with the receiver in bankruptcy in his possession "and disposal" of the mill and machinery, modified, so as to apply only to the possession of the receiver, pending determination of the ownership in the state suit.

⇐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 District of Colorado; Robert E. Lewis, Judge.

In the matter of the Colorado Central Mines Company, bankrupt. On appeal by Edward Butts from an order granting an injunction on petition of the Goodyear Tire & Rubber Company and others. Modified and affirmed.

John J. White, of Georgetown, Colo., for appellant.

Ernest Morris and Daniel B. Ellis, both of Denver, Colo., for appellees.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. On June 11, 1920, John Morgan was appointed receiver of the estate of the Colorado Central Mines Company by the United States District Court, District of Colorado, in bankruptcy. On July 23, 1920, the receiver and the petitioning creditors who signed the involuntary petition against the Mines Company filed a petition in said court for the purpose of restraining the appellant from further prosecution of the case of appellant against the Mines Company in the district court of Clear Creek county, Colo. The petition was amended on July 31, 1920, and the answer of appellant filed to the original petition was by agreement treated as the answer to the amended petition. Appellees claimed that the Mines Company was the owner of the Moraine placer mining claim, located in Clear Creek county, Colo., upon which it had constructed a concentrating mill and installed machinery therein for the treating of ores. Appellant claimed that, by the location of the Four Brothers and Home Stake lode mining claims, he had become the owner of the mill and the machinery, and it was the action commenced by him to quiet his title to said lode mining claims and the improvements and fixtures thereon which the appellees sought to restrain.

Appellant in his action in the state court prayed for a decree that appellant was the owner of said lode mining claims and the improvements and fixtures thereon. During the hearing of the petition, and while evidence was being taken as to whether the mill and machinery were a part of the real estate, the trial court said:

"We will assume it is fixed in the real estate and placed there in a permanent way. You need not offer any evidence on that; we will assume that."

At the close of the evidence and in reply to a suggestion of counsel for appellant, the trial court stated:

"There is no question of title, as I view it, to the building and machinery. I am not assuming to touch Mr. Butts' title. If he has good title, and has located the location under this mill, you can fight that out in the state court; I cannot try that here. I am only enjoining from interference with the receiver's possession of that mill and all the property in it, and from its removal."

The receiver had taken possession of the mill on June 12, 1920. By the final decree entered in the proceeding it was decreed that Butts should not be enjoined or restrained from prosecuting his suit in the

district court of Clear Creek county, wherein he asserted title to his said lode claims as known lodes within said placer, meaning the Moraine placer. The court then proceeded and by its decree restrained and enjoined Butts from taking possession of the mill, machinery therein, and the improvements therewith, and from in any manner interfering with the said John Morgan as receiver in his possession and disposal thereof. If the mill and machinery were a part of the real estate, and it was conceded that they were, they either belonged to the owner of the placer or the lode claims. If the receiver, however, could dispose of the mill, and that is the only inference to be drawn from the injunction, then the suit in the state court, although it was not enjoined, might be defeated in part. The trial court had a right to protect the possession of its receiver, and that is all it apparently intended to do. We are therefore of the opinion that the decree below must be modified, so as to strike therefrom "and disposal thereof," in the paragraph which restrained Butts and his agents from interfering with the possession of the mill.

Let the decree be modified, and, as modified, affirmed.

NESMITH v. ANKENY et al.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3714.

Mortgages ⟸38(1)—Evidence held insufficient to prove deed absolute in form a mortgage.

In action by brother, who had conveyed land to sister, who had assumed mortgage indebtedness, to have the deed, absolute in form, declared a mortgage, evidence *held* insufficient to prove that it was not intended to pass absolute title.

Appeal from the District Court of the United States for the district of Oregon; Robert S. Bean, Judge.

Action by William G. Nesmith against John D. Ankeny, executor of the last will and testament of Levi Ankeny, deceased, and others. Decree for defendants, and plaintiff appeals. Affirmed.

William P. Lord, of Portland, Or., for appellant.

Dey, Hampson & Nelson and G. L. Buland, all of Portland, Or., for appellees.

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

HUNT, Circuit Judge. This suit was brought in 1919 by William G. Nesmith against Levi Ankeny to have a deed absolute in form, made by appellant to his sister, Jennie Nesmith Ankeny, wife of Levi Ankeny, declared a mortgage. We have carefully examined the record in considering the principal question, the sufficiency of the evidence to sustain the decree, and summarize the case in this way:

The property included in the deed was the old home of appellant's father, and passed to appellant as his share of the father's estate. Appellant drank hard and was unsuccessful in farming, and in 1899, upon threat of foreclosure of a mortgage on the place held by an outsider, and in order to save the property from passing into the hands of a stranger, Mrs. Ankeny, through Mr. Daly, an attorney, on March 10, 1899, took a warranty deed from her brother, the consideration named being $1,000, with a covenant on the part of the sister to assume and pay the mortgage. Shortly thereafter Levi Ankeny, husband of Jennie Nesmith Ankeny, paid the mortgage debt, with interest ($7,492.40), and took an assignment of the mortgage. Mrs. Ankeny afterwards leased the farm to one Burch, a relative, with whom William lived until about 1903, when he left. Witnesses did not agree as to what was the value of the place (300 acres) in 1899, some saying it was worth $30 per acre; others, that it was worth from $60 to $75 per acre. Burch put the rental value as not in excess of $3 per acre. From 1899, until her death in 1918, Mrs. Ankeny paid all taxes, exercised exclusive control over the property, and spent about $21,000 in improving it. When she died, the property passed to her husband. William made no claim of interest until shortly before he brought this suit, or about 19 years after he made the deed to his sister. Daly, who acted as attorney for Mrs. Ankeny in the purchase, died before the present suit was instituted, and Levi Ankeny at the time of the trial was of enfeebled mind and has since died.

Certain statements said to have been made by Mrs. Ankeny to William were relied on by William. For instance, that made before the time of the transaction was to the effect that she (Mrs. Ankeny) told William that he was drinking too much, and she feared he would lose the place if nothing were done about it, and that "she would have to take it over." One of the statements, made after the transaction, was:

"I will hold the place just as I have. I have the place in my name, and am going to hold it for him"—meaning William's son, then a small boy.

Aside from the danger of accepting testimony of such oral statements, made 15 years before the evidence is given, even were the testimony reliable, we could not accept it as contradictory of the written deed, or as sufficient to show that a mortgage was in fact intended. The record contains no substantial evidence to justify a reversal of the conclusion reached by the learned District Judge, who held that it was intended that the absolute title should pass and that it was passed.

Inasmuch as plaintiff failed to sustain the burden of proof upon him, his complaint was properly dismissed. Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69, 118 Pac. 188.

Decree affirmed.

CONKLIN v. TOM C. MINING CO.

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

No. 5554.

Appeal and error ⊂=931(1)—Presumption of correctness of decree of chancellor will uphold it, where evidence is contradictory.

Where the evidence is contradictory the presumption of the correctness of a finding by the chancellor will sustain the finding and the decree thereon.

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

Action by the Tom C. Mining Company against Roland R. Conklin. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Hiram W. Currey, of Joplin, Mo. (Marcer Arnold, of Joplin, Mo., on the brief), for appellant.

Frank L. Forlow, of Webb City, Mo., and Howard Gray, of Carthage, Mo., for appellee.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

STONE, Circuit Judge. This is an action upon a promissory note given as part of the payment for zinc mining property located near Joplin, Mo. The execution of the note was admitted. The defense was lack of consideration and fraud in procurement of the contract of sale, and of the execution and delivery of the note. The answer also partook of the nature of a cross-petition, praying cancellation of this note and another given for other property and rescission of the contracts of purchase, on the same basis of lack of consideration and fraud. The reply amounts to a denial of the affirmative matter in the answer. From a decree denying the affirmative defenses, and in favor of plaintiff upon the petition and cross-petition, defendant appeals.

While counsel discuss, on this appeal, certain general principles of law relating to the right of rescission of contracts for fraud or for lack of consideration, there is, and can be, no difference as to those principles. They are firmly established by a long, unbroken line of federal and state decisions, and are so well understood as to require no additional statement here.

The only substantial error here urged is that the evidence did not justify the finding of the trial court that the defendant had failed to establish, through the evidence, his affirmative contentions as to fraud or failure of consideration. The record in this case requires almost 500 printed pages for statement. Most of this is made up of the evidence in the case. A careful consideration of all of this evidence convinces that the determination of the trial court upon the issues of fact was correct. The evidence is substantial upon both sides, but the most that can be said for it in appellant's favor is that it was contradictory. In such a situation, the presumption of the correctness of a finding by a chancellor would sustain the finding and

the decree thereon. But, irrespective of this presumption, the weight of the evidence is in favor of that finding. Defendant has clearly failed to establish his affirmative allegations.

The decree must be, and is, affirmed.

In re B & B MOTOR SALES CORPORATION.

(District Court, D. New Jersey. January 18, 1922.)

1. **Sales ⟸465—Unrecorded conditional sale is valid between buyer and receiver of assignor.**

   Under Uniform Conditional Sales Act N. J. § 1, defining seller, and section 4, making conditional sales valid as to all persons, except purchasers or creditors without notice from the buyer, an unrecorded conditional sale contract, which was subsequently assigned by the seller, is valid as between the buyer and the receiver in bankruptcy of the seller, who had retaken possession of the property.

2. **Chattel mortgages ⟸1—Right of redemption is essential.**

   To constitute a mortgage, the right of redemption must exist, and where such right is established the form of the conveyance is not controlling.

3. **Chattel mortgages ⟸85—Assignment of chose in action as security is not "chattel mortgage," within New Jersey act.**

   An assignment of a chose in action, even if it be as security for the payment of a debt, is not a "chattel mortgage," within the meaning of the New Jersey Chattel Mortgage Act, requiring recording, which applies only when the goods mortgaged are capable of such open and visible possession that their holding by mortgagor might tempt some one to deal with him as absolute owner.

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

4. **Bankruptcy ⟸184(2)—Absolute assignment of conditional sale contract is not "chattel mortgage," within act.**

   An absolute assignment by a seller of a conditional sale contract and the notes secured thereby, under which the seller reserved no right of redemption, is not a "chattel mortgage," within the New Jersey Chattel Mortgage Act, requiring recording, but, although not recorded, entitles the assignee to possession of the property after buyer's default, as against the creditors of the assignor, represented by receiver in bankruptcy.

5. **Bankruptcy ⟸140(1)—Possession by bankrupt, retaken after assignment of conditional sale, gave no right to receiver.**

   Where the seller of a motor truck by conditional sale contract had absolutely assigned a contract and the note securing it to another, the fact that the seller had retaken possession of the property after the buyer's default, and had it in possession when a receiver in bankruptcy was appointed for the seller, gave the seller and his receiver no property right in the truck as against the assignee.

In Bankruptcy. In the matter of the B & B Motor Sales Corporation, bankrupt. On exceptions to the master's report, denying the petition of the First People's Trust that a motor truck held by the receiver be delivered to petitioner. Master's findings disapproved, and order entered, giving petitioner possession of the truck.

Harry Green, of Newark, N. J., for First People's Trust.
Barney Larkey, of Newark, N. J., for receiver.

RELLSTAB, District Judge. The First People's Trust excepts to the master's findings that it is not entitled to Apex truck No. 5365, found in the possession of the B & B Motor Sales Corporation (hereinafter called the bankrupt) at the time the receiver took charge of the bankrupt's estate. The facts are:

The bankrupt carried on the business of buying and selling auto trucks. On July 12, 1920, it agreed in writing with Robert Jones to sell him the truck in question for $1,955, payable in monthly installments. In this writing (called a "conditional sale agreement"), signed by both parties, it was declared, inter alia, that the bankrupt had that day delivered the truck to the buyer; that the title to the truck was not to pass to the buyer, but was to "remain vested in and be the property of the seller, or assigns, until the purchase price has been fully paid"; that, if Jones failed to pay any of the installments when due, the bankrupt might, without demand, notice, or process, take possession of the truck, whereupon Jones' right therein should terminate absolutely, and all payments made thereon be retained by the bankrupt as liquidated damages and rent. At the same time Jones executed two notes to the bankrupt, one for the sum of $1,427.15 (in the conditional sale agreement recited to be the balance to be paid on the truck), payable in 12 monthly installments, wherein it was declared that, "upon default in the payment of any installment when due, the whole amount remaining unpaid shall immediately become due." The other note represented the remainder (or some part of it) of the purchase price.

Both the conditional sale agreement and the $1,427.15 note subsequently were transferred by the bankrupt to the First People's Trust. The transfer of the agreement is dated July 12, 1920, and recites that it is simultaneous with the purchase of the note; in terms it sells, assigns, and transfers the bankrupt's right, title, and interest in the automobile in question, and also in the conditional sale agreement, and asserts that the automobile was sold, and not consigned, to the buyer. The transfer of the note bears no date, is in the form of an indorsement, guarantees payment of the note, principal and interest, waives demand and protest, and is signed by the bankrupt, by its president and secretary, and by the same persons individually.

Jones had possession of the truck for several months, and, after making some of the stipulated payments, defaulted in further payments on both notes; the bankrupt repossessed itself of the truck, and was in possession thereof at the time the receiver took charge. Neither the conditional sale agreement nor the assignment was recorded. No rights or interests of any purchaser or creditor of Jones, the buyer, are involved in these proceedings; the controversy being exclusively between the assignee of the conditional sale agreement and the creditors of the bankrupt (seller).

The master held that the assignment of the conditional sale agreement "was to act as a mortgage for the payment of the note," and that, as neither the conditional sale agreement nor the assignment had

"been recorded in accordance with the laws of the state of New Jersey, and * * * the B & B Motor Sales Corporation had repossessed the truck, and had it in its possession at the time of the appointment of the receiver," the receiver, and not the First People's Trust, was entitled to it.

[1] First, as to the conditional sale agreement: The New Jersey Uniform Conditional Sales Act, approved April 15, 1919, effective from July 4, 1919 (P. L. N. J. p. 461), in section 1, defines a seller as—

"The person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person."

In section 4 it declares that—

"Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided."

The exceptions here referred to are contained in section 5, which declares that—

"Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

From this recital it will be seen that, as no purchaser from, or creditor of, Jones is questioning the validity of such reservation, as between the bankrupt and Jones the reservation to the bankrupt of title and property in the truck was valid, notwithstanding the failure to record the agreement.

Second, as to the assignment of the conditional sale agreement: The New Jersey Chattel Mortgage Act (Revision of 1892) 1 Comp. Stat. N. J. p. 463, in section 4, declares:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent, or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act."

[2, 3] To constitute a mortgage, the right of redemption must exist, and where such right is established the form of the conveyance is not controlling. Wilmerding, Hoguet & Co. v. Mitchell, 42 N. J. Law (13 Vr.) 476; Hastings v. Fithian (E. & A.) 71 N. J. Law (42 Vr.) 311, 60 Atl. 350. An assignment of a chose in action, even if it be a security for the payment of a debt, is not a chattel mortgage within the meaning of the New Jersey Chattel Mortgage Act. Bleakley v. Nelson, 56 N. J. Eq. (11 Dick. Ch.) 674, 39 Atl. 912. This act applies only—

"when the goods mortgaged are capable of such open and visible possession that their holding by a mortgagor who had given a secret mortgage might tempt some one to deal with him as the absolute owner." Cumberland National Bank v. Baker, 57 N. J. Eq. (12 Dick. Ch.) 231, 242, 40 Atl. 850.

[4] The assignment now under consideration was not given as a security. It was an absolute transfer of the seller's property and interest in the conditional sale agreement and the automobile mentioned therein, without right of redemption. By this assignment the People's Trust became the "legal successor in interest," referred to in section 1 of the Uniform Conditional Sales Act, supra, and the reservation of property contained in the conditional sale agreement was transferred to it by the assignment. The assigned agreement recited that the automobile had been delivered to the buyer, and the assignment expressly recited that it had been sold to Jones (the buyer), and the assignor at the time of the assignment was not in a position to retain the automobile, or to deliver it to the assignee. What the assignor could deliver to the People's Trust was the conditional sale agreement, and that was done. Had the transfer been to secure a debt, the delivery of the conditional sale agreement would savor more of a pledge than a chattel mortgage; but as the assignment was absolute, and not conditional, it was neither.

Such a transaction is not contemplated by the Chattel Mortgage Act, which covers transactions where the title, but not possession, is transferred; but by the Uniform Conditional Sales Act, supra, which operates upon transactions where the possession, but not the title, is transferred. The right of the People's Trust to the automobile is fixed by the assigned conditional sale agreement, and is superior to the rights of the bankrupt or its creditors—here represented by the receiver.

As opposed to this view, and in support of the master's finding, the case of David Straus Co. v. Commercial Delivery Co. (N. J. Ct. Ch.) 113 Atl. 604, affirmed by the Court of Errors and Appeals, 112 Atl. 417, is cited by the receiver. That case, made up of facts which existed before the Uniform Conditional Sales Act went into effect, presents many features similar to the instant case. However, the differences, and not the similarities, are controlling. The pertinent facts were: Coincident with the agreement (called a lease) relating to the delivery and use of the automobile truck, the lessee (driver) entered into a service contract with the lessor (Commercial Delivery Company). In that contract the driver agreed to work the truck under the direction of the lessor for two years, and in no other way than as directed by it, and to deliver to the lessor the entire gross monthly earnings. The contract also provided that out of these moneys the latter was to retain a certain percentage for its services, pay the wages of the drivers, storage charges, repairs, etc., and credit the balance to the driver, and that the truck should at all times be stored in a garage furnished by the lessor. The lessor assigned to the Morris Plan Company all its right, title, and interest in the lease and the property therein described, and agreed, "in the event of any resale, release, or repossession of said property," to pay to the assignee any deficiency between the net proceeds of such resale and the amount necessary to pay the unpaid in-

stallments. At the time of this assignment the assignee took a note, made jointly by the assignor and the driver, for the sum advanced by the assignee as consideration for the assignment. Subsequently an equity receiver in insolvency proceedings was appointed for the lessor, and the receiver found it in possession of the truck. The Morris Plan Company petitioned that the truck be delivered to it as the legal owner thereof. The Vice Chancellor held that the assignor was a debtor of the assignee; that the assignment was not an absolute sale of the truck, but collateral security for the payment of the debt; that while the lease apparently gave the right of possession to the driver (lessee), the actual possession, by reason of the service contract, was always in the lessor; that the assignment of the lease was in legal effect a chattel mortgage; and that, not having been recorded, it was void as against the receiver and creditors of the assignor. As already stated, this finding was affirmed by the Court of Errors and Appeals.

In the cited case, as noted, it was held that the possession, as well as the title, of the truck was in the lessor at the time of the assignment of the lease or sale agreement, and that the assignment was not an absolute sale of the agreement, but a security for the payment of the advances made by the assignee for which payment the assignor was jointly liable with the driver. In the instant case, the actual, as well as the right of, possession of the truck was not in the bankrupt, but in a third person—the buyer—and the assignment was an absolue transfer of the bankrupt's property in the conditional sale agreement, without right of redemption. These differences are essential, and distinguish the cases.

[5] The fact that the truck was taken from the buyer by the bankrupt subsequent to the latter's assignment of the conditional sale agreement gave it no property or right in the truck as against its assignee, the First People's Trust. Whatever rights such possession gave it as against the buyer, they were subordinate to the assignee's right of possession on the buyer's default in the terms of the conditional sale agreement then held by the assignee. Such default having taken place, the assignee is entitled to the possession of the truck.

The master's findings are disapproved, and an order will be made giving the First People's Trust the possession of the truck in question.

WENZLER v. ROBIN LINE S. S. CO.

(District Court, W. D. Washington, N. D. December 27, 1921.)

No. 6016.

1. Seamen ⇐3—Action for injury while in a foreign port is governed by the law of the flag.

An action by a seaman of a vessel of the United States for an injury received in a foreign port, while in performance of his duties on board, through alleged negligence in the management of the ship, is governed by the law of the United States, and not that of the port.

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

2. Removal of causes ⇐3, 19(5)—Action at law by seaman for personal injury held removable, the provisions of the Employers' Liability Act against removal not applying.

An action at law in a state court, brought by a seaman for personal injury under La Follette Seamen's Act, § 20, as amended by Merchant Marine Act 1920, § 33, *held* removable into the federal court; that part of the Employers' Liability Act as to removal not being adopted as part of the Marine Act.

At Law. Action by John Wenzler, Jr., against the Robin Line Steamship Company. On motion to remand to state court. Denied.

Walter S. Fulton and Ben L. Moore, both of Seattle, Wash., for plaintiff.

Bogle, Merritt & Bogle, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. The plaintiff, a citizen of the state of Washington, sues the defendant, a corporation of California, for $52,350. The complaint avers that plaintiff was a seaman in the employ of the defendant on the steamship Robin Gray; that, in the harbor of Havana, Cuba, plaintiff, on June 24, 1920, while painting the bulkhead above the engine room of said steamship, from a scaffold upon which he had been ordered by the first engineer to perform such service, fell by reason of defects in the scaffold, which defects are charged to defendant's negligence. For the injury sustained, this suit is brought.

The cause was removed to this court from the state court and plaintiff now moves to remand to the state court on the ground that removal is expressly prohibited by section 6 of the Railway Employers' Liability Act as amended (Comp. Stats. § 8662) and is also forbidden by section 28 of the Judicial Code (Comp. St. § 1010), which provision, plaintiff contends, is expressly adopted by section 33 of the Jones Act (Merchant Marine Act of 1920; 41 Stats. p. 988), amending section 20 of the La Follette Act (38 Stats. p. 1164 [Comp. St. § 8337a]).

[1] Before considering the question of whether the denial of the right of removal in the Employers' Liability Act has been embodied in the Jones Act, it will first be necessary to determine whether—plaintiff's injury having been sustained in Cuban waters—the questions involved will be determined under the Cuban law or under the Jones Act. In the solution of this question, cases of collision, such as involved in Smith v. Condry, 42 U. S. (1 How.) 28, 11 L. Ed. 35, and The Eagle, 75 U. S. (8 Wall.) 15, 19 L. Ed. 365, have no application, for they are not concerned with the "internal discipline or management of the ship."

It cannot be denied that, if considered apart from the ruling itself certain language used by the court in The Hanna Nielsen (D. C.) 267 Fed. 729, 732, lends support to defendant's contention, yet that which was actually decided in that case was that, libelant having repudiated the law of the flag—that is, the law of Norway—and having failed to prove as a fact the British law, on which he relied, the latter law being that of the ship's harbor at the time of the injury, recovery of full indemnity would be denied libelant. That the effect for which con-

tention is now made is not to be given to the language so used is further shown by a consideration of the cases cited in support of the language used. These cases are—The Cuzco (D. C.) 225 Fed. 169; The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Chelentis v. Luckenbach, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; The Lamington (D. C.) 87 Fed. 752; The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152, so cited, was a case of collision, not in a harbor, but on the high seas, between a Norwegian bark and a Belgian steamship. The bark was sunk and her master, on behalf of the owner of the bark and surviving crew, libeled the steamship in an American port.

Chelentis v. Luckenbach, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, was a case of a seaman on board an American vessel owned by a Delaware corporation, who was injured, not in territorial waters, but upon the high seas, because of an alleged improvident order given by an officer of the vessel. Full indemnity was sought under section 20 of the La Follette Act (38 Stats. 1164), which the court limited in its application to the question of fellow servant, and held did not in any way affect the measure of relief to be afforded according to the rule announced in The Osceola, 189 U. S. 171, 23 Sup. Ct. 483, 47 L. Ed. 760.

In The Lamington (D. C.) 87 Fed. 752, a seaman on a British vessel was injured on the high seas because of a faulty rope. The libel in rem was dismissed, because the British law gave no lien for the injury.

In The Scotland, 105 U. S. 24, 26 L. Ed. 1001, the case was one of collision on the high seas between a British ship and a ship of the United States. The law of the United States was held to be controlling, as the ships were of different nationalities and the law of the forum applied.

In the Cuzco (D. C.) 225 Fed. 169, the injured libelant was a stevedore, and not a seaman. Judge Neterer did not in that case refuse to enforce the law of the ship's flag. He held, as shown at page 175, that neither the law of British Columbia, in a harbor of which the ship was lying at the time of the injury, nor the law of Norway, that being the nation of the ship's flag, gave a maritime lien or right of action in rem to an injured stevedore. The fact that the law of Norway gave no such lien is not disclosed by the syllabus in that case.

It may be further said that the same reasons do not obtain for holding a stevedore, hired in a port foreign to the ship's flag, he being, presumably, ignorant of the laws of such flag, to have agreed to such law when, to perform a brief and temporary service, he steps on shipboard in a harbor of the country of which he is a citizen, or that in which he is sojourning. He has signed no articles to live with the ship and serve her. While the relation of the stevedore to the ship may, in a sense, have to do with the internal management and discipline of the vessel, it is in no sense the intimate and mutually dependent relation existing between a seaman and his ship. Of the relation of a seaman to his ship, it is said in Re Ross, 140 U. S. 453, at pages 473 and 474, 11 Sup. Ct. 897, at page 903 (35 L. Ed. 581), quoting with approval the then Secretary of State, Mr. Evarts:

"* * * That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having un-

doubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority, governs its vessels and seamen. '* * * This system of law attaches to the vessel and crew when they leave a national port, and accompanies them around the globe, regulating their lives, protecting their persons, and punishing their offenses. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves.'"

In none of the foregoing cases was the question considered or decided between the law of the ship's flag and the law of the ship's harbor at the time of injury. It is clear that these cases lend no support to the doctrine that the locus of the injury was the harbor and not the ship.

In the case of The Hanna Nielsen, the lower court refused indemnity for the injury, but ordered a reference for the ascertainment, under the rule in The Osceola, 189 U. S. 171, 23 Sup. Ct. 483, 47 L. Ed. 760, of the amount to be allowed for maintenance and cure. The libelant appealed. The lower court was sustained in denying indemnity, but the decree was modified, so as to deny maintenance and cure, in addition to that already received by libelant, and the libel dismissed. 273 Fed. 171.

It is deemed significant that Judge Hough, in this case, in disposing of the question of the law applicable, refrains from either finding that the cause sounded in tort or that the British law, the law of the harbor, was controlling. The court in that connection said:

"If the suit be regarded as sounding in tort, then the trial court had no jurisdiction, unless the tort were maritime, and the lex loci delicti applies. Whether the locus is to be regarded as on a Norwegian ship, and therefore Norwegian, or in Gibraltar harbor, and therefore British, is a question into which it is not necessary to go, further than to note that under no circumstances shown here can the law of the United States apply. The sole function of our courts is to furnish a remedy while enforcing by comity the substantially applicable law. As pointed out above, libelant repudiates Norwegian law as furnishing any ground for recovery; that he was right in so doing the evidence conclusively proved." 273 Fed. at pages 172 and 173.

In the conclusion reached in the instant case, the court has been further influenced by the fact that no case has been called to its attention where, for an injury to a seaman occurring on a foreign vessel in an American harbor, an American court has refused to apply, where pleaded and proven, the law of the flag.

In the case of Rainey v. New York & P. S. S. Co., 216 Fed. 449, 132 C. C. A. 509, L. R. A. 1916A, 1149, the Court of Appeals for the Ninth Circuit, Judge Ross writing the opinion, finds the ship, a British vessel, to have been unseaworthy, and that such condition was the cause of the injury inflicted, resulting in the death, in a Peruvian harbor, of the engineer, an American citizen, signing on in a port of the United States. The decree dismissing the libel was affirmed because, even accepting the libelant's contention that, as an American citizen of the state of Washington, deceased was entitled to invoke its laws, yet, as pointed out by Judge Ross, there is no statute of the United States giving an action for death by wrongful act, and the statutes of the state of Washingon, giving such a right, have force only within the confines

of the state. While reaching this conclusion, the court in that case, in disposing of the question, also said:

"In the libel the cause is designated as one 'of tort, civil and maritime,' and, besides allegations bearing upon the question of the amount of damages, it contains these further averments: 'That the laws of the United States in force at all of said times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, inter alia, that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there is implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship shall provide a seaworthy ship for the voyage at the time of the commencement of the voyage, and shall keep said ship in a seaworthy condition for the voyage during the voyage; and that the laws of Great Britain in force at all times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, inter alia, as follows: "In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument or apprenticeship, whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship, and the master, and every agent charged with the loading of the ship or the preparing of the ship for sea or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage." St. 57 & 58 Vict. c. 60, commonly known as the Merchants' Shipping Act, 1894, and acts amendatory thereof.' It will be seen from the foregoing that the gist of the cause sued on is the alleged failure of the charterer as owner pro hac vice to provide a safety lamp, for lack of which the vessel is alleged to have been unseaworthy. Whether the libel sounds in tort or contract, we deem immaterial. In admiralty, courts determine causes upon equitable principles, and treat as immaterial whether the pleading counts upon contract or tort. California-Atlantic S. S. Co. v. Central Door & Lumber Co. (C. C. A.) 206 Fed. 5, 7, and cases there cited. See, also, 2 Parsons, Shipping and Admiralty, 369." 216 Fed. at page 452, 132 C. C. A. 512 (L. R. A. 1916A, 1149).

The court then goes on to point out that, both under the laws of the United States and the British law, as shown by a quotation from The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688, the ship's owner carrying goods warrants his ship to be seaworthy. Judge Ross then continues:

"A fortiori does the same rule apply in cases where the lives of passengers or crew are involved. So if, instead of the injuries to Rainey having resulted in his death, he had survived and had brought a libel for damages, for the injuries he received, and it be true that the failure of the owner to equip the ship with safety lamps rendered her unseaworthy, he could undoubtedly have reported. * * * The chartering of the ship in question to an American corporation for the particular voyage in question did not deprive the ship of its nationality. When Rainey, although a citizen of the state of Washington, went before the British consul at Seattle and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities." 216 Fed. at pages 453 and 454, 132 C. C. A. 513 and 514 (L. R. A. 1916A, 1149).

[2] Both upon reason and authority, it is therefore clear that the law of the ship's flag, and not that of Cuba, controls in the present suit. Having reached this conclusion, it will now be necessary to consider the appropriate provisions of the Jones Act. Section 33 of this provides:

"That section 20 of such Act of March 4, 1915 [La Follette Act] be, and is, amended to read as follows: That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stats. p. 1007.

In using the words "shall be under the court of the district," etc., Congress, doubtless, had mainly in mind the continental United States, comprising the several states. The territory included in a single jurisdiction of a state court may be called a "district"; but it is not always so designated. It will be noted that the expression is "court of the district"; the word "court," and not "courts," is used—that is, the singular and not the plural.

In all of the states, the districts in which courts of the United States sit geographically include or cover the same territory that is covered by the courts of the several states in their exercise of general jurisdiction. If it had been intended by this act alone to confer jurisdiction on the United States District Court, and expressly recognize, at the same time, that of the courts of general jurisdiction of the state in which such district court was held, the word used would not have been "court," but doubtless would have been "courts," and it would not have been limited to districts, but language would have been used similar to that of subsection J of section 30, already appearing in the act before the above-quoted language of section 33, amending section 20 of the La Follette Act. The language of subsection J, inter alia, is:

"(c) * * * The District Courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several states, territories, districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. * * *" 41 Stat. p. 1003.

Congress, in conferring jurisdiction, must be presumed to intend conferring it on its own courts, the national courts. Congress may, of course, within the sphere of national authority, deprive the state courts of jurisdiction. The extent to which it may or may not confer jurisdiction over federal questions upon a state court it is not necessary to consider. The jurisdiction of the state courts being general in its nature, that general jurisdiction may be so far recognized by Congress by legislation concerning the enforcement of rights arising out of federal law as to leave the door of the state court open to the litigant. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

The language used in the saving clause:

"Saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it." Section 24, Judicial Code (3)

—was appropriate to the end in view. Congress did not seek to confer a power, but rather to leave undisturbed any rights to sue at common law, including the right to sue in a state tribunal.

Section 20 of the La Follette Act, as amended (section 33 of the Jones Act) provides that any seaman may, at his election, maintain an action for damages at law; that is, he does not have to sue in the admiralty, but may sue at law in the District Court. If Congress had intended anything else, the language would have been "may at his election maintain in the state court an action at law."

Passing to the consideration of the precise question raised on the motion to remand—that is, whether Congress, in the Jones Act, by reference to the Employers' Liability Act, intended to include and adopt as part of the Merchant Marine Act that part of the Employers' Liability Act forbidding removal—it will be noted that the Merchant Marine Act provides:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." 41 Stat. p. 1007.

By section 8660, U. S. Comp. Stats., it was provided that a railway employee shall not be held to have assumed certain risks of his employment. This constitutes both a "modifying" of the common-law right in case of injury and a "regulation" of the right of action in the case of death. The same may be said of section 8661, declaring void contracts exempting the carrier from liability, but giving it a right of set-off in certain instances.

These provisions of the Employers' Liability Law may fittingly and appropriately be described as "modifying or extending the common-law right or remedy in case of personal injuries"; but the expression quoted is most inapt, if intended to include a limitation of jurisdiction by denying the right of removal as provided in section 8662, which provides:

"* * * The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Section 28 of the Judicial Code provides:

"* * * Provided, that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States. * * *"

If the foregoing had been any portion of the Employers' Liability Law, which Congress intended to make a part of the Merchant Marine Act, it would have been much simpler, easier, and plainer to have

adopted the quoted portion of section 8662, instead of using the opening and closing language of section 20, as amended by the Merchant Marine Act.

If the removal statute be in any sense a remedy, as distinguished from a right, it is then the remedy of the defendant. But section 20, in speaking of rights and remedies, is not referring to those of the defendant, but to the rights and remedies of the plaintiff at common law. Upon reading the expression, "modifying or extending the common-law right or remedy in cases of personal injury to railway employees," there is no escape from the impression that the dominant thought in the mind of Congress was a modifying or extending, in certain particulars, of the common-law right or remedy "in cases of personal injury."

The sections above noted from the Employers' Liability Act regarding assumption of risk and contracts by carriers to exempt themselves from liability constitute modifications of common-law rights or remedies peculiarly appropriate to personal injury cases. But the statute of removal has no more to do with personal injury cases than any other case. The adding to the expression, "modifying or extending the common-law right or remedy in cases of personal injury," of the further words, "to railway employees," was rendered necessary by reason of the fact that the desired modification of the common-law rights and remedies for personal injuries was particular or peculiar to railway employees, in that Congress had extended to them alone the advantages of such modification, which benefits it was Congress' desire to also confer upon seamen. Hence the reference to railway employees is made to distinguish and point out the law referred to, rather than describe or define its scope or nature, or give to the words "modifying or extending the common-law right or remedy in case of personal injury" any other than the ordinary meaning.

That portion of section 8662 and section 28 denying removal does not modify the common law in cases of personal injuries. It modifies the statute law of removal. To hold that Congress intended to incorporate this provision, it is necessary to find that the statute on removal is a part of a common-law right in case of personal injury. The statute of removal of causes is no part of the common law. It cannot even be said to be either a modification or extension of a common-law right or remedy. It is merely the machinery for getting the case into the right court.

Motion to remand denied.

Ex parte WILLMAN.

(District Court, S. D. Ohio, W. D. December 24, 1921.)

No. 3082.

1. Habeas corpus ⇐4—Discretionary power of federal court.

A District Court is vested with discretionary power to determine whether a petitioner, claiming to be imprisoned by state authority for an act done pursuant to federal law, shall be put to his writ of error to the

highest court of the state, or shall be permitted to have the question determined summarily on writ of habeas corpus.

2. **Post office ⟸4—Regulations of Postmaster General for conduct of department have force of law.**

Under Rev. St. § 396 (Comp. St. § 582), the Postmaster General has power to promulgate regulations generally as to the conduct of the department, and such regulations are controlling, have the force of law, and are judicially noticed.

3. **Municipal corporations ⟸707—Driver of mail truck, conforming to regulations of department, not subject to arrest under state law.**

The driver of a mail truck, on a street which is a post road, *held* not subject to arrest, conviction, and imprisonment because the lights on his truck, which were those prescribed by the regulations of the department, did not conform to the requirements of a state statute.

At Law. On petition of Harry Willman for writ of habeas corpus. Writ granted.

James R. Clark, U. S. Atty., and Thomas H. Morrow, Asst. U. S. Atty., both of Cincinnati, Ohio, and Walter E. Kelly, Asst. Atty. of Post Office Department, of Washington, D. C., for the United States.

Saul Zielonka, City Sol., and Joseph H. Woeste and Chauncey D. Pichel, Municipal Court Prosecutors, all of Cincinnati, Ohio, for city of Cincinnati.

PECK, District Judge. This case is heard upon application for a writ of habeas corpus and upon an agreement that the facts stated may be regarded as the return which would be made should the writ be issued, and that the case may be finally disposed of as upon such return.

The petitioner, Willman, is a mail truck chauffeur in the employ of the Post Office Department of the United States government at Cincinnati. He was arrested by the police officers of the city while driving a government truck carrying the mail, at night, from the post office to the terminal of the Baltimore & Ohio Railroad, over Carlisle avenue, the scheduled route, because the truck, although equipped with oil headlight lamps furnished by the Post Office Department, pursuant to a general order of the Postmaster General prescribing that type as the standard for the use of such vehicles in cities throughout the country, was not fitted out with lamps that would show objects 200 feet ahead of the vehicle and to a width of 10 feet on each side of its path, as required by the law of Ohio approved May 14, 1921 (109 Ohio Laws, 220). Being so charged, he was convicted and sentenced by the municipal court of Cincinnati to pay a fine of $10 and the costs of prosecution, and to stand committed to jail until the same were paid. He declined to pay, and was committed, and now, by this petition in habeas corpus, seeks his release, upon the ground that the act for which he has been imprisoned was committed solely and entirely as an employee and agent of the government, in the performance of his duty in the service, in accordance with the instructions of his superior officers, in pursuance of a law of the United States. R. S. § 753 (U. S. Comp. Stat. 1916, § 1281).

[1] The District Court is vested with a discretionary power to determine whether one who complains that he is imprisoned by state authority for an act done pursuant to federal law shall be put to his writ of error to the highest court of the state, or be permitted to proceed here by writ of habeas corpus, and to have summarily determined whether he is restrained of his liberty in violation of the Constitution and laws of the United States. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. Inasmuch as the question here presented concerns, not only the right of the applicant to his liberty, if his detention be unlawful, but the right of the government to operate its mail trucks with its standard headlight equipment, in this and the other cities of the state of Ohio, and as counsel for the government represent that a large expenditure of money would be required to make such changes as would be necessary to conform with the various local regulations in this state and elsewhere, it is thought that the case is one which should be speedily determined, and therefore the petition is entertained.

It is shown by the agreed statement that the petitioner was acting under orders, and it is fairly to be inferred that he had no choice but to drive the truck with the headlights furnished by the department, or resign. It did not lie within his power to alter the equipment specified by the Postmaster General, had he been of inclination and means to do so. Federal authority within its sphere being paramount, the only question is whether or not the Postmaster General's order prescribing the use of the headlights in controversy was a valid exercise thereof.

It is unnecessary to refer to the constitutional right of Congress to establish post offices and post roads, or to the many incidental powers which result by necessary implication. By the Act of March 1, 1884 (23 Stat. 3 [U. S. Comp. Stat. 1916, § 7457]), all public roads and highways, while kept up and maintained as such, are declared to be post routes, and Carlisle avenue, in the city of Cincinnati, was such by force of this statute (Essex v. New England Telegraph Co., 239 U. S. 313, 321, 36 Sup. Ct. 102, 60 L. Ed. 301).

[2] By section 396 of the Revised Statutes (U. S. Comp. Stat. 1916, § 582), it is made the duty of the Postmaster General, among other things, to establish post offices, to instruct persons in the service with reference to their duties, to control according to law the disposal of the moneys and the expenses, and to superintend generally the business, and execute all laws relating to the postal service. As the result of this enactment he has power to promulgate regulations generally as to the conduct of the department, and such regulations are controlling, have the force of laws, and are judicially noticed. Lewis Pub. Co. v. Morgan, 229 U. S. 288, 306, 33 Sup. Ct. 867, 57 L. Ed. 1190; Caha v. United States, 152 U. S. 213, 14 Sup. Ct. 513, 38 L. Ed. 415; United States v. Warfield, 170 Fed. 43, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186; Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370; United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; McKinley v. United States, 249 U. S. 397, 39 Sup. Ct. 324, 63 L. Ed. 668. As to such regulations as the present one, his

discretion is not reviewable. Niel, Moore & Co. v. Ohio, 3 How. 720, 11 L. Ed. 800; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894.

[3] By the Act of March 1, 1921 (41 Stat. 1152), making appropriations for the Post Office Department for the fiscal year ending June 30, 1922, there was appropriated for vehicle allowance, the hiring of drivers, the purchase and maintenance of wagons and automobiles, and the operation of screen wagons (such was this truck), and for city delivery and collection services, and kindred specified purposes, the sum of $15,000,000. The Postmaster General, by the provisions above referred to, was charged with the duty, and vested with the power, as to the expenditure of this sum for the purposes aforesaid in the carrying on of the business of the postal establishment according to law. His mandate from Congress was to procure, fit out, and operate the trucks. Necessarily, the details as to the equipment best suited to the transportation of the mails were left to his discretion.

It is, then, to be determined whether, in the exercise of such discretion and in the promulgation of the necessary regulations pursuant thereto, he was subordinate to the laws and ordinances of the various states and cities. By Johnson v. Maryland, 254 U. S. 51, 41 Sup. Ct. 16, 65 L. Ed. ——, it is established that the law of a state penalizing one who operates a motor truck on its highways without having obtained a license, based on an examination of competency and payment of a fee, cannot constitutionally apply to an employee of the Post Office Department while engaged in driving a government motor truck over a post road in the performance of his official duty. The court say (254 U. S. 57, 41 Sup. Ct. 16, 65 L. Ed. ——):

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work and that duty it must be presumed has been performed. Keim v. United States, 177 U. S. 290, 293."

It is difficult to distinguish in principle the statute here in question from the one thus decided to be inapplicable to a federal employee. Each is a police regulation of a state, adopted for the safety of its inhabitants. The one has to do with the fitness of the driver, the other with the sufficiency of the equipment; but each rests upon the same basic power of the state, and each would seem to be subject to the same limitation when attempted to be extended over the instrumentalities of the federal government.

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not." Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. at page 429, 4 L. Ed. 579.

In Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699. the Ohio law regulating the serving of oleomargarine in eating houses was held not to apply to the commander of the National Soldiers' Home at Dayton, acting officially.

This case must be distinguished from those in which the driver of a vehicle carrying the mail fails to comply with traffic regulations in instances where no rule of conduct has been prescribed for him by Congress or by the Postmaster General acting under authority of Congress, and from those in which he is himself guilty of negligence. Johnson v. Maryland, supra. The Supreme Court there set apart as inapplicable United States v. Hart, Fed. Cas. No. 15,316, 1 Pet. C. C. 390, in which Mr. Justice Washington decided that a police officer of the city of Philadelphia was not guilty of obstructing the United States mail in arresting the driver of the mail stage for reckless driving, and on another occasion, the stage being placed on runners, for failure to have sleighbells on the horses, and Commonwealth v. Closson, 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C, 939, in which the driver of a mail wagon was held amenable to a traffic regulation requiring him to pass to the right of, and beyond the center of, an intersecting street before turning to the left. Speaking by Mr. Justice Holmes, the court say:

"It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."

Those decisions, therefore, are not apposite to the present case. They apply to unlawful or negligent personal acts of mail carriers, as distinguished from orderly obedience to an established regulation of the Post Office Department. Those persons had no lawful choice but to obey the local regulations. Willman, on the other hand, was confronted with a conflict between the orders of the Post Office Department and the statute of Ohio, and for obeying the former he is imprisoned for violating the latter.

To affirm that the authority of the Postmaster General in carrying out the power conferred upon him by Congress is subordinate to the various state laws would be to say that the federal government is not supreme in the selection of instrumentalities for the carrying of the mail. Such a conclusion is inadmissible, in view of the foregoing authorities. Therefore it must be concluded that the order of the Postmaster General prescribing oil headlights of the type on the truck Willman was driving was a valid exercise of general authority pursuant to law, and that what Willman did in obedience thereto was done pursuant to the laws of the United States, and consequently that he is immune from prosecution by the state for so doing.

It is established that one imprisoned by state authority under such circumstances may be released by this court through the means of a writ of habeas corpus. In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; Ohio v. Thomas, supra. The writ will issue, and, as it has been stipulated that the agreed statement of facts may stand as and for a return thereon, the petitioner will be discharged from custody.

SEAGER et al. v. STEWART-WARNER SPEEDOMETER CORPORATION.

(District Court, N. D. Illinois, E. D. October 8, 1921. Decree October 17, 1921.)

No. 629.

1. **Patents ⊂=226—That patentee does not apply invention to all uses to which it might be applied immaterial.**

That a patentee of a system for feeding the carbureter of internal combustion engines applied his invention commercially only to single-cylinder stationary engines, and not to multi-cylinder engines, did not affect his right to sue for infringement by reason of a device used largely on automobiles.

2. **Patents ⊂=328—984,032, claim 5, and 983,994, for feeding system for engines, held infringed, and not anticipated.**

The Seager Patent, No. 984,032, claim 5, for a system for feeding the carbureter of internal combustion engines, consisting in part of an auxiliary reservoir, filled by means of the suction in the intake pipe, and the Harrington patent, No. 983,994, for an improvement, consisting in dividing the auxiliary reservoir into two superimposed chambers, *held* infringed by a device, all of the essential features of which were found in the patented inventions, except that a screenlike partition took the place of a throttle valve, and a float valve mechanism was used to provide automatically intermittence of suction and nonsuction intervals; also *held* not anticipated.

3. **Patents ⊂=226—Relief not denied, because plaintiff's device never sold to particular trade, while defendant placed its device on the market at great investment.**

Where there is no doubt as to the validity of patents for a feeding mechanism for internal combustion engines, relief against infringement will not be denied because the patented devices, used on stationary engines, have never been sold to the automobile trade, while the infringing device has been put on the market at an enormous investment; the invention being applicable to automobiles, and the infringing device applicable to stationary engines.

In Equity. Suit by James B. Seager and others against the Stewart-Warner Speedometer Corporation. Decree for plaintiffs.

Lynn A. Williams and Clifford C. Bradbury, both of Chicago, Ill., for plaintiffs.

George L. Wilkinson and Charles S. Burton, both of Chicago, Ill., for defendant.

CARPENTER, District Judge. This cause is concerned with the charge by the plaintiffs that the defendant's Stewart vacuum gasoline system infringes Seager patent, No. 984,032, issued February 14, 1911, and Harrington patent, No. 983,994, issued February 14, 1911. No question is raised as to the title of the plaintiffs to the patents sued upon.

Seager's patent has to do with a stationary engine, where the mixture was delivered without the interposition of a throttle. Harrington adapted Seager to use on an engine which in effect had an interposed throttle. Prior to Seager the nozzle of the carbureter commonly was arranged so as to suck the requisite fuel from a float chamber, where the inflow of gasoline was so controlled that it could

not exceed a predetermined level; the supply of gasoline to the float chamber being had by gravity from a storage tank at a higher level.

The record discloses many objections to the gravity supply system. To overcome this it was common, prior to Seager, to pump fuel by mechanical means from a low-level storage tank of large capacity into a small reservoir open to atmospheric pressure, and maintained at a constant level, either by overflow or float control. From this small reservoir the carbureter nozzle was supplied. The great objection to this arrangement was its high first cost and frequent derangement of the complicated pump and pump-driving mechanism. Its real merit was that it supplied fuel to the nozzle of the carbureter under substantially constant and uniform conditions, whereby the correct mixture could be maintained.

Then came Seager, who shows in his patent an auxiliary reservoir, so located in an elevated position as to supply fuel to the nozzle of the carbureter under substantially constant and uniform conditions, and into which reservoir the fuel is elevated from a low-level storage tank by means of the same unimpaired suction of an internal combustion engine as that which draws the air through the carbureter and the fuel from the carbureter nozzle; this elevation of fuel to the secondary reservoir being effected independently of the carbureter nozzle, so that the supply to the carbureter is unaffected by the location of the main storage tank or the level of the fuel contained in it.

Structurally, Seager's combination is perfectly stated in claim 5, which is here in suit, and which calls for the combination with (1) a carbureter of the suction type, of (2) a reservoir for liquid, (3) a discharge conduit leading from said reservoir to said carbureter, (4) a conduit for supplying liquid to said reservoir, (5) from a source at a lower level, (6) and means for feeding the liquid through said supply conduit by the suction of the suction producing means of the carbureter, comprising a conduit connecting said reservoir with the suction means, for the purpose described.

Seager applied his invention commercially to a single-cylinder four-cycle engine, in which the suction in the manifold is of an intermittent character, such as is necessary to be developed in the auxiliary reservoir, as shown in the Seager patent. The Seager combination, applied without change or addition to a four or a six cylinder automobile engine, in which a throttle is used to vary the speed and power output of the engine, makes it necessary, to effect an intermission of suction and nonsuction periods in the auxiliary reservoir, only to shift from time to time the throttle to one side or another of a critical position.

[1] Defendant contended that Seager's combination could not be used upon an automobile, "because an automobile engine must be controlled by a throttle," but the plaintiff's attorneys, during the course of the trial, applied the Seager combination, without change, to a modern six-cylinder Buick automobile, and demonstrated by some 30 or 40 miles of driving over Chicago streets the maintenance of substantially constant speeds from nothing up to 42 miles an hour. From this demonstration I conclude that Seager's combination will operate in the manner and for the purpose described in his patent, and when-

ever the suction in the auxiliary reservoir is intermittent. The record does not disclose that, prior to the date of his patent, Seager ever thus applied his invention to a multi-cylinder engine. This, however, is of no consequence, because Seager was entitled to cover all of the uses in the art to which his invention might be applied.

Harrington, who collaborated with Seager to make a practical use of Seager's invention in an engine having a restricted or throttle intake, devised an improvement upon Seager, which consisted in dividing the auxiliary reservoir into two superimposed chambers, and placing in the dividing wall a downwardly opening check valve, controlling the communication between the upper and lower chambers. He opened the lower chamber continuously to atmospheric pressure, so that the discharge of fuel into the carbureter would at all times be independent of the suction in the upper chamber. Stewart-Warner Company's defense, as stated by its counsel, is "primarily noninfringement," but that an examination of the prior art "is believed to fully warrant the secondary defense of invalidity."

[2] First, as to noninfringement: The defendant's vacuum system, sometimes called the Webb Jay system, comprises an internal combustion engine whose several cylinders are supplied from a common manifold, to which the carbureter is connected, there being a manually controlled throttle valve at or near the place where the flange of the carbureter is joined to the flange of the intake manifold. There is an auxiliary reservoir having within it a concentric wall dividing the reservoir into upper and lower chambers, and a downwardly opening check valve controlling the communication between the two. There is a discharge conduit leading from the lower compartment to the carbureter, and a conduit for supplying fuel to the upper compartment from a low level main storage tank. There is also a suction conduit connecting the upper compartment with the engine manifold on the engine side of the throttle, whereby the suction of the engine develops a partial vacuum in the upper compartment of the reservoir.

The essential features of defendant's device are found in Seager and Harrington, save that in Harrington the obstruction to the flow of the mixture through the venturi tube is in the form of a screenlike partition, whereas in the defendant's equipment the obstruction takes the form of a throttle valve. The effect of the obstruction, however, in both cases is the same. The defendant also operates a float valve mechanism to accomplish automatically the same result sought by Seager and Harrington, namely, to have the suction producing means of the carbureter develop in the reservoir an intermittence of suction and nonsuction intervals. This is new, so far as the record discloses, and for use with four or six cylinder engines is undoubtedly an improvement. It does not, and cannot, however, change or destroy the combination of Seager and Harrington, either in structure, mode of operation, or result.

Webb Jay, the inventor of defendant's so-called infringing system, realized that, in climbing a steep hill with an automobile, the suction of the engine will be inadequate to develop in the reservoir sufficient suction to elevate fuel from the low-level storage tank. Jay realized

the desired result by enlarging and deepening the lower compartment of his reservoir. This made it possible for the level in that compartment to vary as much as six or seven inches. In order to make this reserve capacity available for supplying the carbureter, it was necessary to locate the entire reservoir at a level above that of the carbureter nozzle.

It was undoubtedly an improvement on anything Seager or Harrington had done for the defendant to enlarge the reserve capacity of the lower compartment of the reservoir, but this enlargement, and the inclusion of a float chamber and valve in the discharge conduit leading to the carbureter nozzle, does not organically change or avoid the construction, mode of operation and result of the Seager and Harrington inventions. The essentials of the Seager combination are retained in defendant's equipment, notwithstanding that there have been added, first, the Harrington improvement of a two compartment reservoir with intervening valve; and, second, the automatic suction intermitting mechanism.

In the defendant's system it is the presence of the Harrington invention which permits the use of an obstruction (a throttle) in the air line to the engine at a point between the carbureter nozzle and the point at which the suction conduit is tapped in, so that the suction of the engine, however high it may go, may still be utilized to develop a correspondingly high suction in the upper compartment of the reservoir for elevating fuel into it, while the lower compartment, which is always under atmospheric pressure, will continue to feed fuel to the carbureter, no matter how relatively low the suction upon the nozzle may become, and this, notwithstanding that in the defendant's system there is added to Harrington the automatic suction intermitting mechanism, and notwithstanding that the substantial constancy of the level of the supply to the carbureter nozzle is effected by the float chamber and valve rather than by the overflow pipe of Harrington.

All of the functions which are ascribed by the defendant to the Stewart-Warner Webb Jay system, over and above Seager and Harrington, are functions resulting solely from additions to, and not departures from, the combinations of Seager's and Harrington's claims. I find, therefore, the defendant's device is an infringement, and unless there be something in the prior art to invalidate or restrict the claims of the Seager and Harrington patents, the plaintiffs must prevail. The record is clear and convincing that by a successful reduction to practice Seager completed his invention in substantially identical conformity with his patent specification in the fall of the year 1905.

The defendant urges 22 prior publications and prior public uses, 14 of which were discussed by its expert witnesses, and 8 of which (Sheldon, Hall, Lentz, Graef, Ronan, Bean, Cahill, and Vaganay) were offered without consideration, except by counsel. The anticipatory and restrictive matter may conveniently be divided into groups, as follows:

Savorgnan, Lentz, Hall, and Sheldon show mine water and corrosive fluid pumps having no suggestion of an internal combustion engine,

or the use of the suction of such an engine for any purpose. Of these, Savorgnan was admittedly the best reference. If Savorgnan fails to meet the emergency, we need go no further.

The purport of the defendant's testimony was to the effect that if one unit of Savorgnan's mine pump were to be connected through one of its pipes to a low-level storage tank of gasoline, and if another of its pipes were to be replaced by two-branch pipes, one extending upwardly to serve the reserve and standpipe function of the lower and outer chamber of the defendant's reservoir, and the other were to discharge into the float chamber of a carbureter, or into a vessel at a lower level than the chamber shown in the Savorgnan patent, and if another of the pipes were to be connected with the manifold of that engine, so that the suction producing means of the carbureter (the suction of the internal combustion engine) would take the place of the separate power driven pump of the Savorgnan system, then one would have substantially the Stewart-Warner Webb Jay device. Savorgnan antedated Seager by nine years.

Regardless of what changes may be made in Savorgnan by an expert in internal combustion engines, either by the addition of a small supplemental reservoir or by submerging the whole pump section in a large outer reservoir, or by substituting two pipes for the single pipe of Savorgnan, neither Savorgnan nor any one in the art prior to Seager seems to have hinted at the possibility of utilizing the suction in the intake pipe of an internal combustion engine as a source of power to fill an auxiliary carbureter supplying reservoir with fuel from a low level storage tank. Savorgnan's broadside of pumps never suggested to the world how to feed gas to an automobile.

In the second group in anticipation may be classified the Tookey book, the Engineering Magazine, Weinman & Euchenhofer patent, 555,717, Graef patent, 622,851, Ronan patent, 752,181, Bean patent, 761,192, Bates British patent, 13,169, of 1899, Stover 1902 catalogue, and the Baker engine, the Hafer-Stover engine, and the Goetz-Stover engines. All of these disclosures are of internal combustion engines, in which the suction upon the nozzle of a carbureter directly elevates fuel a greater or less distance to that nozzle.

Of all the direct to nozzle lifting devices of the prior art, the defendant urges most strenuously the Goetz-Stover; but even as to this the defendant's expert finally conceded that its operation was now "not directly comparable" with Seager. It was demonstrated at the hearing that the two-inch rise of level in the outer pipe of the Goetz mixer had no more effect upon the supply of fuel to the carbureter nozzle than if this nozzle had been connected by a pipe leading directly from the bottom of the main storage tank. I cannot find that the Goetz device, or any of the other direct to nozzle lifting schemes, have the essential characteristics of Seager.

It is not claimed that Goetz, or any of the devices of this group, have any bearing upon the Harrington patent.

Melhuish's British patent, 24,201, of 1903, falls into a third line of defense in which an internal combustion engine mechanically drives a pump, elevating fuel from a low-level storage tank and forces it into

the engine cylinder, there being no carbureter of the suction type, or of any type. Its construction and mode of operation are too remote from anything in Seager and Harrington, and even the defendant's system, to warrant further consideration. It is because Seager and Harrington and the defendant all elevate their fuel into an auxiliary reservoir at a rate in excess of the concurrent engine demand that the proportions of their mixtures are wholly independent of variations of level in the main storage tank.

Grouvelle and Arquembourg, 741,962, and De Dion et Bouton, French patent, No. 328,366, of 1903, fall within a fourth group. At the trial these two patents were the most relied upon of all the prior art. The defendant sought by physical demonstrations and testimony to show that, if the float chambers of these carbureters were connected by a conduit having an upwardly opening check valve with a low-level storage tank, and if the sizes and proportions of certain parts of the carbureters were suitably altered, fuel could be elevated to the float chamber when the carbureter was applied to a single-cylinder hit-or-miss governed stationary engine. In this the defendant succeeded, thus realizing Seager's dream; but no amount of testimony or demonstration can overcome the insurmountable barrier that neither Grouvelle nor De Dion ever disclosed or suggested the availability of any suction developed in their float chambers, due to their connection with the engine intake, for the purpose of lifting fuel from a lower than engine level tank.

Counsel for defendant must have recognized this, because in their last and supplemental brief apparently they have abandoned De Dion and advanced a new theory regarding Grouvelle, which I do not regard as pertinent. In so far as the record shows, no one prior to Seager recognized the usability of the suction produced in the intake passageway of an internal combustion engine as a source of power. Certainly, no one prior to Seager in any way applied that power to lifting fuel from a low-level tank to an elevated auxiliary reservoir, from which the curbureter might be supplied independently of the level of the fuel in the main storage tank.

Seager may have failed to claim the broader concept of applying that suction power to every kind of work outside the intake passageway; but certainly the means claimed by him for raising the fuel to an elevated auxiliary reservoir, and then discharging it to the carbureter of the engine, was new and entitled to broad protection.

Binns' British patent, 15,467, of 1906, Vaganay's French patent, 365,739, of 1906, and Cahill's patent, 878,770, may be grouped together, because they are all of a date too late to be effective against Seager.

Vaganay is urged against Harrington, but Harrington's invention was not of the broad character of Seager's. Harrington easily is distinguished from Vaganay. It would require considerable imagination to believe that Vaganay would be operative in the manner described in the patent without essential reorganization, for the reason that, while with a single-cylinder engine the nonsuction intervals are three times as long as the suction periods, the force acting to cause a back

flow through the valveless orifices between the horizontally located vessels is many times greater than the force acting to cause a flow in the desired direction during nonsuction intervals.

[3] I have been urged to resolve any doubts in favor of the defendant, because the plaintiffs' device has never been sold to the automobile trade, and because of the enormous investment made by defendant in putting its device on the market. This plea would be important, if I were in doubt as to the validity of Seager and Harrington. However disturbing defendant's plea in this behalf has been, I must still bear in mind that whatever the power and activity of the defendant may have been in the past, it has been shown, not only that Seager's invention is applicable to automobiles, but also that the defendant's device is applicable to stationary engines.

As early as 1914 Seager was brought to the attention of the defendant, when the Patent Office cited Seager in anticipation of claims made in the then pending application of Webb Jay. The Seager interests then opened negotiations with the defendant, which proved to be fruitless. At that time the defendant resolved all doubts in its favor. In that it was wrong. I find the plaintiffs' patents both valid and infringed, and a decree may be prepared accordingly.

UNITED STATES v. MARINE ENGINEERS' BENEFICIAL ASS'N NO. 38 et al.

(District Court, W. D. Washington, N. D. July 27, 1921.)

No. 254–E.

1. **Equity ⟸150(2)—Bill for injunction against unrelated defendants multifarious.**
   A bill against a number of labor organizations to enjoin alleged unlawful interference with complainant's property and business *held* multifarious, where no conspiracy or concert of action between defendants is alleged.
2. **Injunction ⟸118(1)—Pleadings must clearly allege all necessary facts.**
   To authorize the granting of an injunction, the facts entitling the complainant to such relief must be clearly and positively alleged in the bill, and affidavits filed in its support cannot supply the omission.
3. **Injunction ⟸95—Not granted for protection against personal assault.**
   A court of equity may not grant an injunction to restrain personal assaults, where no injury to property or property rights is threatened; there being an adequate remedy at law in such cases.

In Equity. Suit by the United States against the Marine Engineers' Beneficial Association No. 38 and others. On motions to dismiss bill. Granted.

Robert C. Saunders, U. S. Atty., and F. C. Reagan, Asst. U. S. Atty., both of Seattle, Wash.

Turner, Nuzum & Nuzum, of Spokane, Wash., and Daniel Landon, George A. Custer, William Martin, and G. E. Steiner, all of Seattle, Wash., for defendants.

NETERER, District Judge. The plaintiff as the owner, charterer, and operator of a fleet of passenger and freight vessels, acting through the United States Shipping Board, represented by the Shipping Board Emergency Fleet Corporation, its agent, under the Act of September 7, 1916 (Comp. St. §§ 8146a–8146r), and stating that it controls, through its said representative, wharf and dock facilities in the seaport of the port of Seattle, and certain shipyard plants in said city, brings this action alleging corporate entity and association relation of the six different defendants, and that the plaintiff is operating a fleet of vessels for the purpose of establishing a merchant marine in the United States; that it is necessary for the re-establishment and conduct of the business of said merchant marine that the plaintiff and its agents, the United States Shipping Board Emergency Fleet Corporation, and any other agent or agents to whom the vessels of the plaintiff are allocated, chartered, or assigned, for operation by contract, "which in general terms provides that such agent agrees to man, equip, victual, and supply such vessels, and to pay for the account of the plaintiff the costs thereof and all other costs and expenses incident to the management, operation, and business of such vessels, be able to use freely, fully, and without hindrance or obstruction the said properties, as well as avail itself of the services of all persons entering into its service in the operation of its merchant marine"; and that the port of Seattle is a seaport at which there arrive and from which there depart a great number of vessels of the plaintiff for the purpose of discharging and lading cargo, and that the plaintiff has on the date of the filing of the bill of complaint in said harbor, either just arrived or ready to depart, "at least ten vessels of its merchant marine fleet * * *"; that prior to May 1, 1921, the plaintiff, through its said agents, notified the defendants, "and each and all of them, that the then existing scale of wages paid to the employees of various vessels operated by the plaintiff, as aforesaid, would be reduced 15 per cent.," and that on May 1 the individual members of the defendant corporations and associations "walked out and left the vessels of the plaintiff, and refused to work for the plaintiff upon its terms and conditions * * *"; that "each and all of the defendants have ever since said May 1, 1921, been obstructing and hindering the plaintiff and its agents in the operation of its ships and its plans * * *; that the defendants and each and all of them have been guilty of threats, intimidation, and violence against all persons able and willing to work for the plaintiff and its agents upon its terms, and that they have picketed, paralyzed, and otherwise interfered with and obstructed the plaintiff and its agents in their efforts to keep said vessels of plaintiff's merchant marine from sailing * * *; that on and ever since the said 1st day of May, 1921, each and all the defendants and members of the various corporations, volunteer associations, and organizations named as defendants herein, have trespassed upon the property of the plaintiff herein, and upon its vessels; that they have deliberately and purposely intimidated, threatened, and assaulted citizens of the United States of America who desire to enter the employ of the plaintiff for the purpose of manning and operating its vessels aforesaid * * *; that the plaintiff, in the

operation of its vessels, gives preference to native-born Americans and/or citizens of the United States; that the defendant Sailors' Union of the Pacific, Seattle Branch, a corporation, is largely composed of aliens and/or naturalized citizens of the United States, which union has in effect a so-called 'list system' by which the plaintiff is precluded from giving employment to native-born American citizens until after aliens who are members of this union and precede them on the list have been employed; that each and all of the defendants and pickets stationed around plaintiff's property and vessels, whom plaintiff alleges to be members of the various corporations and organizations, * * * are arrogant, impudent, and discourteous * * *; that the shippers, customers, forwarders, importers, and exporters of the plaintiff are being driven away deliberately by the defendants and each and all of them as aforesaid * * *; that the officers and agents of the various organizations, unions, and corporations named as defendants herein have openly admitted that they are no longer in control of their members, and state that, if any violence and trespassing occurs, they are no longer able to control the members of the various organizations * * *; that the defendants are insolvent, and are not able to respond to the plaintiff for damages. * * *; that the sole and only cause of action of the defendants and each and every one of them, as alleged herein, is that the plaintiff has declined to pay a scale of wages fixed and demanded by the defendants and each and every one of them * * *"—and then alleges damage to the plaintiff and prays for injunction.

The defendants each appear separately. The Marine Firemen, Oilers, and Water Tenders' Union of the Pacific, Seattle Branch, appearing specially for the purposes of the motion, moves to dismiss, stating that it is impleaded as a corporation organized under the laws of Washington, but is a branch organization, organized by the Marine Firemen, Oilers, and Water Tenders' Union of the Pacific, a corporation under the laws of California, and this branch is maintained by the members living in Seattle for their mutual help and protection, and that the parent corporation is a citizen of California and not subject to the jurisdiction of this court. The Marine Engineers' Beneficial Association moves to dismiss on the ground that the action is not brought in the name of the real party in interest, and in the alternative demurs on the ground of a misjoinder of parties plaintiff and defendant, and that the bill of complaint does not state a cause of action, and further answers denying all of the equities of the bill. The Masters, Mates, and Pilots of the Pacific answer, denying all of the equities of the bill, and making a complete denial of the acts charged against the said defendant. The Sailors' Union of the Pacific, Seattle Branch, and P. V. Gill, secretary, specially appear for the purpose of the motion, saying that it is impleaded as a corporation, but is in fact a voluntary association. The Marine Cooks and Stewards' Association of the Pacific and John Norkgauer, secretary, appear specially, and say that they are impleaded as a corporation, and in fact are not a corporation, but a voluntary association. The Neptune Association appears and moves that the restraining order issued be dissolved, and files a number of

affidavits denying all acts of violence, intimidation, arrogance, or charges made.

Considering the contention of the defendants in so far as material to a determination of the issue presented, it may be said that the plaintiff has a right to prosecute an action where interstate commerce or the carrying of United States mails is interfered with or National Highways are obstructed. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. While the Supreme Court did say the scope and purpose of the bill in that case was only to restrain forcible obstructions on the highway along which interstate commerce travels and the mails are carried, and in the exercise of these powers, it is competent for the nation to remove all obstructions on highways, natural or artificial, to the passage of interstate commerce and the carrying of the mails. The bill of complaint in this case is indefinite, in that no direct charge of obstruction of highways or of carrying United States mails or interstate commerce appears, nor physical interference with docks, wharves, or vessels, or cargo, or passengers, to or from such properties, nor threatened interference. But from the view taken of this case it is unnecessary to discuss that matter any further.

The bill of complaint states that the United States is the real party in interest, and it is asserted at bar that the Fleet Corporation was acting in a representative capacity predicated upon the Marine Act of September, 1916, and that the Fleet Corporation is merely an arm of the government. Sloan Shipyards v. U. S. (D. C.) 268 Fed. 624. The status of the Fleet Corporation since the amendment of section 12 of the Merchant Marine Act (41 Stat. 993; section 8146eee, Comp. Stat.), continuing the Fleet Corporation with authority to operate vessels, unless otherwise directed by law, until all the vessels are sold, may give the Fleet Corporation a status other than it bore in the construction of ships in the war emergency, and the relation it sustained under the facts stated in the complaint in the Sloan Case; and it may be said in this connection that it is feasible for the Fleet Corporation to act as a corporate entity in the operation of vessels and be differentiated from the status as an arm of the government in the construction of ships under the emergency of war.

The motions of the defendants under special appearances, impleaded as corporations, who are in fact voluntary associations, are not controverted. The allegation of corporate existence is an issuable fact. May a court enter a decree of injunction against a voluntary association, sued as a corporation? The suggestion that under equity rules 19 and 38 (198 Fed. xxiii, xxix, 115 C. C. A. xxiii, xxix), in furtherance of justice, the court should permit the pleadings to be amended and proceed against the voluntary association. Permission to amend or file supplemental pleading may be granted, but may such amendment be by the court considered as made, and may it grant an injunction against a voluntary association not impleaded? Parties have a right to be heard, and the mere fact that the secretary named as of the corporation is the secretary of the voluntary association—does that change the status before the court of the association? Would not a decree entered against the voluntary association in such case be brutum ful-

men? The suggestion that consent of the defendants to a continuance of a hearing for a motion for temporary injunction does not change the status.

[1] The contention that the bill is multifarious, I think, is well taken. The same cause of action is stated against six different defendants, each from the averments acting independently, and, if so acting, may not be joined in one action. Because several parties, acting independently, may wrong another by conduct which may have the same resultant effect, does not give such other party a right to sue all of the wrongdoers so acting in one action. Equity rule 38 does not so authorize, and this seems to be sustained by McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. Ed. 169. This rule does not apply to individual wrongdoers. Individual wrongdoers may be sued collectively, when they combine by concerted action to do the unlawful thing, or a lawful thing in an unlawful manner. Alaska Steamship Co. v. International Longshoremen's Association (D. C.) 236 Fed. 964. And the term "individual" applies to corporations and voluntary associations.

[2] Plaintiff admits that no conspiracy is directly charged, but asserts that from the bill of complaint and affidavits it appears "that such confederation and conspiracy does exist." The affidavits may not be taken as part of or supplemental to the bill of complaint. The sole function of the affidavits is to support the equities claimed in the bill and not as averments of equities. The averments of the bill must be most strongly taken against the pleader, but the most liberal interpretation does not disclose an averment of unity of movement, preconceived plan, or concert of action, but, if the affidavits filed are considered, all of which have been read since this case was submitted, it appears that some parties had assembled at the Skinner & Eddy yard, but no violence is charged; that several assaults were committed on the streets of the city of Seattle, the identity of the parties assembling or making the assaults, or source from which they come, or authority under which they acted, does not appear, except as to the Sailors' Union, and on one occasion one party belonging to the Neptune Association, who afterwards went to the Sailors' Hall; but there is no averment which would indicate that this party was acting pursuant to any authority, plan, or design on the part of this association. The equities must be clearly shown in the bill of complaint (Joyce on Injunctions, vol. 1, §§ 21 and 109; High on Injunctions, vol. 1, § 34), and not left to inference (Andrew Warsop v. City of Hastings, 22 Minn. 437; Hoyt v. Braden, 27 Minn. 490, 8 N. W. 591; Perkins v. Collins, 3 N. J. Eq. 482; Philhower v. Todd, 11 N. J. Eq. 54. In the Minnesota case the court (22 Minn. at page 438) said:

"It is well settled that, in all cases where equitable relief is sought through the extraordinary remedy of an injunction, the facts entitling the party to such relief must be clearly and positively alleged and shown. It is not enough that their existence may be inferred or spelled out from the averments in the complaint."

[3] Since an amended or supplemental bill of complaint must be filed, it may not be amiss to say that equity only extends its strong

arm when there is no adequate remedy at law. For assaults upon streets of the city, where there is no physical interference with property or property rights, or threatened interference, a complete remedy at law exists. The criminal courts are open, and a resort to a court of equity is not necessary. A court of equity will not undertake to police a city or state. Vassar College v. Loose-Wiles Biscuit Co. (D. C.) 197 Fed. 982; Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Pug. Sd. Traction Lt. & Power Co. v. Whitley (D. C.) 243 Fed. 945, in which case this court said at page 949:

"A line of demarcation must be made between the conduct of an individual or association of individuals engaged in a specific purpose or object, and the conduct of a large number of persons, sometimes denominated, and in this complaint referred to, as a 'mob.' As against the one application may be made to the court, and, in the exercise of sound discretion be afforded relief. But the other clearly comes within the police power of the city, state, or nation."

Justice Field, in Francis v. Flynn, supra, 118 U. S. at page 389, 6 Sup. Ct. 1150, 30 L. Ed. 165, said:

"If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of litigation properly belonging to courts of law."

In this case, plaintiff, the owner of a steam pilot boat on which were employed branch pilots duly licensed, charged conspiracy to destroy his business and property by publications in newspapers, by suits seeking injunction, and in divers other ways, and sought injunction restraining defendants from interfering with his rights, pilot boat, and business. The Supreme Court held he had remedies at law for each and all of the acts complained of. In Re Sawyer, supra, Justice Gray said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

The right to use vessels, and to use them regularly and expeditiously, and wharves or docks or yards, is a property right, the use of which may not be denied the owner, and to preserve such right a court of equity will afford relief upon a proper showing of fact. Decision upon the issues here presented was heretofore especially reserved by the court until this consideration.

The motion to dismiss is granted. Permission, however, is given plaintiff to amend or file a supplemental bill of complaint as it may elect.

THE RICHMOND.

RUSSELL-CRONIN CO., Inc., v. DIRECTOR GENERAL OF RAILROADS.

(District Court, S. D. New York. August 20, 1920.)

Shipping ⊜86(2)—Evidence held to show lighter capsized from unseaworthiness, and not from swells from passing tug.

On trial of libel by owner of lighter, which capsized after libelee's tug had passed, the libel charging that the tug passed too close and at a rate

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

of speed so great that her displacement waves and swells caused the lighter to capsize and sink, evidence *held* to show that the capsizing was caused by unseaworthiness of the lighter, due to inherent weakness or overloading, and not from fault of the tug.

In Admiralty. Libel by the Russell-Cronin Company, Inc., as owner of the steam lighter Richmond, etc., against the Director General of Railroads. Libel dismissed.

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

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for insurers.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Leonard J. Matteson, both of New York City, of counsel), for Director General of Railroads.

KNOX, District Judge. On the morning of September 20, 1918, the steam lighter Richmond went to the Port Reading coal docks and took on board about 135 tons of coal. With this cargo she proceeded to the dredge McMartin, which was then anchored in the East River about 800 feet off Pier 11 on the Brooklyn shore, and about 1,200 to 1,300 feet off Pier 8 on the Manhattan shore. It was here that the Richmond was to deliver part of her cargo. The lighter had hardly been made fast on her starboard side to the port quarter of the dredge when the steam tug Auburn passed by, en route from Pier 8, Manhattan, to Pier 46 in South Brooklyn. Almost as soon as the Auburn had cleared the McMartin and the Richmond, the latter turned on her port beam ends and sank.

Thereafter a libel, on behalf of the owners, insurers, officers, and crew of the Richmond, was filed against the Director General of Railroads, by whom the Auburn was then being operated. The libel charged the tug with having passed too close to the Richmond and at a rate of speed so great that her displacement waves and swells swept over the Richmond and caused her to capsize and sink. The Director General denies that the tug was at fault, and in support thereof alleges that the Auburn had just landed a barge at the end of Pier 8 with her port side at the pier end; that she departed therefrom under a hard aport helm, and, coming around, did not gather full headway until she was about abreast the Richmond and McMartin, that the tug passed the lighter with a good clearance, and that it was impossible for the tug's wash to have brought about the Richmond's disaster.

As is usual, there is a sharp conflict of testimony between the witnesses of the respective parties, and the result to be reached depends largely upon my conclusions of fact as to the speed of the Auburn, the distance at which she passed the Richmond, and the height of her swells. I have but little doubt that the swells of the Auburn somewhat precipitated the sinking of the Richmond, but, if the swells were not unduly large, and the disaster of the Richmond was primarily due to her own infirmities, the libel must be dismissed.

According to libelant's witnesses, the Richmond was properly trimmed, she was seaworthy, and, generally speaking, without all fault. It is said that the Auburn passed by her at a distance of not over 75

feet, and that immediately thereafter three or four swells, reaching a height, I should say, from libelant's testimony, of at least 6 feet, swept in upon her and brought about the catastrophe. It appears that the deck of the Richmond was above the water about 4 feet forward and about 1 foot amidships. The lighter was boarded up along her rails, so as to contain the coal, which, piled on deck, reached a height of 7½ feet above the surface thereof. When the swells of the Auburn struck the Richmond, the latter was lifted up and slammed against the side of the dredge, and from the impact and the tendency to follow along the sweep of the swell the cargo of the Richmond shifted to port, occasioning a list, which with the succeeding swells, caused the Richmond to turn over.

It is unnecessary, I think, to detail the testimony of the various witnesses for the libelant, save to say that I am not convinced that the Auburn was as near to the Richmond as 75 feet, even though there is for libelant a surprising unanimity of testimony to that effect. The Auburn is 108 feet over all, and I am unable to see why, as a matter of navigation, and being bound for Pier 46, Brooklyn, she should, in the natural course of events, pass so close the Richmond; in other words, to get within 75 feet of the lighter, the Auburn was going out of her way. I should assume that, when the tug came around from the end of Pier 8, Manhattan, she would turn within a distance of not over 500 feet, and, if she did so, her natural course would appear to be straight down towards her destination. The tide was slack, there was little or no wind, and consequently, no occasion for an unusual maneuver. A direct course from such position would, when the tug was straightened out, take her something near to 450 feet away from the Richmond. It also seems not unreasonable to suppose that in passing the dredge, which had been anchored in the river for a considerable period, the Auburn would have had some regard for the possibility of becoming entangled in its anchorage cables; and, even though the danger of such entanglement was so slight as to be all but negligible, the master knew of the regulations of the War Department requiring vessels not to exceed 6 miles per hour in passing such plants, and would not deliberately invite liability for accident.

But, aside from this latter, I am unable to see any reason or necessity whatever for the Auburn to come into such proximity to the Richmond, and I seem forced to the conclusion that the witnesses for the libelant are in error in their estimates of the distance of the tug from the lighter. This conclusion would be much more satisfactory than it is, were it not for the fact that the engineer of the dredge testified that the Auburn was within 50 to 75 feet of the Richmond. This witness made a good impression upon me, and he had, so far as could be seen, no interest in the outcome of the case. He also said on cross-examination that the Auburn made no greater swells than are ordinarily made by boats of her class. He further testified, however, that the boat was making a speed of from 10 to 12 miles per hour and that she threw a big swell.

In contradiction to this there is the testimony of all of the tug's crew, one of the government inspectors on the dredge, and the master of the Pennsylvania Railroad tug that the swell of the Auburn was

nothing unusual, and all of said witnesses, save the Pennsylvania captain, who did not testify on the subject, deposed that the speed of the tug was much less than 10 to 12 miles per hour. Of the witnesses so testifying the inspector and captain have no discernible interest in the outcome of the trial, whilst, of course, the Auburn's crew have the incentive to stand by their ship.

Notwithstanding, however, the evidence of the crew is more or less corroborated by the physical facts. I refer to the width of the river between Pier 8 and the lighter, the probabilities as to what was done in coming away therefrom and the location of Pier 46, Brooklyn. According to the time-card of the tug, it took at least 15 minutes for the vessel to go from Pier 8 to Pier 46. The chart in evidence does not show the exact location of the latter, but I think it safe to say that the distance to be traversed between the two locations is not much in excess of a mile and a half. If this be true, and if the time card correctly records the time elements involved, the Auburn probably did not travel at any stage of her trip upwards of 8 miles an hour. Such speed would allow for her slower progress upon turning out from Pier 8 and in going alongside the barges at her point of destination.

As to the height of the displacement waves and swells of the Auburn, the best testimony is that of Mr. Robert S. Haight, who made a trip upon the tug for the sole purpose of observing the same. I think there is no doubt that the tug upon such occasion made quite as much, if not more, speed than she did upon the day she is charged with sinking the Richmond. This witness said that the height of the Auburn's swell was not over 3 feet from valley to crest in the immediate vicinity of the boat, and gradually diminished in height as the distance of the swell from the boat was increased. He gave certain specific examples as to the effect of the swells upon craft passing the tug at a distance of 200 feet, and from that testimony one is called upon to admit that the height of the swell at a distance of say 350 to 450 feet would be considerably less.

From such testimony, it would seem that, by the time the Auburn's waves reached the Richmond, and if the boats were as much as 200 feet apart, and they were not more than 2½ feet in height; indeed, if the distance between the boats was lessened to 75 feet, the waves could not have been over 3 feet in height. Were such the fact, the inundation of the Richmond in the manner described by her witnesses would be impossible. Waves of 3 feet in height would not break over her bow, nor would they have topped the closed half-doors of the engine and fire rooms. True enough, some water would in all likelihood have splashed on her deck amidships; but I do not think there would have been a sufficient amount of this to have seriously disturbed the Richmond's equilibrium, if she were in all respects seaworthy.

I thus come to the testimony which most definitely tends to support the proposition that the Richmond was in trouble before she reached the dredge. On the morning in question a man named Sexton, the dredge's leadsman, and Maurer, an inspector of the United States Engineers' Department, and employed upon the dredge, were at work in the top cabin of the government craft. From this position they had a clear view of that portion of the river across which the Richmond ap-

proached their vessel. Sexton, according to his testimony, saw the lighter, and he says she had a list to port of from 5 to 15 degrees. When he first saw her, her port rail was out of the water, but by the time the lighter reached the dredge her rail was flush with the water. He was so impressed with her condition that he called the attention of Maurer to the lighter's approach. Sexton continued to watch the boat until she was made fast, when he says:

"As she got her third line fast she seemed to take a list to port all the time, and the captain passed the remark to start to trim the coal. He said to get the coal over to the other side."

The testimony continued:

"Q. Did you see anything of the tug Auburn? A. I did, after they made the remark that she threw the swell, when she was about 250 feet astern of the dredge.

"Q. What was said? A. She was 250 feet astern of the dredge, 400 feet off abreast, heading for Governor's Island. I could see the full view of her stern."

He describes the wave as "only the ordinary swell that was there on any calm day. There is always a little ripple." This testimony is in part corroborated by Maurer, who says that, when Sexton spoke to him, he watched the Richmond and "noticed that she was listing as if she was topheavy; in bad trim." When attention was called to her, he watched her until she sank, and from the moment he saw her apprehended that which came to pass. From the way in which she was loaded, he would think that the outer deck must have been under water on her port side. He did not see it under water, but she was listed to such an extent that he would expect to see the water on that side. The witness did not see the Auburn. Maurer went off duty at noon, and subsequent to the sinking and prior to the time he was relieved he made a special report of the occurrence to his superior in the government service. His testimony was given after refreshing his memory from a copy of that report, and it is entitled to whatever additional weight it thus receives.

If, as a matter of fact, the Richmond's rail was flush with the water, and in that condition she took on swells which were such as only arise from the proper navigation of tugs ordinarily and in common use in this harbor, she has none but herself to blame, if misfortune overtook her. It makes no difference whether the unseaworthiness is brought about from inherent weakness or overloading. A boat so circumstanced as was the Richmond was bound to anticipate the ordinary incidents of harbor traffic, and the degree of her seaworthiness must be measured by the necessities of such traffic, when properly conducted. After a careful review of all the testimony in this case, I have reached the conclusion not, however, wholly free from doubt, that the libelants have not sustained the burden of proof to the extent which justifies me in entering a decree in their behalf.

The libel will consequently be dismissed, with costs.

RUSSELL-CRONIN CO., Inc., v. DIRECTOR GENERAL OF RAILROADS.

(Circuit Court of Appeals, Second Circuit. November 7, 1921.)
No. 26.

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

Libel by the Russell-Cronin Company, Inc., against the Director General of Railroads. From a decree dismissing the libel, libelant appeals. Affirmed.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Leonard J. Matteson, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

HOLBROOK, CABOT & ROLLINS CORPORATION v. CITY OF NEW YORK.

(District Court, S. D. New York. July 16, 1921.)

1. **Municipal corporations ⟸868(1)—Supplemental contract increasing compensation void unless board had prescribed amount of bonds or had available funds.**

   Under Rapid Transit Act N. Y. § 37, subd. 2, providing that the amount of bonds authorized to be issued and sold thereunder should not exceed the limit prescribed by the board of estimate and apportionment, and no contract should be made until such board should have consented thereto and prescribed a limit to the amount of bonds available for the purposes of that section sufficient to meet the requirements of the contract in addition to prior obligations, the modification of a contract for construction of a rapid transit railway to provide for increased compensation to the contractor was void unless the board had prescribed bonds or had available funds to meet the expenditures involved therein, and such fact should have been pleaded in an action to recover on the modified contract.

2. **Statutes ⟸219—Executive interpretation usually limited to formal rulings.**

   While departmental interpretations of statutes are evidence of their construction to which the court should give weight, this is chiefly applied to formal rulings, and not to cases where claims in process of adjustment have been recognized in spite of possible question as to their validity.

3. **Municipal corporations ⟸354—Statute held not to authorize supplemental contract for completion of rapid transit contract.**

   Laws N. Y. 1918, c. 586, § 10, authorizing the Public Service Commission (acting under the Rapid Transit Act as the agent of the city of New York) to release contractors from the terms and conditions of their contracts when, by reason of conditions arising from the war, the prosecution of the work is in conflict with public interest or necessity, applies only to a suspension of the work in whole or in part, and does not author-

ize a supplemental contract for additional compensation to the contractor to insure completion of the original contract.

4. **Municipal corporations ⟸354—Refusal to cancel contracts because of war conditions as authorized by statute held so far discretionary as to give no right of action.**

Under Laws N. Y. 1918, c. 586, §§ 3, 4, and 5, authorizing the Public Service Commission (as agent of the city of New York under the Rapid Transit Act) to cancel construction contracts because of war conditions, and to require a settlement of all claims for damages by the contractor as a condition of cancellation, the cancellation of the contract is such a matter of discretion that no right of action can be predicated on failure to exercise such discretion, though in reliance on the promise of the Commission and the board of estimate and apportionment that the contract, so far as necessary, would be placed under the operation of such law, the contractor has paid more than the prevailing rate of wages.

5. **Municipal corporations ⟸354—Emergency held not to justify disregard of statute in promising contractors additional compensation.**

The loss to the city of New York from the noncompletion of contracts for the construction of subways, and the inconvenience to the public from partly constructed subways, did not justify a disregard of statutory provisions in modifying the construction contracts to provide additional compensation to the contractors because of war conditions.

6. **Evidence ⟸29—Judicial notice taken of state laws.**

The court takes judicial notice of the terms of laws of the state.

7. **Pleading ⟸63—Not necessary to negative proviso of law.**

Under the Lusk Amendment to Laws N. Y. 1918, c. 585, declaring the cost of completing public contracts at an increased cost because of the war, in reliance on any promise of relief by local authorities, a valid obligation of the municipality, provided the contracts shall not have been canceled under the original act or an application for a cancellation denied, it is not necessary for a contractor to plead that the contract was not canceled or an application for cancellation made and denied; the provision as to cancellation being set forth in a proviso and constituting a defense.

8. **Municipal corporations ⟸871—Statute making increased cost of public contract valid municipal obligation not invalid as gift.**

The Lusk Amendment to Laws N. Y. 1918, c. 585, declaring the cost of completing municipal contracts at an increased cost owing to the war, in reliance on any promise of relief by local authorities, a valid obligation of the municipality, does not violate Const. N. Y. art. 8, § 10, prohibiting cities, etc., from giving any money or property to or in aid of any individual, association, or corporation, as this does not apply to the enforcement of an ultra vires obligation of public authorities which the Legislature might have originally authorized.

9. **Municipal corporations ⟸327—Statute relative to increased cost of public contracts not invalid if agreements supported by consideration.**

The Lusk Amendment to Laws N. Y. 1918, c. 585, relative to the payment by municipalities of the increased cost of completing contracts because of the war, does not violate Const. N. Y. art. 3, § 28, prohibiting extra consideration to any contractor or officer, as applied to an agreement by municipal authorities to pay the increased cost if such agreement was founded upon a substantial consideration.

10. **Municipal corporations ⟸354—Statute relative to increased cost of completing contract owing to war refers only to increases due to the entry of the United States into the war.**

The Lusk Amendment to Laws N. Y. 1918, c. 585, relative to payment for the construction of public utilities completed at an increased cost owing to the war with Germany, refers to the participation of this coun-

try in the war with the German Empire and not to the European war in general, and embraces only such increases as arose from the entry of the United States into the war.

11. Municipal corporations ⇐374(3)—Complaint held to allege a sufficient consideration for city's agreement to pay increased cost of subway construction due to war.

In an action on a contract with a city for the construction of a section of a subway, a complaint alleging the payment of increases demanded by workmen in reliance on the city's promise to reimburse the contractors for increases in the cost of labor and materials due to the war *held* to plead a sufficient consideration to withstand demurrer.

At Law. Action by the Holbrook, Cabot & Rollins Corporation against the City of New York. On demurrer to the seventh, eighth, and ninth causes of action. Demurrer overruled.

See, also, 277 Fed. 853.

The action was brought to recover amounts alleged to be due on a contract and supplemental contracts for the construction of a section of the Broadway-Fourth Avenue Rapid Transit Railroad in the city of New York, and for damages for alleged breaches of the contract.

The seventh cause of action alleged numerous demands by workmen employed by plaintiffs and other contractors for increased wages, and that the contractors granted such increases at the request and direction of the Public Service Commission; that with respect to an increase to take effect April 1, 1917, the Commission and its chairman assured plaintiff and the other contractors that a way would be found for defendant to assume and pay the amount of such increases and further increases in the cost of labor and materials anticipated because of the war then imminent; that the Commission would endeavor to procure necessary legislative authority; that following the declaration of war the cost of labor and materials was greatly increased and the efficiency of labor greatly diminished; that in or prior to May, 1918, a further large increase in wages was demanded, and plaintiff and the other contractors refused to meet such demand unless defendant would agree to reimburse them for such increase in wages and the cost of materials and enter into an enforceable agreement therefor; that the Commission and the board of estimate and apportionment, acting for defendant, promised and agreed that, if plaintiff would waive the agreements with their workmen and pay the increase demanded, defendant would pay plaintiff and the other contractors such increase and the increased cost of materials and any further increase, etc.; that plaintiff and the other contractors accepted such agreement and paid the demanded increase, but defendant failed and refused to carry out its agreement, and plaintiff and the other contractors gave notice that they would not pay such increased wages unless an enforceable and binding agreement was made as previously stated and provided, or, to put into operation and give the contractors the benefit of the Lockwood Law (Laws 1918, c. 586); that plaintiff's workmen struck and suspended all work; that thereafter the board of estimate and apportionment and the Commission promised and agreed to reimburse the contractors for increases in labor and materials, and, in so far as necessary, to place the contracts under the operation of the Lockwood Law; that the Commission and the board further agreed to adjust, settle, and pay existing claims for damages for breaches of contract; that the contractors accepted such promises, assurances, and agreements, and agreed to and did pay the increased wage scale, but that notwithstanding the full performance by the contractors, defendant had failed to pay such claims and increases, and failed, neglected, and refused to place the Lockwood Law in operation. It also contained allegations claimed to show that the completion of the work under the contracts was essential, if not imperative, to relieve congested conditions and inconveniences to the public.

The eighth cause of action alleged a supplemental agreement by the city for a good and valuable consideration to reimburse and pay plaintiff the amounts of all damages caused plaintiff by defendant's breaches of contract, and to include therein the increased cost of the work.

The ninth cause of action alleged a supplemental agreement for a good and valuable consideration whereby the city agreed to reimburse and pay plaintiff the amounts of increases in wages and cost of materials, in addition to payment in accordance with the unit prices fixed in the contract.

Thomas F. Conway, of New York City, for plaintiff.

John P. O'Brien, Corp. Counsel, Clarence J. Shearn, John F. Collins, and Charles C. Smith, all of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. [1] I can find little in plaintiff's reargument, outside of the so-called Lusk Amendment (Laws 1921, c. 711), which I have not already considered to the best of my ability. A few new decisions are referred to, but they fall within the general principles heretofore discussed. The case of Admiral Realty Co. v. Gaynor, 147 App. Div. 720, 132 N. Y. Supp. 220, does not obviate the necessity of compliance with subdivision 2, § 37, of the Rapid Transit Act (Laws 1891, c. 4, as amended by Laws 1909, c. 498, § 17). There Justice Scott, in referring to changes in plans and specifications in the size of the conduit which affected the cost of same, held that such modifications might be made by the Public Service Commission both by the act and by the terms of the contract as let. That sort of change was, for the reasons I have heretofore stated, different from a change in the rate of compensation. It was in its nature an engineering problem under the control of the Commission which did not fall within the provisions of section 37, supra.

The case of People ex rel. Holbrook v. Mitchell, New York Law Journal, August 24, 1915, is also no authority for holding that the board of estimate and apportionment was not required to prescribe the bonds to be issued for a supplemental contract changing the rate of compensation. That case was discussed in plaintiff's original brief. A condition requiring a lump sum payment for extra work instead of an alternative provision for cost plus ten per cent., or a lump sum as prescribed in article 12 of the general form of city subway contracts, was sought to be inserted by the board of estimate and apportionment in its consent to a contract which had been awarded by the Commission to a successful bidder. This was held to vary the contract which had been advertised and to involve a risk to the contractors which they ought not to be compelled to take. The court decided only that the board of estimate had attached to its consent an illegal condition which interfered with a proposal to bidders lawfully advertised by the Commission and awarded to a successful contractor. It was said in the course of the opinion that—

"There is substantial ground for holding that the board had no discretion in the matter at all as the authorization of the expenditures was made when the general plans were approved at the time the dual contract was decided upon."

These remarks were a dictum; but even if subject to no valid criticism because contemplating only a general prescription of bonds for

the route, rather than a prescription for the special contract, they are inapplicable to this case because it has nowhere been pleaded that the board of estimate and apportionment had prescribed a limit of bonds available for the amended or supplemental contract upon which recovery is here sought. The provision for extra work in the Degnon contract, referred to on page 32 of plaintiff's brief, is not in point, for the cost plus clause there in issue was one of the terms of the contract which like any other provision for compensation for extra work while it might affect considerably the cost of the contract was something which might reasonably be roughly taken into consideration by the board of estimate and apportionment and was quite different from a different rate of payment for the contractor on the entire contract.

The case of McGovern v. City of New York was strongly relied upon in the original brief, and was one of the principal cases in the New York courts which I considered. The changes there came within the terms of the contract and did not involve modifications of the rate of compensation of the most fundamental sort.

The case of Bradley Contracting Co. v. City of New York, also referred to by plaintiff's counsel, is an unreported decision, and the work apparently related to restoration of a street affected by subway construction. Exactly what was the theory of recovery has not been made clear, but it is asserted that the recovery allowed for this item was a small part of the total claim, and that the matter was settled and an appeal taken by the city from the judgment was withdrawn. The case as a precedent is too inapplicable for serious consideration.

The recent decision of Justice Finch in the case of Moore v. City of New York, reported in New York Law Journal December 2, 1919, and affirmed at 192 App. Div. 902, 182 N. Y. Supp. 938, where a consent and provision for payment of work under a subway contract by the board of estimate and apportionment was held to be a condition of validity, seems to bear out the city's contention.

The cases of Meech v. City of Buffalo, 29 N. Y. 198, Moore v. Mayor, 73 N. Y. 238, 29 Am. Rep. 134, Van Dolsen v. Board of Education, 162 N. Y. 446, 56 N. E. 990, and the well-known decision of Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, were all urged on the original argument. They differ from the present case because here there is a lack of power on the part of the Commission to make a contract which shall bind the city unless the board of estimate and apportionment, which has control of the finances of the city, has taken the necessary steps. I think this limitation of power extends to a modification involving such a fundamental change of cost as the present, not provided for in the original contract. The situation may be different where the same official or board has the power both to make the contract and to appropriate the funds. In the latter case, the failure to comply with statutory regulations which ought to be observed has sometimes been regarded as only an irregularity. Under familiar decisions an ultra vires act of a private corporation is treated quite differently from that of a municipal corporation where the whole power to act rests upon a special statute. Edison Electric Co. v. City, 178 Fed. 425, 102 C. C. A. 401.

It is said that section 37 of the Rapid Transit Act does not specifically require bonds to be prescribed for the particular contract or amended contract, but only requires the board of estimate and apportionment to prescribe a limit to the amount of bonds "available for the purposes of this section which shall be sufficient to meet the requirements of such contract in addition to all obligations theretofore incurred and to be satisfied from such bonds." In other words, it is contended that sufficient bonds were made available when the dual subway contract was decided upon and the discretion of the board in refusing any available funds after it had consented to the amendment was exhausted. If this contention be sound, the plaintiff should not rely upon arguments based upon the financial transactions of the board, but should plead that the board of estimate and apportionment had prescribed bonds, or had available funds to meet the expenditures involved in the amended or supplemental contract which it had consented to.

The recent case in the New York Supreme Court, Appellate Division, of People ex rel. Connors v. Board of Education, 197 App. Div. 5, 188 N. Y. Supp. 686, which held that a general appropriation for the construction of school buildings satisfied the charter provisions that no expense should be incurred by a city department unless a previous appropriation had been made and was sufficient to render a contract valid though no express appropriation had been made for the particular contract, is not in point. It is not here pleaded that the board of estimate had "prescribed a limit to the amount of bonds available" which were sufficient to meet the requirements of the amended contract in addition to all obligations theretofore incurred and to be satisfied from such bonds.

[2] I may add at this point that no practical construction of contracts can be valid which does not meet the requirements of the Rapid Transit Act. It is true that departmental interpretations of statutes are evidence of their proper construction to which courts should give weight, but this doctrine is chiefly applied to formal rulings and not to cases where claims in process of adjustment have been recognized in spite of possible question as to their validity.

The point is made that the plaintiff need not plead that bonds or funds are available for extra cost, but if my conclusion is correct, there can be no valid contract by reason of the provisions of the Rapid Transit Act unless such funds have been made available. It would hardly be contended that a mere allegation that the city duly entered into a contract to build a section of the subway would be a sufficient allegation to sustain recovery. If it would not be, such a vital condition of a contract that is itself made a part of the complaint by reference required by a statute that is referred to must be pleaded. Indeed, the plaintiff has carefully thus pleaded as to the original contract.

The difficulty with the argument is that without prescription of bonds or available funds which were a condition precedent to the making of the supplemental contract, it was not good on its face. In the case of McNulty v. City of New York, 168 N. Y. 117, 61 N. E. 111, relied upon by the plaintiff, the contract was good on its face. The highway cases cited in the McNulty decision were similar. The statute did not so much prescribe what should be done before any contract could be

entered into as barred recovery if there were not sufficient funds available. As I understand it, the claim in the McNulty Case was not that there had never been an appropriation but that it had become exhausted. The closest case on pleading which I have discovered are McBean v. San Bernardino, 96 Cal. 183, 31 Pac. 49; City of Waco v. McNeill (Tex. Civ. App.) 29 S. W. 1109.

In the present case we have a statute authorizing extra municipal work to be entered upon under prescribed conditions. All conditions vitally affecting the city must be complied with to give rise to a valid contract and, especially where, as in this case, they are expressly made conditions precedent, must be pleaded.

In respect to the Lockwood Law (Laws 1918, c. 586), it is alleged that the board of estimate and apportionment agreed with plaintiff, and other contractors:

"That if and in so far as it was or might become necessary to enable defendant to carry out and perform said agreement on its part" (to pay increased cost due to war conditions) "said board and said Commission would cancel and place said contracts under the operation of said Lockwood Law, so that plaintiff and said other contractors respectively would in such event have the full benefit of the relief it contemplated and provided for, and said increased costs of labor and material adjusted, settled and paid in the manner it provided or authorized and that pending the examination or investigation hereinafter referred to, to enable said board and said Commission to decide which, if any, of said contracts it would be necessary to place under the operation of said law in order to carry out said arrangement, said increase in said scale of wages would be paid to plaintiff and said other contractors, respectively. * * *"

It is further alleged that to decide which, if any, of said contracts should be placed under the Lockwood Law, the contractors were to permit the examination by defendant of their books and records. It is further alleged that all legal claims for breaches of contract by defendant prior to June 15, 1918, when such agreement was made, would be deemed included in the increased cost; that detailed statements thereof were furnished by the plaintiff to the defendant at the latter's request; and that any and all further damages arising from breaches of contract then accrued would be deemed paid by the payment from and after that date of the increased cost of labor and materials.

The complaint further alleges that the defendant refused to pay the increased cost of labor and materials and the amount of past damages as agreed, and neglected and refused to place in operation said Lockwood Law.

It is manifest that the Lockwood Law does not apply, for it is expressly alleged that the public authorities refused to place it in operation. The operation of this law contemplates a cancellation of existing contracts in all cases except (1) where an event or default specified in the contract has occurred whereby the Commission has the right to take over and complete the contract (section 2 of chapter 586 of Laws of 1918), and (2) where the work is suspended in whole or in part by the Commission with the consent of the contractor (section 10 of chapter 586, supra).

[3] Section 10 is clearly not applicable, and the provision in subdivision 2 thereof authorizing the Commission to "release a contractor

* * * from the terms and conditions of his contract subject to such conditions as may be reasonably imposed" cannot possibly cover this case. Section 10 is entitled in the statute: "Suspension of Whole or Part of Work." It evidently was inserted to provide for a situation where the provisions of prior sections of the Lockwood Act relating to cancellation of contracts and completion of the subway work were not sufficient to cover all anticipated war emergencies, and the things which section 10 says the Commission may do are conditioned upon the decision by the Commission:

"That the prosecution of the work called for * * * has, by reason of conditions arising from * * * a state of war become in conflict with public interest or necessity."

In other words, the section applies, as its title indicates, to "suspension of whole or part of work."

It seems quite impossible that authorization for a supplemental contract made in order to insure the completion of the original contract can be found in language relating to suspension of prosecution of work.

[4] In respect to cancellation under sections 3, 4, and 5 of the Lockwood Act, it is to be noted that the last section specifically enables the Commission to require a settlement of all the contractors' claims for damages as a condition of cancellation.

The mode of cancellation is carefully prescribed. It is apparent from the complaint that the parties were putting themselves in position to cancel the contract. It is evident that the examination of plaintiff's books, and scrutiny of its claims by the Comptroller, had this in view. It may be that the inability to reach an adjustment of these claims which under the Lockwood Act might be required "as a condition of * * * cancellation and annulment" of the contract was what prevented further progress, but the fact remains, and is alleged, that the authorities "refused to place in operation such Lockwood Law," and no cause of action can be predicated upon failure to exercise a statutory discretion.

The plaintiff claims the statutory discretion was exhausted because of an estoppel arising out of the performance by it of its part of the alleged agreement to pay more than the prevailing rate of wages on the faith of a promise by the board and the Commission that, so far as it might become necessary to enable defendant to carry out the agreement on its part to pay the increased cost, they "would cancel and place said contracts under the operation of said Lockwood Law so that plaintiff * * * would * * * have the full benefit of the relief it contemplated and provided for. * * *"

In this case the agreement was to adjust and pay past damages and future extra cost. If the Lockwood Law had enabled the Commission to fix the past damages of the contractor as a quasi judicial function, it might have been possible to contend that a right existed to compel them by mandamus to proceed under the act to fix the damages and pay the increased cost, and if the plaintiff went on doing work on the faith of the alleged promise, it might have been reasonable likewise to contend that a right of recovery in quasi contract for unjust enrichment was made out; but an important provision preliminary to the

operation of the law, which the authorities could by its terms invoke, was a satisfactory adjustment of the claims for past damages. This left the cancellation of the contract a matter so entirely discretionary that no case is established. The complete failure of all parties to observe the provisions of the statute regulating procedure might render recovery, even under different circumstances, difficult to justify.

[5] The argument that the allegations in the seventh cause of action justify a recovery under the doctrine of emergency has been repeated and amplified. I cannot be persuaded that the loss to the city and the public inconvenience of half-built subways would justify a disregard of existing statutory provisions. There were apparently lawful ways by which the city might modify its contracts or make new contracts, and the law of emergency can only be invoked where regular modes of procedure cannot reasonably be complied with. Dillon on Municipal Corporations, § 802. Is it reasonable to say that no time was available to take the requisite steps and comply with the law, and that the case was like that of the sudden suspension of a lighting system in a large city? While the situation may have justified emergency legislation under the police power, it is quite a different thing to hold that it would permit the authorities to proceed in disregard of existing statutes.

The eighth and ninth causes of action are subject to the same defects of pleading as the seventh, because they each contain by reference to paragraphs I to XII of the first cause of action a recital of a contract made under the provisions of the Rapid Transit Act, and seek recovery for the breach of a "supplemental agreement modifying and supplementing the provisions of * * * said contract." Each cause of action was among other things to recover an item for increased cost of construction of subways subsequent to June 15, 1918. If I am right in my previous conclusions, a valid supplemental agreement to pay such increased cost involved the consent of the board of estimate and apportionment to the amendment and adequate financial provision in order to meet the expense. These facts have not been pleaded in the case of either the eighth or ninth causes of action, which are therefore demurrable for the reasons applicable to the seventh cause of action.

The doubtful point in this case, to which I have given great consideration, is the power of the Commission to modify the contract without action by the board of estimate under section 37. The plaintiff argues that the power of the Commission to amend is practically unlimited, and it certainly is if such a vital change as the one here can be sustained. I do not believe that the Rapid Transit Act, so carefully drawn to prevent the city from becoming involved in too heavy expenditures, when embarking upon a somewhat hazardous and extra municipal undertaking, can have intended to leave to the Commission, under the guise of a power to modify, the right to require for the original work increased payment to the contractor so large as to give rise practically to a new contract. If the board of estimate and apportionment, having consented to the alleged contract to pay the contractor the large additional sums, withdrew a sufficient amount of bonds theretofore from the debt limit so that these bonds together with funds otherwise available would meet the requirements of the modified contract "in addition

to all obligations theretofore incurred and to be satisfied from such bonds" (see section 37 of the Rapid Transit Act), the plaintiff should plead these facts. It may also be that so fundamental a change in the contract would require a public hearing under section 37, subd. 2, of the Rapid Transit Act, for the reason that it was too broad a change to amount to a modification within the meaning of section 38 and was substantially a new and different contract.

The New York Court of Appeals, in the case of National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965, held that very substantial changes in the amount of stone masonry in a contract for the construction of a dam across the Hudson river could not be required of the contractor by reason of a provision in the contract that the water power company might "make alterations in the line, grade, plans, form, position, dimensions or material of the work to be performed," and that "if such alterations diminish the quantity of the work to be done they shall not constitute a claim for damages or for anticipated profits on the work that may be dispensed with." They further held that the refusal of the contractor to proceed when such changes were demanded was not a breach of the contract on its part, and that the requirement of the water company that the contractor proceed in accordance with the amended plans was an unjustifiable breach on its part.

After carefully reconsidering the case, I am still of the opinion that the plaintiff has not by its pleading brought causes of action 7, 8, or 9 within the provision of the Rapid Transit Act or of the Lockwood Law, and has not stated grounds justifying recovery under any theory of unjust enrichment or estoppel which can prevail against a municipal corporation engaged in constructing a railroad under the terms of the Rapid Transit Act. But while at common law and under the provisions of the Rapid Transit Act the plaintiff has not pleaded facts entitling it to relief in the seventh, eighth, or ninth causes of action, the so-called Lusk Amendment (Laws 1921, c. 711) to the Walters Act, chapter 585 of the Laws of 1918, passed since the argument of this motion, affords it some relief. That amendment provides that in respect to contracts for construction of public utilities made prior to April 6, 1917, and completed at an increased cost owing to a state of war with Germany in reliance upon any promise of action for relief from such increased cost given by the local authorities, board, or commission of any municipality with or for which said contract was made, any damage, loss, or expense which a court of competent jurisdiction may find to have been occasioned by increased cost in the performance due to the existence of a state of war not to exceed the actual and necessary cost of the performance thereunder subsequent to April 6, 1917, is made a valid obligation of the municipality, provided, however, that said contract shall not have been heretofore canceled or annulled under the act or an application for the cancellation or annulment thereof under the act shall not prior to January 1, 1920, have been denied. The amendment also provides:

"Any court of competent jurisdiction may, in any action or proceeding now pending, * * * hear, try and determine any such claims, and, if it finds

that such damages shall have been sustained, may award and render judgment for such sum as may be just and equitable."

[6] The only application for cancellation which the act contemplates is by the city. The case falls within the act unless it is necessary for the plaintiff to plead that the contract has not been canceled or annulled under the act, or that an application for cancellation or annulment shall not have been denied. The suggestion of counsel for defendant that the Lusk Amendment, supra, ought to be pleaded, is not sound. This court takes judicial notice of its terms. Long Island R. R. Co. v. City, 199 N. Y. 288, at page 303, 92 N. E. 681.

[7] That the contract was not canceled is quite plain from the elaborate recital of the facts in the seventh cause of action of the complaint. It seems also apparent that no application to cancel it under the Walters Act has been made and denied. The only one who could have made such an application "under this act" was the city, and the only one who could have denied it "under this act" was the contractor by refusing to file the statutory stipulation and give its consent after notice by the city that the latter desired cancellation. But in any event, it would be unnecessary to plead that the contract was not canceled or that an application for cancellation under the Walters Act was not made and denied. Such cancellation or application therefor, which would take the case out of the Lusk Amendment, are set forth in a proviso and would, under settled authority, have to be pleaded as a defense. Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; People v. Kibler, 106 N. Y. 32, 12 N. E. 795; Teel v. Fonda, 4 Johns. (N. Y.) 304; Steel v. Smith, 1 Barn. & Ald. 94.

[8] It has been suggested that the Lusk Amendment is unconstitutional under article 8, § 10, of the New York State Constitution. That section provides, among other things, that—

"No county, city, town or village shall hereafter give any money or property * * * to or in aid of any individual, association or corporation. * * *"

The section does not apply to an act which permits the enforcement of an obligation which is due to the fact that it arose from ultra vires action on the part of the public authorities. If it is something which the Legislature might have authorized originally, there is no constitutional objection to a curative act which in effect ratifies an unauthorized municipal contract.

If therefore the plaintiff can prove the facts alleged in the seventh, eighth, or ninth causes of action, while the provisions of the Rapid Transit Act would not seem to have been complied with so as to enable it to recover prior to the passage of the Lusk Amendment, I think that amendment creates quite a different situation, and the causes of action are now good on their face. Matter of Greene, 166 N. Y. at page 494, 60 N. E. 183; People ex rel. Central Trust Co. v. Prendergast, 202 N. Y. at pages 198, 199, 95 N. E. 715; Matter of Borup, 182 N. Y. 226, 74 N. E. 838, 108 Am. St. Rep. 796. As Judge Landon said in Matter of Greene, supra, 166 N. Y. at page 494, 60 N. E. 186:

"The Legislature may ratify what it might originally have authorized, and it seems to be right that it should have the power to relieve against the

special injustice which may sometimes result from the limitations it has imposed upon the authority of the officers which it has empowered with the administration of its municipal creations."

See, also, W. I. B. Co. v. Town of Attica, 119 N. Y. 204, 23 N. E. 542; First Construction Co. v. State of New York, 221 N. Y. 295, 116 N. E. 1020.

[9] Article 3, § 28, of the New York State Constitution, provides that—

"The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor."

This provision stands in much the same position as section 10 of article 8, above discussed. The question is whether there was any substantial consideration for the agreement to pay increased cost of labor and materials.

[10] The relief granted by the Lusk Amendment is limited to increased cost resulting from or due to the existence of a state of war. It is manifest that this cannot embrace all increases from April 6, 1917, which were over and above the rates prevailing at the date when the original contract was made, but only such increases as arose from the entry of the United States into the war. I think it clear that the words "existence of a state of war" refer to participation of this country in war with the German Empire, and not to the European war in general, which began in August, 1914, more than one year before the contract sued upon was made. If the plaintiff can establish an agreement to pay the increased cost due to the existence of a state of war, and can prove at the trial that the agreement was founded upon a substantial consideration, such increased cost will not be "extra compensation" or a gift within the proscription of the New York Constitution, and the plaintiff can recover that amount under the terms of the Lusk Amendment. The applicability of the curative act will depend upon proof at the trial of a substantial consideration sufficient to take the case out of the constitutional provisions.

[11] As I said in my original opinion, a sufficient consideration has been pleaded to withstand the demurrer. Whether the promises to pay increased cost involved rates of wages that were more than then prevailed or were given in exchange for extinguishment of substantial claims for damages, are matters to be developed at the trial. I do not think the Lusk Amendment is unconstitutional on its face or as applied to the facts pleaded. The promise therein referred to would seem to be a promise for a valid consideration; otherwise the constitutional provisions would appear to stand in the way. If the amendment is thus construed, I can see nothing against it. O'Hara v. State, 112 N. Y. 146, 19 N. E. 659, 2 L. R. A. 603, 8 Am. St. Rep. 726; Lehigh Valley R. R. v. Canal Board, 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228.

Accordingly, the demurrer to the seventh, eighth, and ninth causes of action is overruled.

HOLBROOK, CABOT & ROLLINS CORPORATION v. CITY OF NEW YORK.

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

Municipal corporations ⇐75—Act applicable to cities, etc., having specified population, not invalid because not submitted to mayor.

The Lusk Amendment to the Walters Act of the New York Legislature, providing for payment of the increased cost, due to the war, of completing public contracts in reliance on any promise of relief by the local authorities of any county, municipality, or political division of the state having a population of more than one million, and by any state, county, or municipal agency, board, or commission charged with making or carrying out such contract though not submitted to the mayor of the city of New York, is not invalid under Const. N. Y. art. 12, § 2, requiring special city laws to be submitted to the mayor and defining special city laws as those relating to a single city or to less than all the cities of a class.

At Law. Action by the Holbrook, Cabot & Rollins Corporation against the City of New York. Additional opinion on demurrer to complaint. Demurrer overruled.

For former opinion, see 277 Fed. 840.

Thomas F. Conway, of New York City (Joseph A. Kellogg and Thomas E. O'Brien, both of New York City, of counsel), for plaintiff.

John P. O'Brien, Corp. Counsel, of New York City (Clarence J. Shearn, of New York City, of counsel), for defendant.

Kellogg & Rose, amici curiæ.

AUGUSTUS N. HAND, District Judge. Counsel for the defendant has asked that I consider the effect of article 12, § 2, of the Constitution of the State of New York upon the Walters Act (Laws 1918, c. 585) after the adoption of the so-called Lusk Amendment (Laws 1921, c. 711). This section classifies cities according to the latest state enumeration, and provides that—

"Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section."

The section goes on to provide that after any bill for a special law relating to a city has been passed by both branches of the Legislature, the house in which it originated shall transmit a certified copy to the mayor of such city, and within 15 days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon stating whether the city has or has not accepted the same. Whenever any such bill is returned without the acceptance of the city to which it relates, it may again be passed by both branches of the Legislature, and shall then be subject as are other bills to the action of the Governor.

The bill in question was not submitted to the mayor of the city of New York, and was enacted as general legislation.

The limitation of the New York Constitution is confined to "special city laws," and they are defined as "those which relate to a single city, or to less than all the cities of a class."

The Lusk Amendment covers "any county, municipality or political division of the state having a population of more than one million according to the last preceding federal census or state enumeration," and also covers "any state, county, or municipal agency, or any board or commission charged by law with the duty of making or carrying out" such a contract as is referred to in the act.

In the case of Admiral Realty Co. v. City of New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, the Court of Appeals held that the amendment to the Rapid Transit Act (Laws 1891, c. 4, as amended by Laws 1909, c. 498) which authorized the city to contract for the building of the new subways was not a special city law. The recent decision of the Appellate Division in Matter of McAneny, 198 App. Div. 205, 190 N. Y. Supp. 92, relating to the new subway legislation, followed the Admiral Case, and held that the new legislation was not objectionable under section 2 of article 12 of the state Constitution. In the Admiral Case the legislation affected only cities having a population of over one million, and did not include counties and municipal agencies.

The case of Matter of Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132, is not in point, because there a constitutional provision prohibited the Legislature from passing a private or local bill for laying out or altering highways. The court held that the act was so drawn as to amount to an arbitrary classification which limited it locally in such a way as to make it a private or local bill. Here the constitutional provision specifically defines what are "special city laws," and the act in question covers not only New York City, but other political subdivisions.

The demurrer to the seventh, eighth, and ninth causes of action is overruled.

In re RED CROSS LINE.

(District Court, S. D. New York. June 20, 1921.)

No. 691.

1. **Removal of causes ⇐12—Civil suit between alien and citizen in district where neither was an inhabitant, involving more than $3,000, removable.**
   A suit of a civil nature, at law or in equity, brought by an alien against a citizen of a state of the Union, involving a sum of more than $3,000, in a district wherein neither plaintiff nor defendant was an inhabitant, *held* removable to the federal court.

2. **Removal of causes ⇐19 (5)—Suit to specifically enforce arbitration agreement held not to arise under Constitution and laws of United States.**
   A suit involving an attempt specifically to enforce an arbitration agreement under a state contract in a dispute between the owners and char-

terers of a vessel does not arise under the Constitution or laws of the United States, so as to allow a removal to the federal court.

3. **Removal of causes ⟸72—Suit to specifically enforce arbitration agreement held not to involve jurisdictional amount.**

A suit to specifically enforce an arbitration agreement under a state statute in a dispute between the owners and charterers of a vessel *held* not removable, since the jurisdictional amount is not involved; the value of an arbitration being one of convenience, to which no pecuniary value can be given, and breach of which will result in nominal damages only.

4. **Removal of causes ⟸4—Proceeding to enforce arbitration agreement under state statute held not "suit," within removal statute.**

A proceeding between the owners and charterers of a vessel in a state court to specifically enforce an arbitration agreement under a state statute *held* not a "suit," within the meaning of the removal statute.

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

5. **Courts ⟸394(7)—Adverse decision as to whether cause of action is cognizable only in admiralty may be taken to Supreme Court of United States.**

In a proceeding by an alien to recover overpaid charter hire, brought against a citizen of a state of the Union, whether the cause of action is cognizable in admiralty only is a point which may be raised in the state court, and, if decided adversely to defendant, can be taken to the Supreme Court of the United States.

Petition by the Red Cross Line for an order directing the Atlantic Fruit Company to proceed to arbitration, removed on petition of the Atlantic Fruit Company to the United States District Court. On motion by the Red Cross Line to remand, and by the Atlantic Fruit Company to dismiss for lack of jurisdiction. Motion to dismiss denied, and motion to remand granted.

See, also, 277 Fed. 857.

Hunt, Hill & Betts, John W. Crandall, and E. F. Rapallo, all of New York City, for Atlantic Fruit Co.

Loomis, Barrett & Jones, Homer L. Loomis, and Reginald B. Williams, all of New York City, for Red Cross Line.

AUGUSTUS N. HAND, District Judge. The Red Cross Line has a claim against the Atlantic Fruit Company to recover $35,256.96, charter hire and expenses alleged to have been overpaid by the Red Cross Line in ignorance that the master had failed to prosecute the voyage with dispatch. The charter party contained the covenant that the captain should prosecute the voyage "with the utmost dispatch." It contained the following arbitration clause:

"23. That, should any dispute arise between owners and charterers, the matters 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 any two of them, shall be final, and, for the purpose of enforcing any award, this agreement may be made a rule of court. * * *"

The Red Cross Line demanded an arbitration pursuant to the foregoing clause of the charter party, but the Atlantic Fruit Company refused to submit the matter to arbitration. Thereupon the Red Cross

Line filed a petition in the New York Supreme Court, New York County, pursuant to chapter 275 of the Laws of 1920 of the state of New York, praying that an order be made by that court requiring the Atlantic Fruit Company to proceed to an arbitration.

In this state of the record in the state court, the Atlantic Fruit Company filed its petition and bond for removal to this court, alleging that the Red Cross Line is a British corporation and the Atlantic Fruit Company is a Delaware corporation, having an office at 61 Broadway, New York City. The petition for removal further alleges that the matter in dispute exceeds the sum of $3,000, exclusive of interest and costs, and is a suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, because it is one of admiralty and maritime jurisdiction, and is one betweeen a citizen of a state and a foreign citizen or subject. On removal to this court, the Red Cross Line, appearing specially, moved to remand, and the Atlantic Fruit Company, likewise appearing specially, moved to dismiss for lack of jurisdiction.

[1] (a) If this is a suit of a civil nature, at law or in equity, between an alien and a citizen of a state of the Union, and involves the sum of more than $3,000, I have no doubt that it was properly removed under the rule laid down in Guaranty Trust Co. v. McCabe, 250 Fed. 699, 163 C. C. A. 31. All the judges in that case held that an alien, suing a citizen in a district whereof neither the plaintiff nor defendant was an inhabitant, could not object to removal by the citizen. It was on this very point that the majority of the court distinguished the cases of Matter of Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and Matter of Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, from Ex parte Wisner, 203 U. S. 449, 704, 27 Sup. Ct. 150 (51 L. Ed. 264), and the dissenting judge said (250 Fed. at page 704, 163 C. C. A. 31):

"We all start * * * with the assumption that, when an alien sues a nonresident citizen in a state court, the defendant may remove the cause to the District Court for the district in which the suit is brought."

Such an expression of opinion from the Circuit Court of Appeals must clearly be binding on me.

[2] (b) The cause may be removed to this court if it involves more than the sum of $3,000 and arises under the Constitution and Laws of the United States. For the reasons I have given, if cause of removal exists, the defendant's waiver makes removal to this district proper. But it seems clear that the suit does not arise under the Constitution and laws of the United States. Mr. Justice Moody, in the case of In re Winn, 213 U. S. at page 465, 29 Sup. Ct. 516 (53 L. Ed. 873), said:

"* * * It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. Louisville & Nashville Railroad v. Mottley, 211 U. S. 149, and cases cited. If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts, and, if properly set up and denied by the

highest court of the state, may ultimately be brought to this court for decision."

See, also, Berton v. Tietjen & Lang Dry Dock Co. (D. C.) 219 Fed. 763.

In this case the suit involves an attempt specifically to enforce an arbitration agreement under a state statute. It clearly does not arise under the Constitution or laws of the United States, within the meaning of those words as judicially determined.

[3] But, whichever ground of jurisdiction be relied on, there is not the jurisdictional amount involved. The value of an arbitration is one of convenience. No pecuniary value can be given to it, and a breach can only result in nominal damages. Street v. Rigby, 6 Vesey, 815. Such a cause of action cannot be removed. Kurtz v. Moffit, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458; Youngstown v. Hughes, 106 U. S. 523, 1 Sup. Ct. 489, 27 L. Ed. 268; De Krafft v. Barney, 2 Black. 704, 17 L. Ed. 350; Whitney v. American Ship-building Co. (D. C.) 197 Fed. 777.

The overpaid charter hire is not here the matter in dispute, but solely the right of specific performance of the agreement to arbitrate. If the arbitration is ordered, the function of the court, so far as the proceeding instituted goes, ceases.

[4] Furthermore, I think, under the decision of Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743, the proceeding to compel specific performance, instituted in the New York Supreme Court in compliance with the state statute, was not a suit within the meaning of the removal statute.

[5] Whether the cause of action to recover overpaid charter hire is only cognizable in admiralty is a point which can be raised in the state court, and, if decided adversely to the Atlantic Fruit Company, can be taken to the Supreme Court of the United States.

The cause must be remanded because—

(1) It does not arise under the Constitution or laws of the United States.

(2) There is not the jurisdictional amount involved.

(3) The proceeding is not a "suit" contemplated by the Removal Act. That act does not relate to a cause in admiralty, even though the present proceeding can be regarded as such a cause of action.

The motion to dismiss is denied, and the motion to remand is granted.

CUBAN TRADING CO. v. BLACK DIAMOND S. S. CORPORATION.

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

Removal of causes ⊂⊃12—Nonresident of district, sued by alien, may remove cause.

A citizen of the United States, nonresident in the district, sued in a state court by an alien plaintiff, is entitled to remove the action to the federal court, on showing such diversity of citizenship, together with the other requisite jurisdictional elements.

Proceeding by the Cuban Trading Company against the Black Diamond Steamship Corporation, removed to the United States District Court. On motion to remand. Motion denied.

Shattuck, Glenn & Ganter, of New York City (Garrard Glenn and Frank C. Bowers, both of New York City, of counsel), for the motion.

Hunt, Hill & Betts, of New York City (John W. Crandall, of New York City, of counsel), opposed.

KNOX, District Judge. It will serve no good purpose for me to attempt to discuss the proposition as to whether, under the provisions of the Judicial Code (Comp. St. § 968 et seq.), a citizen of the United States, a nonresident of this district, sued in a state court by an alien plaintiff, is entitled to remove the action to this court upon showing such diversity of citizenship, together with the other requisite jurisdictional elements. In view of the hopeless conflict of authority upon the subject, it would seem that whether such removal can be had depends solely upon the district wherein the alien sues.

As to what may be done here, I must consider the dictum of the Circuit Court of Appeals in Guaranty Trust Co. v. McCabe, 250 Fed. 699, 163 C. C. A. 31, as binding upon this court. Judge Augustus N. Hand believed it so to be in the Matter of the Petition of Red Cross Line, 277 Fed. 853, decided June 20, 1921, and upon other occasions, like unto the present, I have acted upon that assumption. I feel constrained to again do so, and will deny the motion to remand.

Ex parte MATTHEWS.

(District Court, W. D. Washington, N. D. October 3, 1921.)

No. 6203.

1. Habeas corpus ⊂⊃25(1)—An alien, who could not be deported pursuant to the warrant, held entitled to discharge.

An alien, who had been held in confinement for months on a warrant for his deportation, which the government was unable to execute because of uncertainty as to the country of his nativity or the absence of a recognized government there, *held* entitled to discharge on habeas corpus.

2. Aliens ⊂⊃53—Can be deported only to country of nativity or allegiance.

Where an alien has been ordered deported to the country of which, as determined by the department, he is a native, an executive officer is without authority to amend the warrant by substituting a different country.

Habeas Corpus. In the matter of the application of John Matthews for writ to secure discharge from custody. Granted.

Geo. F. Vanderveer and Ralph S. Pierce, both of Seattle, Wash., for petitioner.

Robert C. Saunders, U. S. Atty., and Charlotte Kolmitz, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

NETERER, District Judge. [1] The petitioner under oath charges that:

"Under the provisions of the United States immigration statute on the 19th day of February, 1921, after a due hearing, it was determined by said Secretary of Labor for the United States that your petitioner had been born in and was a citizen of Ukrania aforesaid, and should be deported thence under the provisions of the immigration statute above referred to; that ever since said date your petitioner has been and still is unlawfully and unreasonably restrained of his liberty in the county jail * * * under the pretended authority of said warrant or order of deportation; and that said restraint is unreasonable and unlawful in this: That the government of the United States, as your deponent is informed and believes, has no diplomatic relations with the government of Ukrania, and is unable to execute its order or warrant of deportation aforesaid, and is unable to deport your petitioner to said Ukrania, and is making no attempt to do so, and has no intention of so doing, and that, unless the said Henry M. White, Commissioner of Immigration aforesaid, is prevented from so doing he will continue unlawfully and unreasonably to restrain your petitioner of his liberty, and confine him as a prisoner in the county jail of King county aforesaid, all in violation of your petitioner's right under the Constitution and laws of the United States"

—and prays a writ. A writ was issued, and a return and supplemental return made, in which the record taken before the Commissioner of Immigration is set out, from which it appears that the department is unable to secure a "Polish passport" for the petitioner, for the reason "that no satisfactory information has been furnished as to alien's place of birth." The order is to deport the petitioner "to his home in Ukrania." This was entered on the 19th day of February, 1921.

[2] A supplemental return is presented, stating that the warrant of deportation has been amended, directing the deportation of petitioner to "Eastern Galacia," to which is attached a telegram from the Assistant Secretary of Labor as follows:

"Ukrania and Eastern Galacia two separate countries with separate and distinct governments of their own. Not recognized by United States. Town of which Jack Matthews is native is now in Eastern Galacia and passport had to be secured from Eastern Galacian representative before deportation could take place. Warrant of deportation is hereby amended directing deportation of alien to Eastern Galacia."

The testimony shows that the Bureau of Immigration had determined as a fact that the petitioner was a native of Ukrania. A party may not be deported to any country other than of his nativity or of his allegiance. There is no established fact in the record, and none has been presented before the court, upon which to predicate an order of deportation to Eastern Galacia. It appears that Ukrania, Galacia, and Eastern Galacia are distinct sovereignties; that—

"The Galacian Republic is now temporarily in exile outside the boundaries of its country because Galacia in 1919 * * * was militarily occupied by Poland, and that Eastern Galacia is a separate state."

The Eastern Galacian government it appears in the record is contending against the occupation by Poland. It further appears that

Eastern Galacia is regarded as a distinct entity, whose political status has not yet been determined.

"The Supreme Council, by its decision of December 8, 1919, defined the so-called Curzon-Pope line as the extreme eastern *temporary* boundary of Poland." (Italics mine.)

This boundary line excludes all of Eastern Galacia, together with Lemberg, capital of that country. There is no evidence as to the location of this line, and it is admitted that Poland is the de facto military occupant of Eastern Galacia, and the Galacian government, so-called, is in exile. It is stated that the petitioner was born in Kaminetz, Podolska province, Ukrania; that he left his place of birth when 15 years of age, and came to Ontario, Canada, with his parents, where he resided until his entry into the United States in 1917. There is no testimony (the telegram is not evidence) in the record or produced upon this hearing which would warrant the deportation of the petitioner to "Eastern Galacia."

It appearing that the petitioner cannot be deported to Ukrania, he will be discharged, unless within 10 days an appeal is prosecuted, pending which he may be released on his recognizance in the sum of $1,000, with sufficient sureties and the usual conditions.

JOHNSON v. PANAMA R. CO.

(District Court, E. D. New York. October 27, 1921.)

1. **Seamen ⟸29(5)—May sue in district in which defendant resides or has principal place of business, though residing in same state.**
   Under Merchant Marine Act June 5, 1920, § 33, giving seamen a right of recovery under certain conditions, and authorizing suit within district in which defendant resides or in which he has his principal office, an action could be brought thereunder in the district in which employer resided, or in which his principal office was located, though plaintiff was a citizen of the same state, notwithstanding provision of Judiciary Act (Comp. St. § 991[1]) giving federal courts jurisdiction in a common-law action for maritime injuries only if parties are citizens of different states.
2. **Seamen ⟸29(5)—Complaint held insufficient to show suit brought in proper district.**
   In seaman's action for injuries under Merchant Marine Act June 5, 1920, § 33, complaint *held* insufficient, in that it failed to show suit to have been brought in the district in which the defendant resided or had his principal place of business, as required by such statute.
3. **Seamen ⟸29(5)—Complaint's failure to show suit to have been brought in proper district waived by defendant's failure to appear and move to dismiss.**
   In seaman's action for injuries under Merchant Marine Act June 5, 1920, § 33, failure of complaint to show suit to have been brought in district in which defendant employer resided or had his principal place of business *held* waived by defendant's failure to appear specially and move to dismiss.

At Law. Action by Andrew Johnson against the Panama Railroad Company. On plaintiff's motion for judgment on pleadings and defendant's demurrer to complaint. Demurrer overruled.

Silas B. Axtell, of New York City, for plaintiff.
Richard Reid Rogers, of New York City, for defendant.

GARVIN, District Judge. This is a motion by plaintiff for judgment on the pleadings. Defendant has demurred to the complaint upon the ground that it does not show a cause of action within the jurisdiction of this court.

The complaint sets forth a cause of action for personal injuries under the Merchant Marine Act of June 5, 1920 (41 Stat. 1007, § 33), alleging that the parties hereto are citizens of the same state, but failing to allege that the defendant has its principal or any place of business within the Eastern district of New York. Section 33, supra, provides:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

[1] It is true that the Judiciary Act (Comp. St. § 991 [1]) requires that, if an action is brought in a court of the United States, at common law, to recover for maritime injuries, it must appear that the parties are citizens of different states. See Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74; Hornthall v. The Collector, 9 Wall. 560, 19 L. Ed. 560. The court cannot agree with defendant's contention that this rule is not modified by section 33, supra. That section gives a right of recovery, under certain conditions, to any seaman and determines the district in which the suit must be brought as that within which defendant resides or in which he has his principal office. The necessary effect of this is to permit a seaman who is a citizen of a state within the district aforesaid and of that district itself to sue, under the statute, in the federal court of the district in question.

[2] The requirement of this section that suit be brought in the district in which the defendant resides or in which his principal office is located has not been followed, so far as is disclosed by the complaint. Plaintiff contends that this objection has been waived because of the failure of defendant to enter a special appearance and make a motion to dismiss, citing Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093, St. Louis & San Francisco R. R. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659, and Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C.) 178 Fed. 117.

[3] It is quite clear that the effect of the Ware-Kramer Case, just cited, is as claimed by plaintiff. If these conclusions are correct, it follows that, as defendant failed to appear specially and move to dismiss, it has waived its right to object to the venue, and the demurrer must be overruled.

In re CARROLL.

(Court of Appeals of District of Columbia. Submitted November 23, 1921. Decided January 3, 1922.)

No. 1453.

Patents ⊂=113(7)—Decision of Patent Office in rejecting claims held not to be disturbed.

A decision of the Commissioner of Patents, rejecting 17 of 229 claims of an application for a patent on an invention relating to an automatic auditing machine, *held* not to be disturbed, where the court was confined to a mere examination of highly technical references without the aid of enlightening testimony.

Appeal from a Decision of the Commissioner of Patents.

Application by Fred M. Carroll for a patent. From a decision refusing certain of the claims, the applicant appeals. Affirmed.

Henry E. Stauffer, of Dayton, Ohio, for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. This is an appeal from a decision of the Commissioner of Patents refusing 17 out of 229 claims of an application for patent. Claims 1 and 2 of those rejected are sufficiently illustrative of the group and read as follows:

"1. In a machine of the class described, the combination with three or more accumulators, means controlled by one field of perforations in a record strip for selecting any of said accumulators for operation, and means controlled by another field of perforations in the record strip for actuating the selected accumulator.

"2. In a machine of the class described, the combination with three or more accumulators, of a set of differentially movable actuators common thereto, a record strip, and means controlled thereby for selecting any one of said accumulators to be actuated by the actuators."

The invention relates to an automatic auditing machine and is designed to clear a plurality of totalizers controlled by a perforated record. That it possesses great utility and entitles its inventor to liberal treatment is apparent. However, confined as we are to a mere examination of highly technical references, without the aid of enlightening testimony, we are not prepared to disturb the conclusions of the expert tribunals of the Patent Office, notwithstanding the learned argument and able brief of counsel for the applicant.

The decision therefore is affirmed.

Affirmed.

RUTH v. GROCH (two cases).

(Court of Appeals of District of Columbia. Submitted November 23, 1921. Decided January 3, 1922.)

Nos. 1455, 1456.

Patents ⊂=113(7)—Concurrent finding of three tribunals, not palpably wrong, will not be disturbed.

Where the three tribunals of the Patent Office each awarded priority to the same party in interference proceedings, their conclusion will be sustained, unless the court can say it was palpably wrong.

Appeal from the Commissioner of Patents.

Two separate interference proceedings between Joseph P. Ruth, Jr., and Frank Groch, were submitted together. From a decision awarding priority in each proceeding to Groch, Ruth appeals. Affirmed.

A. J. O'Brien, of Denver, Colo., and J. M. Spear, of Washington, D. C., for appellant.

Lloyd B. Wight, of Washington, D. C., for appellee.

SMYTH, Chief Justice. These are interference proceedings which were submitted together and will be disposed of in one opinion. The first relates to flotation apparatus for concentrating ores, wherein the metallic values are caused to be separated and independently removed from the gangue way by the selective action of froth-producing agencies, and the second, to a gas-diffusing device for flotation apparatus. By stipulation the same testimony has been used in both cases.

The first interference is expressed in four counts, and the second in five. In each case the three tribunals of the Patent Office united in awarding priority to Groch. The tribunals in their opinions analyzed the testimony carefully, and made it very clear that the conclusion reached is correct. Certainly we cannot say that it is palpably wrong, and hence we sustain it. Maremont v. Olson, 49 App. D. C. 369, 265 Fed. 1009; Kitselman v. Reid, 49 App. D. C. 378, 266 Fed. 256; Ball v. Barnhurst, 50 App. D. C. 257, 270 Fed. 693; Massey v. Ridge, 50 App. D. C. 271, 270 Fed. 879.

The decision of the commissioner is affirmed.

Affirmed.

In re BORGER.

(Court of Appeals of District of Columbia. Submitted November 23, 1921. Decided January 3, 1922.)

No. 1457.

Patents ⊂=66, 70—Disallowed claims for automobile starting generator held anticipated.

Claims in an application for a patent for an automobile starting generator, wherein the windings of the armature are so formed as to serve the function of a commutator, *held* anticipated by publication and patent, so that three claims were properly disallowed.

Appeal from the Commissioner of Patents.

Application by Henry E. Borger for a patent for a starting generator for automobiles. From a decision of the Commissioner, disallowing three claims, applicant appeals. Affirmed.

C. L. Sturtevant and E. G. Mason, both of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. This appeal is from a disallowance of three claims in appellant's application for patent, described in the opinion of the Commissioner as follows:

"The invention defined by the appealed claims is a starting generator for automobiles, wherein the windings of the armature, which are in the form of metal bars extending beyond the limits of the core of the armature at its ends, are self-supporting and spaced apart to afford bearing surfaces, whereby brushes may be mounted to ride thereon and enable such bars to serve the function of a commutator."

The case turned below upon the anticipation of the appealed claims in the publication of Guilbert "Les Generateurs d'Electricitie a l'Exposition Universelle de 1900," and a patent to one Rollins dated January 30, 1894. From an examination of these citations, we are convinced that appellant has been awarded all the claims to which he is entitled.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

RUDOLPH et al., Commissioners of the District of Columbia, v. SULLIVAN.

(Court of Appeals of District of Columbia. Submitted November 8, 1921. Decided January 3, 1922.)

No. 3638.

Mandamus ⊂=187(5)—Motion to quash mandamus writ does not suspend limitation of time to appeal.

The pendency of a motion to quash a peremptory writ of mandamus does not suspend the running of the time within which the appeal from the order granting the writ must be taken, since a ruling on such motion is not necessary to make the judgment final.

Appeal from the Supreme Court of the District of Columbia.

Application by Jeremiah F. Sullivan for a writ of mandamus against Cuno H. Rudolph and others, Commissioners of the District of Columbia. From a judgment granting the peremptory writ, the defendants appeal. Affirmed.

F. H. Stephens and R. L. Williams, both of Washington, D. C., for appellants.

Dan Thew Wright and C. W. Fowler, both 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 granting a peremptory writ of mandamus requiring the commissioners of the District to reinstate in office appellee, a police officer.

At the outset, we are confronted with a motion to dismiss or affirm, on the ground that the appeal was not taken in time. The writ was issued on February 21, 1921, and appeal was not taken until March 23d. In the meantime, the order of the court had been complied with, and appellee, Sullivan, had been reinstated in his office. Appellants filed a motion to quash the writ, which was overruled on March 18th,

"with leave to defendants to file such proceedings as advised within 10 days hereof." It is urged that this order extended the time within which appellants were required to take their appeal.

We are not impressed with this contention. The only appealable order was the one granting the writ, and it is the order here appealed from. A motion to quash will not stay the period within which, under the rule, the appeal must be taken. It is held that a motion for a new trial, unless made necessary by statute or rule of court as a basis for review of the judgment in the appellate court, does not suspend the running of the limitation of time within which appeal must be taken. In such cases the ruling on the motion is not necessary to attach the character of finality to the judgment.

Applying this test, we think a motion to quash a writ of mandamus after judgment will not suspend the running of the time allowed for taking appeal. A ruling on such a motion is not essential to make the judgment final.

The judgment is affirmed, with costs.

Affirmed.

FOWLER, Health Officer, v. UNITED STATES ex rel. MERRELL-SOULE CO.

(Court of Appeals of District of Columbia. Submitted November 8, 1921. Decided January 3, 1922.)

No. 3644.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of the Merrell-Soule Company, a corporation, against William C. Fowler, as Health Officer of the District of Columbia. From a judgment issuing the peremptory writ, respondent appeals. Affirmed.

F. H. Stephens and R. L. Williams, both of Washington, D. C., for appellants.

Matthew E. O'Brien, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. On February 12, 1921, appellee filed its petition for the writ of mandamus in the Supreme Court of the District of Columbia to compel appellant, as health officer of the District of Columbia, to issue a permit to appellee which would authorize it to ship cream into the District.

A peremptory writ was issued on February 12th, on the petition and exhibits filed therewith. Thereafter the appellant filed a motion to quash the writ, which was overruled on the 18th day of March. Appeal was not taken until the 23d day of March. A motion to dismiss or affirm has been filed, and the case is ruled by our opinion in Rudolph et al. v. Sullivan, No. 3638, 277 Fed. 863, this day decided.

The judgment is affirmed, with costs.

Affirmed.

CITY AND COUNTY OF DENVER v. STENGER.

(Circuit Court of Appeals, Eighth Circuit. December 29, 1921. Rehearing Denied March 16, 1922.)

No. 5849.

1. **Carriers ⇐12(9)—Ordinances fixing street railroad rates held not contracts between city and street railroad.**
   Ordinances which were not contractual in form or in substance, and which declared in their preambles that the ordinances were for the purpose of "regulating and fixing the charges to be collected by" a street railroad, and which merely specified the rates to be charged by the railroad, *held* not contracts between the city and the street railroad, and did not preclude railroad from increasing rates, where rates so fixed were confiscatory.
2. **Carriers ⇐12(9)—Ordinance fixing rates as condition to railroad's right to use streets held not to preclude increase in rates where confiscatory.**
   Ordinances fixing rate of fare to be charged by street railroad as a condition to the right given railroad to use streets, *held* not to bind railroad to charge such rates, even though confiscatory, since the city, in view of Const. Colo. art. 2, § 11, could not make a contract definitely suspending its power to regulate street car fares, and since the contract, if binding on railroad, and not on city, would be void for want of mutuality.
3. **Carriers ⇐12(9)—Contracts suspending city's power to regulate street car fares prohibited by Constitution.**
   Const. Colo. art. 2 § 11, against grant of irrevocable privileges, franchises, and immunities, and section 8 of article 15, against abridging the power of eminent domain or construction thereof, so as to prevent the taking of the property and franchises of incorporated companies, etc., prohibit a contract suspending the power of a city to regulate street railroad fares.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by E. Stenger, as receiver of the Denver Tramway Company, against the City and County of Denver. From an order granting a temporary injunction, and denying defendant's motion to dismiss the petition, defendant appeals. Affirmed.

J. A. Marsh, of Denver, Colo. (Norton Montgomery, Ernest Morris, and Harvey Riddell, all of Denver, Colo., on the brief), for appellant.

Gerald Hughes, of Denver, Colo. (Clayton C. Dorsey, of Denver, Colo., on the brief), for appellee.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. This is an appeal from an order granting a temporary injunction and denying appellant's motion to dismiss the petition of appellee. The injunction was granted on said petition, the intervening petition and answer of appellant, and affidavits and exhibits submitted by both sides. The order, so far as material, was in the following words:

(1) "That the city and county of Denver, its officers, agents, attorneys, and representatives, and all those acting for or on its behalf or in pursuance of

its authority and direction, and each and every thereof, be enjoined and restrained from enforcing or attempting to enforce a maximum fare of six (6) cents for adults and three (3) cents for children, or any lesser fares or amounts under any existing ordinances or franchises, or the fare provisions therein contained, set forth in the petition of E. Stenger, receiver, or the petition in intervention and answer of city and county of Denver."

(2) "That the city and county of Denver, its officers, agents, attorneys, and representatives, and all those acting for or on its behalf or in pursuance of its authority and direction, and each and every thereof, except those acting pursuant to the police power in regulating fares and charges through the city council of said city, be enjoined and restrained from interfering with or attempting to interfere with the collection by E. Stenger, receiver, of such fares for the carriage of persons on the street railway system of the Denver Tramway Company as may be fixed and established by him within the limitations and conditions placed upon him by this decree: Provided, however, and this injunction is conditioned thereon, that E. Stenger, receiver, shall not charge for the carriage of passengers on the street railway system of the Denver Tramway Company to exceed eight (8) cents for adults and four (4) cents for children between the ages of six (6) and twelve (12) years, with free passage to children under six (6) years, and with free transfers to passengers under the conditions, rules and regulations now prevailing, and for two (2) tickets or tokens for adults fifteen (15) cents, or at the rate of seven and one-half (7½) cents for an adult fare if such tickets or tokens are purchased, and likewise four (4) tickets or tokens for fares for children between the ages of six (6) and twelve (12) years at fifteen (15) cents, or at the rate of three and three-fourths (3¾) cents for such tickets or tokens for children when such tickets or tokens are so purchased; and further conditioned that, before any such increases in fares shall be put into effect, said E. Stenger, receiver, shall give public notice thereof by publication in two or more daily newspapers published in the city and county of Denver, and by posting a notice in each of the street cars, showing definitely the amount of fares to be charged and the date when said increase shall become effective, not less than forty-eight (48) hours prior to the time when such collection of fares shall become effective. * * *"

(5) "This order and the enforcement thereof shall in no manner or degree whatsoever be a limitation or restriction on the legislative power of the city and county of Denver to regulate the fares to be charged for the carriage of passengers on the street railway system of the city and county of Denver, which said power is a continuing one in said city and county of Denver, but is based upon the confiscatory character of the present fares hereinabove enjoined and the failure and refusal of the city and county of Denver to further and legally and constitutionally exercise the power of regulating fares, and is without prejudice to the right of E. Stenger, receiver, to question or litigate the legality and constitutionality of any such subsequent exercise of such regulating power of said city."

As appellant answered the petition, no separate discussion is necessary in regard to the motion to dismiss, as the questions raised on the appeal are the same. Appellee was appointed in a creditors' suit pending in the court below wherein the Westinghouse Electric & Manufacturing Company was plaintiff and the Denver Tramway Company was defendant. The petition of appellee set forth facts which, if proven, showed the passenger fares which the appellant was seeking to enforce did not permit a reasonable and fair return for the use by the public of the property of the Tramway Company. The evidence of the petitioner in regard to confiscation was not seriously disputed, and no point is made here that the evidence does not show the rates challenged to be confiscatory in fact, although counsel does not formally admit that they are. If this appeal simply presented a question of whether the

evidence showed the fares challenged to be confiscatory, the case would end here by the affirmance of the order without further discussion.

Counsel for appellant, however, raise a very important legal question. They claim that the acceptance of the ordinances and franchises hereinafter referred to by the Tramway Company and its predecessors constituted a valid and binding contract or contracts in relation to the fares to be charged by the Tramway Company, and therefore the court below had no power or jurisdiction to enjoin them as confiscatory. The strongest form in which counsel state their position in regard to these alleged contracts is substantially as follows: The acceptance of the ordinances and franchises under which the Tramway Company and its predecessors operate a street railway in the city and county of Denver constituted contracts binding upon both parties, and that though such contracts as to rates to be charged by the Tramway Company are not beyond legislative control, yet there was power to make them in the first instance and that they are valid and binding as contracts until the city and county of Denver thinks proper to change the rate.

The appellee contends that these ordinances and franchises never were at any time valid contracts binding both parties thereto as to the rates to be charged by the Tramway Company either in substance or form, and if they shall be held to be contracts, there existed no power in the city of Denver or in the city and county of Denver to make such contracts. The ordinances and franchises having to do with the fares to be charged by the Tramway Company and its predecessors are as follows:

(1) By Ordinance No. 3, 1885, the city of Denver granted to the Denver Electric & Cable Railway Company a right of way in, along, and across the streets of said city for a single or double track railway. Section 6 of this ordinance provided:

"The said company shall not be entitled to receive more than five cents for a single passage on any line of the said company's railway within this city."

(2) By Ordinance No. 36, 1888, the city of Denver granted to the Denver City Cable Railway Company a right of way upon and across the streets, avenues, viaducts, and bridges of said city to build, equip, maintain, and operate a system of cable street railway lines. Section 5 of this ordinance provided:

"That the said the Denver City Cable Company, its successors and assigns, shall not be entitled to receive more than five cents for a single passage upon any one of the lines of said company within the city of Denver."

(3) On May 15, 1906, a franchise was granted to the Denver City Tramway Company by the qualified taxpaying electors of the city and county of Denver. This franchise granted a right of way to locate, build, construct, operate, and maintain a single or double track railway upon, along, and across the streets, avenues, viaducts, and bridges of the city and county of Denver which were specifically named in the franchise. Section 6 of this franchise reads as follows:

"Sec. 6. The Denver City Tramway Company, grantee, shall be entitled to receive five (5) cents, and no more, for a single passage on any line of the company's railway within the city and county of Denver: Provided, that children under six (6) years of age, when accompanied by a paying passenger, shall be carried free of charge; and children over six (6) years of age, and under twelve (12) years of age, at half fare, and the conductor in charge of each car shall at all times be provided with and have on sale half fare tickets to be sold in lots of not less than two (2) nor more than ten (10) at one time."

(4) Ordinance No. 50, 1918, passed by the council of the city and county of Denver had for its preamble the following:

"A bill for an ordinance regulating and fixing the charges and fares to be collected by the Denver Tramway Company in the city and county of Denver, for services furnished by it in said city and county."

Section 1 of this ordinance was as follows:

"Sec. 1. That from and after the passage and approval of this ordinance the rates of charges permitted to be made and collected by the Denver Tramway Company for street car fare for transporting persons within the limits of the city and county of Denver during the period of the war, and until the date of the proclamation by the President of the United States of the exchange of ratification of treaties of peace, and until the President of the United States shall surrender to private management the railroads taken over under the act of Congress, passed the 21st day of March, 1918, and in no event to exceed one year and nine months next after the date of said proclamation by the President of the United States, shall be as follows: The Denver Tramway Company shall be entitled to receive six cents and no more for a single passage on any line of the company's railway within the city and county of Denver: Provided, that children under six years of age, when accompanied by a paying passenger, shall be carried free of charge, and children over six years of age and under twelve years of age at half fare, and the conductor in charge of each car shall at all times be provided with and have for sale tickets, both whole fare and half fare, to accommodate those wishing to purchase same."

(5) By an ordinance dated June 30, 1919, passed by the council of the city and county of Denver, Ordinance No. 50, 1918, was repealed. This repeal restored the five-cent fare provided by the franchise of May 15, 1906.

(6) Ordinance No. 87, 1919, was next passed by the council of the city and county of Denver, with the same preamble as heretofore quoted, from Ordinance No. 50, 1918. Section 1 of this ordinance is as follows:

"Sec. 1. That from and after the time this ordinance becomes effective, the rates and charges permitted to be made and collected by the Denver Tramway Company for transporting persons within the limits of the city and county of Denver for the period of ninety (90) days from and after the time this ordinance becomes effective, shall be as follows: The Denver Tramway Company shall be entitled to receive six cents and no more for a single passage on any line of the company's railway within the city and county of Denver: Provided, that children under six years of age, when accompanied by a paying passenger, shall be carried free of charge, and children over six years of age and under twelve years of age at half fare, and the conductor in charge of each car shall at all times be provided with and have for sale tickets, both whole fare and half fare, to accommodate those wishing to purchase same."

There having been an adverse vote by the electors of the city and county of Denver as to a proposed permanent plan solving the trans-

portation problems between the city and county of Denver and the Tramway Company, at the expiration of this ordinance, the five-cent fare was again put into effect.

(7) Ordinance No. 122, 1919, having the same preamble as heretofore quoted from No. 50, 1918, was passed by the council of the city and county of Denver. Section 1 of this ordinance provided:

"Sec. 1. That from and after the date this ordinance becomes effective, the Denver Tramway Company shall be entitled to receive six cents for a single passage on any line of the company's railway within the city and county of Denver: Provided that children under six years of age when accompanied by a paying passenger shall be carried free of charge and children over six years of age and under twelve years of age, at half fare, and the conductor in charge of each car shall at all times be provided with and have for sale tickets both whole and half fare to accommodate those wishing to purchase the same."

These were the rates that were being charged by the Tramway Company at the time the injunction was issued. The difference in the names of the different political entities which granted the ordinances and franchises above referred to will be understood when it is stated that the city of Denver, pursuant to article 20 of the Constitution of Colorado, adopted in 1904 what is known as a home rule charter. By this action of the city, the people within the territory of the city and county of Denver were vested, in virtue of said article 20, with the power to legislate for themselves as to all rightful subjects of legislation, and were no longer subject to the legislative power of the state. Therefore, when the ordinances of 1885 and 1888 were passed, the city of Denver was acting under the authority of a charter granted by the legislative assembly of the state of Colorado, but when, in 1906, the franchise in regard to fares of May 15 was granted, the qualified taxpaying electors of the city and county of Denver ratified the franchise. Subsequently the power to pass such ordinances was vested in the counsel of the city and county of Denver. The Tramway Company is the successor of all the other companies mentioned in the different ordinances and franchises. It is the only street railway system in Denver, a city of nearly 200,000 people.

[1] We come, now, to the only important question raised upon the record, and that is as follows: Is there an existing contract between appellant and the Tramway Company, in virtue of which the Tramway Company is bound to carry passengers for the fares prescribed by the ordinances and franchises mentioned? Commencing with Ordinance No. 50, 1918, and ending with Ordinance No. 122, 1919, it must be conceded, we think, that they constituted nothing more than the exercise of the power to regulate the fares to be charged by the Tramway Company. The preambles of each of these ordinances, except the repealing ordinance of June 30, 1919, specifically declare that the ordinances were for the purpose of "regulating and fixing the charges to be collected by the Tramway Company." The council of the city and county of Denver possessed the power to do what it said it was doing, and its declared intention must be taken as true. These ordinances were not contractual in form nor in substance. Subject to constitutional limitations, the city and county of Denver had the power to

change the fares at any time. These ordinances to which reference is now being made granted the Tramway Company nothing. They were limitations upon the power of the Tramway Company to fix its own fares. So the Tramway Company accepted nothing that it was not compelled to accept, if the fares were not confiscatory. We are of the opinion, therefore, that they did not constitute contracts binding upon either party, so far as the question of fares was concerned.

[2] The ordinances of 1885, 1888, and 1906 granted a right of way to construct a street railway system in, along, and across the streets of the city of Denver and the city and county of Denver. The ordinance of 1906 was to terminate in 20 years, but it was specifically provided therein that it should in no way prejudice the rights of the Tramway Company in the ordinances of 1885 and 1888, which in terms had no limitation as to their existence. These ordinances provided a fare of five cents for a single passage on any line of the Tramway Company. They were not contractual in form, but they did grant rights of way as above stated, which were accepted by the Tramway Company. It is claimed by appellant that the five-cent fare was a condition of the grant, and its acceptance created a binding contract on the part of the Tramway Company. It can be seen that this might be so as to some conditions of the grant, but as to the fares appellant claims that the city of Denver and the city and county of Denver were bound only until they desired to change the fares. These ordinances were not contractual in form, and, adopting the construction placed upon the same by the appellant, we do not see how they could be called contracts binding upon both parties.

The appellant asserts that, while it cannot make a contract which shall suspend its power to regulate the fares to be charged by the Tramway Company, it could, by granting the ordinances of 1885, 1888, and 1906, bind the Tramway Company for as long or as short a time as appellant might desire not to change the fares. If however, the appellant can at any time change the fares—in other words, refuse to be bound by the contract—how does mere delay cure the lack of mutuality? A party to a contract is bound, or he is not bound, from the time of its execution. To say that a party is bound as long as he wants to be bound simply means that he is not bound at all. Upon the question of whether the parties to these ordinances intended to contract, and upon the question as to whether, if there was a contract, it would be void for want of mutuality, the following cases seem to us to be decisive against the claim of appellant. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; Puget Sound Traction Co. v. Reynolds, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. Ed. 1325, 5 A. L. R. 13; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; San Antonio Public Service Co. v. City of San Antonio (D. C.) 257 Fed. 467; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. ——; Central Power Co. v. City of Kearney, 274 Fed. 253, Court of Appeals, 8th Circuit, opinion filed July 13, 1921; City of Dallas v. Dallas Telephone Co. (C. C. A.) 272 Fed. 410; Cleveland v. Cleveland Street Ry., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Columbus

Ry. & Power Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648; Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; A. Santaella & Co. v. Otto F. Lange & Co., 155 Fed. 719, 84 C. C. A. 145; Woerheide v. Barber Asphalt Paving Co., 251 Fed. 196, 163 C. C. A. 352; Northern Iowa Gas & Elec. Co. v. Inc. Town of Luverne (D. C.) 257 Fed. 818; Id., 262 Fed. 711; Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co. (C. C. A.) 267 Fed. 35.

We do not deem it necessary to multiply authorities in support of the proposition that a unilateral contract is unenforceable for want of mutuality. We are also of the opinion that the city of Denver, or the city and county of Denver, never at any time possessed the power to enter into a contract with the Tramway Company whereby its power to regulate the fares of the company would be definitely suspended for any length of time. Article 2, § 11, of the Constitution of Colorado contains the following language:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the General Assembly."

Article 1, § 17, of the Texas Constitution contains the following language:

"No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

Article 15, § 8, of the Colorado Constitution contains the following language:

"The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

Article 12, § 5, of the Missouri Constitution reads as follows:

"The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state."

Article 263 of the Louisiana Constitution reads as follows:

"The exercise of the police power of the state shall never be abridged nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

Section 725, Iowa Code of 1897, reads as follows:

"*Regulation of Rates and Service.*—They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor,

along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purposes, and to regulate and fix the rent * * * or rates for water, gas, heat, and electric light or power, * * * and these powers shall not be abridged by ordinance, resolution, or contract."

[3] We are of the opinion that the quoted provisions of the Colorado Constitution, under the interpretations given similar provisions in the Constitutions of the states of Texas, Missouri, and Louisiana, the Code of Iowa, and statute of Nebraska, clearly prohibit the making of a contract suspending the power of the city and county of Denver or the city of Denver to regulate the fares of the Tramway Company. The history of the litigation in regard to the constitutional provisions of the state of Texas are to be found in San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491; San Antonio v. San Antonio Public Service Co., supra; San Antonio Public Service Co. v. City of San Antonio, supra; City of Dallas v. Dallas Telephone Co., supra. The case of State ex rel. City of Sedalia v. Public Service Comm., 275 Mo. 201, 204 S. W. 497, construes the Missouri Constitution. Southern Electric Co. v. City of Chariton, 255 U. S. 539, 41 Sup. Ct. 400, 65 L. Ed. ——, construes the Iowa Code. Central Power Co. v. City of Kearney, supra, construes the statute of Nebraska. O'Keefe v. City of New Orleans (D. C.) 273 Fed. 560, construes the Louisiana Constitution.

The public policy of the state of Colorado as shown by her Constitution, statutes, charters, and decisions is opposed to the contracting away of the power of regulating and fixing rates of public utilities through the exercise of the police power. The claim that the legislative power of the city and county of Denver is not subject to the provisions of the Constitution of Colorado is not supported by reason or authority. The trial court having for just cause enjoined the rates shown to be confiscatory, and the council of the city and county of Denver refusing to make any other rates than those enjoined, it became necessary, in order to operate the Tramway Company, to make some provision in regard to rates. Of course, the court had no general power to regulate or make rates or fares for the Tramway Company, but it was its duty to make some order to prohibit the Tramway Company from charging what it pleased, and therefore to fix certain rates which the receiver should not exceed; these being only temporary for the purpose of the receivership.

We think the trial court acted in the premises clearly within the law and the facts, and the order granting the temporary injunction, and refusing to dismiss the appellee's petition, should be affirmed; and it is so ordered.

FORREST v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3756.

1. **Injunction ⟸230(3)—Evidence held to show knowledge of injunction by member of labor union and violation thereof.**
In contempt proceedings against a member of a labor union, which had been restrained from intimidating, assaulting, or threatening persons employed in operating merchant ships of the United States, evidence *held* to show his actual knowledge of the injunction order and his violation thereof, by assaulting a waiter on one of such vessels, who had turned in his union card.

2. **Injunction ⟸213—Service on labor organization held notice to member.**
Where a restraining order was expressly addressed to various labor associations and all persons associated with them, service on one of such associations was notice to a member.

3. **Injunction ⟸230(2)—Papers on motion for attachment for contempt in violating labor injunction held sufficient.**
Where the United States attorney moved for an attachment in the name of the United States, the Shipping Board, and the Emergency Fleet Corporation, for violation of an injunction restraining intimidation, etc., of employees, and made a part of the petition affidavits disclosing the publicity of the injunction, and showing that defendant was a member of one of the associations enjoined, and that he assaulted an employee of a vessel of the United States, and the petition prayed for an attachment against the officers of such association and certain named members thereof, it sufficiently showed the jurisdictional facts, and sufficiently furnished defendant with detailed information of the specific charge against him.

4. **Injunction ⟸230(2)—Failure of petition for attachment for contempt to pray for any special punishment did not deprive court of jurisdiction.**
Under Judicial Code, § 268 (Comp. St. § 1245), authorizing punishment for contempt by fine or imprisonment, the failure of a petition by the United States attorney for attachment, in the name of the United States and certain governmental agencies, to pray for any special punishment, did not deprive the court of power to proceed.

5. **Injunction ⟸230(1)—Proceeding for attachment for violation held one of criminal, and not civil, contempt.**
Where, in a suit by the United States, the Shipping Board, and the Emergency Fleet Corporation, an order was granted restraining a number of labor unions and their officers and agents from intimidating, assaulting, or threatening persons employed on merchant ships of the United States, a proceeding for attachment for violation of such order, brought by the United States attorney in the name of the United States and such governmental agencies, was a case of criminal, rather than civil, contempt.

6. **Jury ⟸21(4)—Jury trial not allowed by statute in proceeding for violation of injunction in suit by the United States.**
Where an order restraining labor unions, their officers and agents, from intimidating, assaulting, or threatening persons employed and operating merchant ships of the United States, was granted in a suit by the United States, the Shipping Board, and the Emergency Fleet Corporation, a proceeding to punish violations thereof as a contempt was not within the class of contempts in which trial by jury is allowed by Clayton Act, §

22 (Comp. St. § 1245b), in view of section 24 (section 1245d), relative to contempts in disobedience of any order, etc., in any suit brought by the United States.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by the United States and others against the Marine Cooks' and Stewards' Association of the Pacific Coast and others. From an order adjudging him in contempt, Edwin Forrest appeals. Affirmed.

H. W. Hutton, of San Francisco, Cal., for appellant.

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

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Appellees who had been plaintiffs in a suit for injunction in the United States District Court in California petitioned for the attachment of appellant Forrest and other members of the Marine Cooks' and Stewards' Association of the Pacific Coast for violation of a restraining order issued on May 26, 1921, in the injunction suit. The petition, which was signed by the United States Attorney and the Special Assistant United States Attorney, was based upon the return of service of the bill of complaint and restraining order in the equity suit and certain affidavits made part of the petition. In one of the affidavits Mendez, a member of the Cooks' and Stewards' Association, swore that on June 1, 1921, with one Rivas, he called at the headquarters of the union to turn in his union card; that the collector of the union took up the card and told him that he was in a "bad fix," and should not return to work on the ship Golden State, which was owned by the United States; that when affiant left the building two men followed him, and one Forrest struck him on the head and body and attempted to break his arm. There was a corroborating affidavit.

The equity suit, in which the restraining order was issued, was against a number of labor unions and their officers and agents, including the Marine Cooks' and Stewards' Association of the Pacific Coast, with headquarters at San Francisco. The complaint charged with much detail that on May 1, 1921, the unions by strike orders and other ways compelled men who had theretofore been employed in operating merchant ships of the United States to leave the vessels, and, conspiring to injure the property and rights of the United States, had caused seamen and others seeking employment or employed to be intimidated, assaulted, and threatened with bodily harm. The restraining order was issued to prevent continuance of such acts.

[1, 2] When the contempt proceedings came on, demurrer was overruled, whereupon Forrest pleaded not guilty, and demanded a jury trial. The demand was denied, and after hearing testimony the court adjudged him guilty of contempt, and ordered him imprisoned for 60 days and fined $100. Forrest appealed and contends that there was no showing that he had notice of the restraining order. On direct examination appellant testified in his own behalf that he had no information of the restraining order, but on cross-examination said:

"I might have heard of it, but I never paid any attention to it, because it was never called to my attention particularly."

Forrest said that he was at the union headquarters on June 1st, stayed a few minutes looking for mail, and then left; that on the stairs two men were standing in his way, and upon requesting them to let him pass one insulted him; that he invited him outside, and was going to ask him to take back the insult, and "grabbed hold of his arm"; that the man "went to his pocket," whereupon he slapped him; that he did not know Mendez, or where he was working; that he knew there was a strike going on; that he was at the union quarters several times between May 13th and June 1st, but could not say it was a matter of common talk around union headquarters that an injunction had been issued.

The evidence of the prosecution consisted of the return of service, of a bill of complaint and restraining order and the testimony of Mendez and several others. The return showed that on May 27th a certified copy of the order to show cause, and of a restraining order, temporary restraining order, and complaint in the equity suit were served upon the Marine Cooks' and Stewards' Association by handing copies to the secretary, and that copies of the papers were posted in the Marine Cooks' and Stewards' Association at Commercial street, San Francisco, and at various other designated places. It also appeared that wide publicity was given in the newspapers to the fact that a restraining order had been issued.

After reading the evidence, we think there is no reasonable doubt that Forrest had actual knowledge of the existence of the injunction order. Mendez testified that he was a waiter on the Golden State, and was at union headquarters on June 1st; that men followed him downstairs as he left, and that Forrest asked him why he worked on the Golden State, and grabbed him by the arm, and tried to break it; that others hit him, and that no one asked him to let him pass on the stairs. One Rivas gave a substantially similar version of the affair. A policeman testified that Forrest said Mendez pulled a pistol, but he saw none. But, in any event, the association of which Forrest was a member having been a party to the suit in which the restraining order was issued, the service upon the association was notice to him as a member. The mandate of the court was expressly addressed to various associations, including that to which Forrest belonged, and all persons associated with them. He therefore had notice, and his acts must be judged accordingly. Upon the merits the court found the account of Mendez to be the true one, and we are satisfied that the evidence clearly sustains the finding.

[3, 4] Relying upon Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, appellant contends that the moving papers were insufficient, in that the papers should have disclosed knowledge that the Golden State belonged to one of the plaintiffs in the equity suit, knowledge that Mendez worked on the ship named, and was assaulted because he worked on that vessel, and also should have contained a prayer for punishment. The Gompers Case is to be distinguished from this. There the contempt

was expressly held to be a civil one, established in a proceeding where the complaining party sought a remedy for its benefit, and all parties adopted the theory that the proceeding was part of the original cause and any punishment would be remedial, for the benefit of the private party, rather than punitive, for the vindication of the authority of the court. The court in its conclusions said:

"* * * This was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant."

But in the case under examination the United States attorney moved for attachment in the name of the United States and certain agencies of the government. The affidavits made part of the petition set up the disobedience of the order. They disclosed the publicity of the injunction, and made clear the fact that Forrest was a member of the association mentioned, that he assaulted Mendez, who was an employee on the Golden State, a vessel of the United States; and the petition prayed:

"That an attachment issue against * * * officers of the defendant Marine Cooks' and Stewards' Association of the Pacific Coast and Edwin Forrest, * * * members, * * * for a violation of the temporary restraining order heretofore, to wit, on May 26, 1921, issued in the above-entitled court and cause."

Facts essential to jurisdiction sufficiently appeared, and the defendant was furnished with detailed information of the specific charge against him. Failure to pray for any special punishment did not deprive the court of power to proceed. In Creekmore v. United States, 237 Fed. 743, 150 C. C. A. 497, L. R. A. 1917C, 845, section 268 of the Judicial Code (Comp. St. § 1245) is carefully examined, and the Court of Appeals of the Eighth Circuit said that, while the statute gives almost unlimited discretion as to the character and extent of punishment, no benefit would be derived from requiring special prayer for a given kind of punishment. The service performed by the prayer is simply to aid in determining whether the proceeding is as for criminal or civil contempt. Doyle v. London Guarantee & Accident Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; U. S. v. Huff (D. C.) 206 Fed. 700. Schwartz v. United States, 217 Fed. 866, 133 C. C. A. 576, holds that there is no fixed formula for contempt proceedings, and that it is sufficient if the offense is set out, so as to inform defendant clearly of the charge against him and whether a civil or criminal contempt is alleged, "and this is to be determined by an examination of the whole record."

[5, 6] It is quite apparent from the record that this was a case of criminal rather than civil contempt, and was rightly so regarded by the District Court; and the writ violated having issued in a suit by the United States in its behalf, it is not within the class of contempts where trial by jury is allowed under the provisions of the Clayton Act (38 Stat. p. 738, § 22, Act of Congress, October, 1914 [Comp. St. § 1245b]); and there was no error in denying a jury trial (Eilenbecker v. District Court of Plymouth County, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; section 24 of the act referred to [Comp. St. § 1245d]; Kreplik v. Couch Patents Co., 190 Fed. 565, 111 C. C. A. 381).

We find no error, and affirm the judgment.

GRECO CANNING CO. v. P. PASTENE & CO., Inc.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3750.

1. Sales ⟸69—**Contract held one for sale by canning company of its own product.**

A contract for the sale of 4,000 cases of Salsa de Pomidoro, a product not theretofore produced in the United States, which provided that quality was to be of the same consistency as the imported, of good flavor and color, and that samples were to be submitted for approval prior to shipping, and shipment to correspond with samples, and that in case of short pack the seller agreed to make pro rata delivery only, *held* a contract for the pack of the seller's own cannery, especially in view of the evidence.

2. Sales ⟸172—**Seller not liable for nondelivery under provision relieving it in case of causes beyond its control.**

Under a contract for the sale of Salsa de Pomidoro, providing that in case of short pack the seller would only make pro rata delivery, and that, if unable to perform by reason of a strike, fire, or other circumstances beyond its control, its obligation should cease, where the parties knew that special machinery would be necessary, and it appeared that the seller's failure to make delivery was entirely due to defects in the machinery, which it exerted itself in good faith to overcome, the seller, having delivered the buyer's pro rata share of its pack, was not liable, especially where the buyer, on learning of the difficulty experienced with the machinery, stated that, if the seller would make every effort to produce the goods, "we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you."

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

Action by P. Pastene & Co., Incorporated, against the Greco Canning Company. Judgment for plaintiff (268 Fed. 168), and defendant brings error. Reversed and remanded, with directions.

The contract for the alleged breach of which this action was brought is as follows:

"The Greco Canning Co., of San Jose, California, hereinafter called seller, this day sold, and P. Pastene & Co., New York City, N. Y., hereinafter called buyer, this day bought, the following described goods—1916 pack:

(2,000) two thousand cases Salsa de Pomidoro packed 200 tins to the case

(2,000) " " " " " " 100 " " " "
six oz. each, in wooden cases at three dollars and fifty cents ($3.50) per
" " " " fibre " " " " " " " " " "
hundred tins.
" "

"Terms.—The above-named goods are f. o. b. cars San Francisco less 1½ per cent. cash discount, sight draft bill of lading attached.

"Guaranty.—Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act June

30, 1906 (Comp. St. §§ 8717–8728), or the California Pure Food Act March 11, 1907 (St. 1907, p. 208). Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. Quality to be of same consistency as the imported, of good flavor and color. Samples for approval to be submitted prior to shipping and shipment to correspond with samples.

"Conditions.—Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease. Usual swell guarantee—viz.: Seller guarantees swells not to exceed one-half of 1 per cent.

"Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to protect draft against documents for invoice value on presentation. Seller agrees to store said goods and insure them at buyer's expense, should buyer so desire, until December 1, 1916.

"Seller: Greco Canning Co.,
"By V. V. Greco, Sec. & Treas.
"Buyer: P. Pastene & Co.,
"By Chas. A. Pastene, Pres.
"Sweet Basil or Basilico.

"One leaf of fresh basil to be put in each tin, either on top or bottom of contents."

The plaintiff in error delivered to the buyer 665 cases of the 4,000 (subsequently reduced to 3,000) cases so contracted for, and set up in defense of the action that they were slightly more than the pro rata to which the buyer was entitled, and that a "short pack" and unavoidable trouble with the necessary machinery, which both parties to the contract knew the seller was to procure, prevented the plaintiff in error from delivering to the buyer any more than 665 cases.

A jury was waived by the respective parties, and while the court below, in deciding the case, made no specific findings of fact, it appears from its opinion that it held that the seller was justified in failing to deliver 20 per cent. of the cases contracted for by reason of a "short crop" in 1916, and, the parties having stipulated that the market price of the product covered by the contract at the time and place of delivery was $10 a case, gave the plaintiff judgment for $5,205 (being at the rate of $3 a case for the deficiency), besides costs of suit.

John L. McNab, of San Francisco, Cal., C. C. Coolidge, of San Jose, Cal., and Byron Coleman and Theodore A. Bell, both of San Francisco, Cal., for plaintiff in error.

William Thomas, Louis S. Beedy, and James Lanagan, all of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Passing the contention of the plaintiff in error that the term "short pack," used in the contract, is more comprehensive than the term "short crop," considered by the trial court, we are of the opinion that the provision of the contract to the effect that the seller should be relieved of his obligations thereunder in the event that the performance thereof be prevented by "a strike, fire, or other circumstances beyond his control," protected the plaintiff in error from the liability imposed by the judgment complained of.

[1] It is admitted that Salsa de Pomidoro, while a well-known product of Italy, had never, prior to the making of the contract in question, been produced in the United States. The evidence shows very clearly that both parties to the contract well knew that, for the manufacture of the specific article contracted for, the procuring of special machinery by the seller was essential, and the contract expressly declared that the quality of the article to be manufactured thereunder should be of the same consistency as the imported article, should be of good flavor and color, and that samples thereof should be submitted by the seller for the approval of the buyer prior to any shipment (required to be made as soon as practicable after packing), and that the shipment when made should conform to such sample.

It is, we think, clear from the contract itself, that it was for the pack of the seller's own cannery that the parties were contracting; but, if there could be any doubt about that, it is at once removed by the evidence in the case. Pastene, in speaking in his deposition of the article contracted for, said:

"It was an article which prior to the war to my knowledge had never been manufactured in this country. As a result of the abnormal conditions, the exportation from Italy was curtailed, embargoes were placed from time to time, until ultimately the exportation was entirely prohibited. As a result of this, domestic canners of tomatoes principally interested themselves in imitating the article, or manufacturing it here from the American tomato. However, this necessitated, of course, the installation of new machinery, new arrangements, so that it was not possible to produce any quantities to take care of the entire demand and consumption of the people who were accustomed to using this product."

And in a letter written to the defendant to the action, of date May 8, 1916, the plaintiff said among other things:

"We beg to acknowledge receipt of your communication of April 28th, contents of which had our careful attention. We found inclosed the contracts to which you refer, and we have filled same in for 3,000 cases, and are returning them to you for your approval and signature, asking you to send us, of course, one copy for our files. You will notice that we have inserted in a couple of places additional words to clear the meaning of what we had no doubt was exactly your intent in said contract, but we thought that possibly it would be best for all concerned to have the matter clearly stipulated. The first is in reference to the approval of sample. Naturally, in view of the fact that you have never made any of this article, and therefore we have no means of knowing what you will put up, it is essential that we have an opportunity to pass judgment on the type of article you will manufacture by having sample tins sent for approval or rejection. * * *

"Basilico.—We will want a leaf in each tin and have added that on to the contract.

"Shipping Cases.—We decided to have a part of them come in fibre cases and a part in wooden cases, this to find out how the fibre cases would go as being a new style package, we cannot tell offhand. * * *"

We do not find in the record any substantial conflict with the following testimony of the witness Victor V. Greco:

"I am the Greco whose name is signed to the contract sued on in this case. I personally met Mr. Pastene, manager of the Pastene Company. He visited my plant prior to signing the contract. We went through the plant together. At the time of signing the contract, or prior to signing the contract, he had gone entirely through my plant. Prior to 1916 I had not pro-

duced any such product known as Salsa de Pomidoro. Salsa de Pomidoro is a highly concentrated tomato. Prior to 1916 it had not been a domestic product in the United States of America, but had been imported from Italy. It is a substitute for tomatoes, used principally by Italians in the making of sauces, gravies, and soups. Prior to 1916 we had not produced such a product commercially, nor had it been produced commercially to my knowledge anywhere in the United States. The war was responsible for the commencement of the product in 1916 by the trade. There was an embargo placed on the exportation of that product by Italy, and therefore none came to America. This was the subject of discussion between Pastene and myself before the contract was signed. After signing the contract, I took steps to fulfill it. I contracted for the necessary equipment and machinery, and apparatus for the manufacture of this product. During the year 1916 the peeled tomato and hot sauce departments of our canning plant were operated during the daytime, while the Salsa de Pomidoro department was operated day and night. We would have made more profit out of the Salsa de Pomidoro. It was to our interest to run the Salsa de Pomidor plant at full capacity. * * * We procured this machinery from the Oscar Krenz Manufacturing Company. I do not know of any other firm in America engaged in the manufacture of such machinery. The fact that we would require to install machinery for the purpose of manufacturing this product, this special product, was discussed between Mr. Pastene and myself. The capacity of the machinery was figured out during a season of about two months that we should have produced about 30,000 cases; 30,000 cases would have more than supplied the contracts we had signed. The total amount which we had contracted to deliver to our various customers was 18,930. These were future contracts; and the total capacity of the machinery which we had purchased for the purpose of delivering that was 30,000 cases for the season. We had a margin of something like 12,000 cases to go on. The actual quantity produced by us by running night and day with our machinery was 3,445 cases. Prorating our deliveries, the percentage which we were bound to deliver to each one of those customers was 18.2 per cent. We actually delivered 665 cases to the plaintiff out of 3,445 cases produced by us for the year. The percentage of the pack that we actually delivered to the plaintiff was 22.2 per cent."

[2] There is no substantial conflict in the testimony showing that the Greco Company's failure to deliver to the Pastene Company the number of cases contracted for was entirely due to the defects in the machinery which it exerted itself in good faith to overcome, working both day and night to that end, but without success. Both of these parties, as has been said, knew that the article in question had never been produced in this country, and that new machinery was essential to its manufacture, and they contracted with reference to that fact. The case of Carnegie Steel Co. v. United States, 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. 576, is therefore not in point.

The record further shows that, almost immediately after commencing the pack in question, the defendant to the action notified the plaintiff by letters of the difficulties experienced with the machinery, and of the indication that it would not be able to make a delivery of over 25 per cent., to one of which letters the plaintiff replied as follows:

"We regret exceedingly to learn of the serious difficulty you are experiencing with machinery, owing to the fact that the tube system in your vacuum pans is wrong. Certainly your advice that you cannot now estimate on making more than a 25 per cent. delivery is a severe disappointment. We certainly trust you will find that you have been overconservative in making this estimate, and that it will be possible for you to make considerable larger delivery than this statement would now indicate. At this time we will

only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full pro rata delivery of all such goods as you are successful in producing."

And in a subsequent letter the plaintiff in the case, in answer to a letter from the defendant thereto, to the effect that it was doubtful whether the latter would be able to make more than a 20 per cent. delivery, said, among other things:

"Pro Rata.—We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry, as in that case we are confident that you will find it possible to considerably increase the production which you previously estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts, and it is for this reason that, knowing that conditions have materially improved since you previously wrote us on this subject, we look forward to a better delivery than previously predicted. Knowing that you will not spare any reasonable efforts to attain the desired result, we look forward in anticipation to your more favorable news as mentioned."

Other correspondence between the respective parties occurred and is set out in the record, and differences and feeling between them evidently arose, all of which we have considered but do not think it necessary to lengthen this opinion by setting it out.

After careful consideration, we are of the opinion that the judgment should be reversed, and the cause remanded to the court below, with directions to enter judgment for the defendant, with costs.

Ordered accordingly.

GILBERT, Circuit Judge (concurring). Passing by the question of the meaning of the words "short pack" and "strike, fire, or other circumstances beyond its control," I think that the defendant is absolved from the payment of damages by the evidence which shows the construction which the parties to the contract placed upon it, and the plaintiff's waiver of performance. On October 25, 1916, the plaintiff, in answer to a letter of the defendant, in which it had set forth the extreme and serious difficulties which it had experienced in the operation of its machinery, wrote as follows:

"At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full pro rata delivery of all such goods as you are successful in producing."

Here is a distinct promise to meet in "reasonable fashion" the failure of the defendant to produce the goods, provided that it exercised every possible effort to produce them. From the evidence there can

be no doubt that the defendant did exercise every possible effort, and the fair meaning of the promise to meet this failure in reasonable fashion is that the plaintiff agreed to meet such effort by excusing full performance. Certainly that was a reasonable view for the plaintiff to take of the obligations of the contract, in view of its terms and the circumstances which made full performance impossible, and if the words have not that meaning they are meaningless.

Again, on November 7, 1916, the plaintiff wrote:

"As previously written you, we certainly have no intention of being unreasonable, or expecting from you that which is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts."

The declaration that the plaintiff did not expect from the defendant that which was physically impossible for it to accomplish is to be taken in the light of the information which it had received from the defendant concerning the nature of the difficulties which in the defendant's view made full performance impossible.

LOISEL, U. S. Marshal, v. MORTIMER.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1922.)

No. 3794.

1. **Clerks of courts ⇐62—Statutory remedy for suit against clerk of court to determine delinquency in account held not an adequate remedy, precluding suit to enjoin marshal from withholding salary.**

Rev. St. 1766 (Comp. St. § 3239), providing that no money shall be paid to any person who is in arrears to the United States, and that accounting officer, if required to do so by the party whose salary is withheld, shall forthwith report the balance due to Solicitor of the Treasury, who shall within 60 days thereafter order suit to be commenced against such delinquent and his sureties, does not provide such a complete and adequate remedy at law as to preclude suit by clerk of Circuit Court of Appeals, whose expense account was approved by senior judge, to compel a United State marshal to pay over amount withheld from clerk's salary on order of Comptroller, which order was based on fact that clerk had charged in his account expenses for transporting records at $10 a day, as authorized, when approved and allowed by senior judge, by Sp. Act June 30, 1902, Sp. Act Dec. 18, 1902, and Sp. Act Jan. 30, 1903, and Comptroller claimed that acts had been impliedly repealed by Act July 19, 1919, providing for expenses not to exceed $5 per day.

2. **United States ⇐125—Suit against United States marshal not suit against United States.**

Suit for mandatory injunction to compel United States marshal to pay over to clerk of Circuit Court of Appeals for Fifth Circuit money withheld from clerk's salary on order of Comptroller of the Treasury is not a suit against the United States, where the order was based on the ground that amount withheld was to cover excessive expenses; the whole controversy involving the implied repeal of provisions contained in special acts under which the clerk made the charge, by provision of later act.

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

3. **Injunction ⟸74—That officer must construe act does not affect ministerial character of duty.**
For the purpose of issuing an injunction against an officer of the United States, that the officer must construe an act of Congress in ascertaining his duty does not render it other than ministerial.

4. **Injunction ⟸5—Performance of duty compelled.**
An injunction may compel the performance of a duty.

5. **Injunction ⟸5—Mandatory injunction may be granted.**
Where the remedy by mandamus is not as available as relief in equity, a mandatory injunction will be granted.

6. **Clerks of courts ⟸40—Special acts relating to fees for transporting records from official residence held not repealed.**
Act July 19, 1919, making appropriation for sundry civil expenses, and containing a provision that only actual expenses of travel and expenses of lodging and subsistence, not to exceed $5 per day, shall be allowed clerks of the United States Circuit Court of Appeals, when absent from his official residence on official business, could apply to various acts not containing any provision for fees of such clerks when absent from official residence, and such act does not repeal the common provision of Sp. Act June 30, 1902, Sp. Act Dec. 18, 1902, and Sp. Act Jan. 30, 1903, relating to holding of terms of Circuit Court of Appeals at Atlanta, Fort Worth, and Montgomery, which common provision provided that the clerk could pay out of the fees and emoluments of his office necessary expenses incurred by him in transporting records from his official residence to the named places for holding court, and expenses of travel and subsistence, not to exceed $10 a day.

7. **Statutes ⟸162—Repeals by implication not favored, and special act construed as exception to general act.**
Repeals by implication are not favored, and even where the words of the general act embrace a special act, no repeal will be implied, but the special act will be construed to be an exception to the general act, unless it is absolutely necessary to so construe it in order to give its words any meaning at all.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Frank H. Mortimer against Victor Loisel, United States Marshal. From an order granting a preliminary injunction, defendant appeals. Affirmed.

Louis H. Burns, U. S. Atty., of New Orleans, La., for appellant.

George Janvier and William C. Dufour, both of New Orleans, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Frank H. Mortimer, the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, filed his bill of complaint in the United States District Court for the Eastern District of Louisiana against Victor Loisel, the United States marshal for said district to restrain him from carrying out an order of the Comptroller of the Treasury of the United States directing said marshal to withhold from the salary of said Mortimer the sum of $380 until said Mortimer should pay to the credit of the treasury of the

United States the sum of $380, charged in his account for the fiscal year ending June 30, 1920.

Said sum was charged by said clerk in his said account for actual expenses, not exceeding $10 per day, to cover travel and subsistence, for 38 days' attendance on the sessions of said Circuit Court of Appeals at Atlanta, Ga., Montgomery, Ala., and Fort Worth, Tex., during said fiscal year. Said charges had been duly approved and allowed by the senior Circuit Judge of the Fifth judicial circuit, and were paid by said clerk out of the fees and emoluments of his office for said fiscal year; such approval, allowance, and payment from said fees and emoluments being as directed in three separate acts of Congress (Comp. St. § 1118) providing, respectively, for the holding of said terms of said United States Circuit Court of Appeals at each place, to wit, at Atlanta (Act June 30, 1902, 32 Stat. 548), at Fort Worth (Act Dec. 18, 1902, 32 Stat. 756), and at Montgomery (Act Jan. 30, 1903, 32 Stat. 784). The fifth section of each act reads:

"That the clerk of said court is authorized and permitted to pay out of the fees and emoluments of his office (1) the necessary expenses incurred by him in transporting from his office in New Orleans, Louisiana, to * * * and in transporting from [Atlanta—Fort Worth—Montgomery] the records, books, papers, files, dockets, and supplies, necessary for the use of the court at its terms to be held in [said places]; (2) an allowance for actual expenses not exceeding ten dollars per day, to cover travel and subsistence, for each day he may be required to be present at [said places] on business connected with his said office, such expenses and allowance to be *approved and allowed* by the senior Circuit Judge of the Fifth judicial circuit." (Italics ours.)

This item of the account of said clerk was disallowed by the Auditor of the State and other departments on the ground that "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1920, and for other purposes" (41 Stat. 163, 210), approved July 19, 1919, repealed so much of these special acts as provided for paying the expenses of travel and subsistence of the clerk. The general Appropriation Act read:

"For fees of clerks, $18,000: Provided, that after July 1, 1919, only actual expenses of travel and expenses of lodging and subsistence, not to exceed $5 per day, shall be allowed any clerk of a United States circuit court of appeals when absent from his official residence on official business."

The clerk appealed from the Auditor's decision to the Comptroller of the Treasury, who approved and amended said disallowance, and on March 10, 1921, directed the clerk to deposit said sum of $380 to the credit of the treasury of the United States. The clerk declined to make such deposit, but advised said officials that he was ready to accept service of process, and aid in expediting an early determination of any suit which the government might file. He based his refusal to make said payment on the following clause in the instructions of the Attorney General of the United States to court officials, dated June 1, 1916 (section 1680):

"If items disallowed have been repaid and deposited and the Auditor has balanced and closed the account, revision of such items cannot be obtained, there being no outstanding difference."

On September 1, 1921, said clerk was notified by the defendant marshal that, as he had instructions from the Comptroller that no credit would be given in settlement of the marshal's accounts for any payment of compensation to said clerk until said alleged indebtedness was paid, he would withhold $380 from said clerk's salary. Authority for this action of the marshal, on demand of the Comptroller, is claimed under Revised Statutes of the United States, § 1766 (U. S. Comp. St. § 3239), which reads:

"No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties."

Upon the hearing in the District Court the grant of a preliminary injunction was resisted on the sole ground that there was no equity in the bill, and that complainant's only remedy was to proceed under said section 1766 of the Revised Statutes. The court granted a temporary injunction. The defendant has appealed to this court and raises the same question.

Appellant's counsel admits that on this appeal the facts alleged in the bill are to be taken as true. He contends: (1) That Revised Statutes, § 1766, provides the only remedy for the clerk. That this suit is in effect a suit against the United States, and that it has not consened to be sued. (2) That said section of the Revised Statutes provides a complete legal remedy. (3) That the bill should be dismissed, as being without equity.

[1, 2] The first and second points can be discussed together. It is quite evident that section 1766, Revised Statutes, gives to the clerk no right to sue at law. It provides a right in him to require a report to be made to the Solicitor of the Treasury of the balance claimed to be due by him, and directs that officer within 60 days to *order* a suit to be brought "against said delinquent and his sureties." This is not a plain, adequate, and complete remedy at law given to the plaintiff.

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." Kilbourn v. Sunderland, 130 U. S. 505, 514, 9 Sup. Ct. 594, 596 (32 L. Ed. 1005); Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 12, 19 Sup. Ct. 77, 43 L. Ed. 341.

This is not a suit against the United States. It is a suit to restrain the United States marshal from refusing to perform a plain ministerial duty. He is required by law to pay to the clerk of the Circuit Court of Appeals his salary at the times fixed by law. The appropriation has been made by Congress of a specific sum to pay this salary, which was subject to the marshal's order for this purpose. The money has been appropriated, and will be paid on the order of the marshal, unless in obedience to the demand of the Comptroller he withholds the same.

If, therefore, there is no legal obligation resting on said marshal to withhold said payment, his refusal would be the unlawful act of an official in refusing to pay to another moneys which the United States had appropriated and placed under his control for that purpose, and his conduct could be restrained, or compelled, by the courts. The suit would not be one against the United States. Payne, etc., v. Central Pac. Ry. Co., 255 U. S. 228, 238, 41 Sup. Ct. 314, 65 L. Ed. —; Lane v. Watts, 234 U. S. 525, 540, 34 Sup. Ct. 965, 58 L. Ed. 1440; Noble v. Union River Logging Railroad, 147 U. S. 165, 176, 13 Sup. Ct. 271, 37 L. Ed. 123.

[3] That the officer must construe an act of Congress in ascertaining his duty does not render it other than ministerial. Roberts v. United States, 176 U. S. 221, 230, 20 Sup. Ct. 376, 44 L. Ed. 443; Smith v. Jackson, 246 U. S. 388, 38 Sup. Ct. 353, 62 L. Ed. 788.

[4] An injunction may compel the performance of a duty. Stevens v. Ohio State Tel. Co. (D. C.) 240 Fed. 759, 766, 769; In re Lennon, 166 U. S. 548, 556, 17 Sup. Ct. 658, 41 L. Ed. 1110.

[5] Where the remedy by mandamus is not as available as relief in equity, a mandatory injunction will be granted. Bourke v. Alcott Water Co., 84 Vt. 121, 78 Atl. 715, 33 L. R. A. (N. S.) 1015, Ann. Cas. 1912D, 108. Here the withholding of this salary is due to a difference of opinion as to what is now the law in force. The items of account, because of which it has been withheld, have been allowed and approved by the senior Circuit Judge. It is not contended that they were not expended.

But it is insisted that, instead of the sum of $10 per day being allowed for actual expenses, covering travel and subsistence, the amount of actual traveling expenses, and not exceeding $5 per day for lodging and subsistence, should have been charged. On this difference the marshal is instructed to withhold the salary for the entire charge, pending a payment of the entire sum of the charge.

In the light of the language of section 1766 of the Revised Statutes, it is doubtful if it is intended to apply to a case like the present. Where such retention of compensation is directed, the party whose salary is withheld, if he requires suit to be ordered, is termed "the delinquent." This is hardly a description appropriate to an official who has received the approval and allowance of a credit made in his accounts, and whose charge is challenged solely on the ground that the statutes under which he claims have been modified by implication by another statute which does not refer to them.

[6] But if Revised Statutes, § 1766, can be considered as applicable to a case like the one under consideration, we think that the account of the clerk was correct, and that the provision quoted from the Sundry Civil Appropriation Act was not the law applicable to the same. The acts requiring the holding of the terms of court at Atlanta, Fort Worth, and Montgomery are special acts, each pertaining alone to the holding of said terms of court at said respective places. The attention of Congress in enacting them was particularly and solely directed to the subject of these terms of this court, and to the expenses to be incurred and paid in holding the same.

Each of these acts provides as to these terms for the payment of said expenses in a particular way; i. e., out of the fees and emoluments of the office of the clerk. Each provides for various expenses, to wit, the expenses of transporting to and from each place the records, files, dockets, and supplies necessary for the use of the court, and also the actual expenses of the clerk, not to exceed $10 per day to cover both travel and subsistence. It provides that the expenses and allowance shall be approved and allowed by the senior Circuit Judge of said Fifth circuit.

In 1919, an act which contains no reference to these special acts, which contains no words of repeal of any act, makes an appropriation for the fiscal year beginning July 1, 1919:

"For fees of clerks, $18,000: Provided, that after July 1, 1919, only actual expenses of travel and expenses of lodging and subsistence, not to exceed $5 per day, shall be allowed any clerk of a United States Circuit Court of Appeals when absent from his official residence on official business."

We do not think that this act can be taken to repeal the special acts providing for certain expenses of the terms of the Circuit Court of Appeals of the Fifth Circuit to be held at Atlanta, Fort Worth, and Montgomery, and for travel and subsistence of the clerk in attendance thereon. The act is certainly not intended to entirely supplant these special acts, as it makes no allusion whatever to the provision for paying a part of the expenses embraced in the fifth section of these special acts; that is, the cost of transporting records, dockets, etc.

[7] This act contains no repealing clause of any sort, and hence only a repeal by necessary implication is insisted on. Repeals by implication are not favored. United States v. Healy, 160 U. S. 136, 146, 16 Sup. Ct. 247, 40 L. Ed. 369; United States v. Greathouse, 166 U. S. 601, 605, 17 Sup. Ct. 701, 41 L. Ed. 1130. Even where a repeal would be implied as between general acts, such repeal of special acts by a general act will not be implied. There, even where the words of the general act embrace the special act, no repeal will be implied, but the special act will be construed to be an exception to the general act, unless it is absolutely necessary to so construe it in order to give its words any meaning at all. Black on Interpretation of Laws, 116; Petri v. F. E. Creelman Lumber Co., 199 U. S. 487, 497, 26 Sup. Ct. 133, 50 L. Ed. 281.

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special." Rodgers v. United States, 185 U. S. 83, 87, 22 Sup. Ct. 582, 583 (46 L. Ed. 816).

As was said in a later case:

"First, such [implied] repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute

that effect reasonably cannot be given to both (United States v. Healy, 160 U. S. 136, 146; United States v. Greathouse, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. (Townsend v. Little, 109 U. S. 504, 512; Ex parte Crow Dog, Id. 556, 570; Rodgers v. United States, 185 U. S. 83, 87–89)." Washington v. Miller, 235 U. S. 422, 428, 35 Sup. Ct. 119, 122 (59 L. Ed. 295).

At the time these special acts were passed there were other United States Circuit Courts of Appeal which were required to meet at more than one place. Since their passage an act has been adopted requiring a term of the United States Circuit Court of Appeals to meet at Asheville, N. C. In none of these acts is any provision made for the payment of expenses; but they are to be paid under the general law requiring the clerk to report his fees to the Attorney General, with expenses deducted as therein provided. The act requiring terms to be held at Denver or Cheyenne and St. Paul in the Eighth circuit was approved on June 9, 1902, just 21 days before the act providing for the term at Atlanta, Ga. (Comp. St. § 1118). The first act contains no provision regarding expenses; the second act, the special provisions above quoted.

Congress, therefore, clearly considered the situation, regarding expenses of holding these terms at Atlanta, Fort Worth, and Montgomery as not properly provided for under the general law, and made the special provisions contained in the three special acts regulating the holding of these terms at these points. There was, therefore, a general act providing that the clerk shall make a report of fees annually to the Attorney General, together with necessary office expenses for such year, which "shall be certified by the senior Circuit Judge of the proper circuit, and audited and allowed by the proper accounting officers of the Treasury Department" (Act of June 6, 1900, 31 Stat. 639, U. S. Comp. St. § 1400), while in 1902 and 1903 these special acts were passed providing for the expenses of holding terms of the United States Circuit Court of Appeals at three designated places. These acts provide that from the clerk's fees and emoluments shall be paid the cost of transporting records, etc., necessary for the use of the court, "and an allowance for actual expenses not exceeding ten dollars per day to cover travel and subsistence, * * * such expenses and allowance to be approved and allowed by the senior Circuit Judge of the Fifth judicial circuit."

The case of United States v. Nix, 189 U. S. 199, 23 Sup. Ct. 495, 47 L. Ed. 775, presented a similar question. There a special act applicable to the territory of Oklahoma provided that a marshal should take all persons arrested before the committing officer nearest to the place where the offense was committed. In a subsequent general act of Congress, making sundry civil appropriations, it was provided that the marshal, his deputy, or other officer, arresting a person, should take him before the nearest officer having jurisdiction to commit or take bail, "and no mileage shall be allowed any officer violating the provisions hereof." 28 Stat. 372, 416 [Comp. St. § 1678]). The marshal

presented an account for mileage, approved by the court, which was disallowed by the accounting officers of the Treasury Department, on the ground that the special act applicable to Oklahoma Territory was repealed by the above provision of the Sundry Civil Appropriation Act. The Court of Claims approved this ruling. The Supreme Court, in reversing the Court of Claims, said:

"Inasmuch as the later act is a general one, applicable to marshals generally throughout the country, we do not think it was intended to repeal or interfere with the former act, providing specially for persons charged with any offense or crime in the territory of Oklahoma, and that in all cases, whether the crime was committed against the Territory or the general government, the accused shall be taken before a commissioner, whose office is nearest to the place where the offense or crime was committed. The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in Townsend v. Little, 109 U. S. 504, that special and general statutory provisions may subsist together, the former qualifying the latter. See also Churchill v. Crease, 5 Bing. 177; Magone v. King, 51 Fed. Rep. 525, and cases cited; State v. Clarke, 25 N. J. Law. 54." United States v. Nix, 189 U. S. 199, 204, 23 Sup. Ct. 495, 498 (47 L. Ed. 775).

The provision in the Sundry Civil Appropriation Act passed in 1919, appropriating $18,000 for fees of clerks, and providing that after July 1, 1919, only actual expenses of travel "and expenses of lodging and subsistence not to exceed $5 per day shall be allowed any clerk of a United States Circuit Court of Appeals when absent from his official residence on official business," which contains no reference to these special acts and no repealing clause, applies to cases covered by the general law, and does not repeal these special acts.

We do not think any error was committed in the grant of the interlocutory injunction, and the order granting the same is affirmed

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PENSACOLA SHIPPING CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1922.)

No. 3772.

1. **Appeal and error ⟸926(2)—Treatment by trial court of instrument as in evidence presumed acquiesced in by appellant, in absence of objection.**
Where there was nothing in the record to indicate that appellant raised any objection to the trial court's action in treating an instrument, a copy of which was attached as an exhibit to libelee's answer, as evidence in the case, it was to be inferred that such treatment was acquiesced in by appellant.

2. **Shipping ⟸50—Maritime liens ⟸30—No lien on ship or claim against owner for coal and supplies furnished with notice of charter restrictions.**
Where charter party required the charterer to provide and pay for coal and certain supplies, a shipping company by furnishing and paying for such coal and supplies for the ship, did not acquire a lien on the ship or a claim against its owner, under Act June 23, 1910, § 3 (Comp. St. § 7785), where the company, not knowing of the terms of the charter party, made no effort to secure information as to its terms, although in com-

munication with the charterer for several weeks before the vessel's arrival at the port for supplies.

3. **Subrogation ⟸26—Volunteer has no right.**

Where shipping company, by payment of bills for coal, etc., furnished a vessel, and approved by its master, acquired no lien on the vessel or claim against the owner, under Act June 23, 1910, § 3 (Comp. St. § 7785), because of the failure to exercise reasonable diligence to ascertain the terms of the charter party, which required the charterer to provide and pay for such supplies, such payments did not give the shipping company the right by subrogation to enforce the liens in favor of the actual furnishers, who were not shown to have been chargeable with notice of the terms of the charter party, for, so far as the vessel and its owner were concerned, the shipping company was a mere volunteer in making the payments, and subrogation does not arise in favor of a volunteer paying another's debt, but the debt is thereby extinguished.

4. **Estoppel ⟸78(4)—Vessel owner held not estopped to deny liability for supplies furnished charterer by directing account be submitted for audit.**

Where, after defendant vessel owner had explicitly denied responsibility for disbursements made by plaintiff shipping company for the charterer's account, it was not estopped to deny such responsibility by telegram directing that plaintiff's disbursements be submitted to defendant's office for audit, where the telegram added, "We return them to you for transmittal to" charterer, "latter should then reimburse you immediately."

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Libel by the Pensacola Shipping Company against the United States Shipping Board Emergency Fleet Corporation. From a decree for libelee, libelant appeals. Affirmed.

W. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for appellant.

John L. Neeley, U. S. Atty., of Pensacola, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a libel by the appellant, Pensacola Shipping Company, against the appellee, United States Shipping Board Emergency Fleet Corporation, to recover the amount of payments made by the appellant for coal and other necessaries furnished to the steamship Belair, a vessel belonging to the appellee, between the date of its arrival at the port of Pensacola on January 10, 1920, and its departure therefrom on January 28, 1920. The evidence adduced showed that the amounts claimed were paid by the appellant under the following circumstances:

On December 22, 1919, a New York firm of ship agents sent to the appellant at Pensacola a telegram, of which, omitting the address and signature, the following is a copy:

"Dale Universal have Belair due Pensacola first Jany. to load lumber for Plate can arrange agency for you fifty dollars want quotation five hundred bunkers wire whether agency acceptable you stop they intimate possibly have several sailings monthly."

On the next day the appellant replied to that telegram by one stating, "Dale Universal agency acceptable at fifty dollars," and quoting

price of bunker coal. By a letter dated December 24, 1919, the Dale Universal Line, through its agents, Dale Forwarding Corporation, appointed the appellant as its agent for the Belair while at Pensacola. A letter of instructions to the appellant, dated December 27th, advised it that its principal was a time charterer of the vessel, and contained the following:

"Regarding disbursements, you will kindly send us your full accounts immediately upon completion of vessel and we will then reimburse you."

The appellant handled the agency according to the charterer's instructions. The disbursements, except a small amount for telegrams, were made by paying bills for the supplies, etc., rendered against the vessel itself and approved by its master. Soon after the vessel sailed from Pensacola the appellant sent a statement of the disbursements it had made to the charterer's New York agent, and requested payment thereof. The account was returned with a letter directing that it be sent to the appellee for payment. In response to a letter from the appellant on the subject, the appellee declined to pay, denying liability for disbursements for which the ship was not responsible under the terms of the charter party. What was alleged to be a copy of that instrument was made an exhibit to the appellee's answer.

[1] In argument attention was called to the fact that the record does not show that the exhibit to the appellee's answer was proved to be a copy of the charter party under which the Belair was being operated at the time the supplies in question were furnished. Language used in the memorandum opinion rendered by the trial judge plainly indicates that the court treated that instrument as before it for consideration as evidence in the case, reference being made to the provision of the charter party requiring the charterers to pay for coal, etc., furnished to the ship. There being nothing in the record to indicate that the appellant raised any objection to this action of the court, it is to be inferred that the court's treatment of that instrument as evidence in the case was acquiesced in by the appellant.

[2] The charter party contained a provision requiring the charterer to provide and pay for coal and other things which were paid for by the appellant. That provision, under the proviso contained in section 3 of the Act of June 23, 1910 (36 Stat. 605; Comp. Stat. § 7785), prevented the furnishing of the coal and other necessaries from having the effect of giving rise to a lien on the ship, or a claim against its owner, therefor, if the furnisher knew, or by the exercise of reasonable diligence could have ascertained, the terms of the charter party. The evidence showed that, when the coal and other necessaries were furnished and paid for, the appellant did not know of the terms of the charter party. It affirmatively showed that the appellant acted under the agency it accepted, and made the payments in question without making any effort to get information as to the terms of the charter party, of the existence of which it was apprized as above stated; it being disclosed that, though the appellant was in communication with the charterer several weeks before the vessel's arrival at Pensacola, it did not ask for a copy of the charter party, or for information as to its terms, until, in a letter writ-

ten to the appellee after the latter had denied responsibility and refused payment, it requested to be furnished a copy of the charter party, or of the form used in making the contract between the appellee and the charterer. It is apparent that the appellant exercised no diligence at all to ascertain the terms of the charter party before making payments in pursuance of the charterer's directions.

The evidence as to the circumstances under which the appellant was put on inquiry as to the terms of the time charter party referred to in a letter to it from its principal, the charterer, persuasively calls for the conclusion that, if the appellant had exercised reasonable diligence, it would have ascertained, before it made the payments in question, that both its principal, the charterer, and the master, were without authority to bind the vessel or its owner therefor. As above stated, the appellant was in direct communication with the charterer during a considerable time before it was called on to make payments in pursuance of the charterer's instructions and on the faith of the latter's promise of reimbursement. Under the circumstances the agent reasonably could have expected that an inquiry of its principal would elicit information as to the terms of the charter party bearing upon the question of the right or lack of right to bind the vessel for supplies or other necessaries furnished or paid for at the instance of the principal. The agent was entitled to be informed by the principal in that regard, as no liability of the ship or its owner would result from payments made for supplies required to be furnished and paid for by the principal, the charterer. If information as to the terms of the charter party had been withheld after a timely request therefor, it is not to be supposed that the agent would have made the disbursement pursuant to the principal's instructions, unless the agent intended to look to the principal alone for reimbursement, or was influenced by the mistaken belief that the vessel would be responsible for the value of the supplies and other necessaries so furnished, whether by the terms of the charter party the charterer was or was not required to provide and pay therefor.

The fact that the appellant was in touch with the charterer a considerable time before the payments in question were made distinguishes the instant case from the case of W. G. Coyle & Co. v. North America Steamship Corporation (C. C. A.) 262 Fed. 250. In the cited case there was no evidence tending to prove that any one who was to be presumed to be able to furnish information as to the terms of the charter party was within reach of the libelant at or prior to the time the supplies were furnished. We think that the evidence in the instant case warrants the conclusion that the appellant's ignorance of the terms of the charter party is to be attributed to its negligent failure to try to get that information before it paid for the coal, etc. It is disclosed that appellant did not avail itself of accessible sources of information in that regard, because of the mistaken belief that the vessel would be bound for the amounts so disbursed, whatever might be the terms of the charter party. It is plain that the making, long after the appellant paid for the coal, etc., of the request by the appellant of the appellee for information as to the terms of the charter, was not the

exercise of the reasonable diligence required by the statute. As the appellant's failure to be informed of the terms of the charter party before making the payments in question, for which neither the charterer nor the master had authority to bind the vessel or its owner, was due to failure to exercise reasonable diligence, the making of such payments did not give rise to a liability of the vessel or its owner to reimburse the charterer or its agent therefor. The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710; The Kate, 164 U. S. 470, 17 Sup. Ct. 135, 41 L. Ed. 512; Curacao Trading Co. v. Bjorge (C. C. A.) 263 Fed. 693.

[3] It was contended in argument that a result of the appellant's payment of the bills for coal, etc., approved by the master, was to give the appellant by subrogation the right to enforce the liens in favor of the actual furnishers, who were not shown to have been chargeable with notice of the terms of the charter party. In making those payments the appellant acted as the charterer's agent, in pursuance of instructions given by the latter, and on the faith of the latter's promise of reimbursement. So far as the vessel and its owner were concerned, the appellant was a mere volunteer in making those payments. The equitable right of subrogation does not exist in favor of a mere volunteer, who pays a debt of one person to another. Extinguishment of the debt results from the payment of it by a volunteer. Prairie State Bank v. United States, 164 U. S. 227, 231, 17 Sup. Ct. 142, 41 L. Ed. 412; 37 Cyc. 375. When the appellant made the payments in question, it was under no obligation, except that incident to its agency for the charterer. The charterer or his agent cannot acquire a right to hold a ship or its owner responsible by paying for supplies which the charter party requires the charterer to furnish and pay for. Minturn v. Maynard, 17 How. 477, 15 L. Ed. 235.

[4] It is insisted that the appellee estopped itself to deny its responsibility for the disbursements in question by directing the appellant to submit the account against the Belair to the appellee for audit. After the appellee had explicitly denied responsibility for disbursements made by the appellant for the account of the charterer, the request that the account be submitted for audit was made in a telegram of which, omitting the address and signature, the following is a copy:

"Refer your letter fourteenth Belair Accounts Stop Pensacola disbursements should be submitted this office for audit we return them to you for transmittal to Dale Universal Line latter should then reimburse you immediately."

The appellee's previous letter, which contained the above-mentioned denial of responsibility, contained also the following:

"You did not, however, transmit copies of bills upon which I could determine what is chargeable against the Shipping Board and what is chargeable against the charterers. Upon receipt of these bills I shall be glad to issue necessary instructions for our managers to pay such bills as were disbursed by you for account of the owners."

The charter party contained the following provision:

"That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel; also for all the

cabin, deck, engine room, and other necessary stores; and shall exercise due diligence to maintain her in a thoroughly efficient state in hull and machinery for and during the service."

An examination of the account by the appellee was appropriate to enable it to ascertain if payments made by the appellant covered things which the owner was required by the charter party to provide and pay for. The appellee's request that the accounts be submitted to it for audit was made under circumstances which negative the conclusion that the appellant was influenced thereby to refrain from enforcing its claim against the charterer, or otherwise to change its position. A reasonable person, situated as the appellant was, could not have been misled as to the significance of the request that the account be submitted to the appellee for audit, as, when that request was made, it had been unequivocally disclosed that the appellee refused to be responsible for the appellant's outlay, so far as it was for what the charter party required the charterer to furnish and pay for, but was willing to make reimbursement for so much, if any, of the outlay as was for things which the charter party required the owner to furnish and pay for. There is no merit in the contention that the appellee estopped itself to deny or defeat the liability asserted by the libel.

The conclusion is that, under the facts disclosed, the claim asserted by the libel was not maintainable. It follows that the decree appealed from should be affirmed; and it is so ordered

Affirmed.

ALBERT HANSON LUMBER CO., Limited, v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1922.)

No. 3644.

1. **Eminent domain ⇐8—Power to condemn not lost by conferring power to purchase.**

   The general grant of power, conferred by Act Aug. 1, 1888 (Comp. St. § 6909), on any officer charged with procuring property for a public use, to acquire it by condemnation, was not withdrawn, as respects the acquisition of the so-called Hanson Canal, in Louisiana, by Act July 25, 1912, authorizing the Secretary of War to purchase the canal for not to exceed $65,000; the conferring of the power to purchase not negativing the existing power to condemn.

2. **Eminent domain ⇐47(1)—Power to condemn other public uses held to authorize condemnation of canal.**

   The general grant of power, conferred by Act Aug. 1, 1888 (Comp. St. § 6909), on any officer charged with procuring property for a public use, to acquire it by condemnation, *held* to authorize the condemnation of a canal as part of intracoastal waterway, by virtue of the term "other public uses."

3. **Constitutional law ⇐80(1)—Act authorizing acquisition of canal for fixed sum not invasion of judicial power.**

   Act July 25, 1912, authorizing the Secretary of War to purchase, as part of an intracoastal waterway, the so-called Hanson Canal, at a cost not to exceed $65,000, is not an invasion of the judicial power, as undertaking to value the property.

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

Proceeding by United States to condemn property of the Albert Hanson Lumber Company, Limited. Judgment of condemnation, and the Lumber Company brings error. Affirmed.

E. Howard McCaleb, of New Orleans, La., and Emmett Alpha, of Franklin, La., for plaintiff in error.

Louis H. Burns, U. S. Atty., of New Orleans, La.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. A proceeding was instituted in the name of the United States of America against Albert Hanson Lumber Company, Limited, in the United States District Court for the Eastern District of Louisiana, to condemn a described strip of land 300 feet wide which embraced a waterway known as the Hanson Canal. It resulted in a verdict and judgment condemning said property and fixing its value at $65,000.

The Lumber Company brings error, attacking said proceeding on several grounds, but mainly on the ground that no authority of law has been granted for maintaining a proceeding to condemn this piece of property. This property is sought to be taken for use as a part of an intracoastal waterway which is being developed along the coast of the Gulf of Mexico. The Hanson Canal extends from Bayou Teche, on the east, to Bayou Portage, on the west. By an act of Congress approved March 2, 1907 (34 Stat. 1073, c. 2509), entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," the Secretary of War was authorized to contract for such material and works as may be necessary to improve an inland waterway channel from Franklin to Mermentau, La., to an amount therein stated.

By two similarly entitled acts, passed, respectively, in 1909 (35 Stat. 815, c. 264) and 1911 (36 Stat. 933, c. 166), changes of the route of such waterway were authorized, each act providing that no change of route should be made "unless the necessary right of way is secured to the United States free of cost." A report of engineers was made which recommended a change of route which would require the use of the Hanson Canal. Thereafter a similarly entitled act was approved on July 25, 1912, making an appropriation of the sum, and for the purpose shown, by the following provision:

"Improving Waterway from Franklin to Mermentau. * * * The Secretary of War is hereby authorized to purchase, for use as part of said waterway, the so-called Hanson Canal, in accordance with the recommendation made by the Chief of Engineers, at a cost not to exceed $65,000, to be paid out of funds heretofore appropriated for this project." 37 Stat. 201, 212.

The legislative history above recited makes it evident that when the developments of this waterway were begun the government did not propose to expend any money for the acquisition of rights of way, but that unless the right of way was donated, free of cost, the work

of construction and development of said intracoastal waterway would not proceed. However, in 1912, for reasons satisfactory to it, this purpose and policy of the government, as to the link in said waterway to be constructed by the use of the Hanson Canal, is entirely changed and express authority is conferred to purchase said property known as the Hanson Canal for a sum not to exceed $65,000.

It is insisted that the act of 1912 confines the power of the Secretary of War to acquiring this property, solely by agreement and contract of sale, and that it operates to withdraw from him all other power with which he may have been vested to acquire this property by condemnation proceedings. The question therefore is: Does such grant of power confine the method of purchase solely to voluntary bargain and sale, or does it leave unaffected the general grant of power conferred on any officer charged with procuring property for a public use to acquire it by exercising the right of condemnation?

Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. § 6909), provides:

"In every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so. And the United States Circuit or District Courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice."

With this statute of force the Congress specifically authorized the Secretary of War to purchase for a public use this property known as the Hanson Canal at a cost not to exceed $65,000. It knew that under the Act of August 1, 1888, it had conferred on any public officer, authorized to procure real estate for any public use, authority to acquire the same for the United States by condemnation, whenever, in his opinion, it was necessary or advantageous to the government to do so. The legislative branch had determined that this property was needed for this public use and authorized its acquisition. It did not negative the power existing in the officer, authorized to purchase it, to condemn if he thought it advantageous to do so.

The question in this case is not whether, in the absence of a statute conferring any power on a public officer to initiate condemnation proceedings, the giving of authority to purchase certain real estate for public uses would confer authority upon him to acquire the same by condemnation, if he was unable to acquire it by contract, but whether an officer, who has general authority under a statute, when he may be authorized to acquire real estate for public uses, to institute condemnation proceedings whenever he considers such course necessary or advantageous, is deprived by implication of such authority, where he is authorized to purchase certain real estate for a public use at not exceeding a given price.

Repeals by implication are not favored. United States v. Greathouse, 166 U. S. 601, 605, 17 Sup. Ct. 701, 41 L. Ed. 1130. The true rule is to construe the statutes together, and that the giving of authority to purchase the real estate, there being no expression of purpose to withdraw, or limit, the existing power to resort to condemnation, left it within the power of the officer authorized to purchase, to resort to condemnation, if he deemed it necessary or advantageous. We therefore conclude that the proceeding to condemn was authorized by law, and the judgment therein is valid.

[2] Nor do we think that the power conferred by the act of August 1, 1888, would not confer power to condemn property required for the public use here designated. The grant of power is to any public officer authorized to procure real estate. Many acquisitions may be authorized for public purposes other than building sites and to be made by public officers in no way connected with the erection of structures. It is not probable that Congress, in extending this authority to all public officers, should have used the words "other public uses" in a less extended sense. The act has been recognized as extending to many uses. Chappell v. United States, 160 U. S. 499, 500, 16 Sup. Ct. 397, 40 L. Ed. 510; United States v. Beaty (D. C.) 198 Fed. 284; United States v. Gettysburg Electric Ry. 160 U. S. 668, 670, 16 Sup. Ct. 427, 40 L. Ed. 576.

[3] The contention of plaintiff in error that the act of 1912 undertakes to value such property, so as to invade the judicial power cannot be sustained. It is true that it appropriates only a certain sum which the Secretary can expend without further appropriation. But as the court properly charged the jury this did not fix the value of the property sought to be condemned, and that they should find a greater or less sum as the evidence might satisfy them as to the value. Upon this point the Supreme Court of the United States has said:

"The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to." Shoemaker v. United States, 147 U. S. 282, 302, 13 Sup. Ct. 361, 390 (37 L. Ed. 170).

The charge of the court properly submitted to the jury the finding of the value of the property and there was evidence to support the finding.

The judgment of the District Court is affirmed.

ALEX HYMAN & CO. v. HAY.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1922.)

No. 3788.

1. **Gaming ⟸12—Transaction valid in form may be shown to be wagering contract.**
   The fact that purchases and sales of cotton for future delivery were made on an exchange, by whose rules contracts where actual delivery is not intended are prohibited, is not conclusive that the transactions were within the rules, and where there is evidence tending to show that, though valid contracts in form, they were in fact mere wagers, the question is ordinarily one for the jury.
2. **Sales ⟸53(1)—Who were the actual parties to contracts held a question for the jury.**
   Whether transaction between plaintiffs, who were numbers of a cotton exchange, and defendant, who deposited margins to cover purchases or sales of cotton for future delivery, were between the parties as principals, or between defendant, through plaintiffs as brokers, and some undisclosed principal, *held* a question for the jury.
3. **Principal and agent ⟸177(3)—Knowledge of agent held to bind principal.**
   Where defendant deposited margins to cover purchases or sales of cotton for future delivery with agents of plaintiffs, the knowledge and understanding of the agents that defendant did not intend to make or accept actual delivery of the cotton; but merely to speculate on the rise or fall of the market, *held* to bind plaintiffs and to characterize the transactions.

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action at law by Alex Hyman & Co. against J. C. Hay. Judgment for defendant, and plaintiffs bring error. Affirmed.

L. C. Going, of Memphis, Tenn., for plaintiffs in error.

H. P. Farish, of Greenville, Miss., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This suit arose out of alleged purchases and sales of cotton for future delivery. Plaintiffs, who are plaintiffs in error here, are partners and members of the New Orleans Cotton Exchange. The declaration alleges that the defendant is indebted to the plaintiffs—

"in the sum of $4,665, being the balance he owes them for money which they expended and services which they performed for him and at his request in and about the purchase and sale of six hundred (600) bales of cotton, which they purchased and sold for him and at his instance and request upon the New Orleans Cotton Exchange and in accordance with its rules and regulations," etc.

Defendant pleaded the general issue, and also interposed special pleas alleging that plaintiffs were seeking to recover for losses incurred by them on contracts for the purchase and sale of cotton for future delivery; that plaintiffs and defendant did not intend that cotton

should be delivered and paid for, but intended only that one party should pay to the other the difference between the contract price and the market price when the time fixed for delivery arrived.

The constitution of the New Orleans Cotton Exchange, filed in evidence, among other things, provides that no contract shall be enforced by the Exchange except between members thereof; that no contract shall be entered into between members with the stipulation or understanding that it is not to be fulfilled, and the cotton received or delivered, but contracts, alike except as to price, held by members of the Exchange against each other, are required to be closed out and canceled upon notice at any time before delivery; and that prior to or at the time of the signing of a contract either party thereto may be required to put up an original margin of from $1 to $5 for each bale of cotton bought or sold.

There was evidence that plaintiffs purchased cotton for defendant, to be delivered on the following dates and in the following quantities: December 9, 1916, 200 bales for March delivery; December 19, 1916, 200 bales for May delivery; February 21, 1917, 200 bales for July delivery; and May 18, 1917, 200 bales for July delivery—and that they sold cotton for defendant, to be delivered on the following dates and in the following quantities; February 3, 1917, 400 bales for July delivery; February 21, 1917, 200 bales for March delivery; and May 18, 1917, 200 bales for May delivery.

Plaintiffs exchanged with other members of the Cotton Exchange bought and sold slips, according to which the purchases and sales just above mentioned were made, the obligation to receive or deliver cotton being "subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange," etc. Such members are not represented to be acting as agents or brokers. No other names appear thereon, and it is not stated that the members are acting for undisclosed principals.

The purchases and sales in question were made by plaintiffs upon telegraphic requests from Kellner & Vincent, who also represented themselves to be agents or brokers for the purchase and sale of cotton for future delivery, at Greenville, Miss., near which place defendant resided. Telegrams, purporting to have been signed by defendant and authorizing purchases of cotton, were filed in evidence; but they were actually prepared and sent by Kellner & Vincent. In letters of the same date to defendant, plaintiffs acknowledged receipt of the orders through Kellner & Vincent.

It does not appear that all the sales were made upon orders given by defendant. As to the first order, that of February 3, 1917, plaintiffs offered in evidence a telegram, purporting to be from defendant, to sell 400 bales. In a letter of that date plaintiffs state:

"We beg to confirm telegrams exchanged to-day, resulting in transactions made for your account as per confirmation inclosed, for which we thank you, and have placed same through account of Messrs. Kellner & Vincent. Inasmuch as this hedges your contract, we presume that you desire the open orders which you have entered, to sell 200 May at 18.30 and 200 March at the same time, to be canceled, and have accordingly done so. If, however,

this is not in accordance with your wishes, kindly advise us, and we will reinstate the order."

The second sale was authorized by telegram from Kellner & Vincent reading:

"Sell two March and buy 2 July hedge account Hay."

The manner in which the last sale was made is shown by a letter from plaintiffs, in which they state:

"We wrote Messrs. Kellner & Vincent regarding the 200 May long and 200 July short several days ago, so that they could see you and advise the taking out of this straddle. * * * We received a letter from them, in which they stated for us to use our own discretion in the covering of these contracts, and we accordingly covered this morning at a difference of 37 points, as per confirmation inclosed; after this they narrowed as low as 23, and close to-night at approximately 28 points," etc.

After the transactions were over, plaintiffs wrote to defendant in an effort to secure the payment of their claim. In a letter of April 1, 1919, they stated:

"Referring to past correspondence in regard to the visit which our Mr. Hyman paid you some time ago, wherein it was his understanding that when you disposed of some of your spot cotton that you would make us some payments against your indebtedness, and you having further advised that you would take the matter up with Messrs. Kellner & Vincent, at Greenville, we understand that there has been some better demand of late, and no doubt you had some opportunities of disposing of some of your spot cotton, and will be in a position to make us substantial payments against your account. * * * As we have not heard from our mutual friends, Messrs. Kellner & Vincent, of late in regard to this matter, we are sending them a copy of this letter."

And again, on June 3, 1919, plaintiffs wrote defendant a letter in which they state:

"You will no doubt recall that it was the understanding of our Mr. Hyman, when he saw you in person, that when you disposed of some of your spot cotton that you would make us some payments against your indebtedness, and you further advised that you would take the matter up with Messrs. Kellner & Vincent at Greenville, Miss."

One of the plaintiffs testified that Kellner & Vincent were entitled to a share of the commissions, but that they were the agents of defendant, while defendant testified that Kellner & Vincent were the agents of plaintiffs. Vincent did not testify, but Kellner testified upon this point that he expected to be paid for his services by the plaintiffs. Defendant denied that he ordered any sales to be made, and claimed that the sales, if any, were made because of his failure to put up margins.

Plaintiffs reported on form letters to defendant, in which they gave accounts of the various transactions, merely stating the number of bales bought or sold, the month of delivery, and the price. Each of the letters contained the following paragraph:

"It is further understood that on all marginal business the right is reserved to close transactions when margins are running out, without further notice, and to settle contracts in accordance with the requirements of the

United States Cotton Futures Act (section 5) and the rules and customs of the Exchange where orders are executed."

Defendant was never informed who the parties were with whom it is claimed the contracts of purchase and sale were made. It is admitted that in the month of December, 1916, defendant in error made five payments, aggregating $4,000, on account of margins, and did not make any payments thereafter. March 26, 1917, plaintiffs wrote to defendant a letter which stated their claim as of that date, as follows:

"Inasmuch as March contracts expired before noon to-day, and you being 200 long and 200 short, we are compelled to render account sale of this transaction, and inclose you sale of 200 March, showing a loss of $2,610, which has been debited accordingly."

The transactions between the parties were completed on May 18, 1917. In a letter of that date plaintiffs stated:

"We also inclose account sale covering 200 July which you were long and 200 short; this leaves your account a net debit of $4,665."

In letters written from time to time, usually when they had occasion to acknowledge payments made to Kellner & Vincent, plaintiffs advised defendant of market conditions. A letter of December 12, 1916, contained the following:

"The market did not respond in the early session to the rumors of Germany's peace proposals, but in fact showed a decline from the time this report was issued. But liquidation had apparently run its course for the time being, and when it was seen that spots in the interior were not showing any signs of distress, and Liverpool became a buyer in the American markets in the later session, it caused some nervousness among recent shorts, who in attempting to cover found little for sale, with the result the market closes at an advance of some 61 points from last night and about 110 to 114 points from yesterday's low level."

In a letter of December 22, 1916, plaintiffs stated:

"Secretary Lansing's explanation of his statement yesterday induced a better feeling. However, the market continued to rule nervous and erratic."

A letter of February 21, 1917, was in part as follows:

"The steadiness in the market to-day was attributed to continued reports of the firmness in the spot department, good exports, lack of need in Texas, and the absence of any unfavorable political news."

A witness for plaintiffs testified that it would have been a violation of the rules of the Cotton Exchange for his firm—

"to have received and executed an order for the purchase and sale of cotton when he knew the person represented did not intend to accept or deliver, as the case may be, the cotton which he bought or sold, and no reputable broker on the New Orleans Cotton Exchange would think of accepting an order for the purchase or sale of cotton, when he even had reason to believe that the person he represented was not acting in good faith in making the contract."

Kellner testified that he had been in the cotton business for 35 or 40 years; that he had no reason to believe that on any of the orders he had handled it was intended to make deliveries, or that the parties to these contracts intended to deliver cotton; and that he knew of no

actual deliveries of cotton in Greenville about that time upon transactions which he was handling.

Defendant testified that he was a cotton farmer; that he had speculated from time to time in cotton futures; that in the transactions in question he had paid $4,000 to Kellner & Vincent in installments on margins, and produced checks aggregating that amount, all payable to and indorsed by Kellner & Vincent only; that he had no idea of receiving the cotton, and was merely intending to gamble on the rise and fall of the market, and to settle on the difference between the contract price and the market price; that he was financially unable to have paid for the cotton represented in the transactions which took place between him and Kellner & Vincent; and that the latter knew he was unable to do so.

A member of plaintiffs' firm testified:

"No delivery could have been demanded by us, and no delivery could have been required of us from the persons to whom we sold it."

In giving his reason for that statement he said:

"Because the contracts made by us for Mr. Hay were never carried to maturity, and no tender to us or by us was made necessary."

No cotton was delivered or tendered.

At the close of the evidence plaintiffs moved for a directed verdict in their favor, which the court denied, and the case was submitted to the jury upon the testimony above outlined. There was a verdict for the defendant, upon which judgment was entered.

The court charged the jury in effect that the alleged purchases and sales were presumed to be valid; that the burden of proving their invalidity was upon the defendant; that it was not sufficient to defeat recovery by the plaintiffs for the defendant to prove that he alone did not intend to accept or make delivery of cotton, as the case might be, but that it was necessary for the defendant further to prove that the plaintiffs did not intend to make or accept delivery of the actual cotton represented by the various bought and sold slips which were exchanged between plaintiffs and other members of the New Orleans Cotton Exchange.

It is not contended that the court committed any error in its charge to the jury upon the law, but only that the court should have instructed the jury peremptorily to find for the plaintiffs. It is conceded, if plaintiffs were not entitled to a directed verdict, that the case was fairly submitted to the jury and that the judgment should be affirmed. It is to be determined, therefore, whether there was any substantial evidence which authorized a verdict and judgment for the defendant.

In the briefs there is some discussion as to whether the contracts relied upon are governed by the laws of Mississippi or of Louisiana. But the difference, if any, between the laws of the two states, is unimportant in this case, because in either of them contracts for the future delivery of cotton, where the parties thereto have not the intention of making such delivery, are void, as such contracts are generally, if not universally, held to be in all the states. If there was any error in re-

fusing to enforce the provisions of the Mississippi Code, it was committed against defendant, and in favor of plaintiffs, and of such an error, of course, the latter cannot complain.

[1] It is argued that a verdict should have been directed for the plaintiffs, because under the rules of the New Orleans Cotton Exchange contracts are forbidden, if the parties do not intend to make actual deliveries. Upon this subject we quote from the leading case of Irwin v. Williar, 110 U. S. 499; 4 Sup. Ct. 160, 28 L. Ed. 225:

"We do not doubt that the question, whether the transactions came within the definition of wagers, is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties; for, as was properly said in the charge: 'It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.' It might therefore be the case that a series of transactions, such as that described in the present record, might present a succession of contracts, perfectly valid in form, but which on the face of the whole, taken together, and in connection with all the attending circumstances, might disclose indubitable evidence that they were mere wagers."

We are of opinion, therefore, that it was a question for the jury to decide whether the real contracts were as represented by the rules of the New Orleans Cotton Exchange, or whether these rules, covering dealings only between members thereof, and denouncing contracts for future delivery made without intention of compliance therewith, were used as mere subterfuges, devised to evade the laws applicable to wagering contracts.

[2] It is also contended that plaintiffs were defendant's brokers, that defendant's contracts were with undisclosed principals, and that it was necessary for him to prove the intention of these undisclosed principals not to accept or make deliveries of cotton. Of course, that would place a burden upon defendant that he not only did not meet, but that he could not possibly have met. To uphold such a contention would obviously be to strike down all laws which prohibit wagering contracts. Dealings on a cotton exchange are between its members, who contract subject to its rules and regulations, one of which is that they have the right to demand ring settlements and to cancel contracts, and this right is very carefully preserved in the bought and sold slips, which are always subject to the rules of the Exchange, and in this case in the letters from plaintiffs to defendant. But forms not being conslusive, or even important, the jury had the right to look through them into the real transactions, and it was within their province to find that the contracts were actually between the plaintiffs and the defendant. The defendant was purchaser of cotton for future delivery under all the evidence, and the seller of cotton for future delivery under evidence furnished by plaintiffs, but disputed by defendant. If, then, the contracts be considered between the parties to this suit, and not between the defendant, through the plaintiffs, and some undisclosed principal, the question becomes important whether Kellner & Vincent were the agents of plaintiffs or of defendant.

Passing by the testimony of the parties to the record, in which they state mere conclusions, to the other evidence, from which the circum-

stances reliably appear, it is not apparent to us that there was no substantial evidence warranting the jury in finding that Kellner & Vincent, in the operations which they carried on at Greenville, were the agents of the plaintiffs. This firm operated one of the many establishments found throughout the country, where those who desire to do so can give orders for the purchase and sale of commodities for future delivery. These agents were not to be paid by the defendant, and they were not accepting and telegraphing orders with no expectation of being remunerated therefor. They could send a telegram with only the defendant's name upon it, and the plaintiffs would know it was from them, and also know, or the jury was justified in so believing, that the margins required had been paid by the defendant to them, because, without any communication from the defendant, they would acknowledge receipt from him through these agents of the payments he made. Testimony for the plaintiffs discloses that they expected to pay for the services performed by Kellner & Vincent. Their testimony further shows that they were insisting that defendant pay the balance they are now suing for to these very agents.

[3] If Kellner & Vincent were their agents, it is unnecessary to inquire further as to the intention of the plaintiffs themselves, because they would be bound by the intention of their agents. It was very clear, from the testimony of Kellner, one of the agents, that he knew the defendant was speculating on the rise and fall of the cotton market, and was neither able to, nor intended to, accept delivery of cotton, and that it was not the intention or expectation of his firm to do other than what the defendant was doing. But, in the light of common knowledge of what is daily taking place about us, it is not difficult to understand how a jury could reasonably have believed that the plaintiffs were also intentionally entering into wagering contracts. Their letters reviewing the effects of the war upon the price of cotton, and notifying defendant of the fluctuations on the Exchange, their references to the market as "nervous" and "erratic," and as being affected by letters written at the State Department at Washington, their advices to "cover," are not consistent with the idea that they were intending to secure the delivery of cotton to the defendant. If the defendant really intended to buy or sell cotton, and accept or deliver it when the time came to do so, he would not have been much concerned about fluctuations in the price which were taking place in the meantime.

Cases of almost, if not exactly, this nature have been before this court heretofore, and it has been held, under evidence similar to that here submitted, that the good faith of transactions of this character is to be determined by the jury, and that usually it is not proper to instruct verdicts for those who claim to be only agents or brokers in the placing of such contracts. Williamson v. Majors, 169 Fed. 754, 95 C. C. A. 186; James v. Clement, 223 Fed. 385, 138 C. C. A. 621.

There is no question of law presented as to the rights of parties under contracts of this kind. We are of opinion that the case was properly submitted to the jury, and the judgment is therefore affirmed.

ADELPHIA HOTEL CO. v. PROVIDENCE STOCK CO.

(Circuit Court of Appeals, Third Circuit. January 12, 1922.)

No. 2748.

1. **Innkeepers ⟸11(4)—Holding out one to public as servant estopped to deny such relation.**
   Where an innkeeper, offering the public entertainment and care, puts a person in the position of a servant, with the duties of a servant, with respect to the facilities of such entertainment, and reserves and exercises control over his work, and says nothing and does nothing whereby a private arrangement to the contrary is disclosed to the public, the principal is estopped from disclaiming the relation of master to the person so positioned, and from avoiding liability for his negligence.
2. **Innkeepers ⟸11(2)—May become bailees of goods from one not guest.**
   An innkeeper may, as a bailee, with or without reward, receive goods from one who is not strictly his guest.
3. **Innkeepers ⟸11(8)—Defendant held liable, either as innkeeper or bailee for hire, for loss of trunk through negligence.**
   Where defendant, keeper of a hotel, accepted plaintiff's trunk for storage, and received pay therefor, and afterward undertook for hire to transfer the trunk to a railroad station, and delivered it to the driver of a wagon, who stole it, defendant was liable for the loss as innkeeper, if the driver was its servant, and, if not, as bailee for hire, if it was chargeable with want of ordinary care in delivering the trunk to him.
4. **Evidence ⟸113(13)—Value placed on property for insurance purposes held irrelevant on issue of market value.**
   On an issue as to the fair market value of merchandise, the value placed on it by the owner for insurance purposes, or in settlement with the insurance company for its loss, *held* irrelevant.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by the Providence Stock Company against the Adelphia Hotel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ralph B. Evans, of Philadelphia, Pa., for plaintiff in error.

Charles J. Biddle, of Philadelphia, Pa., for defendant in error.

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

WOOLLEY, Circuit Judge. The action is in trespass for the loss of the contents of a trunk. It was brought on the liability of the defendant hotel company for the safe keeping of a trunk committed to its care under circumstances presently to be stated. The verdict was for the plaintiff. After judgment the defendant sued out this writ of error.

Samuels was a traveling salesman in the employ of the plaintiff, a jewelry concern of Providence, Rhode Island. When in Philadelphia he had regularly been a guest at the Hotel Adelphia, operated by the defendant company.

On the trip in question Samuels went from the station to the hotel in a taxicab and took with him his trunk of jewelry samples. Arriving at the hotel, he deposited the trunk in a vault provided by the hotel for the storage of valuables, and paid a hotel employé in charge of the vault one dollar for its storage. In return he received a brass vault check with a number and the name "Hotel Adelphia" on it. The defendant company admits that on receiving the trunk it knew that it contained jewelry.

Being unable to obtain lodging at the hotel, Samuels spent the night elsewhere. The next morning he went to the hotel and took some jewelry out of the trunk for the purpose of calling on his customers. Later, he returned, replaced the jewelry and arranged with the head porter to have the trunk taken to the station. Samuels surrendered the vault check to the porter, and on paying him fifty cents for transportation received a transfer check upon which also appeared a number and the name "Hotel Adelphia." He then had lunch at the hotel.

The head porter had his desk in the main lobby of the hotel and was in full charge of the transfer of baggage in and out. Under an arrangement with the hotel company he hired and paid the under porters and wagon drivers and owned the horses and wagons. Ordinarily, guests paid him for the transportation of their baggage but sometimes charges for the service were entered on guests' bills. In both cases the money, directly or indirectly, was paid the head porter and was retained by him as his own. The under porters wore caps bearing the words "Hotel Adelphia" and on the sides of the wagons the same words were painted. The upkeep and appearance of the transportation equipment was inspected by the manager of the hotel.

After lunch, Samuels learned that his trunk had not yet gone to the station. Whereupon the head porter sent another porter to the vault to get it off. The trunk was taken out by the vaultkeeper and put on a wagon by an elevator man and Cohen, the driver of the wagon. Cohen drove off with the trunk and stole it.

The head porter denied that he had employed Cohen. The relation of Cohen to the head porter and to the hotel appears from testimony that on the morning of the day in question Cohen applied to the head porter for a position as driver. The head porter asked him about his qualifications and told him to go around with one of the drivers, learn the locations of the stations, and on his return he would let him know whether he had a position for him. No inquiry was made as to his name or address. Later, Cohen had lunch at the hotel with the employees. He brought the wagon to the hotel and was the only one on it when he drove away with the trunk.

The defendant rested its defense on two propositions: First, that between Samuels and the defendant there was not the relation of guest and innkeeper; and, second, that the head porter, when he accepted the trunk for transfer and received the whole consideration for the service, was acting, not as the servant of the defendant innkeeper, but as an independent contractor.

[1] Taking the second ground first the court, rightly we think, refused for lack of evidence to submit to the jury an issue whether the

head porter was an independent contractor. Where an innkeeper, offering the public entertainment and care, puts a person in the position of a servant with the duties of a servant with respect to the facilities of such entertainment, and reserves and exercises control over his work, and says nothing and does nothing whereby a private arrangement to the contrary is disclosed to the public, and so constructively to the plaintiff, the principal is estopped from disclaiming the relation of master to the person so positioned and from avoiding liability for his negligence. Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760.

[2] Putting aside the question whether the head porter was an independent contractor, the trial court submitted the case to the jury, not on the defendant's liability arising alone from the relation of innkeeper and guest, where care of baggage is an incident to the entertainment of the guest, but mainly on the ground that Samuels' payment of money for the care and transportation of his trunk and the innkeeper's acceptance of the money for the service promised and undertaken, raised between the parties at least the relation of bailor and bailee for hire. Admittedly, an innkeeper may, as a bailee, with or without reward, receive goods from one who is not strictly his guest. 14 Ruling Case Law, 527.

[3] Submitting the issues, first, whether Cohen—the man to whom the innkeeper delivered the plaintiff's trunk and who later stole it—was a servant of the defendant, Huntzicker v. Illinois Central R. Co., 129 Fed. 548, 64 C. C. A. 78; 14 Ruling Case Law, 526; and second (if found not to be), whether the defendant was negligent in turning over the trunk to him, Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390, the court instructed the jury that, on an affirmative finding upon either issue, the defendant should respond in damages; and that the damages should be measured not by any one of the several rules imposing on an innkeeper the duty of care in high degree with respect to his guest's property, 14 Ruling Case Law, 514, 515, but by such care as an ordinarily prudent person would exercise under the circumstances.

Whether innkeeper or bailee for hire, the instruction, we think, confined the defendant's responsibility to the legal minimum,—that of care in the degree which the law imposes on a bailee for hire. Yet the defendant maintains that its responsibility is still one point lower in that its position was that of a gratuitous bailee and its liability as such was for gross negligence only, citing Baker v. Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085, Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Ann. Cas. 345, and Fisher v. Kelsey, 121 U. S. 383, 7 Sup. Ct. 929, 30 L. Ed. 930.

We discover no analogy between the case at bar and Fisher v. Kelsey where goods of a guest were stolen while on exhibition to customers in a display room of a hotel. Recovery was sought in opposition to a state statute limiting liability of an innkeeper to circumstances different from those proven in the case.

Nor do we think Baker v. Bailey and Tulane Hotel Co. v. Holohan rule the case at bar and for two reasons: First, because in these cases

there were findings—on evidence which admitted little else—that the persons whose goods were lost were not guests of the innkeepers; also that the goods were left with the innkeepers without compensation paid or intended to be paid. In the instant case there is evidence from which, under authority of the same cases, the jury might have found that Samuels was a guest of the defendant, 14 Ruling Case Law, 498; or, if the jury found the contrary because Samuels' entertainment was limited to one meal, the evidence is conclusive—the doctrine of independent contractor being out of the way—that he paid the defendant for storing and transferring his trunk and the defendant accepted payment and undertook the service. Whichever relation existed between the two parties, whether that carrying the high degree of care of an innkeeper or the lower degree of care of a bailee for hire, the defendant cannot complain of the court charging the rule of damages applicable to the relation of lesser responsibility.

Of the remaining assignments of error we find only one which calls for discussion. That has to do with a ruling of the court on an offer of evidence. The circumstances were these:

[4] It appeared from the testimony that the trunk contained wares of two classes,—samples and articles for sale called "closeouts." The value of the latter was uncertain because, some having been sold, their number was uncertain. For this reason the court limited recovery to damages for the loss of the samples. There was evidence that the samples were wholly intact. The president of the plaintiff company had testified to the value of the samples. On cross-examination questions were asked and answered as follows:

"Attorney for Defendant: Q. You had these goods insured, didn't you?
"A. Yes, sir.
"Q. You put a value on them, didn't you?
"A. Surely.
"Q. You made a settlement with the insurance company didn't you?
"Attorney for Plaintiff: I object to that. What has that to do with this case?
"Attorney for Defendant: I want to show the value he put on them when he made a settlement with the insurance company.
"(Objection sustained. Exception noted.)"

The subject to which the examination and cross-examination of the witness was being addressed was the value of the goods stolen, to be measured, as later charged by the court, "by the fair market price in a fair market." If objection had been made to the first or second question—"You had these goods insured, didn't you? You put a value on them, didn't you?"—it would, doubtless, have been sustained for the reason that the amount for which they were insured and also the amount at which they were valued for the purpose of insurance is not evidence of market value.

"The theory and practice of insurers and insured is to make the limit of insurance much less than the value of the property, while owners are permitted to procure insurance in amounts far below this limit. The result is that the amount of insurance has no fixed or uniform relation to the value of the property it covers, and hence does not directly tend to disclose its value." Union Pacific R. Co. v. Lucas, 136 Fed. 374, 69 C. C. A. 218.

If the amount of insurance has no fixed or uniform relation to the value of the property it covers and, therefore, is to be excluded in ascertaining the market value of such property, then certainly the value placed on property by the insured "when he made a settlement with the insurance company" should a fortiori be excluded.

The judgment below is affirmed.

CURTIS v. NORTH AMERICAN INDIAN, Inc., et al.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3716.

1. **Replevin ⟸33(2)—Marshal had power to proceed under bond approved by judge.**

That formal affidavit of replevin and bond for delivery of property in the state of Washington were executed and filed, not with the marshal, but with clerk of federal District Court, and that the bond was approved by the District Judge, who ordered that a writ of replevin issue, instead of by the marshal, did not render invalid the action of the marshal in proceeding to take charge of the property, under Rem. Code Wash. 1915, §§ 707–717, providing that affidavit and bond be filed with the sheriff, etc.

2. **Trial ⟸82—Documents properly admitted over objection of lack of authentication.**

The court properly overruled an objection to admission of a paper appearing to be a notice of assessment and receipt issued by the state comptroller of New York for a corporate state franchise tax, and also a certificate by the deputy secretary of such state, certifying that the certificate of the incorporation of the plaintiff was filed and recorded, which was formally attested by the secretary of state and the seal of the state affixed, where objection was put solely on the ground that such papers were "not authenticated in the manner provided by the statutes of the United States," without pointing out specific lack of authenticity.

3. **Evidence ⟸366(1)—Rules of convenience applied, where documents bear appearance of regularity.**

In the admission of record evidence, rules of convenience may often be applied by courts, in cases where documents bear every appearance of regularity and the seal of officials of a state are offered in evidence.

4. **Corporations ⟸630(3½)—In view of statute making directors trustees, they may be made plaintiffs in action by corporation whose life has expired.**

Sole directors of a New York corporation may, on petition be made parties plaintiff in an action by the corporation, where they wish to be added to protect the property and rights of the corporation, notwithstanding the life of the corporation has expired, in view of General Corporation Law N. Y. § 35, making directors trustees, with authority to sue and recover debts and property of corporation, after the life of the corporation has expired.

5. **Courts ⟸343—Adding new plaintiffs on trial discretionary.**

It is discretionary with the federal District Court to add new parties plaintiff after the evidence has closed, under Rev. St. § 948 (Comp. St. § 1580).

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6. Parties ⇐52—No abuse of discretion in adding plaintiffs after evidence was closed.

Defendant, in replevin by corporation, cannot complain that court abused its discretion in permitting directors of the corporation to be added as parties plaintiff after the evidence was closed, where she expressly announced on the trial that she made no claim of ownership of the property, and took a position in merely technical opposition to the claim of the corporation to possession; the real parties entitled to possession being the directors as trustees.

7. Replevin ⇐96—Finding of value unnecessary, in absence of issue.

Omission to find value in verdict in a replevin action was immaterial, where the pleadings made no issue in the matter.

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

Action by the North American Indian, Inc., and others, against Clara J. Curtis and another. Judgment for plaintiffs, and the named defendant brings error. Affirmed.

John G. Barnes, of Seattle, Wash., for plaintiff in error.

Elias A. Wright, Sam A. Wright, C. K. Poe, and A. J. Falknor, all of Seattle, Wash., for defendants in error.

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

HUNT, Circuit Judge. This action is in the nature of replevin by the North American Indian, a New York corporation, against Curtis Studio and E. S. and Clara Curtis, formerly husband and wife, but divorced before the action was instituted. Prior to the divorce, Curtis and wife did business as Curtis Studio in Seattle. Clara Curtis denied that plaintiff was a New York corporation, and that she held unlawful possession, or refused to deliver to plaintiff; Edward S. Curtis denied unlawful possession, admitted ownership by the Indian Company, and denied all damage. After hearing evidence on both sides, plaintiff corporation, over objection by Clara Curtis, was allowed to add two persons, Pegram and Borglund, as plaintiffs, upon petition setting forth that they were citizens and residents of New York and Connecticut, respectively, and were the then sole directors and trustees of the corporation. Verdict in favor of plaintiffs for the return of the property seized was directed, and Clara Curtis brought writ of error.

It is contended that the court erred in denying motion to quash the writ of replevin and to annul the action by the marshal for lack of jurisdiction. The statutes of Washington (sections 707–717, Remington Code) provide that, in action to recover possession of personal property, when immediate delivery is claimed, claimant in an affidavit shall show, among other matters: (1) Ownership or lawful right of possession under facts to be stated; and (2) wrongful detention. Upon receipt of the affidavit and bond in usual form, approved by the sheriff, the sheriff shall take the property described, if it be in possession of defendant or his agent, and retain custody, and without delay serve defendant with copy of the affidavit and bond. Within three days

(section 710) exception to sureties may be made. Defendant at any time before delivery of the property to plaintiff (section 711) may require return thereof, upon giving bond in double the value of the property as stated in the affidavit for delivery to plaintiff. The sheriff must file the affidavit with the proceedings thereon with the clerk of the court within 20 days after taking the property.

[1] The record shows that formal affidavit of replevin and a bond for delivery of the property were executed and filed, not with the marshal, but with the clerk of the United States District Court, and that the bond was approved by the United States District Judge, who ordered that a writ of replevin issue. In this way the process passed into the hands of the marshal, who served the writ, together with copy of the affidavit and bond, upon Mrs. Curtis. We cannot see that, because the court, following older practices, ordered the writ, there was lack of power in the marshal to proceed. Neither does approval of the bond by the judge render that obligation invalid, or prove lack of authority in the marshal to proceed to take charge of the property described in the affidavit. Had he failed to act, he would have been liable on his official bond, and certainly the sureties upon the bond would not be heard in a plea to be released because the judge, and not the marshal, approved of the security. Cobby on Replevin, § 679; 23 R. C. L. pp. 896, 897; Hartlep v. Cole, 120 Ind. 247, 22 N. E. 130. The irregularity was in no manner prejudicial to Mrs. Curtis, who could have availed herself of her right to object to the sureties on the bond, or to take steps to give a counter bond.

Assignment of error is based upon the action of the court admitting a paper appearing to be a notice of assessment and receipt, dated Albany, N. Y., November 18, 1919, issued by the state comptroller of New York to the North American Indian Company, for a state franchise tax imposed on a business corporation for the period ending October 31, 1920. The receipt is dated January 2, 1920. There is also a certificate by the deputy secretary of state of New York, dated October 4, 1920, certifying that the certificate of the incorporation of the North American Indian was filed and recorded on December 18, 1909. The secretary of state of New York formally attested the certificate of the deputy and affixed the seal of the state.

[2, 3] The objection to the papers as evidence was put solely upon the ground that the papers were inadmissible, because "not authenticated in the manner provided by the statutes of the United States." On their faces both papers appear to be regular official documents issued by competent state authorities, and as no specific lack of authenticity was pointed out, the court committed no error in admitting them. In the admission of record evidence, rules of convenience may often be applied by courts in cases where documents which bear every appearance of regularity and the seal of officials of the state are offered in evidence.

[4, 5] Stress is laid upon an assignment based upon the order of the court that Pegram and Borglund should be made additional plaintiffs. Those two persons petitioned the court to be made parties, on the ground that they were the sole and only directors and trustees of the

North American Indian Corporation, plaintiff, and wished to be added to protect the property and rights of the plaintiff corporation. Plaintiff in error argues that, as the life of the corporation was ten years, there was a failure to prove corporate existence at the time of the taking of the property by the marshal. It may be that the acceptance by the lawful authorities of the state of New York of the license tax paid by the corporation is sufficient evidence, in a suit by the corporation against one who has wrongfully taken its property, to establish prima facie the existence of a de facto corporation (B. & P. R. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784); but, accepting it that plaintiffs in error can avail themselves of the point that the records on their face disclosed that the corporation ceased to exist December 18, 1919, or 10 years after December 18, 1909, which was the date the articles of incorporation were filed with the secretary of state in New York, and that the statutes of New York which authorized an extension of corporate life were not complied with, the result cannot help the situation, for if the corporation were lifeless, then under section 35, General Corporation Law of New York (Consol. Laws, c. 23), the directors became trustees of the creditors, stockholders or members, "with full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses," and with "authority to sue for and recover the debts and property of the corporation, by their name as such trustees," etc. It would therefore follow that the trustees had power to sue as plaintiffs, and that the court committed no error in putting them in such an attitude, unless there was an abuse of discretion in making the order after the evidence was closed. As to that we hold there was no error, and that the ruling was made in the exercise of the discretion of the court. Section 948, R. S. U. S. (Comp. St. 1580); Thompson on Corporations, § 3157; McDonald v. State of Nebraska, 101 Fed. 171, 41 C. C. A. 278; Clemmens v. W. P. S. Co. (C. C.) 171 Fed. 168; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784.

[6]. The fact that original demand for the property was made in behalf of the corporation in no way injured Mrs. Curtis, who expressly announced on the trial that she made no claim of ownership of the property, and who took a position in merely technical opposition to the claim of the corporation to possession. By allowing the trustees to be brought in, the need of bringing a new action was obviated, and the addition of the two proper plaintiffs had relation to the commencement of the action, with the legal effect the same as if the action had been instituted in the name of proper plaintiffs. In McDonald v. Nebraska, supra, Judge Caldwell, for the Court of Appeals, discussed at length the power of amendment and substitution, and clearly pointed out the wisdom of allowing amendment, where no substantial rights of the adverse party are affected.

[7] Omission to find value in the verdict was immaterial, for the reason that the pleadings made no issue in the matter.

Other errors assigned have been considered, but we find them without merit.

Judgment affirmed.

Ex parte HOSAYE SAKAGUCHI.

HOSAYE SAKAGUCHI v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3712.

1. **Aliens ⟸42—Board of special inquiry appointed by commissioner of immigration for port held legally constituted.**
   Under the immigration statute (Act Feb. 5, 1917, § 17 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ii]), authorizing the appointment of boards of special inquiry from officers and other persons in cases where maintenance of permanent board or the calling in of a detailed board was impracticable, *held*, that it would be presumed in favor of appointment of two officers and a stenographer as such board that the warrantable circumstances existed.
2. **Aliens ⟸46—Japanese woman held entitled to enter the United States where her husband resides therein.**
   Under Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), a Japanese woman who before leaving Japan became the wife of a Japanese resident here, is entitled to enter the United States, notwithstanding her husband's subsequent refusal to receive her as his wife.
3. **Aliens ⟸49—Facts as to ability of foreign woman held not to sustain finding that she was likely to become public charge.**
   An able-bodied Japanese woman with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and manufacturer of artificial flowers, with a disposition to work and support herself, and having a well-to-do sister and brother-in-law domiciled in this country, ready to assist her, and who has a husband living here engaged in business, was wrongly excluded as likely to become a public charge.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Hosaye Sakaguchi was denied admission to the United States, upon a hearing by a commission appointed by Henry M. White, as the United States Commissioner of Immigration of the Port of Seattle, Wash. On appeal to the Secretary of Labor the findings of the Commission were affirmed, and she petitioned for habeas corpus, and on the return to the writ her petition was dismissed, and she appeals. Judgment reversed, and petitioner discharged from custody.

James Kiefer, of Seattle, Wash., for appellant.

Robert C. Saunders, U. S. Atty., and Charlotte Kolmitz, Asst. U. S. Atty., both of Seattle, Wash., for appellee.

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

GILBERT, Circuit Judge. On December 23, 1919, the appellant, a Japanese woman, arrived at the port of Seattle from Japan as the proxy wife of Sakaguchi Kuinobuemon, who resided at Seattle. On

January 26, 1920, a hearing was had before a special board of inquiry, which consisted of two immigration inspectors and a stenographer appointed to serve on the board. The board unanimously decided that the appellant be excluded on the ground that she was likely to become a public charge. The case was reopened at the appellant's request, and further testimony was taken on her behalf before a special board consisting of two immigration inspectors and a stenographer. That board, one dissenting, again refused her permission to land. On the appeal to the Secretary of Labor the finding of the board was affirmed. The appellant petitioned for habeas corpus, setting forth that she was denied a fair hearing. On the return to the writ her petition was dismissed.

It appeared upon the hearing that some three or four years prior to that time the appellant had gone from Japan to Victoria, B. C., as the proxy wife of a Japanese, with whom she there lived for about six months, whereupon she left him and returned to Japan. Shortly after the appellant arrived at Seattle, Kuinobuemon refused to accept her as his wife, and requested that she be deported to Japan, setting forth as one reason for his refusal to accept her that she had been married before and had been in trouble, facts which he had not known until after her arrival at Seattle. There was evidence that the appellant's brother-in-law and sister resided at Seattle and were desirous of caring for her, and there was some evidence that she might be able to earn her own livelihood, and that she had done so since her release on bond. At the time of the hearings Kuinobuemon had no means and was not employed.

[1] One of the assignments of error is that the board of special inquiry was illegally constituted. This objection was not set forth in the petition for the writ, but it was presented to the court below, and it is here again relied upon. Section 17 of the immigration statute of February 5, 1917 (Fed. Stat. Ann. Supp. 1918, p. 228 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ii]), provides as follows:

"That boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Secretary of Labor the maintenance of a permanent board of special inquiry for service at any sea or land border port is not warranted, regularly constituted boards may be detailed from other stations for temporary service at such port, or, if that be impracticable, the Secretary of Labor shall authorize the creation of boards of special inquiry by the immigration officials in charge at such ports, and shall determine what government officials or other persons shall be eligible for service on such boards."

We may assume from the record that in the opinion of the Secretary of Labor the maintenance of a permanent board of special inquiry for service at Seattle was not warranted, that it was impracticable to detail regularly constituted boards from other stations for temporary service at that port, and that, in pursuance of the authority conferred upon him

by section 17, the Secretary authorized the creation of a board of inquiry at that port, and determined that the two immigration inspectors and the stenographer should be eligible for service on the board, the stenographer being included in the term "other persons" as used in the statute. Nothing appears in the record to show that these assumptions are not justified. Such being the case, we find no ground for holding that the board was not legally constituted.

[2] Did the appellant have a fair and impartial hearing? It is not contended that the manner of conducting the hearings was unfair or was such as to deprive the appellant of substantial rights. The decision of the board of special inquiry denying the appellant admission to the United States was based on two grounds: First, that she was a laborer without a proper passport; and, second, that she was a person likely to become a public charge. As to the first ground, the argument was that Kuinobuemon, if intending not to accept her as his wife, would have been unable to send for her under the provisions of the "Gentlemen's Agreement," which provides that a husband domiciled in the United States may send for his wife even though she be a laborer, and that she would not have been entitled to a passport if she had sought admission with the avowed intention of assuming a status independent of her husband. The passport, which was properly viséed by the American consul at Kobe, Japan, describes the appellant as the wife of Kuinobuemon, and Kuinobuemon testified that he was married to her in January, 1919. The appellant, being Kuinobuemon's wife when she left Japan, is still his wife, notwithstanding her husband's subsequent refusal to receive her as such; and as his wife she is entitled to enter the United States (39 Stat. p. 877, § 3 [section 4289¼b]), unless subject to exclusion on some other statutory ground.

[3] The board of special inquiry, for the reason that the appellant had but little knowledge of the English language and American customs, thought it not probable that she could independently earn a living in the United States, and that while her brother-in-law, Horikawa, might be willing and able to support her, her claim upon him could not be legally enforced. On those considerations they reached the conclusion that she was likely to become a public charge.

The appellant testified that in Japan, after going through with the grammar school, she graduated from a school for teaching sewing and the arrangement of artificial flowers after spending three or four years therein, after which she was employed as a sewing teacher for three years, for which she received pay; that she had studied English under a private teacher; that she could not speak English well on account of the pronunciation, but could read the second and third readers. On being asked what she expected to do in the United States, she said she expected to support herself independently after a while, but for the time being she would have to ask her brother-in-law and sister to assist her. Horikawa testified that it was his intention to have the appellant make her home in his house, and that he was financially able and willing to receive and support her. In evidence of his ability to support her he presented five letters from prominent wholesale houses of Seattle attesting his standing and financial ability. He testi-

fied that he was conducting a hardware business, and he exhibited copies of his individual income tax returns showing that he paid $25.75 income tax for the year 1918, and $31.19 for the year 1920.

In Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114, it was held that the courts are not forbidden to consider whether the reasons given for the exclusion of aliens agree with the requirements of the statute. Said the court:

"And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact."

It was further held that an alien could not be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination was overstocked. The court alluded to the fact that in Act February 20, 1907, § 2 (34 Stat. 898), which was then in force, persons likely to become a public charge were mentioned between paupers and professional beggars, and along with idiots and persons dangerously diseased or certified to have a mental or physical defect of a nature to affect their ability to earn a living, and that the provision excluding aliens likely to become a public charge was presumably to be read as generically similar to the other provisions with which it was associated. Although in the act of February 5, 1917, under which the present case is to be determined, the location of the words "persons likely to become a public charge" is changed, we agree with Judge Ray in Ex parte Mitchell (D. C.) 256 Fed. 229, that this change of location of the words does not change the meaning that should be given them, and that it is still to be held that a person "likely to become a public charge" is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public. If there were in this case any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public, we should have no hesitation in saying that the conclusion of the board of special inquiry would be unassailable in a court. But there is in the record no such evidence. Here is an able-bodied woman of the age of 25 years, with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and a manufacturer of artificial flowers, with a disposition to work and support herself, and having a well-to-do sister and brother-in-law, domiciled in this country, who stand ready to receive and assist her. We cannot see how it can be said that there was any evidence that she was likely to become a public charge. We think the case comes directly within the ruling in the Gegiow Case. There the aliens came from a remote province of Russia. They knew no trade. They knew no language but their own. Only one could read or write in his own language. They had sums aggregating slightly more than $25 each. They were not employed, and had no promise of employment. They were ticketed through to Portland, Or., where, owing to depressed labor conditions, the prospect of their obtaining work "was most unfavorable." See Howe v. United States, 247 Fed. 292, 159 C. C. A. 386; Ng Fung Ho v. White (C. C. A.) 266 Fed. 765,

769; Ex parte Mitchell (D. C.) 256 Fed. 229; United States v. Howe (D. C.) 235 Fed. 990.

The judgment is reversed, and the appellant is discharged from custody.

GENERAL ELECTRIC CO. v. OHIO BRASS CO.

(Circuit Court of Appeals, Third Circuit. January 6, 1922.)

No. 2705.

1. **Patents ⟸26(1)—Where elements are old, invention must be found in combination.**
   Where all the elements of the combinations of the claims in suit are old, invention, if any, must be found in the combinations alone.
2. **Patents ⟸328—925,561, claims 1 to 4, for high-tension electrical conduction system held anticipated.**
   The Buck and Hewlett patent, No. 925,561, claims 1 to 4, for a system for high-tension electric transmission, in which the conductor is suspended from the cross-arms by flexible insulators, *held* void for anticipation.
3. **Patents ⟸328—925,561, claim 6, held void for want of invention.**
   The Buck and Hewlett patent, No. 925,561, claim 6, for a high-tension electric transmission system, in which an insulator covered by another patent is combined with other elements all of which were old, and without which the insulator could not be used, does not disclose invention apart from that disclosed by the insulator patent, and is void.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Suit for infringement of patent by the General Electric Company against the Ohio Brass Company. From a decree dismissing the bill (275 Fed. 213), complainant appeals. Affirmed.

Charles Neave, William G. McKnight, and Clarence D. Kerr, all of New York City, for appellant.

Drury Cooper, of New York City, and Charles M. Nissen, of Chicago, Ill., for appellee.

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

WOOLLEY, Circuit Judge. The patent in suit is for a system of suspending electric conductors in power circuits of high potentials. By its bill of complaint the General Electric Company, owner of the patent, charges the Ohio Brass Company with contributory infringement by selling insulators of its own make for use in transmission systems installed by others within the terms of the patent. The issues are invalidity and infringement. The District Court held the respondent not guilty of contributory infringement because it found the systems for which the respondent had furnished insulators did not themselves infringe the patent. 275 Fed. 213. From the decree dismissing the bill the complainant took this appeal.

The art to which the invention of the patent relates is that of electricity. The branch of the art in which the invention claims a place is that of electrical transmission.

Electrical transmission had its rise in the Morse telegraph. In order to transmit electricity from one point to another, resort was had to bare wires carrying feeble currents at low pressure. These wires were stretched on poles, their support being effected and the flow of current maintained by fastening the wires to small glass insulators mounted on wooden pins vertically affixed either upon cross-arms attached to the poles or upon the poles themselves. With the coming of the telephone, involving a like need of electrical transmission at like low pressure, the same expedients were resorted to. But with the advent of the incandescent lamp, electric railways, and wireless telegraphy, and with the corresponding development of the dynamo and motor, there arose a demand for the transmission of electric current in greater volume and at higher pressure. To meet this demand the same expedients of wires and poles were employed and also the same expedients of insulation; the latter, however, being enlarged, increased in number, varied in design and position to meet the behavior of electricity under increasing pressure or voltage. These electrical changes in the march of the art, always involving increase in the size and therefore in the weight of the apparatus of insulation, brought with them corresponding changes in the mechanical construction of the supporting means. To the expedient of poles with cross-arms was added the expedient of high steel towers with cross-arms, used mainly in systems involving the need of heavy insulation or economy of long spans. There also came into systems, whether of poles or towers, the practice of "dead-ending" the line to the pole or tower at a point where it made a turn, whether horizontal in going around a corner or vertical in going over an obstruction or in ascending a mountain. The expedient of dead-ending a live wire included, as its name denotes, the insulation of the wire from the pole or tower to prevent grounding. But dead-ending made an instant call for means of continuing the transmission of current beyond. This need brought into the art another expedient termed "jumper connection." This was a wire connected with the live wire in front of the point at which it had been dead-ended, then jumped over the cross-arm—either above, to the side of, or below the same—to a connection with the live wire, similarly dead-ended, on the other side of the cross-arm, whence the current was transmitted and carried forward.

At this stage of the art Buck and Hewlett, on February 15, 1906, filed in the Patent Office an application for a patent which recited the problems of power circuits of high potentials and disclosed what they conceived to be an invention solving them. In their specification they said:

"The present invention relates to overhead suspension of electric conductors and more especially conductors of power circuits of high potentials.

"Heretofore it has been the standard practice to provide the poles or cross-arms with pins upon which were placed vertical insulators to which the conductors were directly attached. These insulators, in order to adapt them for use with high potential circuits, were made up by superposing a plurality of horizontal petticoats upon each other, the number of such petticoats depending upon the voltages of the currents, and accordingly the in-

sulators for use with currents of very high potential were of great length. Besides being expensive these insulators are objectionable and practically useless on account of the leverage on the insulator and pin becoming so great as to impose stresses on the insulating material. Moreover, when exposed to heavy rain, the drip from one petticoat to the next below it, and so on down, tend to provide a low resistance path for the current so that it often occurs that the petticoats are short-circuited and the current arcs over the insulator to the pole."

Continuing, the applicants said:

"The object of our invention is to avoid these objections and accordingly we do away with the usual insulators and pins and provide the conductor with flexible insulating tension sections which are directly connected to the cross-arms so that each span of the conductor is dead-ended at each tower or pole and a jumper or connecting loop joined to the conductor at opposite ends of the insulating sections and made of sufficient length to hang clear of the cross-arm."

There were seven claims in this application. The first three provided means for insulating the spans of the conductor by a series of flexibly connected insulating members with dead-ending at *each* pole; the last four were directed to the insulating member, or disc-insulator, itself.

While this joint application was pending, Hewlett alone, on April 20, 1907, applied for a patent for an insulator. By his application he showed two forms of discs flexibly connected in series; discs of one form being the same as the discs of the insulator in the joint application of Buck and himself then pending. Hewlett's sole application also disclosed, not the only way perhaps, but certainly the preferred way, of using the insulator, namely, by dead-ending the conductor at each pole, within the conception of the Buck and Hewlett application. Though clearly adapted to the purpose, nothing was then said about using the flexible insulator as a means to suspend the conductor below the cross-arms of the pole. Seven years later Hewlett was granted Letters Patent No. 1,110,934 for his insulator. Merit in this invention is evidenced by the 900,000 Hewlett insulators in use. But this patent to Hewlett for an insulator is *not* the patent in suit.

We have spoken of the patent to Hewlett for an insulator in order clearly to distinguish it from the patent in suit and finally to exclude it from our decision, because the patent in suit is not for an insulator; it is for a system which in its combination includes an insulator as one of the elements.

The next step in the Patent Office proceedings on the joint application of Buck and Hewlett relevant to this discussion occurred on October 31, 1907. On that day the Patent Examiner, reviewing the claims of the application, found that "the invention, if any, appears to reside in the specific insulators, as the jumper connection system is shown to be old," and thereupon restricted the case to the "specific insulator." Whereupon, Buck and Hewlett filed another joint application for a patent, later permitting their original application to lapse. In due course Letters Patent No. 925,561 were granted Buck and Hewlett (on their second application) for suspension of high-tension lines. This is the patent in suit.

We have found this lengthy preface necessary to an examination of just what the invention of the patent in suit is about.

Turning to the specification of the patent, Buck and Hewlett define the high potentials to which their invention "especially" relates as between 60,000 and 100,000 volts; repeat the practices of the art and the object of their invention in the language of their first joint application, later abandoned; and then show how their invention should be practiced, namely:

"In carrying out our invention, we do away with the usual insulators and their pins and provide at certain of the supporting towers a vertical series of insulators flexibly connected to each other and attached by a hooked joint at the upper end to the under side of a cross-arm of the tower and at the lower end by an ear or other suitable connection to the suspended conductors. At certain other towers the conductor is dead-ended through a horizontal series of flexibly connected insulators on each side of the cross-arm and a jumper connection joins the dead ends of the conductor and hangs freely by gravity below the cross-arm. The dead-ending of the conductor will occur at angles in the conductor in order to take the side stress due to change in direction thereof, and is preferably used at least at every fourth or fifth tower on tangents or straight sections in order to prevent longitudinal waves of the conductor due to wind. The dead-ended arrangement may be employed at all points of suspension where preferred."

The remainder of the specification is devoted to a statement in detail of the structure of the insulator element of the invention. As the invention, differently claimed, involves insulators both in suspending the conductor from a cross-arm and in dead-ending the conductor to a cross-arm, the patentees disclose two kinds of insulators in series; the structure of the insulator shown in Figure 2 of the Buck and Hewlett patent for a system being the same as the structure of the insulator shown in Figures 1 and 2 of the Hewlett patent for an insulator, and the structure of another insulator shown in Figure 3 of the Buck and Hewlett patent being the same as the structure of the insulator shown in Figures 4 and 5 of the Hewlett patent.

Buck and Hewlett Suspension of High-Tension Lines.

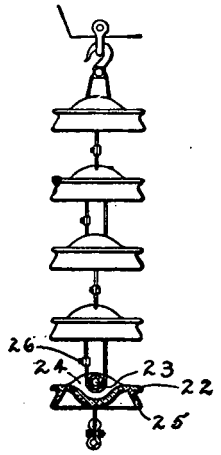
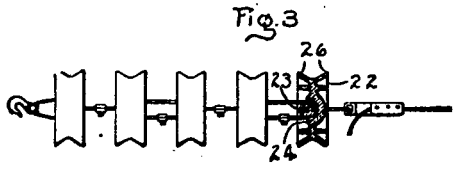
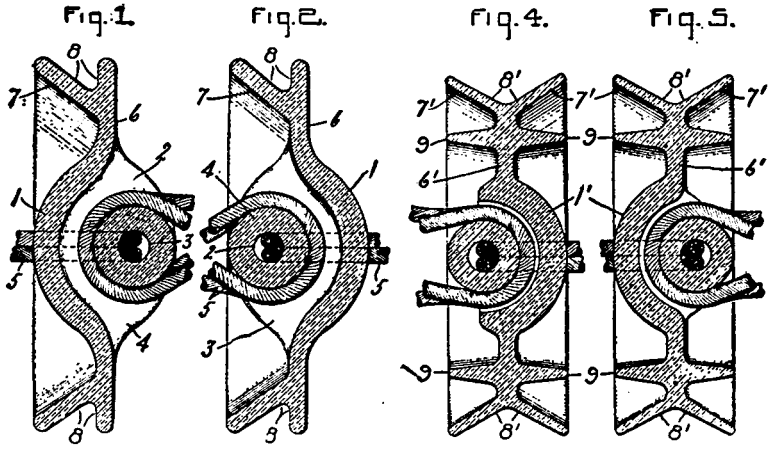


Fig. 2

Fig. 3

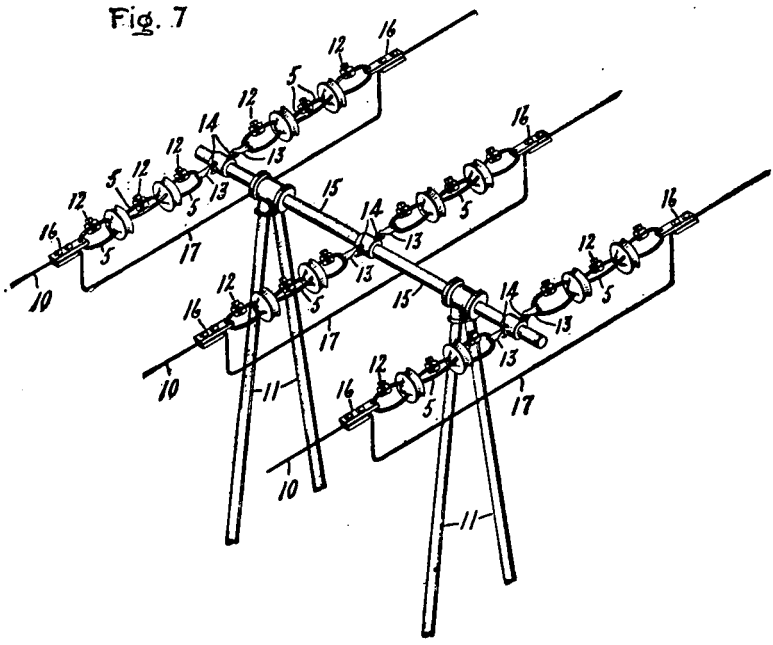


Hewlett Insulator.

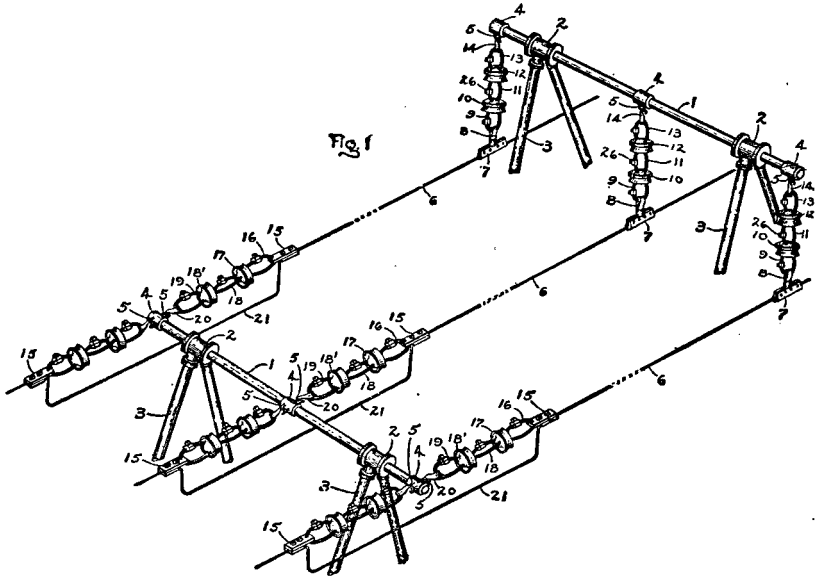


The relation of the invention of the Hewlett patent to the invention of the patent of Buck and Hewlett and the manner in which the respective patentees intend their inventions should be practiced are shown by the diagrams of the patents reproduced as follows:

Hewlett Insulator.



Buck and Hewlett Suspension of High-Tension Lines.



In the light of the specification aided by diagrams we now read the claims of the Buck and Hewlett patent in suit. They are claims 1, 2, 3, 4 and 6. Claim 6, regarded by the complainant as "fundamentally descriptive of the novel feature of the invention," is as follows:

"In a system of high-tension line suspension, the combination of towers provided with cross-arms, of conductor spans freely suspended beneath said cross-arms by series of flexibly connected disc insulators."

In this combination of overhead suspension there are three elements: First, towers; second, conductor spans; and, third, insulators of a described kind. Free suspension of the conductor may conceivably be a fourth element, yet it seems more like a natural result of the use of depending insulators. This claim covers suspension by an insulator where the conductor is not dead-ended but where it passes under the cross-arm.

Claim 1 is as follows:

"In a system of high-tension line suspension, the combination of periodically dead-ended spans joined by jumper connections, and intervening spans freely suspended beneath cross-arms of the supporting towers."

The elements of this claim are: First, conductor spans (second) periodically dead-ended with (third) the associated expedient (where the conductor continues farther) of jumper connections, with the result of free suspension of intervening spans. In claim 1, it is observed, there is no element of an insulator.

Between the extremes of claim 1 and claim 6 are inserted claims 2, 3 and 4, which may, for present purposes, be stated as containing the element of insulators flexibly connected in series with freely suspended spans, and dead-ending and jumper connections in different combinations. In these claims the insulators are not described as discs. Unless limited by the specification they may be of any design or shape.

Several defenses to infringement of these claims were raised and tried. Briefly stated they were, noninfringement, on the grounds found by the trial judge (275 Fed. 213), and invalidity, on the ground that the patentees were not the first and original inventors; that they were not joint inventors; that the invention was anticipated; that the invention was but an adaptation of expedients in power currents of low pressure to power currents of high pressure, requiring nothing more than an increase of insulation; and that the combinations do not themselves involve inventive conception. While most of these defenses are debatable—some of them raising grave doubts—we prefer to decide the case on that defense which appeals to us as involving no doubt, namely, the one concerning the fundamental issue of inventive conception.

[1] On this issue the complainant concedes that, with qualifications, all elements of the combinations of the claims in suit are old. Therefore, it is certain that invention, if any, must be found in the combinations alone. Leeds & Catlin v. Victor, 213 U. S. 325, 332, 333, 29 Sup. Ct. 503, 53 L. Ed. 816. We understand that the complainant does not deny that the combinations themselves were, in their essentials, found in systems of lower potentials and in systems of higher potentials, the former exemplified by railways and the latter by wireless telegraphy. But the complainant says that in determining invention in the patent there should not be charged against it like combinations in systems with extreme potentials because of great differences in the problems of the several systems. But these differences, we are constrained to believe, are electrical differences with corresponding mechanical differences of weight and strain, solved by insulators designed with reference to both. We are prompt to see that these differences have a bearing on invention of an insulator,—as for instance, the transformation from a rigid vertical insulator to a suspended flexible insulator,—but we are slow to see that they bear on invention in a system where electrical problems and their correlative mechanical problems are solved by the insulators themselves.

Much of the great volume of testimony on insulation in this immense record, and indeed much of the argument on that subject, we regard as not pertinent to the issue, because the patent is not for an insulator. It is for a system of suspending conductors by insulators. Yet in the system of the patent, one claim describes quite plainly an insulator covered by the Hewlett patent or insulators of its type; and other claims describe flexible insulators generally; and still another claim includes no insulator at all.

[2] In searching for invention in these claims we first regarded them as though they intended no reference to the Hewlett flexible insulator,

or to disc insulators of that type, but intended generally insulators of whatever shape which are flexibly connected in series. Looking from this viewpoint we found in systems of both low and high potentials in the prior art insulators in series rigidly connected, movably connected, and flexibly connected; also conductors suspended by insulators flexibly connected in series; and in one striking instance we found such insulators in combination with all other elements of claims 2, 3 and 4. This finding also includes within it the narrower combination of claim 1.

The instance referred to was this: In 1900 it became necessary on Washington street, in Indianapolis, to run a feeder line to augment the power of a trolley line. The poles of the line had their cross-arms so filled with pin insulators carrying lines in use that it was impracticable to place upon them any more lines. So, doing what seems to have been an obvious expedient in the circumstances, the workmen hung from the cross-arm of each pole two "globe insulators" flexibly connected in series by which the new conductor was suspended. They also dead-ended the wires at every fifth pole—the precise "periodical" dead-ending of the patent—with jumper connections suspended by gravity underneath the cross-arm on each side of a dead-end, resulting in free suspension of the intervening conductor spans. The reason for suspending the new conductor in the Indianapolis line, instead of mounting it on rigid pins, was precisely the same as in the Chicago Sanitary District line, here charged as infringement, namely, there was no room on top of the cross-arms for more pin insulators, so the line was hung beneath the arms.

But the complainant says the Indianapolis system was of low potential. It was, relatively so. Yet its problems, electrical and mechanical, were different only in degree from those in a system of high potential. That difference is cared for by insulators and their related expedients. But if it were not, still we fail to discern invention in the mere adaptation of this Indianapolis system of low potential to the complainant's system of high potential.

We are of opinion, therefore, that within the general description of the element of an insulator, the invention of the patent in suit was anticipated. On this ground, as well as on the ground which will control our decision on claim 6, we hold claims 2, 3 and 4 invalid. It follows on the same evidence that claim 1 is invalid.

[3] As the insulator in the combination of claim 6, particularly described in the specification and displayed in the diagrams, is the insulator of the Hewlett patent, or an insulator distinctively of its type, we have the question whether the Hewlett insulator, or one falling within its description, can in combination with common expedients of the art be the subject of invention.

Turning to claim 6, we find, as we have said before, the invention to be a combination of three elements: First, towers provided with cross-arms; second, an electric conductor; and, third, disc insulators flexibly connected in series supporting the conductor, thereby producing as a result its free suspension. "Towers provided with cross-arms" were not new. At any rate they are the equivalent of poles with cross-

arms. Poles with cross-arms are an expedient of the art as old as the art itself. Current conductors, of course, are an expedient as old as poles. The only other element is the insulator, and that insulator is intended for use only in suspended connection between cross-arm and conductor. Thus there is a combination which embodies a specific element of suspended insulator in assemblage with expedients of the prior art, which together produce no function other than that which the suspended insulator would itself produce when in operation with these ordinary expedients of the art.

The insulator described in claim 6, whether specifically the insulator of the Hewlett patent or generally an insulator of the Hewlett type, is adapted for both horizontal dead-ending insulation and for suspension insulation. Whether used for one purpose or the other, or for both purposes, such an insulator in overhead suspension can be used —so far as we have been shown or can imagine—only in connection with the very expedients of the art named as elements of the patent combination. At least, claim 6 discloses use of the insulator only with these expedients. There must be a tower or pole with a cross-arm from which to suspend the flexible insulator at one end and a current conductor to be appended to the insulator at its other end. Without these two expedients the insulator cannot work. This being true, can there be invention in a combination of three elements, when two of them, separately free to everyone, are indispensable to the functioning of the third? Or, stated differently, is there invention in a combination which produces no result other than that produced by one of its elements operating in the only way possible for it to operate—that way being through expedients common to the art? Reading claims 6, 2, 3 and 4,—all combinations,—we find, described as an element in each, an insulator of a specific type (claim 6), and an insulator of a more general type (claims 2, 3 and 4), in combination with expedients appropriated from the art without which insulators of neither type can function. The complainant says here is invention. With this we cannot agree because: First, we do not find a combination which in the patent sense is new. Nor can we find such a combination useful beyond that of the insulator itself with the expedients of the art open to it—expedients without which the insulator is useless. If such a combination constitutes invention, then, if patented, use of the common expedients of the art—poles and conductors—would be foreclosed to every one seeking lawfully to use insulators of their own which happen to fall within the class of the insulator elements of the claims. Of such insulators there are numbers patented and extensively used in the art.

As drawn, the patent to Buck and Hewlett grants them not merely a monopoly of a system of electrical transmission, but, in effect, expands the Hewlett patent for an insulator and permits it to embrace, and monopolize, the named expedients of the art, thereby bringing about infringement whenever these expedients are used in combination with insulators of others, which, though not infringing the Hewlett insulator, fall within its broad description. The Buck and Hewlett patent for a system, built around the Hewlett insulator, pretty nearly,

if not entirely, covers the whole art, present and perspective, of insulators in series flexibly connected, whether the insulating members be discs, globes, or other shapes.

We are constrained to hold the claims of the patent in suit invalid and direct that the decree below dismissing the bill be affirmed.

IRVIN et al. v. ANTHONY SHOALS POWER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1921. On Petition for Rehearing December 17, 1921.)

No. 3754.

Corporations ⟸556—Removal of causes ⟸31—Corporation indispensable party to suit for receiver and sale of its property; corporation and complainant being of same state, jurisdiction was not acquired on removal.

Where part of the relief prayed for in a bill is the appointment of a receiver for a corporation and the sale of its property, the corporation is an indispensable party, whether or not the allegations are sufficient to warrant such relief, and where the complainant and the corporation are citizens of the same state, a federal court cannot acquire jurisdiction of the cause by removal.

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

Suit in equity by I. T. Irvin, Jr., executor of the will of J. H. Fitzpatrick, and Mrs. T. M. Fitzpatrick, executrix of the will of T. M. Fitzpatrick, against the Anthony Shoals Power Company and others. Complainants appeal. Reversed.

Horace M. Holden, Stephen C. Upson, and W. R. Jennings, all of Athens, Ga. (Holden, Jennings & Holden, of Athens, Ga., on the brief), for appellants.

T. M. Cunningham, Jr., of Savannah, Ga., Thomas F. Green, of Athens, Ga., and Robert M. Hitch, of Savannah, Ga. (Green & Michael and Erwin, Erwin & Nix, all of Athens, Ga., Hitch, Denmark & Lovett, of Savannah, Ga., and Abit Nix, of Athens, Ga., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This suit was a bill in equity filed in the superior court of Wilkes county, Ga., by the appellants, the personal representatives of J. H. Fitzpatrick and T. M. Fitzpatrick, against the appellees, Anthony Shoals Power Company, a Georgia corporation (herein referred to as the power company), Westinghouse, Church, Kerr & Co., a corporation, William Morris Imbrie & Co., John F. Wallace, and others; the appellees other than the power company being nonresidents of the state of Georgia, and the appellants being resident citizens of that state. On the application of Westinghouse, Church, Kerr & Co., William Morris Imbrie & Co., and John F. Wallace, the

suit was removed to the United States District Court for the Southern District of Georgia. That court overruled a motion to remand the case to the state court, holding that the power company was not a necessary party.

The averments of the bill showed the following: In the year 1907 the Fitzpatricks owned all the capital stock (240 shares) of the power company, which owned a water power and several hundred acres of appurtenant land. The Fitzpatricks also owned options on about 9,000 acres of land, so situated as to be of value to the contemplated development of the water power. In 1907 they entered into a contract with the Electric Properties Company, a New York corporation, which afterwards changed its name to Westinghouse, Church, Kerr & Co. (herein referred to as the Westinghouse Company). In pursuance of that contract, the Fitzpatricks transferred to the Westinghouse Company all the stock of the power company, and the options on the 9,000 acres of land, for $28,000. That contract provided for the Fitzpatricks receiving, in a contingency mentioned, a further stated cash sum and also part of the common stock of a new corporation, the organization of which was contemplated. On August 12, 1909, after the options transferred by the Fitzpatricks had been exercised and the 9,000 acres had become part of the holdings of the power company, the Fitzpatricks and the Westinghouse Company entered into another agreement, which provided as follows:

"1. The title to and ownership of the capital stock of the Anthony Shoals Power Company, and through such stock ownership the title to and ownership of all lands, easements and water rights and other property of said company, shall rest absolutely in the Electric Properties Company, and the parties of the second part individually and as executor as aforesaid admit and declare that they are not and that neither of them is entitled to any right or interest therein or in the proceeds thereof except as created by this agreement.

"2. If the said stock or property is sold by the Electric Properties Company for cash, the sum of twenty-eight thousand dollars ($28,000) with interest at six per cent. shall be first deducted from the proceeds and retained by the Electric Properties Company, and the balance divided between the Electric Properties Company and the parties of the second part, in the proportion of actual cash, with interest at six per cent. thereon, theretofore expended by the Electric Properties Company upon or in connection with said stock of the Anthony Shoals Power Company, or upon or in connection with any property acquired for or in connection with the development of the Anthony Shoals Power Company, or otherwise in any manner for any purpose of the enterprise which is the subject of said agreement of January 22, 1907 (less the $28,000 and interest) and seventy-five thousand ($75,000) dollars with interest thereon at six per cent. representing the investment of the Fitzpatrick interests."

The Westinghouse Company expended about $250,000 on account of the property mentioned in the last-quoted clause of that agreement. The interest of the appellants, under said agreement, in a valid sale of said property for anything approaching its market value, would amount to $88,000 or more; said property being worth the sum of $400,000 or more. The appellees claim that the Westinghouse Company, in December, 1918, sold all said stock in the power company to said Imbrie & Co., for a consideration of $42,000, and that a few days thereafter Imbrie & Co. sold said stock to John F. Wallace for a consideration of $50,000. Wallace was president of the Westinghouse

Company when the contract of August 12, 1909, was entered into, and has continued to be an officer of that company. The considerations of said pretended sales were grossly inadequate. Imbrie & Co. were not bona fide purchasers, but acted merely as a go-between or conduit by means of which the Westinghouse Company and Wallace sought to pass the title of said stock from the former to the latter. The bill prayed that the sales whereby the power company stock was put in the name of Wallace be declared fraudulent, null, and void, and that the same be set aside; that the appellees be restrained and enjoined from disposing of the stock or any property of the power company; that said stock and property be placed in the hands of a receiver and sold through such receiver; and that the proceeds of such sale be distributed in accordance with said contract.

The bill asserts the claim that the appellants have a beneficial interest in land the title to and possession of which are in the power company, and the relief prayed includes the sale of that land under the court's order, and the distribution of the proceeds of the sale between the appellants and others. The suit involves more than a controversy in regard to the stock of the power company. The granting of the relief sought involves divesting the power company's title to and possession of land. Such relief is not grantable in a suit to which the power company is not a party. When the object of a suit is to sell property, put the purchaser in possession, and distribute the proceeds of the sale, the one in possession and holding the title to the property is a necessary and indispensable party. Construction Co. v. Cane Creek, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152; Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Moloney v. Cressler, 210 Fed. 104, 126 C. C. A. 618. That the bill may not state a case against the power company, or one warranting the appointment of a receiver for its property (as to which no opinion is expressed), involves a decision on the merits of the case and is no reason for holding, in passing on the question of removal, that the power company is not a necessary party to a suit seeking the relief which is sought by the bill in this case. A result of the power company being a necessary party and its citizenship being the same as that of the appellants is that the suit was not removable from the state court, the plaintiffs and a defendant corporation which was a necessary party being citizens of the same state.

The decree is reversed, with direction that the case be remanded to the state court.

On Petition for Rehearing.

PER CURIAM. The gravamen of the bill in the above-stated case is: That Westinghouse, Church, Kerr & Co., Inc., formerly Electric Properties Company, held the title to, and ownership of, the capital stock of the Anthony Shoals Power Company, and through such stock ownership controlled the title to, and ownership of, all the lands and other property of said company, the title to which was vested in said Anthony Shoals Power Company. That by the contract of Au-

gust 12, 1909, the plaintiffs became entitled to an interest in the proceeds of said stock and properties of said Anthony Shoals Power Company, whenever sold, and that said Westinghouse, Church, Kerr & Co. became trustee to fairly sell said stock, or property, and to distribute the proceeds thereof in accordance with the agreement. That, instead of so doing, Westinghouse, Church, Kerr & Co. made a fraudulent sale of such stock at an entirely inadequate price, and passed the title to said stock through Imbrie & Co. to one John F. Wallace, an officer of said Westinghouse, Church, Kerr & Co., who took it with entire knowledge of the rights of plaintiffs.

The situs of said shares of stock is at the domicile of the Anthony Shoals Power Company. Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. The bill prays the setting aside of said sale and transfer of said shares of stock to said Wallace, and an injunction restraining the selling or disposing of, or in any manner hypothecating or incumbering, any of said stock, or any of the property the title to which is held by the Anthony Shoals Power Company; that a receiver be appointed to take charge of said stock and all of the property held by the Anthony Shoals Power Company, to carry out said agreement by a sale thereof and distribution of the proceeds. To this bill the Anthony Shoals Power Company, together with Westinghouse, Church, Kerr & Co., and the other parties to said alleged fraudulent sale and transfer, were made defendants.

It is insisted that the Anthony Shoals Power Company is but a formal party to the relief prayed in the bill, and that therefore the case is one removable, although the Anthony Shoals Power Company is a citizen of the same state as plaintiffs. The suit is not one simply for a moneyed recovery against the Westinghouse Company and the other defendants, but is a bill to set up a trust in, and secure its enforcement against, stock, and, on the idea that because of stock ownership the Westinghouse Company could control the action of the Anthony Shoals Power Company, in the property of said company, if sold without a sale of the stock. The bill seeks the setting aside of the sale upon the books of said company of said stock to Wallace and a sale and transfer of said stock in accordance with said agreement.

Even if the bill does not set up the enforcement of an equitable lien against property which has situs within the district where this suit is brought, which is not decided, it unquestionably seeks relief which, if proper, cannot be effectively carried out without either the action of the Anthony Shoals Power Company, or without depriving it of its property, and practically winding it up. That the company itself has no interest in the stock, except to see that it is not improperly transferred upon its books, does not render it merely a formal party. St. Louis & San Francisco Ry. Co. v. Wilson, 114 U. S. 60, 5 Sup. Ct. 738. 29 L. Ed. 66.

The petition for a rehearing is denied.

BALDWIN et al. v. BECKER.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1921.)

No. 5791.

1. **Principal and surety ⟸59—Sureties not compensated not subject to rules as to compensated sureties.**
   Where sureties on a contractor's bond are not compensated, they are to be treated accordingly, and not subject to rules as to a compensated surety.
2. **Principal and surety ⟸100(4)—Alterations held to release sureties.**
   In an action on a contractor's bond for the construction of a bank and hotel building, where the contract provided that any alteration was to be on a written order of the architects only, alterations exceeding $1,000 in value, added to the contract price by agreement between the contractor and the owner, but without the knowledge and consent of the architects or sureties, *held*, to release the sureties.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Action by Gustav Becker against Fred Baldwin and others. Judgment for plaintiff, and defendants bring error. Reversed, and new trial ordered.

John F. Simms, of Albuquerque, N. M. (Neill B. Field, Milton J. Helmick, and C. M. Botts, all of Albuquerque, N. M., on the brief), for plaintiffs in error.

H. B. Jamison, of Albuquerque, N. M., and Herndon J. Norris, of Prescott, Ariz. (Norris & Norris, of Prescott, Ariz., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

CARLAND, Circuit Judge. The defendant in error, hereafter plaintiff, commenced this action against plaintiffs in error, hereafter defendants, to recover damages upon a bond given to secure the faithful performance of a contract executed by and between defendant M. L. Porter and the plaintiff, whereby Porter agreed to construct the Becker bank and hotel building at Springerville, Ariz. A jury was duly waived and the action tried by the court, which rendered a judgment in favor of plaintiff for the amount claimed. The defendants Fred Baldwin, Lee Baldwin, and F. G. Bartlett, who were sureties on the bond, took a severance from Porter, the contractor, and have brought the case here, assigning error.

There was no error in overruling the motion for judgment on the pleadings, nor in overruling the motion for judgment at the close of plaintiff's case. The last motion was without effect, as the court reopened the case at plaintiff's request, additional evidence was taken, and the motion was not renewed.

It is assigned as error that the judgment entered is contrary to and directly in conflict with the special findings of fact made by the court.

Section 700, R. S. U. S. (Comp. St. § 1668). The particular matters in which the judgment is alleged not to be supported by the special findings arise out of certain alterations in the work required by the contract between Porter and the plaintiff. The provisions of the contract in relation to alterations is as follows:

"No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and, when so made, the value of the work added or committed shall be computed by the architects, and the amount so ascertained shall be added or deducted from the contract price. In case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties to this contract shall pay one-half of the expense of such reference."

Article 1 of the contract is as follows:

"The contractor, under the direction and supervision of Trost & Trost, architects, acting for the purposes of this contract as agents of the said owner, shall and will provide all material and perform all work mentioned in the specifications and as shown by the drawings prepared by the said architects for the erection and full completion of Becker bank and hotel building at Springerville, Ariz., which drawings and specifications are identified by the signatures of the parties hereto."

The court in reference to alterations found as follows:

"(7) That during the construction of the building the owner and the contractor agreed that the contractor should widen the sidewalk provided for in the specifications to make it cover an irrigation ditch under the sidewalk around the building, at an additional cost of one hundred ($100.00) dollars, to be added to the contract price, and which work was done by the contractor without the same having been authorized by the architects in writing, or the value thereof fixed by the architects, and which additional work was not known to the sureties, nor consented to by them, and was not included in the specifications or plans.

"(8) That in the course of the work the contractor, by agreement with the owner, changed the brick pilasters in front of the building from a two-inch projection, called for by the plans and specifications, to a four-inch projection, at an agreed valuation, between the contractor and the owner, of one hundred ($100.00) dollars, to be added to the contract price, without the written authority of the architects, or the valuation by them of said work, and without the knowledge or consent of the sureties.

"(9) That in the course of the construction of the said building the contractor, by agreement with the owner, added a partition in the vault in said building, which was not provided for in the plans and specifications, and the value of said additional partition was agreed upon by the owner and the contractor, and said partition was not authorized by the written order of the architects, nor the value thereof fixed by them, and the value of said additional partition was added to the contract price without the knowledge or consent of the sureties.

"(10) That in the construction of said building the contractor, by agreement with the owner, substituted Texas or Oregon pine flooring through a portion of the building in place of native pine flooring required by the specifications, without the written order of the architects, and without the knowledge or consent of the sureties.

"(11) That in the construction of said building the contractor, by agreement with the owner, changed a back coal chute in the building to a stairway

for wood, not included in the specifications, at an additional cost of one hundred sixty-seven and 50/100 ($167.50) dollars, which was agreed upon between the owner and the contractor, and which was not authorized in writing by the architects, nor the value of said additional work fixed by the architects, and which was without the knowledge or consent of the sureties.

"(12) That during the construction of said building the contractor, by agreement with the owner, added an entrance way to the toilets from the barber shop in said building, not included in the specifications or plans, at a cost of seventy ($70.00) dollars, agreed upon between the contractor and the owner, and which was added to the contract price, and which was done without the written order of the architects, and without being valued by the architects, and without the knowledge or consent of the sureties.

"(13) That during the construction of said building the contractor, by agreement with the owner, installed an extra toilet room on the back of the hotel, next to the kitchen, at an agreed price of three hundred thirty-five ($335.00) dollars, which sum was added to the contract price, and which extra toilet room was not included in the plans and specifications for said building, and which was not authorized in writing by the architects, nor the value thereof fixed by the architects, and which was without the knowledge or consent of the sureties.

"(14) That during the construction of the said building the contractor, by agreement with the owner, put in one extra window on the back stairway of the said building, which was not included in the plans or specifications, at an agreed valuation between the contractor and the owner of twenty-seven and 50/100 ($27.50) dollars, which was added to the contract price, and which additional window was not authorized in writing by the architects, nor the value thereof fixed by the architects, and which was without the knowledge or consent of the sureties.

"(15) That during the construction of said building the contractor, by agreement with the owner, put in deadening felt on the second floor of said building, at an agreed price of one hundred twenty-five ($125.00) dollars, which felt was not included in the plans or specifications, and which was not authorized in writing by the architects, nor the value thereof fixed by the architects, and which was without the knowledge or consent of the sureties.

"(16) That during the construction of said building the contractor, by agreement with the owner, added corner beads to protect plastered corners in the building, at an agreed price of eleven and 50/100 ($11.50) dollars, which was added to the contract price of said building, and which corner beads were not included in the plans and specifications for said building, and were not authorized by the architects in writing, nor the value thereof fixed by the architects, and which was done without the knowledge or consent of the sureties.

"(17) That during the construction of said building the contractor, by agreement with the owner, installed certain extra plumbing on extra sinks in said building, not included in the plans and specifications, at an agreed price of thirty-five ($35.00) dollars, which was added to the contract price of said building, and which was done without the written order of the architects, and without the value thereof being fixed by the architects, and which was without the knowledge or consent of the sureties.

"(18) That during the construction of said building the contractor, by agreement with the owner, oiled the floors of said building, at an agreed price of sixty-one and 85/100 ($61.85) dollars, which was added to the contract price of said building, and which was not included in the plans and specifications, and which was not authorized in writing by the architects, nor the value thereof fixed by the architects, and without the knowledge or consent of the sureties."

It was also found that the alterations and additions specified in findings No. 7–18, inclusive, were in the contemplation of the par-

ties at the time the contract and bond were executed; that they were made during the progress of the work and in the manner contemplated by the parties. We fail to discover how the alterations and additions specified in the findings were made in the manner contemplated by the parties signing the contract. The contract provided that no alterations should be made in the work shown by the drawings and specifications, except upon the written order of the architects. The only authority that was ever given for a departure from the specifications was signed by Becker, the owner, in one instance, and by Porter, the contractor, with Becker's O. K., in two others.

It is claimed by counsel for the plaintiff that Trost & Trost, architects, were by article 1 above mentioned appointed the agents of Becker, the owner, and that whatever Becker could do through his agents, he could do himself. Such a construction would entirely nullify article 3, which provides that alterations shall not be made, except upon the written order of the architects. This provision of the contract was of great value to the suretites. It does not seem possible that defendants would have become sureties for the faithful performance of the contract by Porter, the contractor, if the owner, Becker, was to have a free hand in regard to alterations. The sureties, when they became such, looked to the written contract then before them, not to some other contract that Becker and Porter might make. The architects were not only the agents of Becker, so as to bind the latter in what they did about alterations, but they were disinterested experts.

[1, 2] Counsel for plaintiff say in their brief that they do not rely upon the abolition of the doctrine of strictissimi juris, nor upon the fact that the sureties were not injured; but they maintain that only such changes were made and in such a manner as would not release the sureties under the letter of their obligation. It appears from the record that these securities were not compensated in any way for becoming sureties on Porter's bond. They are therefore to be treated accordingly, and not subject to the rule enforced by some courts as to a compensated surety. 21 Ruling Case Law, pars. 200–202. This being so, the following cases are clearly applicable: Miller v. Stuart et al., 9 Wheat. 680, 6 L. Ed. 189; Prairie State Nat. Bank v. U. S., 164 U. S. 233;[1] Reese v. U. S., 76 U. S. (9 Wall.) 13, 19 L. Ed. 541. In 16 Ann. Cas. 349, in a note to Woodruff v. Schultz, 155 Mich. 11, 118 N. W. 579, are collected the authorities on the question of observing the formalities required by a contract in making alterations. The alterations set forth in the findings exceed $1,000 in value. This amount was added to the contract price without the knowledge or consent of the architects or sureties, but simply by the agreement of the contractor and the owner. In Reese v. U. S., supra, Justice Field, in delivering the opinion of the court, said:

"Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the

[1] 17 Sup. Ct. 142, 41 L. Ed. 413.

sureties. They have a right to stand upon the very terms of their undertaking."

The other errors assigned relate to the sufficiency of the evidence to support the special findings, and we do not think that under the decisions of this court they are properly raised.

In view of what has been said, however, we are of the opinion that under the findings of the trial court the sureties were discharged, and therefore the findings do not support the judgment, which is reversed, and a new trial ordered.

SCHONFELD v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 56.

1. **Bankruptcy ⊕=495—Perjury ⊕=33(1)—Evidence held to sustain conviction for concealing property from trustee and for perjury.**
   Evidence showing the improbability of bankrupt's testimony that he was robbed of a wallet containing diamonds worth $115,000 just before his bankruptcy *held* sufficient to sustain a conviction for perjury in testifying to the robbery before the referee, and for fraudulently concealing from his trustee the diamonds he claimed were stolen.
2. **Criminal law ⊕=1159(1)—Verdict is binding as to facts.**
   Finding of the jury on questions of fact is binding on the Court of Civil Appeals on writ of error to a conviction for crime.
3. **Bankruptcy ⊕=242(2)—False testimony before referee is admissible on charge of perjury.**
   Where accused went to trial without objection on an indictment containing separate counts charging concealment of property from the trustee in bankruptcy and perjury, his testimony before the referee was admissible on the perjury charge, notwithstanding Bankruptcy Act, § 7a, subd. 9 (Comp. St. § 9591), providing that no testimony given by a bankrupt on his examination shall be offered against him in any criminal proceeding.
4. **Criminal law ⊕=824(8)—Accused must request charge limiting effect of evidence.**
   Where accused was tried under an indictment containing two counts, and evidence was offered against him which was competent as to one of the counts, he cannot complain that the court did not limit the effect of such evidence to that count, where he did not direct the court's attention to that question.
5. **Bankruptcy ⊕=495—Schedules held admissible in prosecution for concealment of property and perjury.**
   In a trial for concealing property from a trustee in bankruptcy and for perjury in the testimony before the referee, it was not error to admit in evidence the schedules in bankruptcy filed by accused, without limiting them to the perjury count.
6. **Perjury ⊕=32(7)—Testimony by bankrupt before referee held admissible.**
   Where the indictment charged accused with perjury and false testimony before the referee in bankruptcy to the effect that he had been robbed of certain diamonds just before his bankruptcy, and the transcript of his testimony before the referee showed that he had first testified to the robbery before the commissioner, but that in his testimony before the referee he adopted his former testimony and substantially repeated it,

⊕=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 256 U. S. —, 42 Sup. Ct. 316, 66 L. Ed. —.

with additions, it was not error to admit in evidence the testimony given before the referee.

7. **Witnesses ⟸380(5), 397—Government can question own witness as to previous statements, when surprised by testimony, but such statements do not establish offense.**

Where the government is surprised by the testimony of a witness called by it, who was related to accused, it can question him as to previous statements by him inconsistent with such testimony, though proof of such inconsistent statements is not sufficient to establish the offense.

8. **Criminal law ⟸651(½)—Court need not accompany jury on view of premises.**

Permitting the jury to view the scene of the crime is within the discretion of the court, and is permitted to enable the jury to understand the evidence; but it does not constitute the taking of testimony, and it is not necessary that the judge accompany the jury.

9. **Bankruptcy ⟸495—False swearing in bankruptcy does not require same proof as perjury.**

False swearing in bankruptcy, contrary to Criminal Code, § 125 (Comp. St. § 10295), is not equal in enormity to the crime of perjury denounced by the general statute, and the burden of proof in perjury cases, requiring two witnesses to contradict the oath of accused, is practically annulled, and the burden on the government is only to prove beyond a reasonable doubt the guilt of accused.

10. **Criminal law ⟸1134(4)—Denial of new trial is not reviewable.**

Refusal to grant a new trial after a verdict of guilty is not reviewable.

11. **Criminal law ⟸1129(8)—Filing of additional assignments after writ of error not approved.**

Since the filing of assignments of error is a condition to the granting of the writ of error, under rule 10 (235 Fed. vi, 148 C. C. A. vi), errors not assigned in accordance with the rule will be disregarded, unless a plain error is apparent; the growing practice of allowing additional assignments after the writ of error is issued being disapproved.

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

Samuel Schonfeld was convicted of fraudulently concealing property from his trustee in bankruptcy, contrary to Bankruptcy Act, § 29b (Comp. St. § 9613), and falsely testifying before the referee in bankruptcy, contrary to Criminal Code, § 125 (Comp. St. § 10295), and he brings error. Affirmed.

Elijah N. Zoline, of New York City, for plaintiff in error.

William Hayward, U. S. Atty., of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error was indicted by the grand jury on two counts. The first count charged that during the year 1920, including the 9th of July, 1920, the plaintiff in error was engaged in the jewelry business in New York City, and that on the 9th of June, 1920, a petition in bankruptcy was filed against him in the District Court for the Southern District of New York, and he was adjudicated a bankrupt. It alleges that, while a bankrupt, he unlawfully and fraudulently concealed from his trustee in bankruptcy, $100,000

worth of diamonds; that the plaintiff in error had a large number of creditors, who proved claims against him; that there were not sufficient assets or property belonging to the bankrupt to pay all the claims of his creditors in full.

The second count alleges that the plaintiff in error committed perjury in violation of section 125 of the federal Criminal Code (Comp. St. § 10295), in that he took an oath before a referee in bankruptcy and testified falsely that on June 5, 1920, two men, at his place of business in New York City, forcibly took from his possession a wallet containing the diamonds in question, whereas, in truth and fact, no such robbery took place, and it is alleged that the plaintiff in error did not believe it to be true, when he testified, that on June 5, 1920, the two men forcibly took from his possession the wallet containing the diamonds in question.

[1] The evidence offered by the government was sufficient to warrant the submission of the question to the jury as to whether or not such a robbery took place as stated by the plaintiff in error in his testimony; also the question of concealing. If it was true, as he stated, that he had jewelry worth $110,000, and it was false, as he stated, that he was robbed of this jewelry, his failure to turn it over to his trustee in bankruptcy was sufficient evidence to warrant the submission of the evidence to the jury of the question of his concealment of his assets. It likewise was testimony in proof of the charge of perjury. On the trial he did not testify, and no evidence was offered in his behalf.

The plan and photograph of the place of business was offered in evidence. The two strangers who, he says, entered, posed as customers, and negotiated with him in the inner office, and were before his open safe while he held his entire stock of diamonds within their sight. By examining the plan, it is disclosed that the alleged robbers, in making their escape, would have to pass from the inner to the outer office, and then through a door from the outer office leading into the hall of the building. When outcry was made by him, and this was made, according to the plaintiff in error's story, immediately upon the commission of the assault, one Wertheim rushed from his factory toward the office. The door leading from the factory opened into the outer office almost adjoining the main door, which opened from the hall. Wertheim, in doing this, would traverse a point which the robbers would necessarily pass in their flight. He says he saw no one. One Tammas was standing in the hall three or four minutes waiting for an elevator, and he saw no one pass. An adjoining tenant rushed from his office upon hearing the outcry, and was advised at once that a robbery had been committed. He descended through the stairway to the street and saw no one. This, together with the evidence of the physical conditions, as shown by the plans of the office, was the testimony which the government offered to disprove the plaintiff in error's claim of a robbery.

[2] There are circumstances which, as given in the narrative of the plaintiff in error to the police officers, bear out the government's claim that the robbery was a pretended one, and never in point of fact occurred. Evidence was offered to show the condition of the plaintiff

in error's business. This showed a poor financial condition and indicated a motive for pretending a robbery and thus aid in the concealment of the diamonds. The finding of the jury on these questions of fact is binding upon us, and unless there be error of law in the rulings of the court, the conviction must stand.

[3, 4] The first assignment of error is that the court below, in violation of section 7a, subd. 9, of the Bankruptcy Act (Comp. St. § 9591), admitted in evidence the testimony of the plaintiff in error before the referee in bankruptcy, without limiting such testimony to the perjury count alone. But the plaintiff in error, without objection, went to trial on both the concealment and perjury charges. Section 7a, subd. 9, provides that no testimony given by a bankrupt upon his examination shall be offered in evidence against him in any criminal proceeding. The court was not requested to limit or restrict the evidence when offered, and the claim now presented, that this evidence should not have been admitted on the concealment charge, was never presented below. Undoubtedly, it was competent and admissible for the perjury charge. As to the concealment charge, the testimony would have no value to the government. It did not tend to prove that the plaintiff in error concealed his assets, and, quite the contrary, it tended to disprove concealment. That the testimony was false was the essence of the perjury charge, and it was properly admissible. It had no bearing beyond the perjury charge. While it was wholly incompetent as to the concealment count (Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448), and was competent as to the perjury count of the indictment, it was not error to admit such testimony upon this trial of both counts of the indictment. Below it was necessary for counsel to direct the court's attention by an instruction to the limitation of such testimony in order to raise the question which is now presented by the plaintiff in error.

[5] Error is assigned for the admission, without limitation to the perjury count, of the schedules in bankruptcy filed by the plaintiff in error. We find no error in this.

[6] Error is assigned in admitting in evidence, and permitting the prosecuting attorney to read in the record, excerpts from the testimony given by the plaintiff in error before the referee in bankruptcy. It is said that as to this testimony there was no proof that the excerpts read from the manuscript of the proceedings before the referee were true and correct copies of the testimony given by the plaintiff in error before the referee, or that such testimony was, in fact, testified to by the plaintiff in error in the manner and form charged in the indictment. The plaintiff in error testified as to the alleged robbery before a special commissioner. Reference was made to this testimony before the referee. In his testimony before the referee (it is this testimony that is charged in the indictment to be false), he reiterated the story given before the special commissioner that two men forcibly took the wallet from his possession. He repeated and adopted this testimony before the referee, and said further that he paid $115,000 for the diamonds that were in his wallet that was taken from him; also that the wallet contained nothing but diamonds, and that nothing else was taken from

his place. He described conditions as to the office and the arrangement of furniture on the day of the alleged robbery. We are satisfied that his testimony as given before the referee was but a repetition, and as full and complete, as that given before the special commissioner.

[7] Upon the trial, the government called one Joseph Schonfeld, the nephew of the plaintiff in error. He testified that the plaintiff in error gave him the diamonds for mounting to take to the setter, and that he saw some men in the office. He was then asked if he testified before the special commissioner that he did not know whether anybody was in the office at the time. Objection was made to this, and it is for the allowance of this question that error is now assigned. No attempt was made by the government to show that Joseph Schonfeld had previously testified that he did not see the two men in question. We find no error in this. The witness apparently had given testimony which he was not adhering to, and his testimony on the trial was a surprise to the government. Due to the fact, perhaps, that his uncle was on trial, or possibly that he failed to remember his former testimony, it was proper that the court in its wise discretion permit counsel for the government to interrogate him as to his former testimony, by asking him as to the questions and answers previously asked and given on such examination. No objection was made to this, nor was exception taken. The case is different from that of Rosenthal v. United States, 248 Fed. 684, 160 C. C. A. 584, relied on by the plaintiff in error. There all the previous testimony given by the witness at the trial (and he was the main witness to prove the charge of the indictment) was asked in question and answer form. The government was relying on this witness' testimony to prove its case. It was held that it did not constitute evidence against the plaintiff in error and by this method evidence could not be created. The court held that there was no evidence of the charge of the indictment. The questions which were asked the witness Schonfeld were not held by the court to prove the fact that there were not robbers in plaintiff in error's shop, nor was it relied upon as such proof by the government. In the discretion of the court, it was properly received. Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

[8] Nor was it error for the court to allow the jury to view the premises where the alleged robbery occurred, or in failing to accompany the jury while the latter was viewing the premises. This was done upon consent of both counsel and the court. Permitting a jury to view the scene of the crime is within the discretion of the court. People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368. As stated by the trial judge, the view was permitted for the purpose of enabling the jury to understand the evidence. It did not constitute the taking of testimony. It is the presentation of evidence that requires the presence of a judge, jury, and defendant. Nothing is claimed to have occurred which was improper or prejudicial to the plaintiff in error while the jury was taking a view of the premises.

[9, 10] False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required

in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing. Kahn v. United States, supra. Where the probative force of the testimony is equal to that of two witnesses, or to one witness corroborated, it is sufficient. United States v. Wood, 39 U. S. (14 Pet.) 430, 10 L. Ed. 527. The strictness required under the old rule has been relaxed, and convictions have been sustained upon the testimony of a single witness, corroborated by the circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other. Hashagen v. United States, 169 Fed. 396, 94 C. C. A. 618. A conviction of perjury was sustained against a defendant in the state court, where he swore he did not remember certain material facts and the testimony showed that he did remember them. People v. Doody, 172 N. Y. 165, 64 N. E. 807. Disproving plaintiff in error's tale of a robbery as here shown was sufficient. The refusal to grant a new trial after the rendition of the verdict is not reviewable. Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

[11] Additional assignments of error were filed on April 7, 1921. The writ of error was allowed on February 9, 1921. The filing of assignments of error is a condition to the granting of the writ of error (rule 10, 235 Fed. vi, 148 C. C. A. vi), and errors not assigned according to the rule will be disregarded, unless a plain error is apparent. This rule should be adhered to. The practice is growing too frequent of assigning additional errors after the writ has been allowed.

Judgment affirmed.

HONEYCUTT v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 17, 1921.)

No. 1913.

1. **Criminal law ⟸395—Searches and seizures ⟸5—Stolen goods, seized on warrant issued without oath or affirmation, should be returned, and not used as evidence.**

   Where a warrant to search for stolen merchandise was issued without affidavit or affirmation, as required by Const. Amend. 4, and Act June 15, 1917, tit. 11, §§ 3, 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼c, 10496¼d), the goods were illegally seized, and should have been returned on petition for their return, and were incompetent as evidence on a trial for receiving the stolen goods.

2. **Criminal law ⟸395—Searches and seizures ⟸5—Checks not mentioned in affidavit for search warrant should have been returned, and were incompetent as evidence.**

   Where a search warrant was based on an affidavit stating that defendant's books and accounts were necessary to a full and complete investigation of alleged robberies, and asked for an order for the seizure and se-

questration of such papers and accounts as might be necessary, checks not mentioned or described in the affidavit were illegally seized, and a petition for their return should have been granted, and the checks were incompetent as evidence.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh; Henry G. Connor, Judge.

Allen J. Honeycutt was convicted of buying, receiving, and having in his possession articles stolen from an interstate shipment, and he brings error. Reversed.

William B. Jones, of Raleigh, N. C. (Armistead Jones & Son, of Raleigh, N. C., on the brief), for plaintiff in error.

M. B. Simpson, Asst. U. S. Atty., of Elizabeth City, N. C. (E. F. Aydlett, U. S. Atty., of Elizabeth City, N. C., on the brief), for the United States.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. Defendant was convicted on indictment charging him with buying, receiving, and having in his possession "certain articles which had constituted a part of an interstate shipment, to wit, thirty-eight (38) bolts of blue denim," stolen from a car at Apex, N. C.

On the trial the government relied on testimony of persons who testified they had stolen the goods from the car and sold them to the defendant. As corroboration of this testimony, and as evidence of his guilty knowledge, the government was allowed to introduce some of the stolen goods and canceled checks seized in defendant's store under search warrants.

The hearing of a petition to require the goods and checks to be returned as illegally seized was postponed to the day of trial and then refused. The answer of the district attorney, the marshal, and the special agent of the Department of Justice alleged that the goods and checks were seized and held in the due execution of search warrants duly issued by the United States commissioner on October 10, 1920. The affidavit, warrants, and returns of the marshal thereon were attached to the answer. From these it appears that the first search warrant for the goods described therein was issued without an oath or affirmation.

The second warrant was based on an affidavit of a special agent of the Department of Justice, stating that in the execution of the warrant and search for the goods "large quantities of goods, wares, and merchandise stolen from interstate shipments were found in possession of said Honeycutt, and that the books and accounts of said Honeycutt are necessary to a full and complete investigation of the alleged robberies." In the affidavit the agent asked "for an order for the seizure and sequestration of such papers and accounts as may be necessary to such investigation and inquiry." The warrant commanded the marshal "to seize such books, records, and accounts of the said A. J. Honeycutt." In the execution of this warrant the marshal seized a number of paid checks issued by defendant to one or more of the persons alleged to have stolen the 38 bolts of denim.

[1, 2] Thus it appears that the warrant to search for the stolen merchandise was issued without affidavit or affirmation, as required by the Fourth Amendment to the Constitution, and chapter 30, Acts 1917, 40 Stat. 228 (Barnes' Federal Code, § 10052; Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼c, 10496¼d). Under the second warrant checks were not described or mentioned in the affidavit. The second warrant and the affidavit on which it was based, also show that the warrant was obtained and the checks were seized for the express purpose of using them as evidence against the defendant.

The goods and the checks were therefore illegally seized, and the petition for their return should have been granted. It follows that the goods and checks were incompetent as evidence against the defendant. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 314. It is due to the District Court to say that the cause was tried before the decision of the Gouled Case.

Reversed.

HONEYCUTT v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 17, 1921.)

No. 1933.

1. **Criminal law ⇐1168(1)—Failure to order return of goods illegally seized immaterial, where they were not used as evidence.**
   In a prosecution for receiving goods stolen from an interstate shipment, the inadvertent omission from an order for the return of goods illegally seized of certain of the goods, or the failure to return such goods, was immaterial, where they were not used in evidence.

2. **Witnesses ⇐277(1)—Error to permit district attorney to use in cross-examination checks illegally seized and ordered returned.**
   On a trial for receiving stolen goods, where checks illegally seized had been ordered returned, it was error to permit the district attorney to use such checks in cross-examining defendant.

3. **Criminal law ⇐1186(4)—Judgment not reversed because of use of checks illegally seized, which added nothing to defendant's testimony.**
   Where, on a trial for receiving goods stolen from an interstate shipment, defendant testified without objection to his purchase of the goods late at night from boys, who brought them to his country store, and to the giving of checks for the purchase money, and to writing on the face thereof "for labor," the checks themselves added nothing to the evidence already adduced, and, though they had been ordered returned as illegally seized, the judgment will not be reversed, because the district attorney was permitted to use them in cross-examining defendant, in view of Judicial Code, § 269 (Comp. St. Ann. Supp. 1919, § 1246), requiring the disregard of technical errors or defects not affecting the substantial rights of the parties.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh; Henry G. Connor, Judge.

Allen J. Honeycutt was convicted of buying, receiving, and having in his possession goods stolen from an interstate shipment, and he brings error. Affirmed.

William B. Jones, of Raleigh, N. C. (Armistead Jones & Son, of Raleigh, N. C., on the brief), for plaintiff in error.

M. B. Simpson, Asst. U. S. Atty., of Elizabeth City, N. C. (E. F. Aydlett, U. S. Atty., of Elizabeth City, N. C., on the brief), for the United States.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. The indictment charged that the defendant, on July 19, 1920, did—

"unlawfully, willfully, and feloniously buy, receive, and have in his possession, from Cecil Pearce and Tom Williams, knowing the same to have been stolen, which had been stolen by Cecil Williams and Tom Pearce from a certain interstate shipment at Raleigh, N. C., on said date, from car S. S. W. 13828 in the possession of the N. S. Railroad Co., an interstate carrier, consigned from Liggett & Myers Tobacco Co., at Durham, N. C., to B. Facenheimer, at Baltimore, Md., and other parties in other states, certain goods and chattels, which had been moving, and which were a part of, and which had constituted, an interstate shipment of freight or express, to wit, ten (10) cases of Chesterfield cigarettes."

[1] Before his trial and conviction the defendant by petition asked for an order directing the return of certain goods and paid checks given by defendant, which had been seized under alleged illegal search warrants. The goods and checks were described in a schedule attached to the petition. On the day of the trial, before it began, the court made an order finding that the goods and checks had been illegally seized and directing the return of goods and checks described in the order. The schedule in the order specifying the goods to be returned did not contain "28½ bolts of overall goods" nor "34 dozen bottles of Vick's salve" mentioned in the petition. As no reason for the omission is suggested in the record or the briefs, we assume it was due to inadvertence. But, even if these articles were not returned, neither the omission of them from the order nor the failure to return them could have influenced the jury, for it does not appear that they were used in evidence.

The main error assigned is in allowing the district attorney to call on the defendant on cross-examination to produce checks, hand them to the defendant, and have him to identify them. As it is hardly possible to condense without misrepresentation, we copy from the record the agreed statement of the facts pertinent to the appeal:

"After the United States had offered evidence to maintain the issues on its part, the defendant, to maintain issues upon his part, called as a witness A. J. Honeycutt, who, being duly sworn, testified, upon cross-examination by the district attorney, as follows:

"Testimony of A. J. Honeycutt.

"On direct examination defendant testified that he bought cigarettes and denim, and other things which were stolen from the cars of the railroad, and paid to the parties, Cecil Pearce and Tom Williams, checks in part for same.

That they took the goods and carried them to his store at night, and he would receive them and pay them for the same.

"It also appeared in evidence that the witnesses Cecil Pearce and Tom Williams had, before the trial entered pleas of guilty to an indictment charging the breaking and entry, and larceny of the property charged in the bill from an interstate train, and that their judgment and sentence upon the plea had been withheld pending the trial of this cause.

"The defendant, A. J. Honeycutt, testified that he had paid several checks to Cecil Pearce, Priestly Pearce, and Tom Williams in part payment for the cigarettes, tobacco, denim, harness, and other things which were carried to his store at night; that his store was in the country, and the goods were carried there around 10 and 11 o'clock at night in automobiles; that Cecil and Priestly Pearce were boys about 17 and 19 years of age and had no means; that Tom Williams was a colored man, who was a jitney driver and had no means; that the defendant marked on the check given Cecil Pearce and Tom Williams the words 'for labor,' but the checks were given for these materials.

"The cross-examination then proceeded.

" 'Q. You say that, when Cecil and Tom went there with those cigarettes, you marked on the check "for labor"? A. Yes; they said the officers were watching them; that they were not working anywhere.

" 'Q. Which one of them did you give the check to? A. Cecil.

" 'Q. Did you give both of the checks to Cecil? A. I don't think I gave but one check.

" 'Q. It was dated the 20th of July? A. I don't remember the date.

" 'Q. Where are the checks? A. You have them.'

"Thereupon, the district attorney handed to the witness an envelope containing the checks which had been seized by the officers of the government from the possession of the defendant, and which had been ordered returned to the defendant by the court, and proceeded as follows:

" 'Q. Will you look in there and find the check that you gave him?' '

"The defendant in apt time objected, which objection was sustained by the court.

"By the Court: On Tuesday afternoon the defendant's counsel filed a notice in writing to the government for the return of certain checks and other property and papers taken from the possession of the defendant by the officer under search warrant. See Record. The court stated that it would sign an order directing the return of the checks, to which no objection was made by the district attorney. Wednesday morning the district attorney handed to counsel for the defendant an envelope containing checks and other papers referred to in the notice, together with receipts requesting the counsel to sign the receipt; they stated that they desired to check over the papers before signing the receipt. The court postponed further examination until defendant's counsel have opportunity to check up the papers and give receipt to the district attorney.

"The defendant rests.

"On Thursday morning, the district attorney having on Wednesday reserved the right to continue the cross-examination of the defendant A. J. Honeycutt, the defendant again took the witness stand for further cross-examination, and testified as follows:

" 'Q. Have you examined that envelope?'

"The court finds as a fact from an inspection of the record that before the trial began the defendant filed notice for the return of his checks, seized by the officers; that the notice was in writing, and the court ordered the return of the papers to the defendant, the said papers having theretofore been in the possession of and inspected by the district attorney. Whereupon, the defendant having before him upon the witness stand the checks and papers handed him by the district attorney, the district attorney proceeded as follows:

" 'Q. Have you examined these papers? A. Yes.

" 'Q. Did you find any checks in there payable to Cecil Pearce?'

"The defendant in apt time objected, which objection was overruled by the court, and the defendant in apt time excepted, which is defendant's exception No. 2.

" 'A. Yes.'

"The defendant in apt time objected, which objection was overruled by the court and the defendant excepted, and this is defendant's exception No. 3.

" 'Q. You stated on yesterday that you gave him a check for $133. Will you show us that check?'

"The defendant in apt time objected, which objection was overruled by the court, and the defendant excepted, and this is defendant's exception No. 4.

" 'A. I reckon so.'

"Court: The district attorney thereupon hands to the witness the bundle of papers which were seized by the officers, and which had been returned to the defendant, and asked him to find that check.

" 'Q. I want you to find the check dated July 20, 1920, for $133, payable to C. E. Pearce?'

"The defendant in apt time objected, which objection was overruled by the court, and the defendant excepted, which is defendant's exception No. 5.

" 'A. This is it.' "

[2, 3] A number of other checks were introduced in response to similar questions. It seems clear that the court erred in admitting for any purpose the checks illegally seized in the execution of a search warrant and ordered returned to the defendant. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 315; Honeycutt v. United States, 277 Fed. 939 (filed November 17, 1921). But it seems equally clear that the error was harmless, in that the introduction of the checks added nothing to the probative force of the evidence already adduced. The statement copied from the record shows that the defendant testified without objection to the purchase of the stolen goods late at night from boys, who carried them to his country store in the automobile, to the giving of checks for the purchase money, and to writing on the face of the checks "for labor."

The checks themselves evidence nothing whatever that the defendant had not already testified to, and added nothing to the force of the evidence already adduced against him. A judgment should not be reversed, on appeal, for error which could not have affected the result. Lancaster v. Collins, 115 U. S. 222–227, 6 Sup. Ct. 33, 29 L. Ed. 373; Judicial Code, § 269 (Comp. St. Ann. Supp. 1919, § 1246); Dye v. United States (C. C. A.) 262 Fed. 6; Sneierson v. United States (C. C. A.) 264 Fed. 268.

Affirmed.

TAYLOR et al. v. CONNETT et al.

UNITED STATES, to Use of NORFOLK R. CO., v. D. L. TAYLOR & CO. et al.

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

No. 1901.

1. **United States ⇐67(1)—Contractual relations with government contractor unnecessary to recovery on bond.**
   It is not essential to a right to recover on a bond of a government contractor that a contractual relation should exist between the claimant and the contractor.
2. **Evidence ⇐20(1)—Court takes judicial notice scows could not be obtained in vicinity of work.**
   In an action on the bond of a contractor, who agreed to construct a breakwater at Cape Lookout, N. C., the court may take judicial notice that scows of the kind required to transport a large quantity of stone needed for the work could not be obtained in the vicinity of the work.
3. **United States ⇐67(3)—Evidence held to sustain charge for scows leased for contractor's work.**
   In action on a government contractor's bond, evidence *held* to show that an intervener's claim for the rental of scows leased to a subcontractor for the amount which the subcontractor had agreed to pay and for towage and repairs was a reasonable charge, if recovery were based on quantum meruit.
4. **United States ⇐67(2)—Government contractor's surety is liable for hire of scows for transportation of material to work.**
   Government contractor and the surety on his bond are liable for a rental of scows hired by a subcontractor to transport materials to the place of work, where such scows were necessary and could not otherwise be obtained.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Washington; Henry G. Connor, Judge.

Suit by the United States, to the use of the Norfolk Railroad Company, against D. L. Taylor & Co. and others, to recover on the bond given by the government contractor, in which L. R. Connett and another intervened. From a judgment (268 Fed. 635) allowing the claim of the interveners, defendants bring error. Affirmed.

Clarence A. Tucker, of Baltimore, Md., and Julius F. Duncan, of Beaufort, N. C. (J. N. Ulman and Knapp, Ulman & Tucker, both of Baltimore, Md., on the brief), for plaintiffs in error.

R. Clarence Dozier, of Norfolk, Va. (Baird, White & Lanning and Edward R. Baird, Jr., all of Norfolk, Va., on the brief), for defendants in error.

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

KNAPP, Circuit Judge. In this suit on a contractor's bond, two subcontractors, L. R. Connett and the Delaware Dredging Company, filed petitions of intervention. Judgments having been rendered in their favor in the court below, defendants brought the case here on

writ of error. Afterwards, and before argument, the Dredging Company's claim was settled and an appropriate order entered; the controversy with that company will therefore be disregarded.

As to Connett's claim these facts appear: In March, 1915, D. L. Taylor & Co., a partnership, entered into contract with the United States for the construction of a breakwater and shore connection at Cape Lookout, N. C. The Fidelity & Deposit Company of Maryland became the surety on their bond, which was conditioned for the due performance of the contract and "full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract."

It is evident from the testimony, and all parties must have understood, that the large amount of stone required, nearly a million and a quarter tons, could not be procured, except at a considerable distance from the site of the breakwater. The stone was in fact brought by rail from the quarry to Morehead City, where it was transferred to scows and towed to destination. It is not open to serious doubt that this was the most feasible arrangement which the conditions permitted. Taylor & Co. contracted with one Seely to do portions of the work, including the furnishing of scows to transport the stone. Seely rented four scows from Connett, and the latter's claim is for the agreed hire of the same and other obligations connected with their use.

As allowed by the trial court, this claim consists of five items, namely, hire of scows, $4,599.50; towing same, $1,519; repairs of damages to the scows, $1,795.25; wages paid to captains, $194.48; and use of scows by Taylor & Co., $284—or a total of $8,392.21, with interest thereon from July 8, 1918.

[1] The defendants argue that Connett is not entitled to recover: (1) Because there was no contract relation between him and Taylor & Co.; (2) because his claim is for neither "labor" or "materials" within the terms of the statute or purview of the bond; (3) because his contract with Seely was breached by himself; and (4) because in any event his rights must be limited to the actual "user" of the equipment in "the prosecution of the work," and no facts are shown from which the quantum of such user can be determined. The first of these contentions is clearly without merit, as will appear from the authorities cited below; the others will be briefly examined.

[2] We may take judicial notice that scows of the kind required were not to be had at Morehead City or in that vicinity, and there was no attempt to show that they could have been procured at any place nearer than New York, where they were in fact obtained, and where Connett resided. Seely hired from him two deck scows for $5.50 a day each, and two other scows, described as dumpers, one for $8 and the other for $10 a day, such rental to be paid from the date of delivery in New York until the scows were returned to that port. In addition, Seely agreed to pay for towing the scows from New York to the work and back again, to supply captains therefor, and to make all needed repairs, so that the scows would be in substantially the same condition when restored to the owner as when they were taken by the

lessee. One of the scows was delivered in April, 1915; the others, in May of that year. The $4,599.50, charged and allowed, is the aggregate amount of rental at the contract price for the time from the delivery of the scows to Seely until they were surrendered by him to Taylor & Co., as will presently be explained.

For reasons which may here be omitted, Connett paid the towing bills, amounting to $1,519, and also the wages of the captains, amounting to $194.48; it is not disputed that Seely owes him those amounts. Two of the scows were damaged while in Seely's possession, and the necessary repairs cost, or were estimated to cost, the sum of $1,795.23. The reasonableness of these charges is not questioned, or the liability of Seely therefor under the terms of his contract with Connett.

How long it took to tow the scows to Morehead City, or when they arrived there, is not shown. It appears, however, that they were not employed in transporting stone to the breakwater until about the 26th of June, and so defendants say that they were not in use prior to that date. But Seely testified that they were used, presumably before, to carry materials for a mile or thereabouts of railroad track, which had to be built in order to get the stone to the pier, where it was transferred to the scows. The time consumed in this service is not disclosed.

About the 21st of September, for reasons which are only inferable, Seely "threw up the job" and turned over his equipment to Taylor & Co. This is the breach of contract alleged by defendants. Connett was notified by wire, and immediately sent a Mr. Allen to look after his interests. The latter testified that when he got there the scows were in possession of Taylor & Co. and that they voluntarily surrendered them to him as Connett's representative. The record is extremely meager and indefinite as to what then occurred, but as nearly as we can make out dispute arose as to the rental which Taylor & Co. should pay from the time the scows came into their possession, and for the further time the use of them was desired, as the result of which the scows were removed from the work.

[3] In determining the question of defendants' liability, which is the real matter in controversy, account must be taken of the whole situation. The testimony is convincing that the use of scows was the most, if not the only, practicable means of getting this immense quantity of stone to the breakwater. They were a necessary facility for the prosecution of an important public work. Indeed, it is hardly too much to say that scows had to be procured, whatever in reason might be the cost. Nor, so far as appears, were they obtainable nearer than New York, from which place and back again they, of course, had to be towed. Moreover, Connett testified in substance that he rented the scows at a low figure, because Seely agreed to keep them a year; that the rate for a short period would have been much higher; and that he accepted their return at the end of five months, because he "didn't want to see Seely go under," and "thought he might pull through and pay me." In short, there is no showing, nor was any effort made to show, that this practically indispensable service could have been secured elsewhere or otherwise for any less sum than the trial

court awarded; that is to say, whether measured by the terms of Seely's contract or viewed as a quantum meruit, the amount allowed cannot on this record be held unreasonable.

[4] That the items of Connett's claim, to the extent adjudged valid by the court below, are covered by the bond in suit, seems established beyond doubt by numerous decisions of the Supreme Court. It is sufficient to quote the following from the recent case of Brogan v. National Surety Company, 246 U. S. 257, 38 Sup. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, which is very much in point, and in which previous cases are cited and reviewed:

"This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34, the claims for which recovery was allowed under the bond, included not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which entered into the construction of the ship. In United States Fidelity Co. v. Bartlett, 231 U. S. 237, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened 50 miles away. This included, as the record shows, the labor not only of men who stripped the earth to get at the stone and who removed the débris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included, also, the wages of stablemen, who fed and drove the horses which moved the cars on those tracks. In Illinois Surety Co. v. John Davis Co., 244 U. S. 376, recovery was allowed not only for the rental of cars, track, and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

The judgment in favor of Connett will be affirmed.

BRADLEY et al. v. HUNTINGTON et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 58.

1. **Bankruptcy ⟸467—After jury trial on issue of bankruptcy, only questions of law can be reviewed.**

   On writ of error to an order adjudicating plaintiff in error an involuntary bankrupt, entered after a trial by jury demanded by him, the appellate court is limited to errors of law alleged; the verdict being binding as to all questions of fact, including the insolvency of the bankrupt.

2. **Bankruptcy ⟸81(4)—Petition alleging preference to creditors in statutory language is insufficient, but amendable.**

   A petition in involuntary bankruptcy, alleging on information and belief that the alleged bankrupt, while insolvent, made payments to certain of his creditors unknown to petitioners, with intent to prefer such creditors over his other creditors, which was substantially in statutory language, is insufficient, but amendable.

3. **Bankruptcy ⟸81(4)—Defect in petition held not jurisdictional.**

   The defect in a petition in involuntary bankruptcy, which alleged preferences to creditors generally in the language of the statute, was not

jurisdictional, but would uphold an adjudication, if true, or admitted by default, so that a motion equivalent to a special demurrer under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) would have been granted, with leave to amend.

4. **Bankruptcy ⟸22—Equity rules are of limited application.**
The equity rules are of limited application in bankruptcy, but they furnish a guide to procedure, though bankruptcy cannot do everything that equity does, and need not do it exactly the same way.

5. **Bankruptcy ⟸81(1)—Bankrupt cannot, during trial, seek dismissal for amendable defect in petition.**
A bankrupt, who has demanded a jury trial, which has been entered on, cannot during its course seek for a dismissal of the petition because of a defect therein, which could have been cured by amendment, but is entitled only to such relief as would insure fairness in trying the issues.

6. **Bankruptcy ⟸81(4)—Bankrupt's rights against defective petition cured by requiring bill of particulars.**
Where a petition in involuntary bankruptcy was defective for alleging preferences to creditors only generally, the bankrupt's right to a fair trial of the issues was secured for him on his motion to dismiss for defects in the petition, made during the course of the jury trial of the issue in bankruptcy, by granting a postponement of the trial and requiring petitioners to file bill of particulars.

7. **Courts ⟸347—Bills of particulars may be ordered in equity suit in federal court.**
In the Second circuit, bills of particulars in equity suits have been freely ordered and are common practice.

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

Involuntary proceedings in bankruptcy by Frederick R. Huntington and others against William Bradley, in which the Commercial Trust Company of New York appeared as answering creditor. There was an order adjudicating William Bradley a bankrupt, after a trial before a jury, demanded by said Bradley, and the bankrupt and answering creditor bring error. Affirmed.

Henry A. Forster and Thomas Henry Keogh, both of New York City, for plaintiff in error Bradley.

Deiches & Goldwater, of New York City (Maurice Deiches and Francis L. Driscoll, both of New York City, of counsel), for plaintiff in error Commercial Trust Co.

Olcott, Bonynge, McManus & Ernst, of New York City (Irving L. Ernst and Saul S. Myers, both of New York City, of counsel), for defendants in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. [1] Bradley, as the adjudicated bankrupt, and Commercial Trust Company, as an answering creditor, have brought this writ, complaining of errors alleged to have been committed to their prejudice during the jury trial, asserting that this procedure is their remedy under Grant, etc., Co. v. Laird Co., 203 U. S. 502, 27 Sup. Ct. 161, 51 L. Ed. 292; and their only remedy under Lennox v. Allen-Lane Co., 167 Fed. 114, 92 C. C. A. 566, certiorari

denied 214 U. S. 512, 29 Sup. Ct. 694, 53 L. Ed. 1062. Consequently our function is limited to consideration of the errors of law alleged; the verdict binds us as to all questions of fact, including of course the insolvency of Bradley.

The petitioning creditors (defendants in error here) allege in their petition the second and third acts of bankruptcy; i. e., transfer with intent to prefer, and permitting a creditor to obtain a preference by legal proceeding. As the trial court dismissed so much of the petition as rested upon the supposed commission of the third act of bankruptcy, we are not here concerned with it.

The act of bankruptcy as to which verdict was found was thus pleaded in the petition:

"Upon information and belief that at various times during the months of July, August, September, and October, 1918, said William Bradley, while insolvent, made payments to certain of his creditors with intent to prefer such creditors over his other creditors. That the names of such creditors are at present unknown to your petitioners."

Both Bradley and the answering creditor (Farson) answered, denying absolutely this allegation. More than two years after the issue was thus framed it was (pursuant to the demand of defendants) tried before a jury. After trial begun and considerable evidence given, and the court had held that the proof offered in support of the third act of bankruptcy was insufficient, the plaintiffs in error here moved to dismiss the petition because the allegations above quoted as to the second statutory act of bankruptcy "were insufficient * * * and too indefinite and uncertain (a foundation) upon which to prove or attempt to prove any act of bankruptcy."

This motion was denied, but the court directed the petitioners to file and serve a bill of particulars and adjourned the trial for a week in order that this might be done. It was done, the defendants in error here not pleading surprise, and the verdict sufficiently indicates that the particulars were proven. It is now assigned for error that the trial court was bound as matter of law to grant the motion as made, and had no right to cure, or attempt to cure, the situation by ordering a bill of particulars.

[2] The pleading complained of was substantially in the words of the statute, and was plainly insufficient under In re Condon, 209 Fed. 800, 126 C. C. A. 524. But it was amendable. Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514.

[3] Further, the defect in the pleading or petition was not jurisdictional; i. e., the allegations, if true or admitted by default, would uphold an adjudication. Undoubtedly, if a motion (equivalent to a special demurrer) had been made under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), it would have prevailed, but with leave to amend. Therefore the questions here are whether plaintiffs in error could make their motion when they did, and (assuming that they could) whether the court gave them lawful relief by ordering a bill of particulars.

[4] The equity rules are of limited application in bankruptcy (In re Hughes [C. C. A.] 262 Fed. 500), yet they furnish a guide to pro-

cedure, and this was just as true before the promulgation of the present equity rules as it is now. It is a practical application of the maxim that bankruptcy is equity, which does not mean that bankruptcy can do everything that equity does, or must always do it in exactly the same way. There could not be a better example of this than the rulings first above cited in respect of jury trials demanded as of right by alleged bankrupts.

[5] Whether motions in the nature of special demurrers and directed against amendable error, and not against jurisdictional defects, can be made after answer filed (In re Mason, etc., Co. [D. C.] 235 Fed. 974; In re Connecticut Brass, etc., Co. [D. C.] 257 Fed. 445), is a matter not necessary to decision in this case. But that a defendant after entering upon the trial of an issue framed by his own answer can insist upon dismissal for a nonjurisdictional defect in his opponent's pleading is a proposition that cannot be sustained. As was said in Leidigh v. Stengle, 95 Fed. 637, 37 C. C. A. 210, under any system of pleading a plea to the merits waives all formal or modal matters. Cf. Green River, etc., Bank v. Craig (D. C.) 110 Fed. 137; In re Cliffe (D. C.) 94 Fed. 354. The absence of specifications or particulars in the petition here complained of was perhaps more than "modal"; but it was not jurisdictional, and was amendable, and therefore at no stage of the proceedings were the defending parties entitled to more than relief by amendment, and after trial begun, they were entitled to no other relief than such as would insure fairness in trying the issue made by themselves.

[6, 7] Such fairness was fully secured by taking an adjournment and ordering a bill of particulars. Some objection is made to the effect that, since bankruptcy is equity, equity does not know a bill of particulars. This is merely wrong; in this circuit for many years bills of particulars in equity suits have been freely ordered and are common practice.

No other error assigned is thought to require consideration.

The decree of adjudication is affirmed, with costs.

NO-LEAK-O PISTON RING CO. v. NORRIS et al.

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

No. 1903.

1. Copyrights ⇐5—Pamphlet containing list of motor vehicles, with number and dimensions of piston rings, held subject to copyright.

A pamphlet printed and circulated by a manufacturer of piston rings used for replacements, containing a list of the different makes of motor vehicles, giving for each year the model, bore, grooves, size, and number of rings, compiled from original sources at considerable expense, the pamphlet being designed primarily for advertising purposes, but containing information not otherwise obtainable, useful to repair shops and others, *held* subject to copyright.

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

2. **Copyrights ⊜28—Deposit of copies with application held compliance with statute.**

The deposit in the Copyright Office, with application for copyright, of two copies of a pamphlet containing the required notice, out of the first number received from the printer and before their circulation, *held* a substantial compliance with Copyright Act, § 12 (Comp. St. § 9533).

3. **Copyrights ⊜22—Not invalid because the author was an employé.**

A copyright for a pamphlet *held* not invalid because the compiler, in whose name as author the copyright was taken, did the work as employé of another.

4. **Copyrights ⊜87—When damages for infringement are in discretion of court.**

Where the damages for infringement of a copyright are not ascertainable, the compensation to which the owner is entitled is committed to the discretion of the trial judge.

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

Suit in equity by William K. Norris and others against the No-Leak-O Piston Ring Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 271 Fed. 536.

John E. Cross, of Baltimore, Md., for appellant.

John F. Green, of St. Louis, Mo., for appellees.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

KNAPP, Circuit Judge. In this suit for infringement of a copyright, plaintiffs had a decree and defendant appeals.

Both parties manufacture and sell piston rings for replacement purposes; they are active competitors in that business. Beginning in 1913, and each year since down to 1919, the plaintiffs, or their predecessors in title, have published and distributed a printed pamphlet entitled "Dimensions of Piston Rings." This pamphlet lists the various makes of motor vehicles in alphabetical order, and gives for each the year, model, bore, groove, size, and number of rings, and the like. It appears to be an excellent advertisement, and also a valuable reference book for repairmen to use in ordering piston rings for their customers. Indeed, without the data furnished by such a compilation, it would be practically impossible for dealers to keep a supply of rings in stock. Each yearly issue of this pamphlet has been copyrighted, and it is the issue of 1919 which defendant is charged with infringing. For the purpose of detecting infringers, plaintiffs have, for some years past, included in their annual lists a number of fictitious or "trap" models; that is, nonexistent cars, and rings that are never used. In the edition of 1919 there were 12 of these decoys.

Defendant's pamphlet, styled "Piston Ring Size Directory," was issued about the 1st of June, 1920. In December of the previous year, the Motor World, a trade journal, had published a catalogue of piston ring dimensions. Except that models prior to 1916 were omitted and passenger cars separated from trucks, this catalogue was a reproduction of plaintiffs' compilation, including 10 of the 12 fictitious models.

The Motor World admits that it got all the data for its publication from the copyrighted pamphlet issued by plaintiffs. Defendant's pamphlet was prepared by taking the Motor World's catalogue, recombining passenger cars and trucks, thus giving its list the same general character as that of plaintiffs', and adding information obtained by it regarding piston rings for some of the 1920 models, which, of course, did not appear in plaintiffs' 1919 edition. Some 55,000 copies were printed, of which 10,000 to 15,000 appeared to have been distributed at the time of the trial. The decree below finds plaintiffs' copyright valid, and infringed by defendant's publication, grants the usual injunction in such cases, directs delivery of the copies on hand to the marshal, to be by him destroyed, and awards damages in the sum of $3,000, with counsel fees of $750 in addition to taxable costs.

[1] It is argued that plaintiff's pamphlet is not covered by the copyright statutes (Comp. St. §§ 9517–9524, 9530–9584), and therefore not entitled to protection, but the argument is quite unconvincing. This pamphlet is much more than an ordinary price list or table of figures. It is a compilation from primary sources of a great number of facts which, so far as appears, had not before been available to the trade, and in that respect, at least, is an original production. It certainly displays as much originality as a city directory, which frequently has been held entitled to copyright. Williams v. Smythe (C. C.) 110 Fed. 961; Trow Directory Co. v. U. S. Directory Co. (C. C.) 122 Fed. 191. Moreover, the information thus made public was obtained only by considerable effort and expense. The proof shows that it cost plaintiffs some $3,000 to get the data for this 1919 issue, and about $3,500 to have it printed. Whilst it serves and was intended to advertise the plaintiffs' wares, it at the same time furnishes information of real value to the numerous persons who desire to procure piston rings, or have occasion to keep the various kinds in stock, and so performs a distinctly useful service. In short, we deem it is not doubtful that the pamphlet in question is copyrightable, as it has been held to be by several district courts in which similar suits have been brought. For authority it is sufficient to refer to the cases cited in Campbell v. Wireback (C. C. A.) 269 Fed. 372, 374.

[2] But defendant says that in any case the copyright in suit is invalid for failure to comply with the statute, in that the application, with deposit of two copies, was made before, and not, as the act provides (section 12 [Comp. St. § 9533]), after publication, the application and deposit having been made on the 4th of August and the publication some time between the 6th and 10th of that month. The fact appears to be that 50 copies at least were received from the printer on the 4th, of which 2 were mailed that day, with the application, to the Register of Copyrights, and the balance kept by plaintiffs for their own use or sent to their branch offices. Then followed the shipment of 50 copies to each of their "field representatives," and later a general distribution to the trade, which began between the 6th and 10th. We are of opinion that this was a substantial compliance with the statute, and that the contrary contention is wholly without merit. Directly in point are Bel-

ford v. Scribner, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514, and Cardinal Film Corp. v. Beck (D. C.) 248 Fed. 368.

[3] Defendant also says that the copyright is invalid because the application therefor incorrectly states that Paul R. Dolvin was the author of the pamphlet, whereas in fact he was a mere employé of plaintiffs. But in the nature of the case the "author" of such a publication is the one who gets the facts and puts them together in the form desired; and this Dolvin did. He had entire charge of the compilation from first to last, and did a large part of the work himself. He devised the form sheets and form letters used, conducted the correspondence, made numerous inquiries by wire, and arranged the data in proper order. We think it clear that he was the author of the pamphlet, and correctly so named in the application for copyright. Dewitt v. Brooks, Fed. Cas. No. 3851; Roberts v. Myers, Fed. Cas. No. 11,906.

[4] We are not persuaded that the award of $3,000 was excessive. Where the damages are indirect and cannot be ascertained, as in this case, the compensation to which the injured owner of a copyright is entitled is committed to the discretion of the trial judge. It is measured, as the Supreme Court says in Westermann Co. v. Dispatch Co., 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, by "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like." Compared with awards in similar cases, which have been sustained on appeal, the amount allowed in this case, taking all the circumstances into account, seems plainly within the limits of sound discretion. Westermann Co. v. Dispatch Co., supra; Hendricks v. Thomas Pub. Co., 242 Fed. 37, 154 C. C. A. 629; Campbell v. Wireback (C. C. A.) 269 Fed. 374. Moreover, and the fact is not without significance, the damages were fixed at $3,000 on the assumption that only 10,000 to 15,000 copies of the infringing pamphlet had been distributed, which was defendant's testimony at the trial; but it turned out, as a stipulation of record concedes, that some 30,000 copies had been distributed prior to the commencement of this suit. It is enough to say, without further comment, that we find no occasion to interfere with the award of damages, or with the counsel fee allowed.

The decree appealed from will be affirmed.

GIBSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1921.)

No. 5584.

Post office ⇐49—Evidence held not to sustain conviction for unlawful use of mails.

Evidence *held* insufficient to sustain a conviction of defendant of sending nonmailable matter through the mails.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

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

Charles T. Gibson, of Thayer, Iowa, in pro. per.

E. G. Moon, U. S. Atty., of Ottumwa, Iowa (John C. DeMar, Asst. U. S. Atty., of Des Moines, Iowa, on the brief), for the United States.

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

PER CURIAM. The defendant was tried and convicted in the court below on an indictment which charged that on or about the 13th day of February, 1919, he, the defendant, did unlawfully deposit and cause to be deposited for mailing and delivery by and through the post office establishment of the United States, to wit, in the post office of the town of Thayer, state of Iowa, a pamphlet giving information how and by what means conception may be prevented, addressed, etc. The defendant has brought the case to this court by writ of error.

Numerous errors have been assigned, but the only one which it is necessary to consider is the refusal of the trial court at the conclusion of the testimony to direct a verdict for the defendant as requested by him. We have read the record with great care, and are of the opinion that there is no substantial evidence connecting the defendant with the offense charged in the indictment. The most that can be said of the evidence is that it arouses a suspicion that the defendant in some way aided and abetted in the mailing of the pamphlet in question. The facts of the case are these:

Post Office Inspector W. L. Kleinwachter for some reason became suspicious that a Mrs. Cora Brown was using the mails unlawfully, and arranged with the wife of an associate inspector to write a decoy letter from Council Bluffs, Iowa, to Mrs. Brown, requesting that she would send the writer a copy of the book entitled birth control, and inclosing in payment a post office money order for $1. This letter was dated February 10, 1919, and addressed to Mrs. Cora Brown, Box 288, Creston, Iowa. A few days later the pamphlet was received through the mail at Council Bluffs and immediately turned over to the inspector. The envelope inclosing the pamphlet was postmarked Thayer, Iowa, February 13, 1919. On February 17th Mrs. Cora Brown cashed the post office money order for $1 at the Creston post office. It is seen that the evidence thus far recited establishes the guilt of Mrs. Cora Brown with reasonable certainty.

To connect the defendant with the offense made out by the proof against Mrs. Brown, the government proved that in April, 1917, a young woman who is not otherwise identified rented box 288 of the Creston post office for the use of a business concern known as the Brown Book Company. About a week later the defendant called for and was given a key to box 288. He retained the key until in May, 1919. Another key to box 288 was out during this period, but to whom it was given does not appear. The rent for box 288, collected quarterly, was on several occasions paid by the defendant during the time he had a key to the box in his possession. The Brown Book Company, in whose name the box was taken, for aught the record shows,

may have had a well-known place of business in the town of Creston, or it may have been a name only, with post office box No. 288 as its sole identification.

The defendant, a lawyer by profession, had been living with his father and brother at Thayer on a farm for about 2½ years before the trial in September, 1919. On February 22d Inspector Kleinwachter, accompanied by the United States marshal and the post office clerk who had cashed the $1 money order for Mrs. Brown, went from Creston to Thayer, a distance of about 13 miles. Mrs. Brown was found at the home of the defendant. The clerk identified her as the Mrs. Cora Brown who had cashed the $1 money order on the 17th. The marshall at that time arrested both the defendant and Mrs. Brown. After the arrest the defendant told the inspector that Mrs. Brown was his wife. Until he received this information, it does not appear the inspector knew that the defendant and Mrs. Brown were married. The inspector was called as a witness and testified to a conversation he had with the defendant a day or two after the arrest. The Brown Book Company was the chief subject of this conversation.

From a casual reading of this testimony the impression is left that the defendant admitted his guilt to the witness. On a more careful reading of the testimony, however, it is seen that this impression is based upon the inferences of the witness, as is fairly illustrated in his answer to the question on cross-examination: "Mr. Gibson didn't tell you he sent any such book?" when he answered: "No, he didn't tell me; just come out and say that he sent it."

Aside from the inferences of the witness, the direct statements attributed by him to the defendant are of too doubtful import, under the circumstances of the case, to justify the conviction of the defendant. The defendant undoubtedly knew, at the time he had the conversation detailed by the witness, the nature of the evidence connecting his wife, or Mrs. Brown, with the mailing of the pamphlet, and understood its seriousness. When this so-called confession is read in the light of this knowledge, it is evident that the defendant, in what he said, was attempting to shield his wife, and not, as inferred by the witness, making or intending to make a confession of guilt.

The case made by the government amounts to this, when both the evidence and the lack of evidence are considered:

In answer to a letter from Council Bluffs, addressed to Mrs. Cora Brown, Box 288, Creston, Iowa, the pamphlet entitled birth control was received through the mail. Box 288 belonged to the Brown Book Company, a concern which may have had a well-established business at Creston. The defendant two years before had been given a key to box 288 and on several occasions had paid the box rent. Another key was out to the box. He lived at Thayer, 10 or 15 miles distant from Creston. He had never received mail through this box and had never taken mail from it. There is no evidence that he was ever in Creston, except the occasions when he paid the box rent, when he received the key to the box, and when he returned it. The connection of the defendant with post office box No. 288 is certainly insufficient to justify his conviction. The fact next to be added to those recounted above is

that the woman who committed the offense, as shown by the evidence, was the wife of the defendant, and living with him at Thayer, 12 or 15 miles distant from Creston. We do not know how long they had been married, or how long she had resided at Thayer, or how frequently she visited Creston. If the defendant is to be given the benefit of the presumption of innocence accorded to every person accused of crime, he cannot be found guilty of aiding and abetting in the commission of the offense charged in the indictment, and therefore a principal, simply because the woman was his wife. Their relationship cannot be said to do more than raise a suspicion that the defendant aided and abetted her in the commission of the offense. As already stated, we do not think the so-called confession sufficient to justify the conviction of the defendant.

Whether the facts above detailed are considered singly or together, we repeat that we are of the opinion that there is no substantial evidence connecting the defendant with the offense charged in the indictment. The most that can be said of the evidence is that it raises a suspicion that the defendant in some way aided and abetted in the mailing of the pamphlet in question. It may be possible for the prosecution, upon a retrial of this cause, to make a case against the defendant which should be submitted to a jury for its determination; but we are clearly convinced that it failed to do so at the trial now under review.

Let the judgment be reversed, and the court below directed to grant a new trial.

Judge HOOK sat in the case, concurred in the conclusion reached, but died before this opinion was prepared

THE HAVEN.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 75.

1. Collision ⇐100(2)—Drill boat held at fault in drowning out sound of bell by working drill in fog.

A drill boat, working near a pier in the East River in a thick fog, was at fault in drowning out the sound of its bell by the working of the drill, and it was no excuse that the noise of the drill might be heard, as this was not the warning to which moving craft are entitled, and such sound was apt to be puzzling and confusing.

2. Collision ⇐82(1)—Rule of navigation in fog stated.

A vessel navigating in a fog must go no faster than will permit her to stop within the distance she can see ahead.

3. Collision ⇐68—Steamer held at fault in not anchoring, instead of drifting aimlessly, in thick fog.

A steamer, colliding with a drill boat in the East River during a fog so thick that it was difficult, if not impossible, to see an object at any safe distance, *held* at fault in not anchoring, instead of drifting aimlessly, especially where its master knew that the drill boat was in the neighborhood.

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

Libel in admiralty by the Great Lakes Dredge & Dock Company against the steamer Haven, her engines, etc., claimed by Harriet M. Spraker and another. From a decree for the libelant, the claimants appeal. Modified.

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

Haight, Smith, Griffin & Deming, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

MAYER, Circuit Judge. The Haven, a Sound steamer, 190 feet by 40 feet, was bound from New Haven to her pier in the North River. Her master was apparently thoroughly experienced, having been licensed for 15 years and on the Haven for 10 years.

We are satisfied with his account of his difficulties. He testified that he struck "a very thick fog" when he got down a little below the Navy Yard in the East River. There was nothing to warn him of the fog at Corlears Hook, or, for that matter, prior to the time that the fog was encountered. The situation was one which called for the exercise of judgment, and he concluded not to anchor. He sounded proper fog signals, then slowed his vessel, then stopped, then proceeded cautiously, and thought he lost steerage way, then started ahead again under one bell, and again proceeded cautiously until he lost steerage way. He continued in the same manner—that is, stopping, proceeding, losing steerage way, and starting again—until he reached Fulton Ferry, and then he stopped his engines and drifted down with the ebb tide.

Finally, the Haven came into collision with the drill boat No. 8, working on Coenties Reef, off Pier 6, Manhattan shore. The time was about 4:30 a. m. on January 30, 1917. The lights of the drill were observed "just about two minutes" before she struck; but, although the Haven reversed, it was too late, because she sagged down against the drill in the tide.

The Haven's witnesses are united in testifying that they did not hear any bell nor other warning from the drill. The government inspector on the drill testified that the bell "was ringing continually during the fog; the man would ring, and would stop maybe a minute, about, and then ring again"; but the inspector could not hear the bell, because the drill was working, and the noise of the drill manifestly shut out the sound of the bell.

We have no doubt that those on the Haven were prevented from hearing the bell by the noise of the working drill. The master of the Haven knew that the drill was "in that neighborhood," and expected to hear from her.

[1] 1. We think the fault of the drill is plain. In the circumstances, it was her duty to warn approaching vessels by the sound of

the bell. If, under the fog conditions here described, instead of making sure that the ringing bell was heard, she took all the chances of "drowning out" the sound by the noise caused by the working of the drill, she invited collision. It is no excuse that the noise of the drill might have been heard. First, that is not the kind of sound with which it was her duty to warn moving craft; and, secondly, such a sound in that location is apt to be puzzling and confusing.

[2, 3] 2. The fault of the Haven is not so patent. We recognize that a problem calling for the exercise of sound judgment confronted the Haven's master, and we are not disposed to substitute our judgment for that of the master, where we think there is a fair choice between two courses. We agree that the situation was such that it was unwise, probably useless, to attempt to steer by compass. The question, then, was whether the master should let the Haven drift or whether he should anchor.

A vessel navigating in a fog must go no faster than will permit her to stop within the distance she can see ahead. The fog was very thick, and thus it was difficult, if not impossible, to see an object at any safe distance. The master testified that, when he saw the lights of the drill, he was only 50 to 100 feet away. To drift blindly and aimlessly and uncontrolled in such a dense fog as the Haven's witnesses described is a proceeding full of potential danger in crowded waters, and particularly in this case, where the master knew that the drill was in the "neighborhood."

To attempt to turn around would also have been most unwise. By far the least dangerous course was to anchor. The objection to dropping anchor, according to the master, was that "she would have swung around and maybe struck something at the head of the dock * * *"; and the City of Lowell, 152 Fed. 594, 81 C. C. A. 583, is cited in support of the master's navigation.

In that case, the court was not favorably impressed with the suggestion that the steamer should anchor, but the point of the case was that "the distance was not great from the place below the Williamsburg Bridge, where the fog closed in, to the more open water beyond the river's mouth, and the bells on successive ferry slips were guides by which the navigators could note their progress, and determine when they had reached the point where the necessary change of compass course should be made," and that the court was satisfied that the navigators of the Lowell "had made a serious miscalculation as to their course."

Here, however, the vessel was permitted to drift in a dense fog, and we think that the danger of striking something when anchoring is much less than the danger of striking something or being struck when drifting in such a fog. In brief, our view is that a vessel of this size in these waters in this fog should have anchored, or attempted so to do, that such was her duty in these circumstances, and that to drift was so much more likely to cause or result in some collision that her master was not confronted with a fair choice between two courses in

determining so to do, but that he erred, and the Haven must therefore be found in fault.

The decree is modified, by awarding half damages and half costs to appellee, with costs of this appeal to appellant.

MANKIN v. BARTLEY.

(Circuit Court of Appeals, Fourth Circuit. December 6, 1921.)

No. 1906.

1. **Appeal and error ⟸204(4)—Defendant not objecting to evidence, and assuming burden on issue to which it related, not entitled to complain that it was incompetent.**

Where, on a motion to quash an execution on the ground that the judgment had been discharged by a compromise agreement, evidence that the agreement was executed on condition was not objected to, and, on the contrary, defendant assumed the burden of proving that the settlement was honestly and fairly arrived at, and executed and delivered without conditions of any kind, he could not be heard to say that it was improperly admitted, because the agreement was under seal and delivered to defendant or his agent.

2. **Compromise and settlement ⟸5(1)—Evidence ⟸444(2)—Evidence admissible to show conditional delivery of agreement under seal, though delivered to obligee.**

Under the law of Virginia, a compromise agreement, though under seal, might be delivered on condition, and parol evidence was admissible to show that it was executed and delivered on condition that it was not to be effective unless approved by a party's attorneys, and that the condition had not been complied with, though the delivery was to the other party or his agent.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Edmund Waddill, Jr., Judge.

Action by James Bartley against Speed Mankin. A motion to quash an execution was denied, and defendant brings error. Affirmed.

Roland E. Chase and George C. Sutherland, both of Clintwood, Va. (Chase & McCoy and S. H. & George C. Sutherland, all of Clintwood, Va., on the brief), for plaintiff in error.

Clarence E. Gentry, of Charlottesville, Va. (R. H. Cooper, of Pikeville, Ky., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. In a personal injury suit, tried in May, 1919, Bartley recovered a judgment against Mankin for $4,000 and costs. The judgment was affirmed by this court a year later (266 Fed. 466), and Mankin thereupon petitioned the Supreme Court for a writ of certiorari (254 U. S. 631, 41 Sup. Ct. 7, 65 L. Ed. ——). While this application was pending, negotiations were opened for a compromise and settlement of Bartley's claim. It was finally agreed to submit

the matter to two arbitrators, namely, W. J. Branham, representing Bartley, and George C. Sutherland, one of Mankin's attorneys. In compliance with their decision the parties signed an agreement under seal, on June 9, 1920, which provided for a release of the judgment by Bartley on payment to him of one-half the amount thereof with interest, less any costs, and for a dismissal of the petition to the Supreme Court. At Bartley's request, as is alleged, Mankin gave his check for the agreed amount to Branham, who deposited it in bank to the credit of the firm of which he was the senior member.

Bartley's attorneys had no notice of the negotiations and knew nothing of the settlement until after the agreement was executed. Bartley says, and this is the whole dispute, that he agreed to the compromise and signed the contract on the express condition, repeatedly stated by him, that it should be approved by his attorneys. As they strongly disapproved, when the contract was presented to them, he refused to carry out the agreement or to be bound by it. The money paid by Mankin remains in the possession of Branham's firm. Some time afterwards execution was issued on the judgment and a levy made. Mankin filed a motion to quash on the ground that the judgment had been discharged by the agreement in question. The court below denied the motion, and Mankin brings the case here on writ of error.

The main contention, to quote from the brief, is that, "in the absence of fraud or mistake a bond or deed (or in fact any written contract), complete on its face cannot be proven to have been delivered on condition when the delivery was to the obligee or grantee"; that is to say, since this contract was under seal, parol proof was inadmissible to show that it was delivered to Bartley, or his agent, Branham, on condition that it should not take effect unless approved by his attorneys, and a number of the earlier Virginia cases are cited in support of the proposition.

[1] It would be a sufficient answer to point out that all the testimony bearing on this issue was received without objection. Indeed, the record indicates that at the trial Mankin assumed the burden of proving that the settlement was honestly and fairly arrived at, that no advantage was taken of Bartley or misrepresentation made to him, that he perfectly understood what he was doing, and that the agreement was executed and delivered without conditions of any kind. This being so, it seems plain that Mankin cannot now be heard to say that the testimony was improperly admitted. Even in a criminal case, incompetent evidence, received without objection by the accused, "is to be considered and given its natural probative effect as if it were in law admissible." Diaz v. United States, 223 U. S. 442, 450, 32 Sup. Ct. 250, 252, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

[2] Aside from this, however, it is believed to be the settled rule of law, in Virginia as well as in other jurisdictions, that a contract under seal may be delivered on condition, and that parol evidence is admissible to show failure of compliance with the condition. As to Virginia, it is enough to cite the recent case of Whitaker v. Lane, 128 Va. 317, 104 S. E. 252, 11 A. L. R. 1157, in which the subject is fully and ably discussed. The conclusion reached in that case, which seems di-

rectly in point, accords with repeated decisions of the federal courts. Thus, in Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, the Supreme Court says:

"We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter."

To the same effect, and of unmistakable import, are among others, Beach v. Nevins, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N. S.) 288, and Gateway Produce Co. v. Farrier Bros. (C. C. A.) 268 Fed. 513. It is not open to doubt that the testimony in dispute was properly received and considered.

Whether or not the agreement signed by Bartley was delivered on the condition stated by him, which concededly had not been met, was a question of fact for the trial court to determine. On conflicting testimony the finding was in Bartley's favor, and no convincing reason appears for setting it aside.

Affirmed.

PARK & POLLARD CO. v. STUYVESANT INS. CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 57.

1. **Insurance ⟸246—Policy issued by local agent held invalidated by agreement with company that any policy so issued should be returned.**

   Where plaintiff's sole brokers, having exclusive charge of insurance in O., in negotiating with defendant for a line of insurance, agreed that, if defendant's local agent in O. had issued or should issue a renewal of a particular policy, it should be returned as not wanted, a policy issued by the local agent two weeks afterwards on request of plaintiff's local manager was not new and additional insurance, but was invalidated by the agreement.

2. **Trial ⟸141—Verdict properly directed when proof of defense uncontradicted.**

   Where facts constituting a defense were proved, and there was no evidence the other way, it was proper for the trial judge to direct a verdict.

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

Action by the Park & Pollard Company against the Stuyvesant Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William Otis Badger, Jr., of New York City (Joseph Thurlow Weed, of New York City, of counsel, and Francis R. Holmes, of New York City, on the brief), for plaintiff in error.

Prentice & Townsend, of New York City (Robert Kelly Prentice and Myron T. Townsend, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The few and simple facts contained in this bill of exceptions seem to us to present no material point of law. Plaintiff is a corporation of Massachusetts, having its chief offices and officers in Boston; defendant is a New York insurance company.

Plaintiff has a storage warehouse in Oswego, of which in 1918 one Seavey was manager, having charge of "also the office work and insurance work." Defendant had in Oswego an agent, one Wright, who was authorized to issue insurance. In and before July, 1918, defendant had underwritten a policy for $11,000 on plaintiff's Oswego warehouse, expiring July 16, 1918. Under date of July 16th Wright issued a renewal policy, taking effect on the expiration of the policy first above mentioned. It may be assumed (as claimed by plaintiff) that such renewal policy was issued at the request of Seavey. On or about July 20th a fire occurred in said storage warehouse causing a loss covered by said renewal policy, if the same constituted valid and enforceable insurance in plaintiff's hands. This is the policy in suit, and none of the above facts are controverted.

Plaintiff had a desire to obtain insurance in Oswego other and greater than any renewal of the $11,000 policy expiring July 16, 1918, and on or before June 1, 1918, and from the head offices of plaintiff in Boston the firm of Hall & Co. of New York City were appointed sole brokers with exclusive charge of Oswego insurance. Hall thereupon negotiated through an agency representing defendant and other underwriters for a considerable "line" of insurance, including a renewal of the Stuyvesant policy, expiring July 16th, but not in the Stuyvesant itself. The renewal policy was taken out in the Industrial Company. This transaction took place in New York City, and it was at the time noted that the local agent, Wright, might in Oswego have issued or be about to issue such a renewal policy as is here actually in suit, whereupon it was agreed between Hall & Co. representing plaintiffs and defendant company (in substance) that, if Wright had done or should do everything he did, such renewal policy so issued by him should be "returned as not wanted."

As above stated the fire occurred, the policy had been physically delivered by Wright to Seavey, it was not returned, and this suit is the result. The plaintiff declared upon the policy so issued by Wright in usual form; defendant did not deny any of the allegations made, but by way of separate defense and counterclaim it set up the above-recited occurrences between itself and Hall & Co. as representing plaintiff, averring that as a result thereof the policy in suit was null and void, and praying that it be so decreed and plaintiff required to surrender the document for cancellation.

Defendant having thus pleaded, moved for a separate trial of its separate defense and counterclaim, on the ground that it was an equi-

table defense, and therefore, under Judicial Code 274b (Comp. St. § 1251b), such trial should be had as in equity. See Keatley v. United, etc., Co., 249 Fed. 296, 161 C. C. A. 304; Union, etc., Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531; Upson, etc., Co. v. American, etc., Co., (D. C.) 251 Fed. 707; Manchester Ry. v. Barrett (C. C. A.) 265 Fed. 557. This motion was denied, the order of denial reciting the court's holding that—

"The facts alleged in said defense and counterclaim constitute, if established, a complete defense at law to the cause of action set forth in the complaint, and therefore do not constitute an equitable cause of action or counterclaim."

As to the correctness of this ruling we express no opinion because it does not affect the propriety of the result reached when long afterward the case came on for trial at a jury term and judgment was directed for defendant.

[1] The stories of plaintiff and defendant move in different planes; they do not and cannot collide. Plaintiff's contention, most earnestly insisted upon, is that it is not suing upon a renewal policy but upon new and additional insurance; this is thought to follow from the conceded fact that Wright issued the policy in suit at least two weeks after in another city Hall and defendant had made their agreement.

We do not think this fact is of the least importance. Wright was a subordinate, and so was Seavey; by evidence absolutely uncontradicted it was proven that Seavey's employers had agreed that Hall should entirely control Oswego insurance for them, and when Hall made the agreement above recited, which in effect invalidated any policy that Wright might issue on this particular piece of property, anything that Wright did thereafter and did with Seavey was ineffectual as against the agreement of their superiors.

[2] If defendant's story as pleaded had been separately tried as an equitable defense, it should have resulted in a decree that would have required final judgment in the law action in favor of defendant; and when the same set of facts was proven before the jury, there being no evidence the other way, it was proper for the trial judge to direct a verdict as he did.

Judgment affirmed, with costs.

ZIMMERMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. December 22, 1921.)

No. 2851.

1. **Time ⟸9(1)—Date "from and after" which time is computed is excluded.**
Where time is to be computed "from and after" a specified day, and not from and after the occurrence of an event on that day, the specified day must be excluded, particularly in cases of penalties and forfeitures (citing Words and Phrases, First and Second Series, From and After).

2. **Statutes ⟸250—Title 2 of National Prohibition Act took effect January 17, 1920, under a provision that it was to take effect from and after the day the Eighteenth Amendment went into effect.**
Under National Prohibition Act, tit. 3, § 21, providing that title 2, §§ 3, 33, of that act, should take effect from and after the day the Eighteenth Amendment of the Constitution goes into effect, those sections took effect on January 17, 1920, the day after the constitutional amendment took effect, so that an indictment charging violation January 16, 1920, must be quashed.

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

John Zimmerman was convicted of violating the National Prohibition Act, and he brings error. Reversed, with direction to quash the indictment.

Leopold Saltiel, of Chicago, Ill., for plaintiff in error.

Charles J. Monahan, of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was sentenced under an indictment in two counts, one for having in possession and the other for selling intoxicating liquor, in violation of sections 3 and 33 of title 2 of the National Prohibition Act commonly known as the Volstead Act, approved on October 28, 1919.[1] Time of committing each offense was laid on the 16th day of January, 1920.

Section 21, title 3, of the Volstead Act, provides that the aforesaid sections "shall take effect and be in force from and after the day when the Eighteenth Amendment of the Constitution of the United States goes into effect." The Eighteenth Amendment went into effect on the 16th day of January, 1920.

[1] If the computation of time is to be made from and after a specified day, and not from and after the occurrence of an event on that day, then the day must be excluded. Arnold v. United States, 13 U. S. (9 Cranch) 104, 3 L. Ed. 671; United Timber Co. v. Bivens (D. C.) 253 Fed. 968; 4 Words and Phrases, First Series, p. 2987. And this is particularly true in cases of penalties and forfeitures.

[2] As the sections on which the indictment was founded did not come into effect until the 17th day of January, 1920, no violation of the Volstead Act was stated in either count.

The judgment is reversed, with the direction to quash the indictment.

[1] 41 Stat. 305.

FITZHUGH v. MITCHELL, U. S. Prohibition Director, et al.

(District Court, N. D. California, Second Division. January 12, 1922.)

No. 651.

1. **Intoxicating liquors ⟸328—Equity will not aid purchaser of liquors unlawfully in getting possession of them.**
   Purchaser of liquors January 11, 1920, in violation of the War-Time Prohibition Act, who stored them in a bonded warehouse, cannot obtain aid of equity to get possession of them.
2. **Intoxicating liquors ⟸139—Possession of liquors purchased before Eighteenth Amendment, and not in one's dwelling, and not reported within 10 days under Volstead Act, unlawful.**
   Where liquor purchased in February, 1919, was not in one's dwelling at the time the Eighteenth Amendment went into effect, and the ownership was not reported to the Commissioner within 10 days thereafter, under Volstead Act, tit. 2, § 33, his possession thereafter was unlawful.

In Equity. Suit by William McPherson Fitzhugh against E. Forrest Mitchell, United States Prohibition Director, etc., and others. Decree for defendants.

Robbins, Elkins & Van Fleet, of San Francisco, Cal., for plaintiff.
John T. Williams, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal., for defendants.

DOOLING, District Judge. This is an action in equity to secure the transfer of 43 cases of whisky from the Sea Wall bonded warehouse to the home of plaintiff for his personal use and the personal use of his family and of bona fide guests entertained by him therein. The bill avers that on January 11, 1920, and before the Eighteenth Amendment to the Constitution went into effect, plaintiff became the owner of the whisky in question, which was then in storage in the warehouse, and became entitled to the possession thereof upon payment to the government of all duties and taxes thereon; that on the date mentioned plaintiff bought the liquor for the personal consumption of himself and family in his private dwelling, and that it was acquired by him and intended for his personal use, and that of his family and bona fide guests; that in September he made demand upon defendants for said liquor, and for permission to withdraw the same and move it to his dwelling, tendering all taxes and duties due thereon, and that such permission was refused.

In the case of Lacks v. Mitchell, 278 Fed. 393, recently decided by Judge Rudkin in this court, a similar question was presented, and the court held that liquor in a bonded warehouse could not be withdrawn for beverage purposes. In the case of Gnerich et al. v. Yellowley, 277 Fed. 632, recently decided by the Circuit Court of Appeals of this circuit, the court held that the Prohibition Commissioner was a necessary party to actions of this character. Passing over the points decided by these two cases, however, the present action must fail. If we take the averment of the bill of complaint to be true that plaintiff

purchased this liquor on January 11, 1920, the sale thereof was in violation of the War-time Prohibition Act, and a court of equity will not lend its assistance to him in his endeavor to obtain the fruit of such unlawful sale. If we disregard the averment of the complaint and accept the testimony of plaintiff that he purchased the liquor in February, 1919, then, as the liquor was not in his private dwelling at the time the Eighteenth Amendment to the Constitution went into effect, he was bound by the Volstead Act (41 Stat. 317, tit. 2, § 33), if the liquor was in his possession at that time, to report it to the Commissioner within 10 days thereafter. This was not done, and his possession of such liquor thereafter was without authority of law. If he did not have possession at that time, he could not thereafter lawfully acquire possession of it for beverage purposes. In either view he cannot now invoke the aid of equity, either to secure possession of the liquor, or its transfer for beverage purposes.

Plaintiff contends that this case comes within the decision in the case of Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. ——, 10 A. L. R. 1548. I do not so read that case. There it was admitted by the pleadings that plaintiff was in the exclusive possession and control of the liquors in question, and that he intended to report the same to the Commissioner as soon as the Volstead Act went into effect. The action was begun before the Volstead Act became effective, and was designed to protect the plaintiff thereafter in a possession which had theretofore been lawful. Such is not the present case.

A decree will be entered in favor of defendants.

MULLEN v. ALASKA PACKERS' ASS'N.

(District Court, W. D. Washington, N. D. July 16, 1921.)

No. 137-L.

Courts ⇐328(5)—Parties having several claims cannot create jurisdictional amount by assignments to one party.

Where several parties unite to enforce a single right, in which they have a common interest, it is enough to give a federal court jurisdiction if their interests collectively equal the jurisdictional amount; but the interest must be common and pertain to the enforcement of a single title or right, and the assignment of separate claims to one party does not create a single demand within the court's jurisdiction.

At Law. Action by Ralph B. Mullen against the Alaska Packers' Association. On motion to remand to state court. Motion granted.

Burkey, O'Brien & Burkey, of Tacoma, Wash., for plaintiff.

Hadley & Abbott, of Bellingham, Wash., for defendant.

NETERER, District Judge. The plaintiff, on behalf of himself and others, setting forth assignments to him of the others' respective claims, in the state court, alleges that the defendant employed him to secure

fishing boats with their crews to fish in Alaskan waters from June 1, until September 1, 1920, for which service he was to receive $25 for each boat and crew secured, and that he was to secure not less than four boats. The contract is based upon correspondence.

The defendant removed the cause to this court on the ground of diversity of citizenship. The plaintiff has moved to remand, stating that the amount of the respective claims is not of jurisdictional amount. The defendant avers that the plaintiff, representing himself and the other interested parties, even though the demands are distinct, may unite for convenience and economy in a civil suit, but strenuously asserts that the plaintiff, Mullen, was himself the contractor who agreed to furnish all of the boats and crews, and that he is the proper party to complain, and that the defendant has nothing to do with the other parties.

Where several parties unite to enforce a single right, in which they have a common interest, it is enough if their interests collectively equal the jurisdictional amount. Troy Bank v. Whitehead, 222 U. S. 40, 32 Sup. Ct. 9, 56 L. Ed. 81. But the interest must be common and pertain to the enforcement of a single title or right. The letter upon which the plaintiff relies states:

"Will give you $25 for each boat for your trouble when you leave in the fall."

Again:

"Now be sure and get six boats, if you can, get seven, and get good fishermen."

Again:

"But want not less than four boats or more, for it would not pay to have any less."

The telegram of May 8th with relation to the price:

"Now you and the men that are figuring on coming up here to fish had better come together and talk this matter over."

It is clear from the correspondence, and it is the basis of contract, that the plaintiff was acting in a representative capacity purely as the agent of the defendant, and not as principal to furnish the boats and fishermen. He could not recover for the men and boats that he secured, because he is not the real party in interest. Section 179, Rem. & Bal. Code Wash. And the amount which he seeks for himself is less than $3,000. Each claim assigned to him is likewise less than $3,000. They aggregate considerably more than the jurisdictional amount, but parties may not assign claims to one party for the purpose of creating a demand within this court's jurisdiction. Sere v. Pitot, 10 U. S. (6 Cranch) 332, 3 L. Ed. 240; Metcalf v. City of Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; Mex. Nat'l R. R. Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; Waite v. City of Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; Woodside v. Beckham, 216 U. S. 117, 30 Sup. Ct. 367, 54 L. Ed. 408.

Thus concluding, this court is without jurisdiction, and the motion to remand is granted.

THE CITY OF OAKLAND.

(District Court, N. D. California, First Division. January 13, 1922.)

No. 17234.

1. Shipping ⇐=81(1)—Dredge held liable for cutting cable.
Where either a dredge or a cable cut by it was out of its proper place, but the cable was practically stationary, with a possible swing of 50 feet, while the dredge was moving, the dredge *held* liable, as it is more likely that it was out of place than that the cable was.
2. Admiralty ⇐=26—Decree in rem entered against dredge for cutting cable.
In a suit against a dredge for cutting a cable, decree in rem entered for the libelant, in order that the question whether the action in rem was maintainable might be determined.

In Admiralty. Libel by the Postal Telegraph-Cable Company against the dredge City of Oakland, etc., and another. Decree for libelant.

Willard P. Smith and William B. Acton, both of San Francisco, Cal., for libelant.

Leon E. Gray, City Atty., and John Jewett Earle, Deputy City Atty., both of Oakland, Cal., for respondents.

DOOLING, District Judge. [1] Respondent was warned that its dredge was operating in the neighborhood of libelant's cable and was likely to cut it. The warning was apparently unheeded. Either the dredge or the cable was out of its proper place. The cable was practically stationary, with a possible swing of 50 feet. The dredge was moving. It is more likely that the dredge was out of place than that the cable was.

[2] A decree will therefore be entered for libelant. I am not sure that the action in rem may be maintained, but a decree in rem will be entered, so that the matter may be determined for the guidance of all of us.

In re GRAF.

(District Court, D. Maryland. January 23, 1922.)

No. 5805.

Citizens ⇐=9—Naturalization of minor surviving parent during his minority makes him a citizen.
The son of alien parents, whose father died an alien, but whose mother remarried, and her husband was naturalized during her lifetime and the son's minority, *held* to have thereby become a citizen.

In the matter of the petition of Michael Graf for naturalization. Petition dismissed.

ROSE, District Judge. The petitioner seeks naturalization. Both his parents were foreign-born. His father, who was never naturalized, died while he was quite young. His mother married again, and dur-

ing her lifetime, and while the petitioner was still a minor, his stepfather was naturalized, and, in consequence, his mother also became a naturalized citizen. His only living parent having been naturalized while he was a minor residing in the United States, he thereby became a citizen. United States v. Kellar (C. C.) 13 Fed. 82; United States v. Rodgers (D. C.) 144 Fed. 711.

His petition for naturalization will accordingly have to be dismissed, because he is already a citizen.

CHICAGO RYS. CO. et al. v. ILLINOIS COMMERCE COMMISSION et al.

(District Court, N. D. Illinois, E. D. January 9, 1922.)

No. 2496.

1. **Courts ⇐282(3)—Federal court has jurisdiction over suit to enjoin enforcement of order reducing street car fares.**

   A federal court has jurisdiction over a suit to enjoin enforcement of an order of the Illinois Commerce Commission reducing street car fares, on the ground of alleged confiscation of property, in violation of the United States Constitution.

2. **Carriers ⇐18(6)—Order of state Commerce Commission may be enjoined as complete legislative act, though motion for reconsideration might be made.**

   An order of the Illinois Commerce Commission reducing fares chargeable by street railroad companies, in force immediately after its passage, was a complete exercise of the legislative power, so as to support a suit for injunction, in the absence of any provision for suspension by an application for rehearing, though under Public Utilities Act Ill. § 67, a motion to reconsider might have been made and entertained, in the discretion of the Commission.

3. **Carriers ⇐18(6)—Injunction granted to restrain enforcement of order reducing street car fares, if confiscatory.**

   On application for a preliminary injunction restraining the enforcement of an order of a state commission reducing street car fares, all doubts will be resolved against plaintiff; but, if the record discloses that the order in fact confiscates property without adequate and just compensation, the court is bound to grant the injunction.

4. **Carriers ⇐12(7)—Order reducing street car fares void, if not based on substantial evidence.**

   The Illinois Public Utilities Act grants power to the Commerce Commission to enter orders only when based on substantial evidence, and if the record contains no substantial evidence an order reducing street car fares is void.

5. **Carriers ⇐12(4)—Commission held without power to prescribe inadequate rate to compel improved methods of doing business.**

   Under Commerce Act Ill. § 75, authorizing the state Commerce Commission to regulate methods of operation of public utilities, and providing for enforcement of changes in operation by application to the circuit or superior court, the commission cannot force improved methods of operation, by penalizing street railroad companies with a rate which will not return even operating expenses.

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

6. Carriers ⟸12(7)—Evidence insufficient to show such savings could be made in street railroad operation as would make rate adequate.

In a suit to enjoin the enforcement of an order of a state Commerce Commission reducing street car fares, evidence *held* insufficient to show that such savings could be made in operating expenses as would render the rate prescribed adequate.

7. Carriers ⟸12(5)—"Depreciation," as affecting rates, defined.

"Depreciation" in the property of street railroad companies, as affecting rates chargeable. means the loss in value of some destructible property over and above current repairs.

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

8. Carriers ⟸12(9)—State commission without power to prevent setting aside of depreciation fund required by franchise.

Where ordinances authorize and require street railroad companies operating thereunder to set aside each year a certain percentage of gross receipts for renewals, and provide that at the end of the grant to the companies the city may purchase the properties at the valuation fixed by the ordinances, or, if it grants the right to other companies to operate the railways, such other companies should take over the properties at the same price, the state Commerce Commission, in proceedings to determine fares, has no power to prevent the setting aside of funds representing a depreciation sufficient to take care of necessary renewals, since, if such fund should not be on hand at the expiration of the grant, an abatement of the contract price could be secured, and the right to set aside the fund is a property right, which cannot be taken away by the state without the consent of the companies, or without due compensation.

9. Carriers ⟸12(5)—Share of street railroad earnings paid city not included in earnings in fixing rates.

The share of the earnings of street railroad companies paid to the city for the use of its streets is an overhead expense, to be paid before dividends or interest on invested capital can be estimated, and cannot be included in estimating net earnings to the shareholders for rate-fixing purposes.

10. Carriers ⟸12(5)—Cannot be required to do business at loss, because of large earnings of previous years.

Street railroad companies operating under contracts with the city made in 1908 cannot be required to operate at a loss, because of large returns had by the stockholders for several years subsequent to the making of the contract.

11. Courts ⟸369(2)—Decision of state Supreme Court conclusive in federal District Court, when writ of error to federal Supreme Court dismissed.

Where the Supreme Court of a state sustained the validity of an order of the state Utilities Commission increasing street car fares over those prescribed in contract ordinances, and a writ of error to the Supreme Court of the United States was dismissed for want of jurisdiction, the claim that the contract rates could not be impaired is foreclosed, so far as the United States District Court is concerned.

12. Carriers ⟸12(7)—Mismanagement determined by comparing with operating costs of similar companies.

In absence of evidence that all businesses of the same nature are mismanaged, there is no better way of determining whether a street railroad is mismanaged, for rate-making purposes, than to compare its operating costs with other businesses of a similar character.

In Equity. Suit by the Chicago Railways Company and others against the Illinois Commerce Commission and others. On application for a temporary injunction. Injunction granted.

On the filing of the bill in this cause a temporary restraining order was entered, and the defendants duly notified to appear on a day certain to respond to a motion for a preliminary injunction. The bill states:

That the plaintiffs are Illinois corporations owning street railway systems constructed upon the streets of the city of Chicago with the consent of the city, evidenced by ordinances passed by the city council on February 11, 1907, March 30, 1908, and March 15, 1909. That since February 1, 1914, the four plaintiffs' system has been operated under the designation of "Chicago Surface Lines," pursuant to an operating agreement between the companies, and with the consent of the city expressed by ordinance passed November 13, 1913.

That the defendant Illinois Commerce Commission is an administrative board created by act of the Illinois Legislature, in force July 1, 1921 (Laws 1921, p. 702). That the defendant city of Chicago is a municipal corporation organized and existing under the General Cities and Villages Act of Illinois. That the defendant Edward J. Brundage is the Attorney General and chief law officer of the state of Illinois.

That the state Public Utilities Commission of Illinois was created by an act in force January 1, 1914 (Hurds Rev. St. 1919c, 111a). That pursuant to that act the plaintiffs, on or about January 1, 1914, filed with the Utilities Commission schedules showing their rates and charges then in force, and that by order of that commission, entered August 6, 1919, the rate of fare on the plaintiffs' lines was increased from five to seven cents. That the validity of this order was sustained by the Supreme Court of Illinois in Chicago Railways Co., et al. v. City of Chicago, 292 Ill. 190, 126 N. E. 585, and a writ of error from the Supreme Court of the United States to review that judgment was, on November 21, 1921, dismissed for want of jurisdiction.

That on November 5, 1920, the state Utilities Commission fixed the then present fair value of the plaintiffs' properties at an amount approximately of $160,000,000, and established an 8-cent fare based upon that valuation. That by act in force July 1, 1921, the Illinois Commerce Commission superseded the Illinois Public Utilities Commission.

That on July 8, 1921, the city of Chicago and others filed with the Illinois Commerce Commission petitions for the restoration of the 5-cent fare. That an extended hearing was had, and that on November 23, 1921, the Commerce Commission entered an order re-establishing the original ordinance contract 5-cent rate, to take effect November 25, 1921, at 12:01 o'clock a. m.

That approximately 2,000,000 passengers are carried daily over the plaintiffs' lines, and that for the fiscal year ending January 31, 1921, plaintiffs' net earnings amounted to $9,723,875.75; that for the 12 months ending October 31, 1921 plaintiffs' net earnings amounted to $10,768,767.86. That in order properly to finance, maintain, preserve, and improve their properties, to maintain credit and meet public obligations, it is necessary that plaintiffs should receive a fair rate of return upon the present value of their properties employed in the public service.

That to that value, as determined by the state Public Utilities Commission of Illinois on November 5, 1920, to be approximately $160,000,000, there have been capital additions to the properties to the value of nearly $1,500,000, and that a fair net return to the plaintiffs on the total investment is at least $12,000,000 annually. That the plaintiffs will be able to receive as gross earnings under the 5-cent rate fixed by the Illinois Commerce Commission on November 23, 1921, a sum not exceeding $38,000,000 per annum, and that the annual operating expenses of the plaintiffs will amount at least to the sum of $44,000,000.

That the defendant Commerce Commission, in making its order fixing the fare as therein stated, disregarded the laws of the estate of Illinois to the effect that the rates of fare of plaintiffs and other public utilities shall at all times be just, reasonable, and sufficient. That the real ground upon which

the commission fixed the 5-cent rate of fare was that such rate was prescribed in the original settlement ordinances of the city of Chicago. That the commission did not base its order upon the evidence, or upon any sustaining proof. That its action was without authority of law, in disregard of its powers under the Commerce Commission Act and of the rights of plaintiffs under the Fourteenth Amendment of the Constitution of the United States.

That if plaintiffs comply with the order requiring the 5-cent rate they will not receive sufficient revenue to pay the actual operating expenses of their system, with the result that they will be forced into bankruptcy, and suits to foreclose their mortgage indebtedness immediately instituted. That, should the plaintiffs fail to comply with the order of the commission, they would also be subjected to certain pains and penalties prescribed by the Illinois Commerce Commission Act.

That section 67 of the Illinois Commerce Commission Act would compel the plaintiffs to charge only the 5-cent rate fixed by the order of November 23, 1921, from the named effective date, which was November 25, 1921, at 12:01 o'clock a. m., leaving to the discretion of the commission whether a stay of said order should be granted and that said order was conclusive, without any right of judicial investigation as to whether the plaintiffs had been thereby deprived of rights protected by the Constitution of the United States. That any application to the commission for a stay or postponement of said order would be wholly futile.

That the difference between the revenues of the plaintiffs from the 5-cent fare fixed by the commission and the 8-cent fare authorized by the order of the state Public Utilities Commission, issued November 5, 1920, would amount to approximately $60,000 a day. That if plaintiffs are compelled to carry passengers at the 5-cent rate it will amount to a confiscation of their property without due process of law. That unless a temporary restraining order is entered approximately $60,000 a day will be lost to plaintiffs.

The bill prays for a temporary restraining order, for an interlocutory injunction pendente lite, for a permanent injunction against the enforcement of the commission's order, and for general relief. The cause is now before the court upon the motion for a preliminary injunction.

The only evidence offered by the plaintiffs was the verified bill and accompanying affidavits. The defendants offered all of the proceedings had at the hearing before the Illinois Commerce Commission, together with a statement used on the oral argument by Supervisor of Orders Woods, representing the commission.

W. W. Gurley, James M. Sheean, Harry P. Weber, and Charles S. Babcock, all of Chicago, Ill., for plaintiffs.

Edward J. Brundage, Atty. Gen., of the State of Illinois.

Illinois Commerce Commission, pro se, by Frank L. Smith, Chairman, and Harvey E. Wood, Supervisor of Orders.

Samuel A. Ettelson, Corp. Counsel, Chester E. Cleveland, Daniel A. Roberts, and James G. Skinner, all of Chicago, Ill., for city of Chicago.

Jacob Legion Tenny, of Chicago, for certain interveners.

Before EVANS and PAGE, Circuit Judges, and CARPENTER, District Judge.

CARPENTER, District Judge (after stating the facts as above). [1, 2] The jurisdiction of this court ought not to be seriously, and cannot be effectively, challenged. Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; Willcox et al. v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 383, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; L. & N. R. Co. v. Central Stock Yards Co., 212

U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441; Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027.

Willcox v. Consolidated Gas Company, supra, concerned a bill to enjoin the enforcement of certain acts of the New York state Legislature, and an order of the Gas Commission of that state fixing rates to be charged by the complainant, which were alleged to be confiscatory, and therefore in violation of the Fourteenth Amendment of the Constitution. The jurisdiction of the chancellor in the court of first instance was attacked. The court said (212 U. S. at page 40, 29 Sup. Ct. 195, 53 L. Ed. 383, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034):

"They assume to criticize that court for taking jurisdiction of this case as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohens v. Virginia, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court, where there is a choice, cannot be properly denied. In re Metropolitan Railway Receivership, 208 U. S. 90–110; Prentis v. Atlantic Coast Line et al., 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent."

The defendants urge Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, as defeating the jurisdiction of this court, because the record does not disclose that the plaintiffs have applied for the rehearing provided for in section 67 of the Public Utilities Act.

The order of the Illinois Commerce Commission was a complete exercise of the legislative power of the state, and was in force immediately after its passage, notwithstanding a motion to reconsider might have been urged and entertained. If the state of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; but the statutes of Illinois did not so provide, and, the granting or denying of a petition for rehearing being wholly within the discretion of the commission, the legislative act was complete upon the entry of the order.

[3] The question involved here is that of a United States court exercising power under the Constitution of the United States to protect a citizen against the alleged confiscation of its property by some agency of a state. The matter is of extreme importance, because the relief prayed for interferes with the Illinois Commerce Commission, and would stop ad interim the regulatory power of the state over public utilities. It is a serious and very grave matter, and all doubts are resolved against the plaintiffs. If, however, the record discloses that the order of the state Commerce Commission is in fact a con-

fiscation of private property without adequate and just compensation, this court not only has the power to act, but is in duty bound to exercise that power.

It is quite apparent from a reading of Prentis v. Atlantic Coast Line, above referred to and relied upon by defendants, that there the court of first instance was the final legislative body, just as in this case the Illinois Commerce Commission was the final legislative body. The Prentis Case was carefully considered by Judge Hook in A., T. & Santa Fé Railway Co. v. Love et al. (C. C.) 174 Fed. 59, and by Judge Sanborn in the same case on appeal, 185 Fed. 321, 107 C. C. A. 403, and the logic of the opinions in those cases makes it quite impossible for a different conclusion to be reached here.

With reference to the plaintiffs in this case, it is clear that prosecution for violating the order of the commission would not be suspended by the application for a rehearing. The character, force, and effect of the commission's order while it remained in operation is in no respect modified or affected by the opportunity given by the statute to apply to the commission for a rehearing, and, however the order be styled, it is nevertheless, until changed or rescinded, the final legislative act of the state of Illinois. For an indeterminate time at least it is complete and binding so far as is concerned the public utility affected.

The sole point open to this court for decision on this motion is whether the 5-cent rate of fare ordered by the Illinois Commerce Commission will produce for the plaintiff companies sufficient revenue to pay operating expenses and a fair and just return for the value of their property devoted to the public use. The Illinois Commerce Commission is the principal defendant here, and we may look to its brief, if anywhere, for reasons to deny the motion for the preliminary injunction.

The Commerce Commission, as well as the city of Chicago, were invited to point out from the record facts which would justify this court in refusing to grant injunctive relief. The commission stated in its brief and argument:

"In coming to the conclusions expressed in our order, we took into consideration all the evidence introduced in the case before us, also the law creating the commission, the law governing public utilities generally as it has been set forth in court decisions, *matters of which we have special and official knowledge as members of the commission, and matters of common knowledge to all moderately well informed men.* However, all the figures herein discussed which concern the affairs of the companies, and the tabulations attached hereto as appendices, were taken or deduced directly from the evidence in the case before us."

[4] The Public Utilities Act of Illinois granted power to the commission to enter orders only when based upon substantial evidence. It must follow, therefore, that unless the defendants can show that the record contains such substantial evidence, the order of the commission is void. L. & N. R. Co. v. Finn et al., 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379.

The plaintiffs having shown prima facie by the sworn bill and affidavits that the order of the commission was confiscatory, and there

being no way in which they could demonstrate that there was no substantial evidence introduced before the commission, without reading to the court the entire record made before that body, which comprises several volumes of testimony and exhibits, the court asked the defendants to point to the evidence upon which they relied to support the ruling. Defendants availed themselves of the opportunity thus afforded, and introduced all of the evidence heard by the commission. Time was given to them by this court to file a statement pointing out such evidence as the record might contain which they deemed would be sufficient in law to support the findings of the commission. The commission and the city of Chicago have filed statements, which will now be analyzed and discussed.

With the exception of one item, that of renewals, $4,853,487.00, they attempted to justify the order upon the ground that the companies could put into effect certain savings in operation. The attorneys for the commission and the city of Chicago in effect urge that the Illinois Commerce Commission has authority *to regulate the service by fixing the rates of fare charged therefor* of all public utilities in Illinois, and that the only limitation upon its control of rates is that the rates fixed shall be just and reasonable. That the authority to control rates carries with it control of operation.

[5] The Illinois Commerce Commission has the right to regulate the methods of operation employed by any public utility within the state, and section 75 of the Illinois Commerce Act (Laws 1921, p. 702) shows how changes in operation can be enforced by the commission, namely, by making application to the circuit or superior court in case the utility fails to comply with orders duly made. Nowhere, however, is the power given to reduce rates for the purpose of enforcing new methods of doing business.

The order of the commission found that at no time since the entry of the 8-cent fare order—

"have the companies rendered, nor are they now rendering. safe. adequate, or efficient service; that, on the contrary, the service rendered by them has during all said time been, and now is, grossly inadequate and inefficient; that said companies have not * * * complied with the law of the state of Illinois in relation to service, with the license ordinances of the city of Chicago, nor with any of the orders of said Public Utilities Commission of Illinois, or its predecessor, the state Public Utilities Commission of Illinois, as to service; and that said companies have not * * * shown any just or reasonable reason for not complying with said ordinances, law or orders, or for not furnishing adequate and efficient service."

The order then states that the service rendered by the plaintiff companies since November 5, 1920 (the date the 8-cent fare was established), and now being rendered by them, is reasonably worth no more that a 5-cent fare for adults and a 3-cent fare for children.

These findings are entirely beside the question. They might have been very important on a bill by the Attorney General to forfeit the charter of the companies. They have nothing whatever to do with the operating cost, but are based upon the opinion of the commission that the services actually rendered, no matter at what cost, are worth

in reality only 5 cents. The commission should have ordered whatever changes in their opinion were proper, and adjusted the rate after the various reforms had been carried out.

At this point it may be well to state that the record shows that the actual operating expenses of the Chicago Surface Lines, comprising wages, taxes, and power, amount to more than 6 cents for every passenger carried. It may be that the Surface Lines, the plaintiffs here, could improve their business methods; but the Illinois Commerce Commission is not permitted, under the law, to force that improvement by penalizing them with a rate which will not return even the operating expenses, and might, in fact, prevent them from rendering any service at all.

[6] In answer to the questions of the court during the oral argument to point out from the record specific facts which would justify the court in denying the injunction, we find in the brief of the commission two items: $616,581 for paving, and $409,717 for street cleaning—more than a million dollars. It was suggested that these expenditures had to be made because of the license ordinances; that because they were really municipal duties the patrons of the public utility should not be in effect taxed to pay them. The defendants finally admitted that these items are not properly a part of operating expenses, but are a part of the compensation the companies undertook to pay to the city of Chicago when they accepted the license ordinances.

The next deduction urged was $451,764 as an expenditure for maintenance for the year ending July 31, 1921. This deduction was made because the commission's chief accountant stated that in man hours and material maintenance it was at least 6 per cent. above normal for that year. The record, however, discloses that maintenance almost vitally necessary for the operation of the roads was deferred, because of abnormal prices of labor and material during the war and the subsequent reconstruction period. There is no evidence that in averaging the maintenance it was too high.

The next item is $900,000, being a 20 per cent. deduction on the prices of materials. That materials had decreased in prices 20 per cent. was deduced by the commission from Plaintiff's Exhibits 170 and 171. These exhibits showed the different prices of various materials going into maintenance during the past few years. The exhibits did not show how much of any material was used in maintenance, but the commission averaged the prices and deduced the conclusion that there could be a saving of 20 per cent. in the price of all materials. The commission states in its brief:

"We very frankly state the intention of our order was for the companies to take advantage of the falling market above referred to. It is a matter of common knowledge that all prices are falling. The commission knows and the court knows * * * that the prices of the things upon which the very life of the nation depends—the products of the farms, the ranges, and the plantations—are far below pre-war prices now, at the point of production. The commission knows, as a matter of common knowledge, that the weighted average reduction in the retail prices of 33 of the principal articles of food in Chicago from August 15, 1920, to August 15, 1921, was 18.22 per cent.; that

the weighted average reduction in the retail prices of 11 of the principal articles of dry goods in Chicago for the same period was 42.89 per cent."

The great difficulty with this argument is that you cannot run street cars on food and dry goods, and we have looked in vain through the record and in the briefs of the defendants to find some concrete suggestion which would warrant the court, even if it were pertinent in this case, to regulate the plaintiffs' expenditures for maintenance.

The commission, in urging the saving of 20 per cent., gave just as much importance to the purchase of sand as it did to steel rails, and yet the record shows that the companies had on hand during the present year a large quantity of rails, bought at a low price before the war, that this supply was exhausted, and that in the future the companies would be obliged to pay a very much higher price. The item of rails is one of the largest in the companies' budget of maintenance. $900,000 is 20 per cent. of $4,500,000, yet the evidence is that of the total cost of maintenance, amounting to $7,529,400, less than 45 per cent., or $3,400,000, is for materials. It is difficult, therefore, to see how 20 per cent. of $4,500,000 could be saved on a total expenditure of $3,400,000.

The next item of proposed saving in operation is $1,741,795, which the commission assumes may be made by rearrangement of schedules. The evidence shows clearly that on the hearing before the commission the plaintiffs introduced evidence which the vice chairman of the commission indicated showed that all had been done that was humanly possible in arranging schedules to eliminate overtime, and to reduce to a minimum the amount of payment for services not rendered. The concession by the vice chairman of the commission that the plaintiff companies had exercised the highest effort in getting the most effective system of handling their cars leaves nothing for us to say on this point.

Next there was proposed a saving of $1,000,000 in the amount annually expended for injuries and damages arising from the operation of the cars. This proposal during the oral argument was based upon the premise that many damage suits resulted from overcrowding the cars, and therefore, if the cars were not overcrowded, there would be fewer damage suits. Mr. Woods, for the commission, claimed great saving could be made here by preventing accidents from happening.

You may train the pedestrian and passenger public to become more careful for their lives and limbs, but courts know from common experience that accidents for which the law gives compensation happen from negligence. If it is the passenger or the passer-by who is negligent, they alone have to pay. The Commerce Commission, to save accidents, would force the plaintiff companies to relieve congested points; but congestion at street intersections has no connection necessarily with happening accidents. Excluding acts over which no one has control, every accident is due to some one's lack of care for his own or other's safety.

The city, in its brief, however, on this point insisted that the companies had accumulated $1,955,217.82 in an account to take care of accidents, and that that fund should be reduced by at least $1,000,-

000. This reserve fund to meet unliquidated claims and pending litigation was never the subject of evidence or discussion in the hearing before the commission, and we may therefore dismiss it. There has been introduced no evidence by the commission or the city of Chicago that the plaintiff companies, in their law department or accident department, have been lax in their work, or have made settlements of claims unlawfully.

[7, 8] There remains but one other item which the commission and the city of Chicago claim should be eliminated, namely, the item of $4,853,487 for renewals and depreciation. Depreciation has been well defined as "the loss in value of some destructible property over and above current repairs." Under the settlement ordinances with the city of Chicago, the plaintiff companies are authorized and required to set aside each year a certain percentage of gross receipts for renewals. At the end of the grant to the plaintiffs the city may either purchase the properties at the valuation fixed by the ordinances, or, if it grants the right to another company or companies to operate street railways in the streets of Chicago, such other companies shall take over the properties at the same price at which the city might have purchased them.

All of these ordinances were passed in pursuance of legislative authority. No provisions were made for sinking funds to retire bonded indebtednesses, or for amortizing the investment. The traction companies are required to maintain their properties in an adequate state of physical efficiency, and when various items of property can be no longer maintained, because worn out, to renew them. No authority need be cited to show that, if at the expiration of the grant these properties have decayed, and the fund provided by the city ordinances for renewals should not be on hand, that an abatement in the contract price could be secured by either the city of Chicago or any new licensee of the city.

The ordinances provide that the renewal fund, at the expiration of the grant, shall be turned over to the city or any purchaser. The Illinois Commerce Commission, therefore, has no power to prevent the setting aside of a fund representing depreciation, sufficient to take care of renewals as they may be needed from time to time. The right to set aside a depreciation fund is a property right, created for the benefit of the plaintiffs, and cannot be taken away by the state without their consent or due compensation made therefor. City of Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. The record shows that the depreciation fund at present is over $2,000,000 short of what it should be.

[9] Counsel for the city of Chicago claim that, in estimating the net earnings of the plaintiffs to their shareholders, the 55 per cent. of the earnings due to the city of Chicago should be included. This argument hardly merits comment. The payment to the city might have been made in dollars or sprinkling or pavement of streets. It was compensation paid to the city of Chicago for use of its streets, and necessarily an overhead expense, to be paid before dividends or interest on the invested capital could be estimated. Venner v. Chicago City Railway Co. et al., 236 Ill. 349, 86 N. E. 266.

[10] The city of Chicago urged with great emphasis that the contracts between the plaintiffs and the city were entered into in 1908, that during that year and several years subsequently large returns were had by the stockholders, that the contract with the city should be taken as a whole, and that a minor return to-day to the present stockholders was a matter of no importance. Nothing was said of the stockholders in 1908, 1909, 1910, 1911, and 1912 who sold their stock on the basis of the then large earnings. This argument would make the present stockholders sustain a loss of $5,000,000 a year because other and more fortunate shareholders, dead and gone, perhaps, received in the past a fair, or more than fair, return. To require the companies to-day to run at a loss, and say that all of the earnings of the companies during the entire contract period of operation should be equalized, is like trying to turn the mill wheel with water that has already run by.

[11] The commission and the city of Chicago both attempt to justify the 5-cent rate on the basis of the original contract ordinances. It is claimed that the contract rate could not be impaired by the state or anybody. A complete answer to this may be found in the decision of the Supreme Court of Illinois in Chicago Railways Co. et al. v. City of Chicago, 292 Ill. 190, 126 N. E. 585, where a writ of error to the Supreme Court of the United States for revision was dismissed for want of jurisdiction. 256 U. S. —, 42 Sup. Ct. 95, 66 L. Ed. —. This question is foreclosed so far as this court is concerned.

If the Illinois Commerce Commission had the right, under the act of its creation, to order changes in operation of utilities, in this case it is aiming to accomplish its end by drastic and unlawful means. It is one thing to order (1) changes in routing of cars; (2) reduction in lay-over time to employees; (3) remodeling of accident and law department; (4) reduction of wages and labor; (5) deferring maintenance and renewals; (6) in fact, to order any variation of operation making for the public good. It is quite another thing, having in mind all of these benefits to the utilities and to the public, to say to the utilities we admit that it costs you over 6 cents to carry every passenger; we will, however, reduce your fare rate to 5 cents, and invite you to test out our opinion as to what improvements may be made in the internal operation of your own business.

The basis of the commission's action in this case is quite wrong. As outlined by its chairman, and urged by its counsel, supplemented by the corporation counsel for the city of Chicago, it affords no locus pœnitentiæ for the plaintiff railroads. No opportunity is given them to try out the urged reforms. They are told in advance that the medicine is good and that they must take it, whether they like it or not, irrespective of whether it has any therapeutic value. The orderly, rational, and legal method of procedure would have been for the commission to outline these various changes in management and operation, and invite the companies to put their suggestions in force, giving the companies an opportunity to demonstrate the benefits, or even the possibilities, of the order.

All of the changes suggested by the commission were matters of conjecture and opinion, and it is quite within the range of human thought that some of the changes could not be carried out to advantage, either to the companies or to the people. Why, then, should the Illinois Commerce Commission, discounting impossibility of performance, direct a rate which both it and the city of Chicago admit will not produce operating expenses, to prevail until their views are adopted. Too much commendation cannot be given to any public utilities commission for its interest in public affairs. It will always be forgiven if its enthusiam leads it to incidental legal excesses. It cannot, however, act arbitrarily to force its views without trial. The reduction of three cents in fare ordered by the commission would make a difference in the revenue of the companies of approximately $22,500,000 a year.

[12] Assuming, therefore, that the companies would be entitled to no more than 6 per cent. net return upon the property invested (the rate of return we do not pass upon) the defendants are required to show, excluding items of renewals, that a saving of over $17,000,000 could be made in operating expenses out of a present total of about $46,250,000. This presupposes, necessarily, that the plaintiff companies are presently grossly mismanaged. To determine whether a business is mismanaged, there is no better way than to compare its operating cost with other businesses of a similar character. In the absence of evidence that all businesses of the same nature are mismanaged, it seems fair to assume that a business whose operating costs compare favorably with others of like nature is properly conducted.

The only evidence before the commission on this subject was offered by the plaintiffs. This consisted of three tables of figures, one showing comparative costs per car hour between the plaintiff lines and the street railways of other cities; another showing comparative speeds of cars; and the third showing the comparative per cent. of gross income and the cost per 1,000 passengers carried for injuries and damages. From this evidence the court cannot escape the conclusion that the cost of operation of the plaintiff lines is lower per car hour than that of the traction companies in the other large cities of the country; that the average speed of plaintiffs' cars, excluding layovers, is the highest; and that the amounts expended in damage suits is the lowest, excluding Boston, where a large part of the railway system runs in subways and on elevated structures. With such evidence before us, we suggest that criticism should be fortified with convincing evidence, when charges are made of inefficient and wasteful management.

All of the defenses urged to the bill in this case are collateral to the real issue, and are treated here only because so strenuously urged. The pertinent fact charged in the bill, namely, that the 5-cent fare ordered by the Illinois Commerce Commission will not permit the plaintiff companies to earn money enough to pay for wages, power, and taxes, is unanswered by the record. In fact, the attorney for the commission stated during the oral argument that after putting all of the

proposed economies into effect there would be available a return of a little over 1 per cent. upon the invested capital.

An order may be prepared, enjoining, pending the final hearing of this cause, the enforcement of the commission's order as to rates, and unless the parties can agree upon some more satisfactory method, the companies will be required to issue transfer slips to the passengers, as heretofore ordered.

EVANS and PAGE, Circuit Judges. We concur in the foregoing opinion, both as to reasoning and result.

NELMS, KEHOE & NELMS v. DAVIS, Federal Agent, et al.

(District Court, S. D. Texas, at Houston. December 30, 1921.)

No. 413 D. L.

1. **Removal of causes ⇐17—Defendant may contest case in state court after removal without loss of right.**
   If a state court proceeds with the trial of a cause after the filing of petition and bond for removal, the defendant may contest the action there without losing his right of removal.

2. **Removal of causes ⇐107(6)—Petition for removal not amendable in federal court to state new ground for removal.**
   A removing defendant may not amend his petition for removal in the federal court, by adding a new ground for removal.

3. **Removal of causes ⇐19(5)—Action for damages under Interstate Commerce Act held removable.**
   An action brought in a state court against a common carrier to recover damages for delay, loss of, or injury to property received for interstate transportation is removable as one arising under the laws of the United States, where the amount in controversy exceeds $3,000, as required by Comp. St. § 1010, being based on and governed by Carmack Amendment (Comp. St. §§ 8604a, 8604aa).

4. **Removal of causes ⇐19(1)—That a federal question has been authoritatively decided does not affect the right to remove a cause in which it is raised.**
   That a question arising under the laws of the United States in a cause which would authorize its removal has been decided by the Supreme Court does not change its effect for the purposes of Removal Act, § 28 (Comp. St. § 1010).

5. **Courts ⇐489(9)—Removal of causes ⇐19(5)—State courts have jurisdiction of suits for damages for injury to shipments, under Interstate Commerce Act, but cause is removable.**
   A state court has jurisdiction of a suit for damages for delay, loss of, or injury to, property in interstate transportation, under Carmack Amendment (Comp. St. §§ 8604a, 8604aa), but such cause is removable when it involves the jurisdictional amount.

At Law. Action by Nelms, Kehoe & Nelms against James C. Davis, Federal Agent, and others. On motion to remand to State Court. Denied.

Garrison, Pollard & Berry, of Houston, Tex., for plaintiff.

Terry, Cavin & Mills, of Galveston, Tex., and R. W. Franklin, of Houston, Tex., for defendants.

HUTCHESON, District Judge. This is a motion filed by Nelms, Kehoe & Nelms to remand to the state court, from whence it was removed, the cause known on the docket of the Eightieth judicial district court of Harris county, Tex., No. 96,270, and styled Nelms, Kehoe & Nelms v. James C. Davis, Federal Agent of the St. Louis & San Francisco Railway Company, and James C. Davis, as Federal Agent of the Gulf, Colorado & Santa Fé Railway Company.

The record shows that in due time, and in the manner required by law, a petition for removal was filed by the Federal Agent, setting up as a ground for the removal that the cause of action was one over which the District Court of the United States for the Southern District of Texas had jurisdiction under the act of Congress approved March 3, 1911 (36 Stat. 1094, § 28 [Comp. St. § 1010]), and that defendant was entitled to remove the same to said court for the reason that the cause of action of the plaintiff arose under and was governed and controlled by the acts of Congress regulating interstate commerce (Comp. St. § 8563 et seq.), in that the suit of plaintiffs was based upon the allegation of negligent handling by defendants of interstate shipments of cotton originating in Oklahoma, and consigned to points in the state of Texas, for which bills of lading were executed and issued as required by and under the acts of Congress regulating interstate commerce (Comp. St. § 8604a et seq.).

The bond was duly presented and approved by the judge of the Eightieth judicial district court of Harris county, Tex., but that court, conceiving that the cases were not removable, proceeded to enter judgment by default against the defendant. The defendant thereafter duly proceeded under the laws of Congress to take out its transcript of the record, and filed the same in this court, where it now is.

The plaintiffs moved to remand, on the ground that no federal question is involved, and further on the ground that, after the petition and bond had been filed in the state court, the defendants voluntarily entered their appearance in the district court by motion to set aside the judgment of the district court, and thereafter gave notice of appeal to the Court of Civil Appeals from the action of the court in refusing to set aside said judgment.

[1] The latter ground presents no meritorious contention, as it is well settled both by state and federal decisions (T. & P. Ry. Co. v. Davis, 93 Tex. 386, 54 S. W. 381, 55 S. W. 562, illustrating the Texas decision, and Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87, the federal) that, if the state court proceeds with the trial after petition and bond have been filed, a defendant may, without loss of his rights, contest the action there.

[2] The defendants, after the record was filed in this court and the cause was called for hearing on motion to remand, applied to the court for leave to amend the petition for removal by setting up, in addition to the ground of a federal question as stated in the petition

for removal filed in the state court, that the case was also a removable one because of the fact that it was a suit against James C. Davis, Federal Agent, and, under the law governing and controlling his activities, is in effect a suit against the United States, or an agent thereof, so that it for that reason is a suit arising under the laws of the United States, and removable.

The right to so amend the petition is contested by the plaintiffs, on the ground that the application to amend comes too late, and I agree with that contention, since it is essential to the removal of a cause that the petition provided for by statute be filed with the state court within the time fixed by statute, unless the time be in some manner waived. An attempt at this time, after the state court had acted in the cause, to present as a ground for removal a matter of federal right, which could have been waived, and must be presumed to have been waived, by the federal agent, comes too late.

"Amendments have been permitted, so as to make the allegations of the removal petition more accurate and certain, when the amendment is intended to set forth in proper form the ground of removal already imperfectly stated." Southern Pacific v. Stewart, 245 U. S. 363, 38 Sup. Ct. 131, 62 L. Ed. 345.

But nowhere has it been permitted to a defendant to delay filing his petition setting up a ground of removal until after the time allowed by law, and this would be in effect what this court would permit the defendant to do, if it now permitted, after the time for filing the petition had passed, the insertion of new and distinct ground for removal in that petition.

Since I refuse the request to file the amendment, it is unnecessary to determine the effect of the amendment, if it had been filed; yet I deem it not improper to say that in my opinion it would have added nothing to the petition for removal, had it been timely filed, since it is plain, from the act of Congress properly known as the Transportation Act of 1920 (41 Stat. 461, § 206), that a federal agent may be sued in any court which, but for federal control, would have had jurisdiction of the cause of action had it arisen against the carrier company itself.

This brings the court, then, to the question of whether plaintiffs' cause of action arises under the laws of the United States, so as to present a federal question which would authorize the removal of the suit to this court.

Section 1010 of the Compiled Statutes of the United States, providing for removal, among other provisions, contains the following:

"Provided, further, that no suit be brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation, * * * under section 20 of the Act to Regulate Commerce," etc., "shall be removed to any court of the United States when the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

Counsel for the removing defendant contends that this proviso is not merely a limitation, but an express grant, and that it in effect explicitly declares that, if the suit is one against a railroad to recover damages for delay, loss of, or injury to the property received for trans-

portation in interstate commerce, where the amount in controversy does exceed $3,000, the case is removable.

There is much strength in this contention, for, though it is a matter of general knowledge that the moving purpose of the proviso was to insert a value limitation, in order to stop the tremendous flood of removal causes which resulted after the decision in the McGoon Case (D. C.) 204 Fed. 998, it is also true that, though in McGoon's Case the court had on May 14, 1913, definitely declared that suits arising out of interstate shipments were removable. Congress in January, 1914 (Act Jan. 21, 1914, 38 Stat. 278 [Comp. St. § 1010]), amended the Removal Act, and placed no limitation whatever on the right to remove suits to recover damages "for delay, loss of, or injury to property received for transportation by such common carrier under section 20 of the Act to Regulate Commerce," except the sole limitation of value.

[3] But in the view which I take of the case it is not necessary to rest a decision that this is a removable case on a finding that the proviso of January, 1914, affirmatively grants a right to remove. It is sufficient to declare that I think it plain that since the acts to regulate commerce have entered and exclusively appropriated the field theretofore occupied by common law and state statutes declaring, interpreting, and giving rights of action, it necessarily follows that any suit upon interstate shipments is a suit arising out of or under the laws of the United States, and that as to such cause a right to remove exists.

So much has been written on the subject that it will serve no useful purpose to present the matter in extenso; it is sufficient to say that in my view the principle is excellently stated by Judge Amidon in McGoon v. Northern Pacific Ry. Co. (D. C.) 204 Fed. 1001:

"So far as I am aware, the following is a correct affirmative rule: Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts."

This definition is supported, not only by the decisions of other district judges, whose opinions are well and carefully considered, as in the opinion by Judge Pollock, in Smith v. Atchison, Topeka & S. F. Ry. Co. (D. C.) 210 Fed. 988, and the opinion of Judge Augustus N. Hand, in Wells Fargo & Co. v. Cuneo (D. C.) 241 Fed. 727, but is, I think, removed from debate by the well-considered decision of the Circuit Court of Appeals of this circuit, in Alabama Great Southern Ry. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 C. C. A. 313, and of the Supreme Court of the United States in Southern Pacific Co. v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345.

[4] Counsel for the plaintiffs in their argument presented what, but for its support by an opinion of a United States District Judge in Re Vadner (D. C.) 259 Fed. 614, I would have considered a wholly groundless position, that when a federal question has been decided by the Supreme Court of the United States it ceases to be a federal question within the meaning of the removal statutes. The effect of this position is to hold that the case may be said to arise under the Constitution and laws of the United States only so long as some person is found contentious enough and disputatious enough to demand a reinterpretation of

the law, and at once ceases to arise when the law has become so well settled that it is no longer in active dispute.

Such a contention, in my opinion, is contrary to common sense and reason, for it presents as the ground of the right to remove *contention as* to the basis of a right, rather than *the basis itself* of the right. The fallacy of this position is well exposed in Alabama & Great Southern Ry. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 C. C. A. 313, wherein a clear and authoritative opinion of the Circuit Court of Appeals discusses the right of removal where a federal question is involved, saying, on page 21 of 229 Fed., on page 323 of 143 C. C. A.:

"It is insisted with apparent earnestness * * * that no cause is removable where the law involved has once been decided, construed, and settled by the Supreme Court of the United States. * * * Since, however, the law relating to removal of causes because of a federal question is precisely the same as that upon which the original jurisdiction of the federal court because of such question depends, this contention, if meritorious, would seem to destroy the original jurisdiction and the right of removal as well."

[5] In the briefs of both parties many authorities are cited which at first blush would create confusion through the failure to clearly distinguish, as should be done, between the exclusive jurisdiction of the United States courts under sections 8 and 9 of the Commerce Act (Comp. St. §§ 8572, 8573) and the concurrent jurisdiction under the Carmack Amendment (Comp. St. §§ 8604a, 8604aa) and Cummins Amendment (Comp. St. §§ 8592, 8604a), but the confusion arising out of the inapt language or incomplete statements in some of the opinions of the lower courts is happily removed in Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, where the decision of the point at issue here, though not made there in esse, is made in fieri by the enunciation of the principle which foreshadowed and made this present decision imperative.

In that case it was contended that a suit against a carrier for failure to deliver mohair shipped from Texas to Massachusetts was a suit under sections 8 and 9 of the Commerce Act, and therefore cognizable solely in federal courts. Mr. Justice Lamar made clear the distinction between a suit based upon a *violation of* the statute and a suit grounded upon the *existence of* a statute, and thus stated his point:

"It was contended that Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, ruled that this jurisdiction [under the Commerce Act] was exclusive, and from that it was argued that no suit could be maintained in a state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods, is in no way traceable to a violation of the statute, and is not, therefore, within the provision of §§ 8 and 9 of the act to regulate commerce. *The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.*"

He then states:

"Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. * * * On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to

the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States."

This clear enunciation, in the light of the statute and of the decisions which have followed it, leaves no room for doubt that, while suits arising out of interstate shipments may be cognizable in the state court, they are also removable to the federal court as matters of federal instance, when the jurisdictional amount is presented.

It is therefore considered, and it will be so ordered, that the motion to remand be denied.

NELMS, KEHOE & NELMS v. DAVIS, Federal Agent, et al.

(District Court, S. D. Texas, at Houston. December 30, 1921.)

No. 411 D. L.

Removal of causes ⊜19(5)—Action for loss or injury to interstate shipment held removable, as arising under federal law.

Congress having undertaken by the Carmack Amendment (Comp. St. §§ 8604a, 8604aa) to regulate the rights of shippers and the liability of carriers of interstate shipments, any action for delay, loss of, or injury to such shipment is based on and governed by such statute, and where brought in a state court, if it involves the requisite amount, such action is removable, as arising under a federal law, though the entire carriage was by a single carrier and not by connecting carriers.

At Law. Action by Nelms, Kehoe & Nelms against James C. Davis, Federal Agent, and others. On motion to remand to state court. Denied.

Garrison, Pollard & Berry, of Houston, Tex., for plaintiff.

Terry, Cavin & Mills, of Galveston, Tex., and R. W. Franklin, of Houston, Tex., for defendants.

HUTCHESON, District Judge. This is a motion filed by Nelms, Kehoe & Nelms to remand to the state court, from whence it was removed, the cause known on the docket of the Eightieth Judicial district court of Harris county, Tex., as No. 96269, and styled Nelms, Kehoe & Nelms v. Gulf, Colorado & Santa Fé Railway Company and James C. Davis, as Federal Agent of said Gulf, Colorado & Santa Fé Railway Company.

This case is identical in all respects with those of D. L. 412 (no opinion filed), 413 (277 Fed. 982), and 414 (no opinion filed), except that in those cases the defendant was sued as agent of two or more carriers, the shipments originating outside the state on one and terminating inside the state on the other, whereas in this case the shipment, while an interstate shipment, originated and terminated on the lines of the Gulf, Colorado & Santa Fé Railway, and the defendant James C. Davis was sued as federal agent for that railroad alone.

The contention is made by plaintiffs, who have filed the motion to remand in this case, that whatever may be the law as to a federal question being present, so as to justify removal, where the bill of lading

affected both the initial and connecting carrier, there ought to be no basis whatever for the claim that the right of plaintiffs was grounded upon a federal statute, where the same road carried the entire shipment from origin to destination.

The ground of the position is apparent that, while it may be true that, in the case of an initial and connecting carriers, it is essential to the plaintiffs to rely upon the statute in order to recover full liability against the initial carrier for its own acts and those of the other carriers, the plaintiffs are not at all dependent upon such statute when, though the shipment was interstate, the whole journey was made over the lines of a single carrier.

They claim that, in every case where a court has held that a suit was under the federal statute, more than a single carrier was involved, and they point especially to this language in Alabama G. S. Ry. Co. v. American Cotton Oil Co., 229 Fed. 16, 143 C. C. A. 318:

"The declaration alleges that the car of oil was delivered by the Mississippi Railway to the Alabama Railway at Meridian in good condition and without exception. The Mississippi Railway was then conceded to be not at fault. Warren county, where the suit was brought in the state court, is on the western boundary of Mississippi. Meridian, where the car and oil were delivered in good condition to the Alabama Railway, is on the eastern boundary. There was obviously no local jurisdiction over the Alabama Railway. In the absence of the national law, the plaintiff then would have been helpless."

The answer to this contention of plaintiffs and to this citation is that, while it is true that the case *seems* clearer where it not only arises under, but the plaintiff himself asserts his right upon, the federal statute, it is none the less true that the right *is in fact* no clearer if the position assumed in the opinion in D. L. 413 is sound, that under the Carmack Amendment (Comp. St. §§ 8604a, 8604aa) the federal government entered and pre-empted the field of liability for interstate shipments, even though in the particular case the plaintiff, but for the Carmack Amendment, could have recovered at common law.

In Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, the court said:

"The Carmack Amendment legislated directly upon the carrier's liability for loss of and damage to interstate shipments."

So that through the requirement for uniform bills of lading, through the privileges extended to the shipper, and the limitations imposed upon the carrier by the Carmack Amendment, it has become true that any suit, brought against any carrier on interstate shipments under a through bill of lading, is, in the language of Mr. Justice Bradley, in Provident Savings Society v. Ford, 114 U. S. 642, 5 Sup. Ct. 1108, 29 L. Ed. 261, "pervaded from its origin to its close by United States law and United States authority."

I am satisfied to rest my decision upon the principles announced in the prior case and restated here, but I might point to other decisions, where the same rule has been applied in other courts to an interstate shipment carried over the line of one interstate carrier. In the case of Smith v. Atchison, Topeka & S. F. Ry. Co. (D. C.) 210 Fed. 989, where plaintiff shipped 33 cars of cattle over defendant's line of rail-

way from the station of Panhandle, in the state of Texas, to the city of Guthrie, in the state of Oklahoma, the court said:

"The shipment of which complaint is made was an interstate shipment, and being of such nature the Congress has undertaken to regulate shipments of that character, and the states are powerless to exercise any control over the same by laws they may enact, or through principles of the law enunciated by * * * such states. * * * As Congress has by the Interstate Commerce Act undertaken to regulate the entire field of such commerce, and has created the rights and remedies for the redress of wrongs suffered by interstate shippers, I am of the opinion the rights of plaintiffs, whatever they may be, are governed and controlled exclusively by said act and any recovery sought by the plaintiffs must be in accordance with the provisions of said act."

It follows, therefore, that in this case, as in the other three, plaintiffs' motion to remand should be denied; and it is so ordered.

DUNKLEY CO. v. CALIFORNIA PACKING CORPORATION.

(District Court, S. D. New York. April 23, 1920.)

No. 572.

1. **Patents ⟸213—License to corporation and its "successors" held to pass to corporation purchasing its business and assuming its obligations.**
A license to a corporation, "for the benefit of itself and its successors * * * for the use of the said invention in connection with its business relative to the canning or treatment of fruit," *held* to inure to the benefit of another corporation to which the licensee sold its "business franchise and property as a whole," and which continued its business, assumed its debts and obligations, and also purchased practically all of its stock.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Successor.]

2. **Patents ⟸328—1,104,175, for machine for peeling peaches and other fruit, held void for lack of invention.**
The Dunkley patent, No. 1,104,175, for a machine for peeling peaches and other fruit, *held* void for anticipation and lack of invention.

3. **Patents ⟸328—1,237,623, for process of peeling peaches, held void as for the function of a patented machine.**
The Dunkley patent, No. 1,237,623, for process of peeling peaches or other fruits or vegetables, *held* void as for the function of a machine previously patented.

In Equity. Suit by the Dunkley Company against the California Packing Corporation. Decree for defendant.

Fred L. Chappell, of Kalamazoo, Mich., and Drury W. Cooper and Robert F. Little, both of New York City, for complainant.

Gravath & Henderson and James R. Sheffield, both of New York City, and Francis J. Heney, Frederick S. Lyon, and Kemper Campbell, all of Los Angeles, Cal., and Nicholas A. Acker and Frank D. Madison, both of San Francisco, Cal., for defendant.

AUGUSTUS N. HAND, District Judge. This is a suit for infringement of letters patent No. 1,104,175, issued July 21, 1914, to Samuel J. Dunkley, and letters patent No. 1,237,623, issued August

21, 1917, to the same person. The first patent relates to machines for peeling peaches or other fruit or vegetables, and the second to an improved process for peeling peaches or other fruit or vegetables. The claims in the first patent relied on are 5, 6, 14, 19, 20, 21, 22, 23, 24, 25, and 26, and in the second, 4, 5, and 7.

The first patent was held valid and infringed in a suit by the above-named complainant, the assignee of the patent, against the Central California Canneries Company, and the decree of Judge Van Fleet in that case was affirmed in the Circuit Court of Appeals for the Ninth Circuit (247 Fed. 790).

Both patents were held invalid for anticipation and lack of invention in the case of Dunkley Co. and Michigan Canning and Machinery Co. v. Pasadena Canning Company and George E. Grier (261 Fed. 203), by Judge Trippet; and his decision has been recently affirmed by the Circuit Court of Appeals of the Ninth Circuit (261 Fed. 386). Judge Rudkin, who wrote the opinion, did not place the decision upon anticipation or lack of invention, but upon noninfringement. He said as to the first decision of the Circuit Court of Appeals:

"For, assuming that the decision in that case should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case."

The foregoing language of the decision of the Circuit Court of Appeals would seem to me to indicate that the court, while it did not attempt to disturb the decision between the parties in the prior case, declined to consider the question of anticipation there involved and to say whether it would follow its former decision or not, contenting itself with disposing of the question of infringement only.

After hearing the testimony, I was very clear that the complainant had not a valid patent, and that the decision of Judge Trippet was correct. As the Circuit Court of Appeals for the Ninth Circuit upon a different record from the one presented to me had held the original patent valid, and shortly after the briefs were submitted I learned that the appeal in the second case was soon to be heard, I thought it better to make no disposition of the matter until the Circuit Court of Appeals had passed upon a record not very dissimilar to the one before me, and had a chance to determine whether or not Judge Trippet was right in the decision of the case that seemed at first sight to differ from the first decision of the Circuit Court of Appeals. I confess I regret to have had no more definite disposition of the various findings of Judge Trippet, but as I have examined the voluminous briefs and the printed record of the testimony before me and some excerpts from the testimony in the other cases, I am more convinced than ever that complainant should not prevail.

[1] At the very outset complainant is met by the very formidable defense that the defendant is a licensee under the Dunkley patents. The Dunkley Corporation granted a license to the California Fruit Canners' Association—

"for the benefit of itself and its successors * * * for the use of the said invention in connection with its business relative to the canning or treatment

of fruit * * * the said license herein granted to be for the benefit of the said California Fruit Canners' Association and its successors for the full term of years of any letters patent which may hereafter be granted for the invention set forth in the said application Ser. No. 234,715 now pending in the United States Patent Office."

It may be here noted that the foregoing application seems to have been divided in the Patent Office, and thereafter to have resulted in the two patents in suit.

After the above license was granted to the California Fruit Canners' Association, that corporation sold, transferred, and assigned to the defendant its "business, franchise and property as a whole," and since such sale has never done any business. The defendant thereafter reduced its capital stock, and about two months after the transfer acquired all but ten shares of the stock of the California Fruit Canners' Association. The transfer was accompanied by an agreement of the defendant to assume all the debts and obligations of the transferor.

The defendant insists that under these circumstances, although no merger or consolidation was technically affected, nothing was left of the California Fruit Canners' Association but a mere corporate shell, and that the transaction was in effect a merger carried out in the only way then possible under the California statutes.

In the case of Lightner v. Boston & Albany Railroad, 1 Low, 338, Fed. Cas. No. 8,343, there was a Massachusetts statute providing for the consolidation of the Boston & Worcester and Western Railroad corporations. The Boston & Albany Railroad was formed pursuant to this legislation, and the statute declared that the new corporation should have, hold, and enjoy all the powers, rights, privileges, franchises, property, claims, demands, and estates which at the time of such union were held and enjoyed by either of the then existing corporations. The old corporations were still kept in existence for certain purposes, but the court held that a license belonging to the original companies to use a patented invention passed to the Boston & Albany Railroad. In that case the word "successors" does not seem to have appeared in the licenses. This case was referred to by the Supreme Court with approval in Lane & Bodley v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049. That court, in citing the Lightner Case, said that it was there held:

"That a license, though not usually transferable, is transmissible by succession to a corporation formed by the union of two licensees succeeding to the obligations of both, for the reason that the consolidated company is the successor rather than the assignee of the original companies."

In the Lane & Bodley Case it appeared that a copartnership which had obtained an implied license was incorporated. While it is true that there the patentee worked for the corporation as well as the partnership and there were thus other facts than the mere practical perpetuation of the copartnership in corporate form, nevertheless the transmission of the license by reason of the practical identity of the business of the partnership and the corporation was, in the opinion of the court, an apparent incident of the transaction.

In the case of Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30

L. Ed. 369, the court held that a license to a corporation, afterwards dissolved, would not pass to a corporation which had been formed by the stockholders of the defunct company, where there were no words indicating the right of the licensee to assign.

In Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 103 C. C. A. 330, the Circuit Court of Appeals for the Seventh Circuit held that a corporation which took from another, afterwards dissolved, all of its property, profits, and good will by a bill of sale, but without assuming any of the liabilities of the grantor, was not the legal successor of such grantor and did not succeed to its right under a contract granting it a license which by the terms of the contract was not assignable without the consent of the patentee.

In the present case the license was—

"for the use of the said invention in connection with * * * (the) business relative to the canning or treatment of fruit * * * the said license herein granted to be for the benefit of the said California Fruit Canners' Association and its successors."

The word "successors" originally was used in connection with a corporation sole, where the person, but not the corporate entity, would change. It was also used in connection with an aggregation of persons named in the charter, who would necessarily change, and to whom corporate franchises were granted. These words in the license granted to the California Fruit Canners' Association add nothing and have no significance if they are to be taken in the antique sense for which the complainant argues. I think the use of the word "successors," in connection with the other words, "for the use of the said invention in connection with its business relative to the canning or treatment of fruit," clearly indicates a purpose to allow the transmission of the license to a corporation fairly succeeding to the business of the California Fruit Canners' Association. Any other interpretation would seem technical and unjust under the circumstances.

The cases of Lightner v. Boston & Albany Railroad, and Lane & Bodley v. Locke, supra, are in line with the results that I have reached and show that the federal courts have treated situations like the present in a broad way and have allowed corporations succeeding to the business of a licensee to succeed to the license where the particular circumstances of the case warranted such a result.

The case of Niagara Fire Extinguisher v. Hibbard, supra, seems in a general way to support the view I have taken. It is true that the decision was that the license would not pass, but that was because there was a contract against an assignment without the consent of the licensor in the bill of sale from the licensor to the new company. The court said:

"The grantee neither assumed, nor took the property subject to, the liabilities of the grantor. * * *"

And the court added that—

"The Ohio Company was not the successor (or heir) of the West Virginia Company."

Apparently the court would have reached a different result if there had not been a covenant against assignment, and the word "successor" had been used.

[2] Coming to the question of the validity of the patent to Dunkley, it is first necessary to consider the date of his invention. His attempt to carry it back to August, 1902, seems to be met by an overwhelming weight of testimony to the contrary. This weight of testimony is sought to be answered principally by that of Dunkley himself, his son, and Mrs. Easterbrook, his sister-in-law, and the witness Harvey Schau, at present an employee of the Dunkley Company. There are other witnesses who in general seem to have been employees. The defendant in answering Dunkley's testimony has been obliged to go into the enemy's camp and in doing so has presented a great number of witnesses who knew nothing of a machine constructed in 1902. More than that, Dunkley, in his preliminary sworn statement in the Beekhuis interference proceeding, said:

"That he conceived the invention set forth in the declaration of interference during the month of August, 1902, that the invention was first disclosed by him to us during the month of September, 1902; that a drawing of the invention was made during the month of September, 1902; that he made no model of the invention; that the invention was first embodied in a complete working structure during the month of July, 1903. * * *"

Moreover, in the case of Dunkley Company v. California Canneries' Company, Dunkley testified, on December 3, 1915, as to his original experimental machine, as follows:

"Q. When was the first put up? A. As near as I can remember, it was June or July of 1903."

It was not until the later litigations, when the date of the Grier machine came into question, that Dunkley testified that a machine was constructed in the autumn of 1902. It is significant that no drawings such as Dunkley claims that he made in 1902 have ever been produced, and that the disclosure of his invention to his son substantially depends upon the testimony of these two interested witnesses. Judge Trippet has discussed this testimony carefully and has reached the conclusion that Stewart's testimony that he made the first machine in 1903 is correct.

The Norton letters in view of the close financial relations between Dunkley and Norton, and his apparent dependence upon the latter as a financial backer, strongly corroborate the position of the defendant.

In the various alleged anticipating devices which were exhibited to me at the time of the trial, the one which impressed me most was the Baker-Chalker machine. This seemed to work perfectly and the use of one like it at the Fresno Packing House of the California Fruit Canners' Association in 1902 was a clear anticipation of the patent in suit. No definite pressure is called for by the first patent to Dunkley, and the pressure which was used at the Fresno plant was evidently sufficient to peel a very large number of peaches.

The witness Fred Stebley was called for the first time before Judge

Trippet. He saw the operation of the Baker-Chalker machine in 1902, and testified as follows:

"Well, I observed that it was a new application of the machine which I had not seen before, and it was being used as I say in which to remove the peel from peaches preparatory to canning and it was done in conjunction with —by using water in conjunction with the brushes."

There can be no doubt whatever that all this occurred in the summer of 1902. Stebley refreshed his recollection from a letter which he had written in July of that year, and Vernon died in December.

Horace G. Baker likewise testified before Judge Van Fleet, in the San Francisco case, as follows:

"Q. Describe the action of the water and of the brushes on the fruit as you observed it at that time. A. The brushes themselves turned this fruit over as they touched it, and the water washed the skins off. There was not much left but this disintegrated soft pulp, like a pulp almost."

R. I. Bentley was likewise a witness who testified for the first time as to the Vernon use before Judge Trippet. He said that the whole pack of peaches at the cannery, in the neighborhood of 100,000 cases, was peeled in 1902 by the Baker-Chalker machine. He said:

"The water had the effect of cleansing the brushes and the fruit."

He also said (at page 3697 of the Los Angeles record):

"Why, as I stated, there were three perforated pipes, one played on one brush and one on the other and on the fruit."

This testimony which was before Judge Trippet was significant. Moreover, Mr. Bentley testified before me that 50 per cent. of the pack went through in halved condition because it had not been pitted and was found difficult to handle after it was reduced to a pulpy condition by passing through the machine.

The Baker-Chalker machine was not before Judge Van Fleet, and if it had been, supplemented by the additional testimony that was before Judge Trippet, I believe he would have had no doubt that a valid prior use was established. The very fact that there is testimony from Cobbey and Combs that in the afternoon, when the water pressure was lower, they applied a pump to increase the pressure, seems to show the use of the jets in peeling the peaches, and the identity of function between the Baker-Chalker machine exhibited to me and that of Dunkley is convincing evidence that the latter contributed nothing to the art which can be regarded as amounting to invention.

The specification of the patent in suit provides as follows:

"My invention consists in the means I employ to practically accomplish this object or result; that is to say, it consists, in combination with a peel or skin softening, disintegrating or shriveling means or device, preferably consisting of a tank or chamber containing a heated fluid, and a heater for the same, a conveyor for automatically conveying the peaches through the skin softening, disintegrating or shriveling device and subjecting the peaches to its action for uniform and measured time, a chute or device for delivering the peaches in single file line to a brushing and washing mechanism, and a peach brushing and washing mechanism, preferably comprising a group of three long perforated pipes for spraying water upon the moving line of peaches, and subjecting them to a water brushing action, an endless belt brush arranged between the

two lowermost perforated pipes and operating to brush the peaches as they are rotated and to convey them along, and a pair of oppositely rotating cylindrical brushes operating both to rotate and brush the peaches, and having hollow perforated pipe cores for spraying the rotary brushes with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water; whereby the peaches may be very rapidly and cheaply and perfectly peeled, without waste or injury."

It is true that the claims in suit rely specifically upon jets of water as a means of peeling the peaches, but their language I think is to be taken in connection with the disclosure of the specification which certainly shows a co-operation of the brushes which carry the peaches with the peeling mechanism. A similar co-operation was exhibited in the Baker-Chalker machine. If the claims be read so broadly as to ignore the general form of mechanism described in the specification and shown in the drawings and to the extent of discarding the brushes, it would seem to me that the Pyle peach-peeling apparatus which employed no brushes to turn the fruit would read on the claims. In view, however, of the fact that the Pyle peach-peeling apparatus employed no brushes to turn the fruit and that this mechanism seems an essential part of the Dunkley device, I shall not base my decision upon the alleged prior use of Pyle. Nor shall I rely, as Judge Trippet did, upon the Grier invention because of some possible uncertainty as to the date of the latter and the reduction of the invention to practical use. While I am inclined to agree with Judge Trippet that both of these devices are a bar to the complainant's patent, I prefer to rely upon the Vernon use of the Baker-Chalker machine.

As for the Roach prior use, I have some doubt as to its practicability in handling a large number of peaches, and never regarded either that or the McDermott process as having a close bearing upon the question of invention.

As it is my opinion that no invention was involved in the Dunkley patent, it is unnecessary to consider the question of infringement in the various devices before the court.

[3] The second patent to Dunkley is for a process involved in the operation of the Dunkley machine, that is to say, for a mere function, and is therefore invalid. Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Westinghouse v. Boyden, 170 U. S. 556, 18 Sup. Ct. 707, 42 L. Ed. 1136.

For the foregoing reasons, the bill is dismissed, with costs, in respect to the first patent for lack of invention, and, in respect to the second patent, because it covers only the function of an apparatus already patented.

DUNKLEY CO. v. CALIFORNIA PACKING CORPORATION.

(Circuit Court of Appeals, Second Circuit. May 25, 1921.)

No. 231.

1. **Patents ⊜211(1)—License to use machine includes license to make the machine for use.**
   A license to use a patented machine *held* to include the right to make, or to have made, the machines for such use.
2. **Corporations ⊜437—Grant to corporation and successors interpreted according to circumstances and "successor" not necessarily a consolidated corporation.**
   A grant to a corporation and its successors is to be interpreted according to surrounding circumstances, and one corporation may be the successor of another, though there is neither a merger nor a technical consolidation.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Successor.]
3. **Patents ⊜213—License to corporation and its "successors" held to pass to a corporation succeeding to its property and business and assuming its obligations.**
   A license granted by an applicant for patents, in settlement of an expensive contest before the Patent Office to a corporation "for the benefit of itself and its successors, * * * for the use of the said invention in connection with its business relative to the canning and treatment of fruit," for the full term of any patent which might be granted on the pending application, *held* to inure to the benefit of another corporation to which the licensee sold its business, franchise and property as a whole and which continued its business, assumed its debts and obligations, and also purchased practically all of its stock.
4. **Patents ⊜327—Decree enjoining infringement binds only parties personally.**
   A decree against certain fruit packing companies enjoining infringement of complainant's patents *held* not to affect the right of a licensee under such patents, on its purchase of the plants of the defendants, to use the patented machines and process therein.

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

Suit in equity by the Dunkley Company against the California Packing Corporation. Decree for defendant, and plaintiff appeals. Affirmed.

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

Plaintiff as assignee and owner sues on two patents covering the inventions of Samuel J. Dunkley, viz., No. 1,104,175, for a "machine for peeling peaches and other fruit," and No. 1,237,623, for a "process of peeling peaches or other fruits or vegetables."

These patents rest upon a single application filed by Dunkley November 29, 1904—subsequently divided so as to separately produce the above referred to machine patent and process patent.

The history of these Dunkley patents is to be found in the reports. One Beekhuis applied on May 25, 1904, for patent upon "apparatus for removing the skin from fruit"; patent issued September 3, 1907, No. 864,944. Beekhuis was subsequently put into interference with Dunkley and the latter succeeded in taking from Beekhuis what are now claims 19–22, inclusive, of the machine patent. Dunkley v. Beekhuis, 39 App. D. C. 494.

Beekhuis had assigned his patent to the California Fruit Canners' Association, which then instituted in the Patent Office a "public use proceeding," which Dunkley sought to prevent by praying for a mandamus against the Commissioner. In this he was defeated (United States ex rel. Dunkley v. Ewing, 42 App. D. C. 176), but the Association above named withdrew its application for said proceeding on May 25, 1914. Thereafter the machine patent issued on July 21, 1914.

This left pending application for the process patent, which was put in interference with one Monte; the invention of the latter being owned by the same concern as the Beekhuis patent. In this interference Dunkley also prevailed in February, 1917 (Monte v. Dunkley, 46 App. D. C. 70), and thereafter Dunkley's process patent issued on August 21, 1917.

It is plain that Dunkley's real opponent in the Patent Office was the California Fruit Canners' Association, and cotemporaneously with the abandonment by that concern of its "public use proceeding," and for a nominal consideration the plaintiff herein executed a license to its opponent for and under whatever patents might be ultimately granted upon the Dunkley application of November 29, 1904.

This license is dated May 22, 1914, and the words here important are as follows:

"Now therefore, be it known, that for and in consideration of the sum of $10 in hand paid by the California Fruit Canners' Association unto the said Dunkley Company the receipt whereof is hereby acknowledged, the said Dunkley Company does hereby grant unto the said California Fruit Canners' Association for the benefit of itself and its successors, a license free of royalties of any kind whatsoever, for the use of the said invention in connection with its business relative to the canning or treatment of fruit, granting unto the said California Fruit Canners' Association the free right for the use of any machine or machine or invention owned or controlled by the said Dunkley Company"—and covered by the patents expected to grow out of the application aforesaid.

The license agreement continues that it is granted "for the benefit of the said California Fruit Canners' Association and its successors for the full term of years of any letters patent which may hereafter be granted for the inventions" disclosed in the aforesaid application.

In August, 1915, plaintiff sued upon its then recently granted machine patent in the Northern District of California, summoning as defendants numerous companies engaged in the canning of fruit, especially peaches, including the Griffin & Skelley Company and the Central California Canners' Company. In this case Dunkley prevailed. Central, etc., Co. v. Dunkley Co., 247 Fed. 790, 159 C. C. A. 648.

Within a fortnight after the lower court's favorable decision in the case just cited, this plaintiff began action against another alleged infringer in the Southern District of California. The process patent had not yet issued and suit was begun on the machine patent alone. Subsequently and in April, 1918, the suit was enlarged by supplemental bill so as to count upon the process patent also. It was then brought to trial and the bill dismissed, the trial court holding that the Dunkley machine invention could not be "carried back beyond the summer of 1903" and was under the evidence anticipated. That court was "clearly of the opinion that there is no validity at all" in the Dunkley process patent, wherefore the bill was dismissed. The appeal resulted in affirmance, but upon the ground of noninfringement. Dunkley Co. v. Pasadena, etc., Co. (C. C. A.) 261 Fed. 386.

This present suit was brought before the decision of the District Court for the Southern District of California adverse to the patents. A. N. Hand, J., followed the reasoning, and reached the conclusion of Trippet, J., in the last-mentioned California case. But the issues in this litigation differ from those in any of the preceding causes. Here, as there, anticipation and lack of invention are advanced by the defense; but in addition there is a plea of license growing out of the following uncontradicted facts:

The California Fruit Canners' Association is a corporation of California. After it obtained the above-recited license, it continued to carry on its busi-

ness until November, 1916. At that time it sold, transferred, and assigned to this defendant, the California Packing Corporation (which is formed under the laws of New York), all its "business, franchise and property as a whole," including its good will and all its real and personal property.

It is not denied that this transaction was and is in accord with the law of California, which does not permit the express merger and consolidation of corporations.

Defendant by its contract of purchase assumed all the debts, obligations, and liabilities of the California Fruit Canners' Association, and since the purchase aforesaid defendant has carried on the business of its assignor or predecessor. It has also acquired additional canning plants, including especially those of Griffin & Skelley and the Central, etc., Co., which were two of the unsuccessful defendants in the suit brought in the Northern District of California.

Since the sale in November, 1916, the California Fruit Canners' Association has done no business, but shortly after said sale its capital stock was reduced to a par of $3,000 and all its assets (except $3,000) were distributed among its stockholders. The defendant herein has acquired all of this $3,000 par of stock (except eight shares) and is now the holder and owner of the same.

The decree below (appealed from by plaintiff) held: (1) That defendant during all the times complained of was a licensee of plaintiff; (2) that both the patents in suit are "invalid, null and void."

Frederick L. Chappell, of Kalamazoo, Mich., Drury W. Cooper, and Robert F. Little, White & Case, and Kerr, Page, Cooper & Hayward, all of New York City, and Chappell & Earl, of Kalamazoo, Mich., for appellant.

Cravath, Henderson, Leffingwell & De Gersdorff, of New York City, Pillsbury, Madison & Sutro, of San Francisco, Cal., and Frederick S. Lyon, of Los Angeles, Cal., for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The above statement shows that the license of 1914 was a settlement of expensive conflict between Dunkley and the Fruit Canners' Association; the consideration is manifest, entirely apart from the formal recital.

Two phrases of this document are especially important: (1) The association is licensed "for the benefit of itself and its successors," and (2) the privilege is granted for the use of the Dunkley invention "in connection with (the association's) business relative to the canning or treatment of fruit."

[1] One preliminary contention may be put aside; it is suggested that, since the license is merely to use, no one acting thereunder can make the licensed article. This is not true, for "if the circumstances indicate such an intention, a license to use implies a license to make the thing to be used." Edison, etc., Co. v. Peninsular Light, Power & Heat Co. (C. C.) 95 Fed. 669, 676, citing cases. In 1914 all that Dunkley had were applications for two patents, one for a machine, the other for a process; and every circumstance points to the conclusion that his licensee was expected to make or have made whatever machine it desired to use; while, as for the process, it is difficult to see how any one can be licensed to use a process, without by necessary im-

plication having the right to devise and build whatever apparatus exemplifying the process seems good to the licensee.

Considering the first phrase of the license agreement: While the word "successor" is a term of art, it is of the most general signification, meaning no more than "one who follows or comes into the place of another." Historically it is the equivalent, when applied to a corporation, of the word "heir" in connection with a natural person. Bouv. Law Dict. and citations. In conveyancing it is necessary to insure more than a life estate in a corporation sole (Boston v. Sears, 22 Pick. [Mass.] 122), but, though usual, a grant to a corporation aggregate without the phrase is prima facie in perpetuity, inasmuch as the company is usually perpetual (Union Co. v. Young, 1 Whart. [Pa.] 410, 425, 30 Am. Dec. 212; Chancellor v. Bell, 45 N. J. Eq. 538, 541, 17 Atl. 684).

Doubtless a license, without more, is but a personal privilege expiring by operation of law with the death of the licensed individual, or with the cessation of business life in the case of a corporate recipient (Keystone, etc., Foundry v. Fastpress Co. [C. C. A.] 272 Fed. 242, Op. filed Feb. 2, 1921), yet if the grant be also to heirs or successors it is plain that the property is descendible. Usually descendibility carried with it the quality of assignability, and it has been held that the words "heirs or successors" import assignability. Wood Harvester Co. v. Minneapolis, etc., Co. (C. C.) 61 Fed. 256, 258.

"Successor" is a plastic word, and "in modern acceptation has a broader significance than succession in respect to the estate of a deceased. It may mean * * * succeeding to a place, or a right, or an interest or a power, official or otherwise. It may mean succession in corporate control." American, etc., Co. v. Campbell, 138 Fed. 531, 534, 71 C. C. A. 55, 58.

[2] Both from reason and authority we conclude that a grant to a corporation and its successors is a phrase to be interpreted according to the surrounding circumstances. There can be no doubt that one corporation may be the successor of another, although there is neither a merger nor technical consolidation. Lightner v. Boston, etc., Co., 1 Low. 338, Fed. Cas. No. 8,343. Indeed, where what is ordinarily called consolidation occurs, the presumption (in the United States courts) is that all the constituent companies retain their corporate identity. Keokuk, etc., R. R. v. Missouri, 152 U. S. 301, 305, 14 Sup. Ct. 592, 38 L. Ed. 450. Two corporations may "remain separate legal entities and yet be merged for all practical purposes," as was said in Southern Pacific Co. v. Lowe, 247 U. S. 330, 337, 38 Sup. Ct. 540, 62 L. Ed. 1142; but always it is necessary to consider the connection in which words of succession, merger or consolidation are used.

The second phrase above quoted from the license shows that the Dunkley devices were to be utilized in a business; context and evidence prove that that business was the preserving of fruit, for which the peeling thereof was and always would be necessary. There was thus excellent reason for stating that the invention was licensed for use "in connection with" the association's business; and it is reasonable to read

the phrase of succession in conjunction with the phrase relating to a business use.

A license is but "the right not to be sued," yet it is also a piece of intangible, incorporeal personal property, and, in the nature of its estate, does not differ from many other privileges or (in a very broad sense) franchises.

It is this similarity which renders applicable to the matter in hand such cases as International, etc., Co. v. Smith County, 65 Tex. 21, and Grand Canyon, etc., Co. v. Treat, 12 Ariz. 69, 95 Pac. 187, affirmed 222 U. S. 448, 32 Sup. Ct. 125, 56 L. Ed. 265, where, speaking of the privilege of exemption from taxes as passing from the exempted corporation to one purchasing its property in foreclosure, the court held that—

"The word 'successors' is evidently used to designate such corporations or persons as may in any lawful manner acquire the proprietorship of the corporate rights and property through which they are to be exercised."

In these cases the privilege of exemption was held to be attached to the property, and the "successor" reasonably and legally to be that company which "came into the place of" the original recipient of the privilege. In like manner, an easement (another piece of incorporeal but descendible property) has been held when granted to one "and his successors" to be attached to the business of a certain store and to pass with the business. Ainslie v. Eason, 107 Ga. 747, 33 S. E. 711.

Without any written license the doctrine here contended for by appellee was enforced in Wilson v. Wilson Corp. (D. C.) 241 Fed. 494, and in Lane, etc., Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049, it was held to be sufficient to work a succession to a license privilege enjoyed by a copartnership, that the succeeding "company was organized upon the same basis as the firm; that the business of the company was to be the same as that carried on by [the firm], and to be carried on in the same premises; that the entire property and assets of the firm and its liabilities and obligations * * * devolved upon the company." This decision sufficiently discusses and distinguishes the earlier decisions.

Nor is it perceived that Niagara, etc., Co. v. Hibbard, 179 Fed. 844, 103 C. C. A. 330, favors appellant's contention, though much relied upon. In that case the patentee gave a corporation a ten-year license without any clause of succession. During the ten-year period, the licensee in question transferred all its property to a new company formed in another state, but the new concern did not assume the liabilities of the assignor. It was held that the second corporation was "not the successor or heir" of the original one. Plainly in that case there was no intention to make a perpetual grant. Again, it is of the essence of a legal succession that in all material respects the succeeding corporation should stand in the boots of the old one, and the deliberate omission to assume liability was itself enough to prevent that continuity of business and corporate life which is the essence of succession.

[3] Result is that when in due legal form this defendant succeeded not only to the business but (as proven) to the franchise, property, liabilities, and good will of the Fruit Canners' Association, it became within the purpose and meaning of the license agreement the successor of the licensee.

[4] It is urged that this result is an attack upon Dunkley's rights as assured in the case brought in the Northern district of California, because he there obtained injunctions against two canning companies which have now been acquired by this defendant. But this is a mistaken view of legal rights; the injunction referred to necessarily ran against certain corporations; it affected the corporate personalty, and a license likewise affects persons and corporations, and does not directly reach machinery and buildings. The Griffin & Skelley Company and Central California Company may well remain under injunction and be required to account; but that is no reason why an unlimited licensee of Dunkley's may not buy the property of these two enjoined corporations and under his license use on his own property and in his own business machines properly forbidden to the former proprietors.

Holding as we do that this defendant is the plaintiff's licensee, we need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion, but affirm the decree below on the sole ground of license. Appellee will recover costs.

DUNKLEY CO. v. CENTRAL CALIFORNIA CANNERIES CO. et al.

(District Court, N. D. California, Second Division. August 22, 1921.)

No. 201.

Patents ⇐328—1,104,175, for machine for peeling peaches, held valid.

The Dunkley patent, No. 1,104,175, for a machine for peeling peaches and other fruit, *held* not anticipated and valid, after reconsideration on further evidence.

In Equity. Suit by the Dunkley Company against the Central California Canneries Company and others. On motion to reopen decree. Denied.

See, also, 247 Fed. 790, 159 C. C. A. 648; 261 Fed. 203.

Chappell & Earl, of Kalamazoo, Mich., and W. A. Richardson, of San Francisco, Cal., for plaintiff.

Kemper B. Campbell, Francis J. Heney, Frederick S. Lyon, and William J. Carr, all of Los Angeles, Cal., for defendants.

VAN FLEET, District Judge. The above-entitled cause and the seven similar causes by the same plaintiff, numbered in the margin,[1] all involving the validity of the same letters patent, were heretofore tried together in this court in April, 1916, and on December 4, 1916, in accordance with an oral opinion by the court, an interlocutory

[1] Companion cases: Nos. 202, 205, 206, 209, 210, 211, and 212.

decree was entered in each holding the patent valid and infringed and ordering an accounting. These decrees were thereafter in due course in all respects affirmed by the Circuit Court of Appeals (Central California Canneries Co. v. Dunkley, 247 Fed. 790, 159 C. C. A. 648), and its mandate of affirmance filed in this court on May 22, 1918. Thereafter on October 14, 1918, after the coming down of the remittitur, the present motion was interposed by the defendants asking that this court request of the Circuit Court of Appeals the withdrawal of its mandate of affirmance therein and that the causes be thereupon remitted to this court with authority to set aside its decrees and all other proceedings therein, to reopen the same and permit the defendants to reform and amend their pleadings, and thereupon to rehear said causes for the purpose of receiving certain alleged to be newly discovered, additional, and further evidence bearing on the validity of the patent involved and its infringement by the several defendants, and upon such hearing to enter new and different decrees should the evidence warrant.

The grounds of the motion are, in substance, that subsequent to the entry here of said decrees in a suit on the same patent by this plaintiff and its assignee against another alleged infringer (Dunkley Co. et al. v. Pasadena Canning Co., 261 Fed. 203), tried before Judge Trippet in the District Court for the Southern District of this state wherein certain further and additional evidence was produced and heard which it is alleged could not with reasonable diligence be earlier discovered and was for that reason not available on the trial of these causes, the latter court rendered its decree on September 4, 1918, holding the patent void and dismissing the bill, which decree has thus resulted in a conflict of decision as to the validity of the patent and it is said will work confusion and result in hardship to the defendants; and it is claimed that the newly discovered evidence is of a character which would render it probable that on another hearing the patent would be held void by this court. There is a further and distinct ground that at the date of the hearing in this court the plaintiff herein had parted with all its interest in the subject-matter of the suit by assigning its title in the patent pending the hearing to another corporation, and for that reason it is claimed the decrees are void and should be set aside.

The motion was based upon affidavits as to diligence in discovering and the character of the newly discovered evidence largely as disclosed in the record in the cause heard in the Southern district and other evidence and documents to be produced at the hearing of the motion; and falling within the latter category, there was produced and relied on at the presentation the record of the evidence, proceedings, and decree in another and later suit brought by the assignee of the plaintiff, and decided by Judge Hand (A. N.) in the Southern district of New York, subsequent to the filing of this motion but before it was heard, in which the same patent was involved and wherein the decree, based substantively upon the same evidence as that produced before Judge Trippet, was again in favor of the defendant (Dunkley Co. v. Cal. Packing Corporation, 277 Fed. 989).

While, as noted, the motion was entered here in October, 1918, its hearing was at the suggestion of the court postponed until the determination of the appeal then pending in the Circuit Court of Appeals, in the suit heard before Judge Trippet, in anticipation that the decision in the latter might facilitate a solution of the questions involved in the motion—and which, as we shall see, has contributed to that effect. That decision having been rendered (Dunkley Co. v. Pasadena Canning Co. [C. C. A.] 261 Fed. 386), the motion has after some considerable delay been argued and submitted. Since the submission, an appeal in the suit in the New York case has been heard and decided. Dunkley v. California Packing Corporation (C. C. A.) 277 Fed. 996.

Motions of similar import are not without precedent in patent cases, but they are unusual, and the practice not uniform, and this fact doubtless led to some confusion in the minds of defendants' counsel as to where the jurisdiction rested. It appears that defendants first presented a motion to accomplish the same purpose and upon the same showing, to the Circuit Court of Appeals in these cases after its denial of a rehearing but before the remittitur had been sent down; but that court peremptorily denied the defendants' motion, without opinion, and by an order which is wholly silent as to defendants having leave to apply to this court for such relief. This action is now made the basis of an objection by plaintiff that the defendants are precluded from renewing the present motion here and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked.

I was disposed at the argument to regard the objection rather lightly, but a more mature consideration of the authorities discloses that the question is not free from difficulty. That defendants in applying to this court are now pursuing the more usual and proper course in such instances is, I think, fairly to be gathered from the cases on the subject; and had that course been taken in the first instance, the present objection could not have arisen. Barber v. Otis Motor Sales Co. (D. C.) 245 Fed. 945; Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 156 C. C. A. 591; Wilson v. Union Tool Co. (C. C. A.) 265 Fed. 669. But this fact does not aid us. The defendants saw fit to first make the application to the Circuit Court of Appeals while the controversy was yet in its hands, and it ruled upon it. That that court had jurisdiction in a proper case to grant the relief no question is or could well be made. In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 C. C. A. 326. In the latter case the Circuit Court of Appeals of the Sixth Circuit, after rendering its decree, granted a similar application authorizing the lower court to reopen the cause without requiring a request from the latter. In the present case the Court of Appeals took cognizance of the motion and ruled on it, and apparently upon its merits—at least, there is nothing to indicate a more limited view—but it denied the relief, not merely without prejudice to an application here, but unconditionally and finally, and we must therefore assume that it so ruled because the application did not appeal to it as having merit. Of course, it is hardly necessary to suggest that where

a question in a cause has been ruled by the higher court it becomes as to the court below the law of the case and the latter may not competently proceed in contravention of it. As stated in Re Potts, supra, where the lower court had taken a course not in pursuance of the mandate of the higher court:

"When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer. [Citing cases.] In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in Southard v. Russell, above cited, said: 'Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.'"

But defendants contend that they are not asking here the same relief they asked of the Court of Appeals; that what they are asking this court to do in no way runs counter to the ruling of the higher court; that what they asked there was for a direct order from that court reopening the decrees, whereas all they ask this court to do is to "request the privilege" of taking that action. The answer of the plaintiff is that this is merely seeking the same relief by going the other way about—"whipping the devil around the stump," as it were—and I am inclined to take that view.

But however the objection should be decided, is, in the view I take of the merits, of little moment in the present case. I say this for the reason that, after a very careful review of the voluminous record, I find myself able to take no more favorable view of this application than that indicated by the Court of Appeals; and there can be no transgression or disparagement of the ruling of the latter court by looking into the record for the purpose of stating my reasons for that conclusion.

The controversy involves the validity of United States letters patent No. 1,104,175, issued to one Sam'l J. Dunkley on July 21, 1914, for a peach-peeling device for use in fruit canning, a full and luminous description of which will be found in the opinion of the Circuit Court of Appeals above noted, upholding the validity of the patent.

The conception at once took rank as of great value in the fruit canning industry, one of great magnitude in this state, and, as is not unusual in such circumstances, it has almost from the date of the application been beset by bitter and stubborn litigation instigated by adverse claimants against both branches of the application; it having been divided in the Patent Office to cover both the device patent here involved and a process patent. The application was filed November 29, 1904, and before the patents thereunder were issued, there had been interposed two interference proceedings and one so-called "public use proceeding," all emanating from the same source which had to run

their course through the Patent Office and the courts of the District of Columbia, before patents were finally secured. Dunkley v. Beekhuis, 39 App. D. C. 494; Monte v. Dunkley, 46 App. D. C. 70; United States ex rel. Dunkley Co. v. Ewing, Comm. Pats., 203 O. G. 603. And since the issuance of this device patent there has been a cloud of infringers, necessitating a large number of infringement suits, the first of which to come to trial being those in this district resulting in the decrees here involved. In view of the history of the litigation in the Patent Office, it was not surprising that when those suits came on for hearing it should be found that both parties were thoroughly prepared, the knowledge gained in the interference and other proceedings having made them entirely familiar with the questions they had to meet and the evidence required; and the cases gave indication of every effort having been put forth by both parties to meet those issues with every item of evidence that could be secured, and indeed that the cases had in all respects been thoroughly prepared, through able counsel, for a determined fight. As a result, the questions involved were very ably presented and no stone left unturned by either side. The whole controversy was made to turn on the same question substantially as that involved in the interference proceedings of anticipation or prior conception, there being no claim of noninfringement and the validity of the patent as involving invention being conceded. As a result of such hearings, these decrees were entered; and, as noted, the decrees were after a full and painstaking consideration of the challenged sufficiency of the evidence fully sustained by the Circuit Court of Appeals in an elaborate opinion meeting every objection urged.

It is obvious that, with this prolonged history of bitter controversy over the fundamental question of priority which underlies these adjudications and where three several tribunals have, after the most mature consideration, successively reached the same conclusion, this court should not, without the most impelling reasons, set these decrees aside and open up the whole controversy anew. As I stated to counsel at the argument, I should not entertain the idea of opening up these decrees unless the showing satisfied me that the interests of justice demanded it in obedience to an unescapable conviction that a rehearing would probably change the result. The showing has fallen far short of disclosing such a situation, but, to the contrary, leaves me quite satisfied with the propriety of those decrees. I have taken pains, with the aid of a very complete index memorandum furnished by counsel, not only to carefully review the evidence introduced before me, but everything additional found in the records in both Dunkley v. Pasadena Canning Co. and Dunkley v. California Packing Corporation, presented for the first time before Judge Trippet in the former case and later to Judge Hand in the latter, and in my consideration of the evidence I have had the benefit of the views and comments found in the opinions of both my learned Brothers, which led them to an opposite conclusion with myself as to the validity of the patent; yet, nevertheless, I am constrained to say that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the

new evidence nor with the conclusions reached in those cases. That there was a cloud of "new" witnesses it is quite true, giving indication that the country had been raked with a "fine-toothed comb," so to speak; but there was little "new" evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent. In the very recent case of Symington Co. v. National Malleable Castings Co. et al., 250 U. S. 383, 386, 39 Sup. Ct. 542, 543 (63 L. Ed. 1045), that court took occasion to say:

"This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; particularly if the testimony be taken after the lapse of years from the time of the alleged invention. Deering v. Winona Harvester Works, 155 U. S. 286, 300."

There is a striking absence of anything in the nature of models, drawings, or memoranda produced to support the mere oral statement of these witnesses made in nearly every instance purely from memory, and this after a lapse of from 15 to 18 years; and as to the items of book entry and correspondence they were not only wholly inconclusive in their character, but made as strongly in support of the plaintiff's theory as to the date the invention was put in practice as that of the defendants'. Indeed, I regard the item referred to as the "Norton letters," to which much significance is attached, as making, in their sequence, when properly construed, entirely in favor of the plaintiff.

And singularly enough while the motion is based entirely on the newly discovered evidence as produced in the hearings before Judge Trippet and Judge Hand, neither of those learned gentlemen seem to have relied on it as the fundamental basis of his conclusion in determining the validity of the patent, but they both resort to evidence that had found a place in the controversy from the beginning.

For instance, Judge Trippet, after noting two or three items of book entry, in themselves of no definitive value, and referring to the Norton letters, contents himself by saying:

"There is other documentary evidence, such as the books of the Clark Engine & Boiler Company, which throw more or less light upon the controversy."

But without specifying anything further he proceeds to discuss the evidence of the witness Stewart L. Campbell, the defendants' chief witness produced before this court on the subject as to when the first device of the Dunkley invention was constructed; and Judge Trippet shows quite clearly that it is largely upon the evidence of this witness that he bases his conclusion that plaintiff's patent had been anticipated. This witness had testified before this court that he himself was the one who conceived the Dunkley invention and constructed the first experimental device in 1903, and that it was not built in 1902 as testified by Dunkley. Of this testimony I had occasion to say in my opinion:

"The main reliance by defendant in the evidence is upon the testimony of the witness Campbell. * * * I indicated at the trial, and my mind has

been only confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell."

When the cases got to the Circuit Court of Appeals, the appellants disclaimed relying on Campbell's testimony that he was the inventor of the peach-peeling device, but offered it only to negative Dunkley being the inventor. This attitude occasioned the Circuit Court of Appeals to say in its opinion:

"There is in the record the testimony of one Stewart L. Campbell, who was called as a witness by the defendants in surrebuttal, and who testified that he was employed by the Dunkley Company in constructing machinery from the first of 1902 to December, 1904. According to the testimony of this witness he designed and built, in August, 1903, a peach-peeling table, for which the plaintiff obtained the patent in suit, and this he did without any ideas from Dunkley as to its construction. In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. 'Falsus in uno, falsus in omnibus.'

"But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting that process. They deny the priority of the Dunkley peach-peeling machine, and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose, it is true for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903, instead of 1902."

Campbell's testimony was not materially different before Judge Trippet, but the latter does not advert to the aspect above discussed by the Circuit Court of Appeals, merely closing his consideration of the witness' evidence by saying: "There is no reason in any event for discrediting Campbell." I have carefully reviewed the particulars of the evidence as to which Judge Trippet seems to think it tends to corroborate Campbell, but I am wholly unable to change my former conclusion as to his evidence.

Basing his conclusion largely on the evidence of this witness, Judge Trippet found the Dunkley patent anticipated and for that reason void. He also found that the device, claimed in that case to be an infringement, did not infringe the Dunkley invention; and it is significant that it was only on this latter ground that the Circuit Court of Appeals affirmed his decree dismissing the bill.

As to Judge Hand's opinion it is devoted largely to a question not

here involved—whether defendants were protected by a license set up in defense—and on the question of anticipation he indulges, with a single exception to be noticed, in little original discussion, contenting himself with following and adopting the views of Judge Trippet. He starts out by saying:

"After hearing the testimony, I was very clear that the complainant had not a valid patent, and that the decision of Judge Trippet was correct."

And referring to Judge Trippet's views on anticipation, he says:

"Judge Trippet has discussed his testimony carefully and has reached the conclusion that Stewart's testimony that he made the first machine in 1903 is correct."

This reference is to Campbell's testimony, the learned judge inadvertently calling him "Stewart"—his first name. He then proceeds to some independent discussion and says:

"In the various alleged anticipating devices *which were exhibited to me* * * * the one which impressed me most was the Baker-Chalker machine. * * * The Baker-Chalker machine was not before Judge Van Fleet, and if it had been, supplemented by the additional testimony that was before Judge Trippet, I believe he would have had no doubt that a valid prior use was established. * * * The identity of function between the Baker-Chalker machine *exhibited to me* and that of Dunkley is convincing evidence that the latter contributed nothing to the art which can be regarded as amounting to invention." (Italics volunteered.)

In these extracts Judge Hand has inadvertently fallen into a singular error or misapprehension arising perhaps from the evidence before him having been largely stipulated into the case from the record before Judge Trippet and not heard orally. In the first place, there was not before Judge Hand one of the Baker-Chalker machines as relied upon by defendants to anticipate plaintiff's device. What was before Judge Hand was a copy of the old original Baker-Chalker orange-washing device, remodeled or adapted from memory by Baker, one of the patentees, to represent that device as the witness testified to seeing it used experimentally in Fresno in 1902 for peeling peaches; and it had been admitted before Judge Trippet solely for illustrative purposes as representing, as nearly as the witness' memory could make it, the device as it was used in Fresno. It found its way before Judge Hand from being stipulated into the record and was only there for the same purposes as used before Judge Trippet. In the next place, all of the evidence as to this device, with a single exception, that was before Judge Trippet, was before me in the present cases, including that of Baker. The exception was the evidence of one Stebler—referred to by Judge Hand as "Stebley"—who saw the device used on one occasion in Fresno in 1902 or 1903 and, testifying purely from memory, said:

"Well I observed that it was a new application of the machine [Baker-Chalker] which I had not seen before, and it was being used as I say in which to remove the peel from peaches preparatory to canning and it was done in conjunction with—by using water in conjunction with the brushes."

It will be observed that the witness says nothing about how the water was being used, and consequently his evidence was entirely valueless

as showing anticipation of plaintiff's patented device, even if otherwise competent. But in fact, under the principles of the Symington Case, neither the evidence of Baker nor that of Stebler was competent to anticipate plaintiff's patent.

Of this Baker-Chalker device I had occasion to say in my oral opinion:

"As to the Vernon device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that this device was an anticipation in its essential characteristics. It operated upon a fundamentally different principle. That was an adaptation to the purposes for which the plaintiff's device was used, that of peeling peaches, of a device by Baker and another for scouring oranges for the market; it had a system of revolving brushes, and it used a saturation or douche of water for the purpose of softening the brushes and of washing the fruit; but the essential operative principle there was the brushes. They were for the purpose of scrubbing and washing the hard outer surface of the skin of the orange and of freeing it from mold and other detrimental substances which interfered with its marketability, and the essential principle was the operation of the brushes. The water was used, as I have suggested, only for a saturating and washing purpose. I may say, furthermore, that the patent itself did not call for the essential feature which I find characterizes the plaintiff's device, that is, of peeling jets of water, or water admitted at 'such a high pressure upon the fruit as to act itself as the primary means of washing the skin from the fruit; nor do I think that the manner in which the Vernon patent was used was such as to suggest readily to the mind the idea that peeling jets of water would be efficient for the purpose for which the plaintiff's device was intended. The plaintiff's device operates upon quite a different principle. It has the rotating brushes, but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye bath; and I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent."

I may add that I have found nothing in the record, either new or old, tending in any way to change my views as there expressed.

As a result of his conclusions, Judge Hand found the patent void for anticipation, but he also found that the defendants held a valid license to use plaintiff's device and for that reason was not infringing. It was upon this latter ground alone that the Circuit Court of Appeals of the Second Circuit affirmed his decree, leaving the question of the validity of the patent untouched. As a result their decree, like that of the Circuit Court of Appeals of this circuit, lends no aid to defendants on the present motion.

In what has been said above of the adverse conclusions reached by my Brother Judges I need hardly say that nothing is intended in a spirit of criticism, my sole purpose being to show that the case is not one where I am called upon to accept their conclusions as making in support of the present motion.

In view of the considerations suggested, to grant defendants' motion would, as it seems to me, do violence to a cardinal rule for the guidance of courts, that when parties have had full opportunity to be heard there should be a period to litigation. And in the practical adminis-

tration of the law a party has had full opportunity to be heard when he has been afforded a fair and reasonable opportunity.

As to the last ground of defendants' motion, that the decrees should be vacated for want of proper parties, it is antagonized by a counter motion by plaintiff to add as plaintiff in the several actions the name of the corporation to whom the present plaintiff's rights have been assigned pending the controversy. Leave to apply to this court for that privilege was heretofore granted by the Circuit Court of Appeals and, as the right is one which does not inhere in the merits of the controversy but is purely modal and formal that there may be proper parties to sustain a final decree, the plaintiff's motion should be granted.

Accordingly, the defendants' motion that this court ask leave to reopen the decrees is denied; that of plaintiff to add the new party is granted.

In re BEISEKER & MARTIN.

(District Court, D. Montana. October 25, 1921.)

No. 2303.

1. **Bankruptcy ⟸68—Occupation at time of alleged act of bankruptcy governs.**

   In determining whether respondents are subject to involuntary bankruptcy, their occupation at the time they committed the act of bankruptcy counted on governs.

2. **Bankruptcy ⟸91(1)—Petitioning creditors have burden of proving that alleged bankrupts are subject to involuntary proceedings.**

   The burden is on creditors petitioning for involuntary bankruptcy to show that the respondents are among those who can be adjudged involuntary bankrupts.

3. **Bankruptcy ⟸68—Facts held to show principal business of respondents was farming.**

   Where respondents were engaged in leasing and farming large tracts of land, one of them devoted his entire time to managing the farm, and the other, though he had been manager of a bank, had devoted most of his time to handling the business of the farming operations, and, since the closing of the bank some time prior to the alleged act of bankruptcy, had devoted his time exclusively thereto, their principal occupation at the time of the act of bankruptcy was tilling the soil, so that they were not subject to be adjudged involuntary bankrupts.

4. **Bankruptcy ⟸58, 68—Equitable transfer of farm leases held not to subject farming partners to involuntary proceedings.**

   Even if the leases to the farms which the respondents had been tilling had been transferred in equity to a corporation organized by them, so that they were no longer farmers, they could not on that account be adjudged involuntary bankrupts because of a mortgage of the property amounting to a preference, since, if they were not farmers, they were only wage-earners, who are not subject to involuntary proceedings, and, if the property was not theirs, a mortgage of it did not affect their creditors.

In Bankruptcy. Involuntary proceedings against Beiseker & Martin, alleged involuntary bankrupts. Proceedings dismissed.

Wheeler & Baldwin, of Butte, Mont., for creditors.

Norris, Hurd & Rhoades, of Great Falls, Mont., for alleged bankrupts.

BOURQUIN, District Judge. [1-3] In these involuntary proceedings in bankruptcy, there is but one issue, viz.: Were defendants not engaged chiefly in farming or tillage of the soil when they committed the act of bankruptcy counted upon? That is the vital time (In re Folkstad [D. C.] 199 Fed. 363; Harris v. Tapp [D. C.] 235 Fed. 918), and the burden is upon petitioners to establish that respondents are of those subject to be adjudged involuntary bankrupts.

The evidence is that in 1916 respondents entered into partnership for the purpose of leasing and farming some thousands of acres of lands. At that time Martin was a farmer, and Beiseker cashier and manager of a small bank, of which he owned $1,000 or 5 per cent., of the capital stock, and from which he had a salary of $225 per month. They equipped the lands with all necessary and suitable machinery, and that and every year thereafter cultivated to various grains from 2,500 to 5,000 acres. Martin lived upon the lands and managed them, and Beiseker lived some 40 miles distant in the town of the bank, continued its cashier and manager until it closed, but visited the lands two or three times a week during the crop seasons, and exercised management and control over the lands and Martin. Beiseker financed the enterprise, and bought and sold for it. Obviously expenses were heavy and risks great.

Although not clear, it would seem there were failures of crops and accumulation of debts, and in 1920 Beiseker's financing assumed an altitudinal aspect. Through his bank they floated $52,000 of notes, secured by 1,400 sheep, and $200,000 of bonds of a corporation by them then organized, and apparently falsely represented to own the leases, equipment, and farm operations aforesaid. This equipment on January 11, 1921, was by respondents mortgaged to the son-in-law of Beiseker's brother, who was one of the organizers of said corporation, which as an alleged preference is the act of bankruptcy counted on herein. December 14, 1920, the bank closed, and thereafter Beiseker had no occupation, but in connection with the farming operations aforesaid, the headquarters of which, before maintained by him in the bank, thereafter are maintained in the same town in the office of a land company for which he performs some service.

During the fall of 1920 and winter following, Beiseker continued his usual services to the farm operations, including procuring and preparing seed for some 2,500 acres of grain sowed in the spring of 1921. He testified his salary from the bank was his support, but the farming operations were his chief activities, absorbed all his money and most of his time and attention, and were the basis of all his hopes; and in the main this is obvious. The case is within the circumstances that determine that men are engaged chiefly in farming or tillage of the soil (see In Re Brown, 253 Fed. 357, 165 C. C. A. 139), and accordingly such determination is made herein.

[4] Petitioners make some contention that in equity the corporation should be assumed to be the owners of the leases and equipment, and

hence that on January 11, 1921, when the act of bankruptcy was committed, respondents were at most mere wage-earners, and not engaged chiefly in farming. Be that as it may, however, it helps not petitioners' case. Wage-earners cannot be adjudged involuntary bankrupts, and if the equipment was then the corporation's, respondents' mortgage of it did not diminish their estate available to creditors—was not a preference and act of bankruptcy. See Trust Co. v. Title & Trust Co., 229 U. S. 444, 33 Sup. Ct. 829, 57 L. Ed. 1268.

The proceedings are dismissed.

GRIFFIN WHITE SHOE CO. v. O'CONNOR & GOLDBERG.

(District Court, E. D. New York. October 27, 1921.)

1. Removal of causes ⇐111—Service on foreign corporation in another district not set aside after removal.

In an action removed from a state court where defendant, a foreign corporation, was served in another federal district of the same state, the service will not be set aside.

2. Courts ⇐90(1)—Decision in same district not binding, when not followed by later case in the same circuit.

Where an early decision by a District Judge of the same district has not been followed in a later case in the same circuit, it is not binding on the District Court, as a decision of the Circuit Court of Appeals would be.

At Law. Action by the Griffin White Shoe Company against O'Connor & Goldberg. On motion to set aside service of summons. Motion denied.

Thornton & Earle, of New York City, for plaintiff.

Engelhard, Pollak, Pitcher & Stern, of New York City, for defendant.

GARVIN, District Judge. [1, 2] By special appearance defendant questions the service of summons herein. The action was brought in the New York Supreme Court, Kings county. The defendant is a foreign corporation, and was served in the Southern district of New York. After the action was begun, it was duly removed to this court by petition, and upon a bond having been filed, approved by a justice of the New York Supreme Court. I have been referred to two decisions, both made within this circuit by District Judges. Wange v. Public Service Ry Co. (C. C.) 159 Fed. 189, and Centaur Motor Co. v. Eccleston (D. C.) 264 Fed. 852. Although the earlier decision was made in this district, the fact that it was not followed in the same circuit by a later case justifies me, I think, in holding that, where an early decision in this district by a District Judge has not been followed, it is not binding upon me, as would be a decision of the Circuit Court of Appeals. I have reached this conclusion after some hesitation having in mind the importance of harmony and consistency in judicial decisions, certainly within the same district, and only because the reasoning of the later case is to me more persuasive.

Motion to set aside service denied.

MEMORANDUM DECISIONS

AMERICAN OIL CORPORATION v. JOHN R. WATERS CO. (Circuit Court of Appeals, Second Circuit. December 22, 1921.) No. 103. In Error to the District Court of the United States for the Southern District of New York. Action by the American Oil Corporation against the John R. Waters Company. Judgment for defendant, and plaintiff brings error. Affirmed. Finkler & McIntire, of New York City, for plaintiff in error. T. Ludlow Chrystie, of New York City, for defendant in error. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed, with costs.

BOLEN, Collector of Internal Revenue, v. BLACK. (Circuit Court of Appeals, Eighth Circuit. May 31. 1921.) No. 5826. In Error to the District Court of the United States for the Western District of Oklahoma. For opinion below, see 268 Fed. 427. Herbert M. Peck, U. S. Atty., of Oklahoma City, and Frank S. Ransdell, Asst. U. S. Atty., of Hominy, Okl., for plaintiff in error. William A. Sipe, of Tulsa, Okl., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendant in error, under rule 24 (188 Fed. xvi, 109 C. C. A. xvi).

BRACEY v. O'BRIEN. (Circuit Court of Appeals, Fourth Circuit. May 5, 1921.) No. 1872. In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling. S. O. Boyce and C. J. Schuck, both of Wheeling, W. Va., for plaintiff in error. J. J. P. O'Brien and J. B. Handlan, both of Wheeling, W. Va., for defendant in error.

PER CURIAM. Cause dismissed under Rules 22 and 24 (233 Fed. xiv, xv, 146 C. C. A. xiv, xv) upon motion of defendant in error.

In re CHRISTOFFER HANNEVIG, Inc. (Circuit Court of Appeals, Second Circuit. December 19, 1921.) No. 84. Petition to Revise Order of the District Court of the United States for the Southern District of New York. In the matter of Christoffer Hannevig, Inc., bankrupt. On petition by Henry A. Wise and another, receivers, to revise an order directing them to surrender premises to a claimant thereof. Order affirmed, and petition dismissed. Saul S. Myers, of New York City (Charles H. Tuttle, of New York City, of counsel), for receivers. Breed, Abbott & Morgan, of New York City (Percy Muloch, of New York City, of counsel), for respondent. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. The order of the court below is affirmed, and the petition to revise is dismissed, on the authority of In re Breyer Printing Co., 216 Fed. 878, 133 C. C. A. 82.

COMMERCE TRUST CO. v. BYERS. (Circuit Court of Appeals, Eighth Circuit. July 12, 1921.) No. 5741. In Error to the District Court of the United States for the Western District of Missouri. B. C. Howard, of Kansas City, Mo., for plaintiff in error. A. C. Malloy, of Hutchinson, Kan., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation.

COOKE et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 19, 1921.) No. 93. In Error to the District Court of the United States for the Southern District of New York. Leslie H. Cooke and another were convicted of using the mails in the furtherance of a scheme to defraud, and they bring error. Affirmed. James A. Turley, of New York City (Vincent T. Follmar, of New York City, of counsel), for plaintiffs in error. William Hayward, U. S. Atty., of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

COUSE et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 21, 1921.) No. 50. In Error to the District Court of the United States for the Southern District of New York. Jose Couse and another were convicted of offenses, and they bring error. Affirmed. Silas B. Axtell, of New York City, for plaintiff in error. William Hayward, U. S. Atty., of New York City (Peter B. Olney, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed, upon the authority of Hamilton et al. v. United States (C. C. A.) 268 Fed. 15, certiorari denied 254 U. S. 645, 41 Sup. Ct. 15, 65 L. Ed. —.

DAVIS, Director General of Railroads, v. REITZ. (Circuit Court of Appeals, Second Circuit. December 5, 1921.) No. 72. In Error to the District Court of the United States for the Southern District of New York. Action by Frank Reitz, as administrator of the goods, chattels, and credits of Arthur Frank Reitz, deceased, against James G. Davis, Director General of Railroads, as Agent under Transportation Act 1920 (41 Stat. 461) § 206. Judgment for plaintiff, and defendant brings error. Affirmed. Alex S. Lyman, of New York City (William Mann, of New York City, of counsel), for plaintiff in error. Almy, Van Gordon & Evans, of New York City (William S. Evans, of New York City, of counsel), for defendant in error. Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

DAVIS, Director General, etc., v. SCHAEFER. (Circuit Court of Appeals, Second Circuit. December 22, 1921.) No. 111. In Error to the District Court of the United States, for the Southern District of New York. Action by Jacob Schaefer, as administrator of Harry Schaefer, deceased, against James C. Davis, Director General of Railroads, as Agent, under section 206 of the Transportation Act of 1920 (41 Stat. 461). Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded. John A. Gibbons, for plaintiff in error. Thomas J. O'Neill, of New York City (J. A. Goodwin and Leonard F. Fish, both of New York City, of counsel), for defendant in error. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. This case is indistinguishable from that of Heller v. New York, etc., Railroad Co. (C. C. A.) 265 Fed. 192, a decision rendered after the trial of this cause. Judgment reversed, and new trial awarded.

DAVIS v. WHELPLEY. (Circuit Court of Appeals, Sixth Circuit. October 7, 1921.) No. 3560. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; Westenhaver, Judge. Squire Sanders & Dempsey, of Cleveland, Ohio, for plaintiff in error. Newcomb, Newcomb & Nord, of Cleveland, Ohio, and Sheldon & Rinto, of Ashtabula, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

EGGLESTON v. BIRMINGHAM TRUST & SAVINGS CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 28, 1921.) No. 3704. Appeal from the District Court of the United States for the Southern Division of the Northern District of Alabama; Henry D. Clayton, Judge. Involuntary bankruptcy proceedings against the Grocers' Baking Company. An order of the referee sustaining the claim of the Birmingham Trust & Savings Company was confirmed by the District Court (266 Fed. 900), and the trustee appeals. Affirmed. Sterling A. Wood and William S. Pritchard, both of Birmingham, Ala., for appellant. Edward H. Cabaniss, of Birmingham, Ala. (Cabaniss, Johnston, Cocke & Cabaniss, of Birmingham, Ala., on the brief), for appellees. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The opinion rendered by the District Judge, reported in 266 Fed. 900, contains a complete statement of facts and disposes of all the objections urged here in accordance with our views. The decree appealed from is therefore affirmed.

EVERETT v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 16, 1921.) No. 5820. In Error to the District Court of the United States for the Eastern District of Arkansas. Berry H. Randolph and Arthur Cobb, both of Hot Springs, Ark., for plaintiff in error.

PER CURIAM. Judgment reversed, without costs to either party in this court, per stipulation, on confession of error by counsel for defendant in error.

GOOD v. BUSCH et al. (Circuit Court of Appeals, Eighth Circuit. May 10, 1921.) No. 5773. In Error to the District Court of the United States for the District of Nebraska. David A. Fitch, of Omaha, Neb., and J. W. Kridelbaugh, of Chariton, Iowa, for plaintiff in error. J. A. Douglas and F. S. Howell, both of Omaha, Neb., for defendants in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendants in error.

GRAND RAPIDS SAVINGS BANK v. FEDERAL LIFE INS. CO. (Circuit Court of Appeals, Sixth Circuit. December 12, 1921.) No. 3570. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Sessions, Judge. Wicks, Fuller & Starr, of Grand Rapids, Mich., for appellant. Norris, McPherson, Harrington & Waer and Knappen, Uhl & Bryant, all of Grand Rapids, Mich., for appellee.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

GROGAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 19, 1921.) No. 33. In Error to the District Court of the United States for the Southern District of New York. Robert Grogan was convicted of conspiracy to violate the National Motor Vehicle Theft Act, and he brings error. Affirmed. William J. Fallon, of New York City, for plaintiff in error. William Hayward and Francis G. Caffey, U. S. Attys., both of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

HANDEL CO. v. JEFFERSON GLASS CO. et al. (Circuit Court of Appeals, Fourth Circuit. November 1, 1921.) No. 1898. Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge. Suit in equity by the Jefferson Glass Company and the Jefferson Company against the Handel Company. Decree for complainants, and defendant appeals. Affirmed, on opinion of District

Court. 265 Fed. 286. Harry Lea Dodson and Zell G. Roe, both of New York City (Dodson & Roe, of New York City, and H. E. Dunlap, of Wheeling, W. Va., on the brief), for appellant. F. P. Warfield, of New York City (Duell, Warfield & Duell and L. A. Watson, all of New York City, on the brief), for appellees. Before KNAPP, WOODS, and WADDILL, Circuit Judges.

PER CURIAM. Careful review of the record and examination of the exhibits convince us of the correctness of the conclusions of the District Judge. Nothing of substance can be added to his elaborate and satisfactory opinion. Affirmed.

H. NORTHWOOD CO. v. MACBETH-EVANS CO. (Circuit Court of Appeals, Fourth Circuit. May 20, 1921.) No. 1857. In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi. John A. Howard and J. M. Ritz, both of Wheeling, W. Va., for plaintiff in error. Frank W. Nesbitt, of Wheeling, W. Va., Arthur S. Dayton, of Philippi, W. Va., and Reed, Smith, Shaw & Beal and W. M. Robinson, all of Pittsburgh, Pa., for defendant in error.

PER CURIAM. Cause dismissed, upon joint motion of plaintiff in error and defendant in error.

HOOD et al. v. PERKINS GLUE CO. (Circuit Court of Appeals, Sixth Circuit. June 29, 1921.) No. 3543. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Sessions, Judge. John B. Macauley and Edward Rector, both of Chicago, Ill., and Travis, Merrick, Warner & Johnson, of Grand Rapids, Mich., for appellants. Knappen, Uhl & Bryant, of Grand Rapids, Mich., and Wm. Houston Kenyon and Gorham Crosby, both of New York City, for appellee.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

THE HUGO. THE SUSAN A. MORAN. THE CHEROKEE. (Circuit Court of Appeals, Second Circuit. December 22, 1921.) Nos. 109, 110. Appeals from the District Court of the United States for the Southern District of New York. Libels in admiralty by the New York Contracting & Trucking Company and another against the steamship Hugo, her engines, etc., claimed by Neils Laurits Hansen, and the steam tug Susan A. Moran, her engines, etc., claimed by the Moran Towing & Transportation Company, and libel by Neils Laurits Hansen against the steam tug Susan A. Moran, her engines, etc., claimed by the Moran Towing & Transportation Company, and the dumper scow Cherokee, her engines, etc., claimed by the New York Trucking & Contracting Company. From adverse decrees (253 Fed. 851), the libelants in the first case and the claimant of the Cherokee in the second case appeal. Affirmed. Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellant. Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for the Susan A. Moran. Harrington, Bigham & Englar, of New York City (D. Roger Englar and Vine H. Smith, both of New York City, of counsel), for Hugo. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decrees affirmed, with costs.

IRVING NAT. BANK v. AMERICAN STEEL CO. (Circuit Court of Appeals, Second Circuit. December 5, 1921.) No. 68. In Error to the District Court of the United States for the Southern District of New York. Action by the American Steel Company against the Irving National Bank. Judgment for plaintiff, and defendant brings error. Affirmed. Certiorari denied, 256 U. S. —, 42 Sup. Ct. 271, 66 L. Ed. —. See, also, 266 Fed. 41. Daniel E. Hanlon, of New York City (Charles Oakes, Daniel E. Hanlon, and Joseph S. Buhler, all of New York City, of counsel), for plaintiff in error. Larkin,

Rathbone & Perry, of New York City (Albert Stickney, of New York City, of counsel), for defendant in error. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

JACKSON v. SCRUGHAM et al. In re THOMPSON. (Circuit Court of Appeals, Third Circuit. February 9, 1922.) No. 2785. Appeal from District Court of the United States for the Western District of Pennsylvania; W. H. S. Thomson, District Judge. In the matter of the estate of Josiah V. Thompson, bankrupt. The claim of Henry M. Jackson against G. R. Scrugham and others, as trustees in bankruptcy, was disallowed by the District Court, affirming the order of the referee in bankruptcy and the claimant appeals. Affirmed. See, also, 276 Fed. 313. Lowrie C. Barton, of Pittsburgh, Pa., for appellant. A. Leo Weil, of Pittsburgh, Pa., for appellee. Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This appeal is from a decree of the court below, which affirmed the order of the referee in bankruptcy, disallowing the claims based on certain notes, etc., of the bankrupt. No question of the regularity of procedure was made before the referee, but the case proceeded on the merits, and a large amount of testimony was taken and the questions of fact, on which alone the matter turned, were all determined against the validity of the claims. On certificate from the referee, the claimant questioned the jurisdiction of the referee to open up, of his own motion, a claim which had already been formally allowed without objection; but the court held that this question had been waived by all parties, including this appellant, appearing and without objection contesting the case on the merits. Accordingly, the court again took up the question on the merits and arrived at the same conclusion as the referee, and on motion for a rehearing refused to change its views. The opinion of both referee and judge show a most thorough understanding and a painstaking determination of the proofs. We do not determine the case on presumptions arising from the finding of the referee, supported as it is by the approval of the court, but from our own independent consideration of the proofs we have reached the same conclusion they did. Involving, as the case does, no question of law, and turning wholly on questions of fact, there is no reason why this record and the reports should be cumbered with a long discussion of the multitudinous proofs. We therefore limit ourselves to an affirmance of the court's decree.

KOZINSKI v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. January 4, 1922.) No. 3591. In Error to the District Court of the United States for the Northern Division of the Western District of Michigan; Sessions, Judge. N. C. Spencer, of Escanaba, Mich., for plaintiff in error. Myron H. Walker, U. S. Atty., of Grand Rapids, Mich.

PER CURIAM. Dismissed on motion of counsel.

LAY v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. February 7, 1922.) No. 3604. In Error to the District Court of the United States for the Northern Division of the Eastern District of Tennessee; Sanford, Judge. S. G. Heiskell, of Knoxville, Tenn., for plaintiff in error. Geo. C. Taylor, U. S. Atty., of Greeneville, Tenn.

PER CURIAM. Dismissed for failure of plaintiff in error to file brief.

LEVINSON v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. May 21, 1921.) No. 1869. In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington. Litz &

Harman, of Welch, W. Va., for plaintiff in error. L. H. Kelly, U. S. Atty., of Charleston, W. Va.

PER CURIAM. Stipulation of attorneys for the plaintiff in error and the defendant in error to reverse judgment of District Court upon confession of error filed. Judgment of District Court reversed and cause remanded, with directions to set aside the sentence and quash the indictment, per stipulation of attorneys.

LOWITZ v. KIMMERLE. (Circuit Court of Appeals, Sixth Circuit. June 7, 1921.) No. 3584. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Sessions, Judge. Gore & Harvey, of Benton Harbor, Mich., for appellant. James T. McAllister, of Grand Rapids, Mich., for appellee.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

MAGNUSON v. BANK OF AVON, S. D., et al. (Circuit Court of Appeals, Eighth Circuit. May 23, 1921.) No. 5803. Appeal from the District Court of the United States for the District of South Dakota. Joe H. Kirby, Joe Kirby, and Thomas H. Kirby, all of Sioux Falls, S. D., for appellant. Henry A. Muller, A. B. Fairbank, and Clarence C. Caldwell, all of Sioux Falls, S. D., for appellees.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation.

MANITOU MINERAL WATER CO. v. SCHUELER et al. (Circuit Court of Appeals, Eighth Circuit. September 14, 1921.) No. 5869. Appeal from the District Court of the United States for the District of Colorado. Ralph Hartzell, of Denver, Colo., for appellant. Charles W. Waterman and William A. Jackson, both of Denver, Colo., for appellees.

PER CURIAM. Appeal dismissed, at costs of appellant, on motion of appellees.

MICHELSON v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. January 4, 1922.) No. 3527. In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Peck, Judge. Froome Morris and Paul V. Connolly, both of Cincinnati, Ohio, for plaintiff in error. James R. Clark, U. S. Atty., and Allen C. Roudebush, Asst. U. S. Atty., both of Cincinnati, Ohio.

PER CURIAM Dismissed for failure of plaintiff in error to file brief.

MIDLAND PACKING CO. v. HEGNES. (Circuit Court of Appeals, Eighth Circuit. May 19, 1921.) No. 5723. Appeal from the District Court of the United States for the Northern District of Iowa. Byron L. Sifford, of Buffalo Center, Iowa, and A. L. Fribourg and C. N. Jepson, both of Sioux City, Iowa, for appellant. E. E. Wagner, of Sioux City, Iowa, A. B. Carlson, of Canton, S. D., and G. M. Caster, of Lake Andes, S. D., for appellee.

PER CURIAM. Appeal dismissed, with costs, per stipulation.

MILLER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 1, 1921.) No. 5720. In Error to the District Court of the United States for the Eastern District of Missouri. Horace L. Dyer, of St. Louis, Mo., for plaintiff in error. James E. Carroll, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error dismissed without costs to either party in this court, on motion of defendant in error.

MOORE, Collector of Internal Revenue, et al. v. GRIESEDIECK BROS. BREWERY CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 2, 1921.) No. 5531. Appeal from the District Court of the United States for the Eastern District of Missouri. For opinion below, see 262 Fed. 582. Benjamin L. White, Asst. U. S. Atty., of St. Louis, Mo., for appellants. Charles A. Houts, of St Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed for want of prosecution.

ORR v. GEIGER. (Circuit Court of Appeals, Sixth Circuit. December 6, 1921.) No. 3647. Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Tuttle, Judge. N. Calvin Bigelow, of Detroit, Mich., for appellant. Charles L. Mann, of Detroit, Mich., for appellee.

PER CURIAM. Dismissed on motion of counsel.

THE PEHR UGLAND. HANSEN v. BUENOS AIRES GREAT SOUTHERN RY. CO., Limited. (Circuit Court of Appeals, Fourth Circuit. November 1, 1921.) No. 1902. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. For opinion below, see 271 Fed. 340. Hughes, Little & Seawell, of Norfolk, Va., and Herbert K. Stockton, of New York City, for appellant. Hughes, Vandeventer & Eggleston, of Norfolk, Va., for appellee.

PER CURIAM. Appeal dismissed on motion of parties.

PORT DEPOSIT QUARRY CO. et al. v. UNITED STATES, to Use of BOYER et al. (Circuit Court of Appeals, Fourth Circuit. February 2, 1922.) No. 1910. In Error to the District Court of the United States for the District of Maryland, at Baltimore. For opinion below, see 272 Fed. 698. Haman, Cook, Chesnut & Markell and Geo. Ross Veazey, all of Baltimore, Md., for plaintiffs in error. John T. Tucker, of Baltimore, Md., and Willard M. Harris, of Philadelphia Pa., for defendants in error.

PER CURIAM. Cause dismissed, under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), per agreement of attorneys.

PRIEST v. WALTON & SPENCER CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 17, 1921.) No. 213. Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri. Robert E. Moloney and George T. Priest, both of St. Louis, Mo., for petitioner. George O. Durham, of St. Louis, Mo., for respondents.

PER CURIAM. Petition to revise dismissed, at costs of petitioner, per stipulation of parties.

RAPHAEL v. RAUSCH. (Circuit Court of Appeals, Eighth Circuit. September 16, 1921.) No. 218. Petition to Revise Order of the District Court of the United States for the District of South Dakota. F. B. Morgan, of Wagner, S. D., and E. E. Wagner, of Sioux City, Iowa, for petitioner. Charles O. Bailey and John H. Voorhees, both of Sioux Falls, S. D., and Kay Todd, Walter Fosnes, and Charles W. Sterling, all of St. Paul, Minn., for respondent.

PER CURIAM. Petition to revise dismissed, without costs to either party in this court, per stipulation.

ROLLS-ROYCE, Limited, v. GENERAL PHONOGRAPH MFG. CO. (Circuit Court of Appeals, Sixth Circuit. November 9, 1921.) No. 3550. In Error to the District Court of the United States for the Eastern Division of the

Northern District of Ohio; Westenhaver, Judge. Stearns, Chamberlain & Royon, of Cleveland, Ohio, for plaintiff in error. M. B. & H. H. Johnson, of Cleveland, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

THE ST. JOHNS. COLONIAL BEACH CO. v. QUEMAHONING COAL CO., Inc., et al. (Circuit Court of Appeals, Fourth Circuit. November 25, 1921.) No. 1866. Appeal from the District Court of the United States for the Eastern District of Virginia, at Alexandria. Henry Bowden, of Norfolk, Va., Jas. R. & H. B. Caton, of Alexandria, Va., and Hugh H. Obear, Paul Dulaney, and Fred N. Oliver, all of Washington, D. C., for appellant: Welsh & Preece, of Baltimore, Md., for appellees.

PER CURIAM. Decree of District Court affirmed. 273 Fed. 1005. Original writ of certiorari of Supreme Court issued on October 22, 1921, presented November 25, 1921.

THE SAN RICARDO. THE WILLIAM P. PALMER. ROBERTSON v. ARENTSON. (Circuit Court of Appeals, Fourth Circuit. July 5, 1921.) No. 1826. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. For opinion below, see 261 Fed. 925. Hughes, Little & Seawell, of Norfolk, Va., for appellant. Hughes, Vandeventer & Eggleston, of Norfolk, Va., for appellee.

PER CURIAM. Cause dismissed upon motion of parties.

SENFT v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 16, 1921.) No. 133. In Error to the District Court of the United States for the Eastern District of New York. George Senft was convicted of violating the Prohibition Act, and he brings error. Reversed. Elijah N. Zoline, of New York City, for plaintiff in error. Wallace E. J. Collins, U. S. Atty., of Jamaica, N. Y. (Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment reversed in open court.

SEWELL et al. v. MOUNTAIN OIL COMPANY et al. (Circuit Court of Appeals, Sixth Circuit. January 4, 1922.) No. 3562. Appeal from the District Court of the United States for the Eastern District of Kentucky; Cochran, Judge. O'Rear & Williams, of Frankfort, Ky., Myers & Howard, of Covington, Ky., William L. Wallace, of Frankfort, Ky., Martin M. Durrett, of Covington, Ky., and Sidney G. Stricker, of Cincinnati, Ohio, for appellants. S. Monroe Nickell, of Lexington, Ky., G. C. Allen, of West Liberty, Ky., and E. C. Hyden and O. H. Pollard, both of Jackson, Ky., for appellees.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

SMIETANKA v. CHICAGO, L. S. & E. RY. CO. (Circuit Court of Appeals, Seventh Circuit. December 16, 1921.) No. 2843. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Action by the Chicago, Lake Shore & Eastern Railway Company against Julius F. Smietanka, as Collector of Internal Revenue for the First District of Illinois. Judgment for the plaintiff, and defendant brings error. Reversed, with direction to dismiss the case. James R. Glass, of Chcago, Ill., for plaintiff in error. William Beye, of Chicago, Ill., for defendant in error. Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. This is a companion case to Smietanka v. Indiana Steel Co., 277 Fed. 1021, herewith decided, and for the reasons therein stated the

judgment in this case is reversed, with the direction to the District Court to dismiss the case as against the plaintiff in error.

SMIETANKA v. INDIANA STEEL CO. (Circuit Court of Appeals, Seventh Circuit. December 16, 1921.) No. 2844. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Action by the Indiana Steel Company against Julius F. Smietanka, Collector of Internal Revenue for the First District of Illinois. Judgment for the plaintiff, and defendant brings error. Reversed, with direction to dismiss the case, in conformity to answers by the Supreme Court to certified questions. 256 U. S. —, 42 Sup. Ct. 1, 66 L. Ed. —. James R. Glass, of Chicago, Ill., for plaintiff in error. William Beye, of Chicago, Ill., for defendant in error. Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. In view of the answers given by the Supreme Court to the questions certified by this court, the judgment is reversed, with the direction to the District Court to dismiss the case as against the plaintiff in error.

SOCORRO MINING & MILLING CO. v. BEARUP. (Circuit Court of Appeals, Eighth Circuit. September 9, 1921.) No. 5725. In Error to the District Court of the United States for the District of New Mexico. Percy Wilson, of Silver City, N. M., for plaintiff in error. James G. Fitch, of Socorro, N. M., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, for want of prosecution.

STEINSNYDER v. MORNINGSTAR. (Circuit Court of Appeals, Fourth Circuit. January 2, 1922.) No. 1943. On Petition to Superintend and Revise, Order of the District Court of the United States for the District of Maryland, at Baltimore. Randolph Barton, Jr., of Baltimore, Md., for petitioner. Sylvan Hayes Lauchheimer, of Baltimore, Md., for respondent.

PER CURIAM. Cause dismissed, under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), per agreement of attorneys.

SULLIVAN v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 7, 1921.) No. 5668. In Error to the District Court of the United States for the Western District of Arkansas. Ben Cravens and Ira D. Oglesby, both of Ft. Smith, Ark., for plaintiff in error. Steve Carrigan, of Hope, Ark., and J. S. Holt, of Ft. Smith, Ark., for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on stipulation suggesting death of plaintiff in error.

UNITED STATES ex rel. NEWMAN v. WALLIS, Immigration Com'r. (Circuit Court of Appeals, Second Circuit. December 15, 1921.) No. 119. Appeal from the District Court of the United States for the Southern District of New York. Application for writ of habeas corpus by the United States, on the relation of Barol Newman, against Frederick A. Wallis, Commissioner of Immigration of the Port of New York. From an order dismissing the writ, relator appeals. Affirmed. Morris Jablow, of New York City, for appellant. William Hayward, of New York City, for appellee. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Order affirmed in open court.

THE VIRGINIA PENDLETON. (Circuit Court of Appeals, Second Circuit. December 19, 1921.) No. 90. Appeal from the District Court of the United States for the Southern District of New York. Libel in admiralty by the Mex-

ican Petroleum Corporation against the schooner Virginia Pendleton, her tackle, etc., claimed by Fields Pendleton. From a decree for libelant, claimant appeals. Affirmed. Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant. Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellee. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed.

WABASH RY. CO. v. TERRILL. (Circuit Court of Appeals, Eighth Circuit. May 24, 1921.) No. 5809. In Error to the District Court of the United States for the Eastern District of Missouri. N. S. Brown, of St. Louis, Mo., and George A. Mahan and Dulany Mahan, both of Hannibal, Mo., for plaintiff in error. Aubrey R. Hammett, of Moberly, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation.

WATSON v. SAVAGE TIRE CORPORATION. (Circuit Court of Appeals, Sixth Circuit. May 3, 1921.) No. 3524. In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Peck, Judge. A. C. Shattuck, of Cincinnati, Ohio, for plaintiff in error. Jackson & Woodward, of Cincinnati, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel

WEISMAN et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 1, 1921.) No. 5716. In Error to the District Court of the United States for the Eastern District of Missouri. Horace L. Dyer, of St. Louis, Mo., for plaintiffs in error. James E. Carroll, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

WELLMAN v. WESTERN UNION TEL. CO. (Circuit Court of Appeals, Sixth Circuit. October 5, 1921.) No. 3465. In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Sessions, Judge. Clare J. Hall, of Grand Rapids, Mich., for plaintiff in error. Rodgers & Rodgers, of Grand Rapids, Mich., for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

WESTERN ASSUR. CO. OF TORONTO, CANADA, v. ATLANTIC TRANSPORT CO. et al. DALY et al. v. ATLANTIC TRANSPORT CO. et al. (Circuit Court of Appeals, Second Circuit. December 19, 1921.) Nos. 73, 74. Appeal from the District Court of the United States for the Southern District of New York. Libels in admiralty by the Western Assurance Company of Toronto, Canada, and by Bartle Daly and another against the Atlantic Transport Company and the Director General of Railroads, operating the Philadelphia & Reading Railroad. From adverse decrees, the Director General appeals. Affirmed. Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant. Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and J. Harvey Turnure, both of New York City, of counsel), for appellee Atlantic Transport Co. Henry E. Mattison, of New York City, for appellee Western Assur. Co. Herbert Green, of New York City. for appellees Daly and Wood. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed.

WEST MICHIGAN FURNITURE CO. et al. v. PERKINS GLUE CO. (Circuit Court of Appeals, Sixth Circuit. October 4, 1921.) No. 3544. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Sessions, Judge. John B. Macauley and Edward Rector, both of Chicago, Ill., and Travis, Merrick, Warner & Johnson, of Grand Rapids, Mich., for appellants. Knappen, Uhl & Bryant, of Grand Rapids, Mich., and Wm. Houston Kenyon and Gorham Crosby, both of New York City, for appellee.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

In re EMPIRE GROCERY CO. (District Court, D. Massachusetts. October 4, 1921.) On petitions to reclaim. Order of referee, denying said petitions. Order of referee affirmed in 277 Fed. 73. Eaton & McKnight, of Boston, Mass. (Robert G. Wilson, Jr., of Boston, Mass., of counsel), for claimants. Albert A. Ginzberg, of Boston, Mass., for alleged bankrupt.

OLMSTEAD, Referee. These were four petitions to reclaim certain goods sold to the debtor company in the spring of 1921. They are brought by the same counsel, and containing substantially the same allegations may be considered together. On May 3, 1921, an involuntary petition was filed against the debtor, and on May 4, 1921, a composition offer before adjudication was made. The claims were submitted on a record taken under section 21a. I find as a fact that while the company was somewhat embarrassed for want of funds, it continued to do business in the regular course down to the time of the filing of the involuntary petition against it; that its officers did not know of its insolvent condition, and that there was no intent on its part to withhold payments for any of the goods purchased; and that it did not purchase them without any reasonable hope or expectation of meeting payment. I further find that there was no fraudulent act on its part. There exists in the minds of some attorneys an erroneous impression that the purchase of goods on the eve of bankruptcy is necessarily fraudulent. The cases, however, hold that purchases made even when the debtor knows of his insolvency, are not necessarily voidable. The facts in the case of In re Berg (D. C. Mass.) 183 Fed. 885, 25 Am. Bankr. Rep. 170, 175, were much stronger in favor of reclamation than those in the issues presented, and yet reclamation was denied. I am of the opinion that reclamation issues are becoming increasingly frequent, especially in composition cases, and are not to be favored. In re Berg, supra; In re O'Callaghan (D. C. Mass.) 199 Fed. 662, 30 Am. Bankr. Rep. 97, 104. Perhaps the principle of law governing such sales is nowhere better stated than by the Supreme Judicial Court of Massachusetts in the case of Watson v. Silsby, 166 Mass. 58, 43 N. E. 1117. I accordingly entered decrees on the 4th day of October, 1921, denying said four petitions.

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⚖17 (D.C.) Application for patent on cobbling outfit *held* to involve invention.—In re Glafcke, 603.

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⚖26(1) (U.S.C.C.A.N.J.) Where elements are old, invention must be found in combination.—General Electric Co. v. Ohio Brass Co., 917.

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⚖36 (D.C.) Doubt should be resolved in favor of invention.—In re Glafcke, 603.

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⚖37 (D.C.) Application for patent on cobbling outfit *held* novel.—In re Glafcke, 603.

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⇐70 (D.C.) Disallowed claims for automobile starting generator *held* anticipated by publication.—In re Borger, 862.

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⇐90(7) (D.C.) Patent attorney could not file application relating to same subject-matter as client's invention, or profit by client's disclosure.—Goodrum v. Clement, 586.
⇐91(1) (D.C.) Attorney has heavy burden to show invention not derived from former client and failing to sustain burden cannot defeat client's priority.—Baumgardner v. Hudson, 552.
⇐91(1) (D.C.) Attorney, claiming invention claimed by clients, *held* to have burden of proof.—Goodrum v. Clement, 586.
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⇐91(4) (D.C.) Evidence *held* to show junior applicant revealed idea to senior applicant.—Baumgardner v. Hudson, 552.
⇐91(4) (D.C.) Evidence *held* to show client conceived invention and disclosed it to attorney.—Goodrum v. Clement, 586.
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⇐112(4) (D.C.) Interference decision not res judicata in subsequent proceeding involving broader issue and additional party.—Goodrum v. Clement, 586.
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⇐113(7) (D.C.) Concurrent findings of three office tribunals, not manifestly wrong, will not be disturbed.—Clark v. Buffum, 611.
⇐113(7) (D.C.) Decision of Patent Office in rejecting claims *held* not to be disturbed.—In re Carroll, 861.
⇐113(7) (D.C.) Concurrent finding of three tribunals, not palpably wrong, will not be disturbed.—Ruth v. Groch, 861.

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⇐213. License to corporation and its "successors" *held* to pass to a corporation succeeding to its property and business and assuming its obligations.
—(U.S.C.C.A.N.Y.) Dunkley Co. v. California Packing Corporation, 996;
(U.S.D.C.N.Y.) Dunkley Co. v. California Packing Corporation, 989.
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⇐226 (U.S.D.C.Ill.) That patentee does not apply invention to all uses to which it might be applied immaterial.—Seager v. Stewart-Warner Speedometer Corporation, 824.
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⟸236 (U.S.C.C.A.Cal.) Transformation of parts effecting substantially different operation avoids infringement.—Pacific States Electric Co. v. Wright, 756.

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⟸287 (U.S.C.C.A.N.Y.) Purchaser of infringer, assuming debts, *held* liable for infringement.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 171.

⟸298 (U.S.C.C.A.N.Y.) To justify preliminary injunction, prima facie case, free from reasonable doubt, must be established.—A. B. Dick Co. v. Barnett, 423.

⟸312(1) (U.S.C.C.A.N.Y.) Infringer has burden of showing portion of profits not resulting from infringement.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 171.

⟸312(1) (U.S.D.C.N.Y.) Burden on defendant to prove that foreign patent for process is identical with United States patent.—General Electric Co. v. Alexander, 290.

⟸312(3) (U.S.C.C.A.N.Y.) Evidence *held* to show essential value was derived from infringement.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works. 171.

⟸312(3) (U.S.C.C.A.N.Y.) Similarity of results may justify conclusion of infringement of process.—A. B. Dick Co. v. Barnett, 423.

⟸318(3) (U.S.C.C.A.N.Y.) Process covered by patent to another is not a standard of comparison.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 171.

Standard of comparison must have been open to use prior to plaintiff's patent.—Id.

Process subsequently developed to avoid infringement cannot be standard of comparison. —Id.

⟸318(4) (U.S.C.C.A.N.Y.) Profits from finishing *held* not separable from infringing use. —Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works. 171.

⟸318(4) (U.S.D.C.Wis.) Patentee not entitled to all profits from sale of velocipede containing patented hub.—A. Mecky Co. v. Garton Toy Co., 507.

⟸318(5) (U. S. C. C. A. N. Y.) Interest not charged to innocent infringer prior to decree. —Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 171.

⟸318(6) (U.S.C.C.A.N.Y.) Profits on compounds mixed with infringing products properly disallowed.—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 171.

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Apportionment of expenses to infringing product *held* correct.—Id.

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⟸319(1) (U.S.D.C.Wis.) Profits on infringing article may be considered in determining reasonable royalty.—A. Mecky Co. v. Garton Toy Co., 507.

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⟸322 (U.S.D.C.Wis.) Master's finding, not involving credibility of witnesses who testified orally, not entitled to weight.—A. Mecky Co. v. Garton Toy Co., 507.

⟸324(5) (U.S.C.C.A.Ohio) Finding by trial court as to prior date of invention presumptively correct.—Vanderburgh v. Truscon Steel Co., 345.

⟸324(6) (U.S.D.C.Pa.) Issue *held* decided on petition to lower court after reversal and remand, to reopen and admit supplemental answer.—Ingle v. Landis Tool Co., 247.

⟸327 (U.S.C.C.A.N.Y.) Decree enjoining infringement binds only parties personally.—Dunkley Co. v. California Packing Corporation, 996.

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925,561. High-tension electrical conduction system, claims 1 to 4, and 6, held void, 277 F. 917.

973,200. Union suit, claim 1, held void; claims 2 and 3, held not infringed, 277 F. 315.

979,849. Distributing plate for stokers, claims 9–12, held valid, but not infringed, 277 F. 636.

983,994. Feeding system for engines, held infringed, and not anticipated, 277 F. 824.

984,032. Feeding system for engines, claim 5, held infringed and not anticipated, 277 F. 824.

1,018,502. Filament for electric incandescent lights, claims 1, 2, and 3, held valid and infringed, 277 F. 290.

1,103,506. Hair-steaming device, claims 1, 2, and 7, held void, 277 F. 186.

1,104,175. Machine for peeling peaches, held void, 277 F. 989; held not anticipated and valid, 277 F. 1001.

1,130,443. Mechanical stoker, claims 1, 2, 3, and 9, held not infringed, 277 F. 636.

1,134,025. Oil hole cover held not anticipated, valid, and infringed, 277 F. 469.

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1,214,486. Electrical cooking device, claims 5 to 9, held not infringed, 277 F. 756.

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⚖17 (U.S.D.C.Pa.) Allegation of receipt of goods *held* insufficient as allegation of agency.—Northwestern Consol. Milling Co. v. Rosenberg, 245.

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